Polish Journal of Political Science

Volume 7 Issue 2 (2021)

Polish Journal of Political Science

Volume 7 Issue 2

eISSN 2391-3991
Original version: e-book
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Table of Contents

Articles

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Comparative analysis of the use or making use of direct coercive measures and firearm in selected European countries. *De lege lata* analysis and *de lege ferenda* postulates

Abstract

The issue of direct coercive measures and firearm falls *in concerto* within the subject of the protection of the state internal security – since it belongs to the activity scope of entities holding competences for use or making use of the above. The entitled entities mostly include services, formations or inspections which are established for the protection of widely understood security, in particular public safety and order. The objective of this study is to attempt to conduct *de lege lata* analysis and the comparative analysis of the use or making use of direct coercive measures and firearm in selected European countries, and also to indicate *de lege ferenda* postulates. The objective of this study is to attempt to conduct *de lege lata* analysis and the comparative analysis of the use or making use of direct coercive measures and firearm in selected European countries, and also to indicate *de lege ferenda* postulates.The triangulation of research methods is applied in this study. The following methods are used: descriptive, theoretical-legal, comparative with the elements of legal comparative literature.

Keywords: direct coercive measures and firearm, law, comparative analysis, national security, uniform services

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Introduction

The issue of direct coercive measures and firearm falls *in concerto* within the subject of the protection of the state internal security – since it belongs to the activity scope of entities holding competences for use or making use of the above. The entitled entities mostly include services, formations or inspections which are established for the protection of widely understood security, in particular public safety and order.

The "security" term originates etymologically from the Latin expression "*sine cura*" (*securitas*), which in the Roman times meant political stability (K.A. Wojtaszczyk and A. Majerska-Sosnowska, 2009: 11); whereas notions with a similar meaning have outlasted until the present day and they are still used in a few European languages. For instance, in English there is *security* and in French – *securite* (E. Nowak and M. Nowak, 2011: 13).

The objective of this study is to attempt to conduct *de lege lata* analysis and the comparative analysis of the use or making use of direct coercive measures and firearm in selected European countries, and also to indicate *de lege ferenda* postulates.

The triangulation of research methods is applied in this study. The following methods are used: descriptive, theoretical-legal, comparative with the elements of legal comparative literature.

The legal status of this study is as of 30 October 2020.

I. *De lege lata* analysis

The Law of 24 May 2013 on direct coercive measures and firearm (Official Gazette of 2019, item 2418; hereinafter referred to as: "DCM Law")[2] became effective on 5 June 2013 and it substituted the former various legal acts of varied importance, regulating the issues concerning the use or making use of direct coercive measures and firearm by those entitled in this regard.

The said Law comprises, in particular, the catalogue of direct coercive measures and firearm, the cases and rules for their use or making use of them by entitled persons, as well as pre and post-use or making use of procedures or the documentation method for their use or making use of them (M. Jurgilewicz, 2015).

Article 2 of the DCM Law indicates the group of entities entitled to use or make use of direct coercive measures and firearm, which include:

- the officers of the Internal Security Agency (Article 2.1.1 of the DCM Law);
- the officers of the Foreign Intelligence Agency (Article 2.1.2 of the DCM Law);
- the officers of the State Security Service (Article 2.1.3 of the DCM Law);
- the officers of the Customs and Fiscal Control Service (Article 2.1.4 of the DCM Law);

[2] Legislative information – which was the governmental bill concerning direct coercive measures and firearm, form No 1140 of the Seym of the Republic of Poland of the seventh tenure. The details of the legislative process: http://www.sejm.gov.pl/Sejm7.nsf/PrzebiegProc.xsp?nr=1140 – access of 30 June 2020.

- the officers of the Central Anti-Corruption Bureau (Article 2.1.5 of the DCM Law);
- the wardens of the State Hunting Guard (Article 2.1.7 of the DCM Law);
- the officers of the State Fishing Guard (Article 2.1.8 of the DCM Law);
- the officers of the Police (Article 2.1.9 of the DCM Law);
- the officers and soldiers of the Military Counterintelligence Service (Article 2.1.10 of the DCM Law);
- the officers of the Prison Service (Article 2.1.11 of the DCM Law);
- the officers and soldiers of the Military Intelligence Service (Article 2.1.12 of the DCM Law);
- the wardens of communal (municipal) guards (Article 2.1.13 of the DCM Law);
- the officers of the Border Guard (Article 2.1.14 of the DCM Law);
- the wardens of the Forestry Guard (Article 2.1.15 of the DCM Law);
- the officers of the Marshal's Guard (Article 2.1.16 of the DCM Law);
- the officers of the railway security guard (Article 2.1.17 of the DCM Law);
- the officers of the Park Guard (Article 2.1.18 of the DCM Law);
- the soldiers of the Military Police or military law enforcement agencies (Article 2.1.19 of the DCM Law);
- security staff authorised to use or make use of direct coercive measures or firearm pursuant to the provisions of the Law of 22 August 1997 on the protection of persons and property (Official Gazette of 2020, item 838; Article 2.1.20 of the DCM Law);

- the inspectors of the General Inspectorate of Road Transport (Article 2.1.21 of the DCM Law).

Whereas, pursuant to Article 2.2 of the DCM Law, the persons entitled to use or make use of direct coercive measures are also as follows:

- the members of law enforcement services, referred to in the Law of 20 March 2009 on the security of mass events (Official Gazette of 2019, item 2171; Article 2.2.1 of the DCM Law);
- the employees of reformatories, juvenile shelters or youth fostering centres (Article 2.2.2 of the DCM Law).

In Article 12.1 of the DCM Law, the legislator indicated the closed catalogue (due to the lack of the expression "in particular") of direct coercive measures. They include:

- physical strength in the form of the following techniques: transport, defence, attack, overpowering (Article 12.1.1(a)-(d) of the DCM Law);
- cuffs fastened on: hands, legs or combined (Article 12.1.2(a)-(c) of the DCM Law);
- straitjacket (Article 12.1.3 of the DCM Law);
- restraining belt (Article 12.1.4 of the DCM Law);
- restraining net (Article 12.1.5 of the DCM Law);
- safety helmet (Article 12.1.6 of the DCM Law);
- stick (Article 12.1.7 of the DCM Law);
- water restraining measures (Article 12.1.8 of the DCM Law);
- service dog (Article 12.1.9 of the DCM Law);
- service horse (Article 12.1.10 of the DCM Law);
- non-penetrative bullets (Article 12.1.11 of the DCM Law);

- chemical restraining means in the following form: the manual throwers of restraining substances, the backpack throwers of restraining substances, tear gas grenades or other devices intended for throwing restraining means (Article 12.1.12 (a)-(d) of the DCM Law);
- objects for restraining persons by means of electricity (Article 12.1.11 of the DCM Law);
- security cell (Article 12.1.14 of the DCM Law);
- isolation ward (Article 12.1.15 of the DCM Law);
- isolation room (Article 12.1.16 of the DCM Law);
- road spikes and other measures for stopping or immobilising motor vehicles (Article 12.1.17 of the DCM Law);
- vehicles (Article 12.1.18 of the DCM Law);
- measures for overcoming construction closures and other obstacles, including explosives (Article 12.1.19 of the DCM Law);
- pyrotechnical means with deafening and dazzling properties (Article 12.1.20 of the DCM Law).

Pursuant to Article 11 of the DCM Law, direct coercive measures may be used or made use of in the event of the necessity of undertaking at least one of the following actions, e.g.:

- enforcing a behaviour required under law, according to the instruction given by the entitled person (Article 11.1 of the DCM Law);
- repulsing a direct, unlawful attempt against the life, health or freedom of an entitled person or other person (Article 11.2 of the DCM Law);
- counteracting actions directly aimed at an attempt against the life, health or freedom of an entitled person or other person (Article 11.3 of the DCM Law);

- counteracting the infringement of public order or public safety (Article 11.4 of the DCM Law);
- counteracting a direct attempt against areas, objects or devices protected by the entitled person (Article 11.5 of the DCM Law);
- protecting order or safety on areas or in facilities protected by the entitled person (Article 11.6 of the DCM Law).

The use of a direct coercive measure means its application against a person; whereas, making use of a direct coercive measure means its application against an animal or in order to stop, block or immobilise a vehicle or overcome an obstacle (Article 4.6, in connection with Article 4.9 of the DCM Law).

Whereas, in accordance with Article 45 of the DCM Law, firearm may be used when there is at least one of the following cases, e.g.:

1) the necessity of repulsing a direct, unlawful attempt against the life, health or freedom of the entitled person or other person, or the necessity of counteracting actions directly aimed at such an attempt, important objects, devices or areas, or the necessity of counteracting actions directly aimed at such an attempt,

2) the necessity of opposing a person disregarding a call to immediate abandonment of arms, explosive material or other dangerous object, the use of which may endanger the life, health or freedom of the entitled person or other person.

A specific *conditio sine qua non* of applying direct coercive measures, pursuant to Article 6.1 of the DCM Law, is their use or making use of them in the manner indispensable for achieving the objectives of such use or making use of,

proportionally to a hazard degree, at the same time choosing a measure with as low harm as possible. On the other hand, under Article 6.2 of the DCM Law, the use or making use of firearm is permissible only when the use or making use of the direct coercive measures proved to be insufficient for the achievement of the objectives of the said use or making use (item 1), or their use is not possible due to given circumstances (item 2).

Furthermore, direct coercive measures or firearm may be used or made use of in the manner with as low harm as possible (Article 7.1 of the DCM Law). The use or making use of direct coercive measures or firearm must be abandoned when the objective of their use or making use of them is attained (Article 7.2 of the DCM Law). Direct coercive measures are used or made use of with utmost caution, considering their properties which may pose a hazard to the life or health of the entitled person or other person (Article 7.3 of the DCM Law). When taking a decision on the use or making use of firearm, utmost caution is required and treating its use as a last resort (Article 7.4 of the DCM Law).

II. Comparative analysis

a) France

Legal basis:

(Fr. *Code pénal*; eng. *The Criminal Code*)

(Fr. *Code de Procedure Penale*; eng. *The Code of Criminal Procedure*)

(Fr. *Code de la Sécurité Intérieure*; eng. *The Code of Internal Security*)

(Fr. *Code de la Défense*; eng. *The Defence Code*)

It is worth underlining that in France the use of force by services (especially by the Police) is strictly regulated and controlled. Its use is deemed justified in a situation when enforcement agency officers face a direct threat – both for themselves and for third persons. In such cases, the French legislation clearly provides that a given person in such circumstances shall not bear any criminal liability. It must be indicated that officers may use firearm in two cases, i.e. in the event of detaining a given person and in self-defence and the defence of other persons.

Whereas, Article 73 of the French Code of Criminal Procedure authorises arrest (i.e. police arrest) in situations of flagrant offences. Nevertheless, what must be emphasised here, the use of force is required to be necessary and proportionate. The provision of Article R211-13 of the French Code of Internal Security establishes the rule of absolute necessity and proportionality.

What is important, Article 122-5 of the French Criminal Code provides that criminal liability shall not apply to a person who, in the presence of an unjustified attack against such a person or another person, uses coercive measures for self-defence or the defence of other person; unless there is disproportionality between the defence measures used and an attack type – in such a case, the said person may (although not necessarily) be subject to criminal liability.

Furthermore, it must be accepted that the use of coercive measures in the form of fastening cuffs, does not hold the attribute of discretion. The provision of Article 803 of the French Code of Criminal Procedure provides that cuffs (or chains) cannot be fastened groundlessly, unless a given person is deemed dangerous for officers or other persons and there is a situation consisting in such a person's attempted escape.

Whereas, Article L. 2338-3 of the French Code of Defence includes the catalogue of situations in which coercive measures may be used, among others, the immobilisation of vehicles, boats or other means of transport whose drivers fail to comply with the stop order.

What is interesting, pursuant to Article R211-9 of the French Code of Internal Security, a gathering may be dispersed by the police force after two summons to disperse have remained without effect.

In France, following the example of the Polish Police Bureau of Internal Affairs, there is a special institution responsible for ensuring that police officers comply with the laws and regulations and the code of ethics of the national police force. This is the General Inspectorate of the National Police. The said body may conduct investigations (that is institute proceedings) both at the court and administrative level.

Various penalties may be imposed on officers who used coercive measures in an unauthorised manner, e.g. a warning, a reprimand, suspension in duties, temporary expulsion from service (from one month to two years) or permanent expulsion from service. Furthermore, the punishment of a fine, deprivation of liberty (based on the French Criminal Code; depending on the loss) may be imposed. What is important, administrative penalties, as well as those included in the Criminal Code, may be imposed on the officer. Nevertheless, in practice, when the ordered deprivation of liberty amounts to six months (or more), then administrative penalties are revoked.

It must be noted that in 2017, 1085 criminal investigations and 276 administrative investigations were submitted to the General Inspectorate of National Police. What is essential, 809 infringements on the part of officers were established in 288 administrative investigations.

b) Croatia

Legal basis

The Law on Police Tasks and Powers; Official Gazette 76/09, 92/14, 70/19)

The Law on Police (Official Gazette 34/11, 130/12, 89/14, 151/14, 33/15, 121/16, 66/19)

Pursuant to Article 81 of the Croatian Law on Police Tasks and Powers, coercive measures are as follows:

- physical strength,
- spray chemical retaining means,
- stick,
- restraining net,
- devices used for stopping or immobilising a motor vehicle,
- service dog,
- service horse,
- special vehicles,
- chemicals,
- firearm,
- special weapon,
- explosives (pyrotechnical means),
- water sprinkler devices (water cannons).

Article 82 of the said Law provides that coercive measures are used in the cases described in the Act, in order to protect human life, overcome resistance, prevent an escape, repulse attacks, as well as to eliminate a threat, if probable. Coercive measures applied in relation to children, the disabled, persons whose mobility is impaired significantly, as well as pregnant women and noticeably sick persons – are used obligatorily after the previous warning of their use.

Analogously to the Polish legislation – Croatian police officers, pursuant to Article 83 of the Law on Police Tasks and Powers, cannot use coercive measures except situations in which they are required by the necessity of achieving official objectives. Furthermore, an officer, at each time, should apply the mildest coercive measure possible by means of which it is possible to attain a given objective. What is important, an officer is obliged to stop the application of coercive measures as soon as the reasons for which they were used cease to exist.

Whereas, in line with Article 84 of the commented Law – a police officer is empowered to use physical strength in order to overcome the resistance of a person infringing public order, as well as a person who must be transported, detained or arrested and counteract actions aimed at auto-aggression (i.e. self-mutilation), etc. Moreover, a police officer is entitled to use an aerosol consisting of irritant chemicals. A police officer is also authorised to use a police stick in a situation when using physical strength or the said spray does not bring in or does not guarantee any results.

As per Article 85 of the Law on Police Tasks and Powers, an officer is entitled to apply measures resulting in the immobilisation of a person in order to make it harmless, as the form of self-defence or in a situation when such a person escapes. Furthermore, such a measure may be applied when a detained person mutilates itself or other persons.

Article 86, in connection with Article 89 of the said Law, refers to the indication of a situation when a service vehicle may be used. In line with its reading, the use of such a coercive measure is intended for stopping a motor vehicle in order to prevent a person who committed a crime from escaping (crime prosecuted *ex officio*). Additionally, such a measure

is applied when a prisoner escaped or a detention order is issued for such a person. Furthermore, a service vehicle is used in a situation of the unlawful passing of a border by a vehicle or when such a vehicle infringes the territory under the supervision of officers (i.e. strategical objects). The measure under discussion may also be applied when a driver does not follow the police officer's instructions. What is essential, a service vehicle or other vehicle (by default – a civil vehicle) may be used to fulfil the above described tasks.

Another coercive measure which may be applied by officers is the already mentioned service dog. Under Article 87 of the said Law, it may be used (on a leash and in a muzzle) in a situation when there are analogous prerequisites for using physical strength, spray or stick. Obviously, a service dog may be unleashed and without a muzzle for instance during an attempt to catch an escaping perpetrator of the offence (prosecuted *ex officio*), in relation to a person infringing border control regulations, in relation to persons threatening the safety of so called state strategical objects or in the event of flagrant public order infringement. What is interesting, unleashing a service dog by an officer and the lack of a muzzle – is regarded tantamount to a situation when an officer is entitled to use firearm.

Widely understood chemicals may be used – pursuant to Article 90 of the Law under discussion – in the need of recovering public order which was infringed "on a larger scale", and also to prevent the activity of a group of persons threatening people and property of "higher value". Furthermore, the said measures may be used in the event of closing a given person in a room and counteracting its resistance.

What is more, in line with Article 91 of the same Law, an officer is authorised to use firearm as a last resort and

in necessary protection. In addition, firearm may be used when an officer is not able, by any other means, to arrest a person who committed a crime punishable with the imprisonment of at least 10 years. Additionally, such a coercive measure may be used in relation to the imprisoned who escaped from the penitentiary unit (sentences for an act subject to the punishment of at least 10 years' imprisonment). Analogously to the Polish legislation – Croatian police officers, before shooting, under Article 92 of the said Law, are obliged to say the following phrases: "Stop, Police" and then "I will shoot". After having said that, there is a warning shoot into the air (caution – such a shoot may be performed if persons or property are not at risk). Moreover, it must be noted that an officer does not have to give the above oral instruction in the situation of a direct threat to its life or the life of another person. Restrictions concerning the use of firearm are included in Article 93 of the Law under discussion. There is information that this type of coercion must not be applied if it may endanger the life of other persons. Furthermore, it must not be applied in relation to children and juveniles.

The Croatian officers, pursuant to Article 94 of the said Law, are also authorised to use firearm against animals if there is no other possibility of eliminating a threat for the life and health of other persons. What is interesting, this measure is also applied when an animal is seriously ill or injured, and a veterinarian or other person is not able to save that animal's life.

In the context of discussing the service responsibility of officers, it is also recommended to refer to the regulations of the Law on Police mentioned at the beginning of this paper. In accordance with Article 93 of the said Law – an officer is subject to punishment in the event of infringing its

duties or if it fulfils such duties without due diligence or with negligence. Furthermore, an officer bears liability when its actions violate the provisions of the Constitution, laws, regulations and other acts concerning its service. An officer is also subject to the punishment when it infringes the good name of the service.

c) Czechia

Legal basis

Law No 283/1991 on Police
(č. 283/1991 Sb. o Polícii ČR)
Law No 119/2002 on firearm and ammunition
(Zákon č. 119/2002 Sb. o strelných zbraniach a strelive a o zmene zákona č. 156/2000 Zb. O overovaní strelných zbraní, streliva a pyrotechnických predmetov a o zmene zákona č. 288/1995 Zb. o strelných zbraniach a strelive (zákon o strelných zbraniach) v znení zákona č. 13/1998 Zb. a zákona č. 368/1992 Zb. o správnych poplatkoch v znení neskorších predpisov a zákona č. 455/1991 Zb. o živnostenskom podnikaní (živnostenský zákon) v znení neskorších predpisov, (zákon o zbraniach) v znení neskorších predpisov. Zákon č. 310/2006 Sb. O nakladaní s niektorými vecami využiteľnými na obranné a bezpečnostné účely na území Českej republiky a o zmene niektorých zákonov (zákon o nakladaní s bezpečnostným materiálom).

Law No 361/2003 on employing security forces members
Zákon č. 361/2003 Sb. o služobnom pomere príslušníkov bezpečnostných zborov v znení neskorších predpisov.

Law No 310/2006 Coll. on handling some useful objects for the purposes of defence and safety in the territory of the Czech Republic and on amending some laws

Zákon č. 310/2006 Sb.o nakladaní s niektorými vecami využiteľnými na obranné a bezpečnostné účely na území Českej republiky a o zmene niektorých zákonov (zákon o nakladaní s bezpečnostným materiálom)

To begin with, it must be indicated that the Czech officer is authorised to use coercive measures and firearm only when it completed specialised training courses within their proper use. As per § 52 of the Law on Police (the Czech Republic), coercive measures are, among other things, as follows: physical strength, paralyser, restraining gas, service stick, non-penetrative bullets, other types of firearm, restraining belt, means for motor vehicle immobilisation, service dog, service horse, water cannon, firearm, warning shot and handcuffs.

Whereas, the provisions of Law No 171/1993 describe situations in which the use of physical strength, service stick, paralyser and pepper spray is justified.

d) Hungary

Legal basis

Law No XXXIV of 1994 on Police

In line with the Police Law, the Hungarian officers, when applying coercive measures, are obliged, primarily, to respect constitutional rules and other normative acts concerning human rights. What is important, as in Poland, an officer is obliged to adapt a measure type in an adequate manner to a specific situation and must consider a proportionality principle – i.e. when there are circumstances for using physical strength only, it must not use firearm. The catalogue of the said measures is included in chapter 6 of the said Law. In accordance with its reading, they are divided into

two categories, i.e. ordinary coercive measures and measures used by officers to counteract unrests in which physical strength is used. The first category includes: the use of physical strength, handcuffs, service stick, pepper gas, paralyser, service dog, closing a road section, the use of firearm. The second category includes: the use of long service stick, smoke grenade with tearing gas, water cannon, service horses, restraining net, rubber ammunition gun (non-penetrative) and devices used for throwing restraining means.

e) Slovakia

Legal basis

Law No 171/1993 on Police (Zákona č. 171/1993 Z. z. o Policajnom)

The Regulation of the Minister of Internal Affairs No 67/2014 on armament, engineering and chemical technology, and materials

Rozkaz ministra vnútra SR č. 67/2014 o systemizácii výzbrojnej, ženijnej a chemickej techniky a materiálu

Decision of 24 May 2004 on manual throwing devices

Rozhodnutia z 24. mája 2004, ktoré sme si vyžiadali od Odboru vedecko-technického rozvoja Prezídia PZ

Coercive measures used by the Slovakian officers are commonly referred to as "non-lethal weapons" or "less lethal weapons" (B. Planka and L. Kovárník, J. Tureček) which – in accordance with the Police Law – are to make a given person or a given group of persons harmless. The measures under discussion involve: the use of physical strength, paralyser (taser), non-penetrative bullets, chemical restraining means, service stick (personal), defensive shield or pepper gas.

What should be mentioned here are reusable handcuffs, known in Slovakia as *Lapaj* which are similar to cable ties but which may (and often are) be reused. According to the author of this study, the said device is the hybrid of a cable tie and lasso which may be attached (more specifically, thrown onto) to every part of the body of a person to whom such a measure is applied.

Whereas, in line with the decision of 24 May 2004 on manual throwers, an officer may use such a type of coercive measure in order to neutralise a danger.

f) Germany

Legal basis

The Law of 3 October 1961 on direct coercion in exercising public power by the federal officers of law enforcement agencies (UZwG)

Gesetz über den unmittelbaren Zwang bei Ausübung öffentlicher Gewalt durch Vollzugsbeamte des Bundes (UZwG); Full name: Gesetz über den unmittelbaren Zwang bei Ausübung öffentlicher Gewalt durch Vollzugsbeamte des Bundes in der im Bundesgesetzblatt Teil III, Gliederungsnummer 201-5, veröffentlichten bereinigten Fassung, das zuletzt durch Artikel 43 der Verordnung vom 19. Juni 2020 (BGBl. I S. 1328) geändert worden ist

The Law on the Federal Police Officer of 19 July 1960 - Official Gazette I, p. 569

Des Bundespolizeibeamtengesetzes vom 19. Juli 1960 - Bundesgesetzbl. I S. 56

German officers, as per § 1 of the said Law, are obliged to act in accordance with law, and they are also entitled

to use coercive measures in their duties. In line with § 2, direct coercive measures involve the use of force against persons or objects, where force means physical strength and the use of other means – also firearm. In accordance with § 2 of the said normative act, physical coercive measures consist in the use of physical strength by an officer. The further analysis of § 2 leads to a conclusion that water cannons, service vehicles, service dogs and other devices used for immobilisation – constitute the additional elements of direct coercive measures when the use of physical strength turns out to be insufficient. Direct coercive measures also include firearm, (chemical) irritant (neutralising) materials and explosive materials.

Analogously to the Polish legislation and other, already mentioned countries – German officers, under § 3, in connection with § 4 of the Law under discussion, while applying direct coercive measures, must respect the fundamental human rights (including the German Constitution) and the principle of the proportionality of the measures used.

Pursuant to § 8 of the Law, an officer is entitled to overpower a given person when there is a risk of attack against itself or other person. Furthermore, such a measure may be used in the situation of (active and passive) resistance on the part of a person concerning whom given operations are carried out. In addition, the use of the said measure is a result of i.a. attempted escape or the possibility of committing a suicide by a given person.

While referring to the conditions of firearm use, it is worth mentioning § 9 of the said Law from which it arises that the use of this direct coercive measure is allowed only for i.a. the officers of Police, Border Guard, Customs Guard, Water and Sailing Guard, the officials of judicial body entrusted

with a task consisting in ensuring safety in protected facilities and of other entities who under special laws are authorised to use firearm.

What is important, firearm – pursuant to § 10 of the discussed normative act – may be used only against one person (*Schußwaffen dürfen gegen einzelne Personen nur gebraucht werden*) for the purpose i.a. of preventing committing a crime by such a person or when a prohibited act was already done. Furthermore, this measure may be applied for in flagranti cases. Nevertheless, this provision also stipulates that firearm may be used against a crowd which uses or intends to use force, and when the application of other direct coercive measures will not or did not bring in any result.

Analogously to other presented legislations – the use of firearm under § 12 of the Law is connected with numerous restrictions, i.e. it may be used only as a last resort when other direct coercive measures are not effective. What is important, shooting by an officer should aim at immobilising a person and not killing. Furthermore, before using this measure, it is required to ensure whether it does not pose a threat to any third persons or whether a firearm is not used against a child.

III. *De lege ferenda* postulates

The author of this study wants to indicate that he is not an entity entitled to issue any recommendations concerning the use of direct coercive measures because he is not a person applying such measures and he is familiar with the psychological aspect of their application, as well as (perhaps, first and foremost) the effects of their use against a person. *Prima facie* it could appear that the application of the most

serious coercive measure, especially firearm, does not affect psychologically a person applying such measures – nothing is further from the truth. The use of firearm by an officer of each of the entitled formation surely is a last resort and its use affects the further functioning of such an officer; therefore, such a person, directly after using firearm, stays under the psychological supervision and receives psychological support.

Furthermore, it must be noted that the Polish legislation is complete within this scope.

De lege ferenda it may be only indicated that it would be advisable to revise the regulations within the use of firearm. The author of the study, taking into account humanity and a respect for the superior right of a human to life – recommends considering the possibility of removing this measure from the catalogue discussed in this study. Its possible use could be reserved only for intelligence agencies. An optimal solution would be inventing a new type of *quasi*-firearm which would cause the immediate overpowering of a given person without a threat of the loss of life.

Conclusion

Recapitulating the above considerations *in concerto* it must be noted that the use or making use of direct coercive measures and firearm by entitled formations for the purpose of ensuring the protection of internal security is of a varied nature, not mentioning the practical aspects of using such measures. What is important, entities entitled by the legislator to use coercive measures hold such a competence which is included in the Law. Moreover, it must be underlined that the law on direct coercive measures and firearm, which is currently

in force, repealed the dispersed normative acts concerning this subject. Such a legislative procedure enabled the normative ordering of the said subject matter.

Furthermore, it must be indicated that the presented legislative solutions based on the selected European countries – as a rule – are tantamount to those implemented in the Polish legislation.

Bibliography

a) Normative acts

Poland

The Law of 24 May 2013 on the direct coercive measures and firearm (Official Gazette of 2019, item 2418)

The Law of 22 August 1997 on the protection of persons and property (Official Gazette of 2020, item 838)

The Law of 20 March 2009 on the safety of mass events (Official Gazette of 2019, item 2171)

France

Code pénal; eng. *The Criminal Code*

Code de Procedure Penale; eng. *The Code of Criminal Procedure*

Code de la Sécurité Intérieure; eng. *The Code of Internal Security*

Code de la Défense; eng. *The Defence Code*

Croatia

The Law on Police Tasks and Powers; Official Gazette 76/09, 92/14, 70/19

The Law on Police; Official Gazette 34/11, 130/12, 89/14, 151/14, 33/15, 121/16, 66/19

Czechia

č. 283/1991 Sb. o Polícii ČR

Zákon č. 119/2002 Sb. o strelných zbraniach a strelive a o zmene zákona č. 156/2000 Zb. O overovaní strelných zbraní, streliva a pyrotechnických predmetov a o zmene zákona č. 288/1995 Zb. o strelných zbraniach a strelive (zákon

o strelných zbraniach) v znení zákona č. 13/1998 Zb. a zákona č. 368/1992 Zb. o správnych poplatkoch v znení neskorších predpisov a zákona č. 455/1991 Zb. o živnostenskom podnikaní (živnostenský zákon) v znení neskorších predpisov, (zákon o zbraniach) v znení neskorších predpisov.

Zákon č. 310/2006 Sb. O nakladaní s niektorými vecami využiteľnými na obranné a bezpečnostné účely na území Českej republiky a o zmene niektorých zákonov (zákon o nakladaní s bezpečnostným materiálom).

Zákon č. 361/2003 Sb. o služobnom pomere príslušníkov bezpečnostných zborov v znení neskorších predpisov

Zákon č. 310/2006 Sb.o nakladaní s niektorými vecami využiteľnými na obranné a bezpečnostné účely na území Českej republiky a o zmene niektorých zákonov (zákon o nakladaní s bezpečnostným materiálom

Hungary

Law No XXXIV of 1994 on the Police

Slovakia

Zákona č. 171/1993 Z. z. o Policajnom

Rozkaz ministra vnútra SR č. 67/2014 o systemizácii výzbrojnej, ženijnej a chemickej techniky a materiálu

Rozhodnutia z 24. mája 2004, ktoré sme si vyžiadali od Odboru vedecko-technického rozvoja Prezídia PZ

Germany

Gesetz über den unmittelbaren Zwang bei Ausübung öffentlicher Gewalt durch Vollzugsbeamte des Bundes in der im Bundesgesetzblatt Teil III, Gliederungsnummer 201-5, veröffentlichten bereinigten Fassung, das zuletzt durch Artikel 43 der Verordnung vom 19. Juni 2020 (BGBl. I S. 1328) geändert worden ist

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Spór o dowody z kontroli operacyjnej w procesie karnym – gwarancyjny charakter art. 168b k.p.k w świetle konstytucyjnych praw i wolności

Abstrakt

W artykule podjęto próbę ukazania przykładu spornych regulacji prawnych przyjętych na gruncie Kodeksu postępowania karnego (t.j. Dz. U. z 2021 r. poz. 534) – treści art. 168b k.p.k – regulującego kwestię wykorzystania dowodów pochodzących z kontroli operacyjnej w polskim postępowaniu karnym. W pierwszej kolejności omówione zostaną podstawowe aspekty prawne i definicyjne kontroli operacyjnej oraz geneza art. 168b w Kodeksie postępowania karnego. W drugiej części artykułu zostaną przytoczone wybrane poglądy doktryny, jak i orzecznictwo Europejskiego Trybunału Praw Człowieka, Trybunału Konstytucyjnego oraz polskich sądów, które czynią za punkt rozważań wykładnię treści normatywnej art. 168b k.p.k.

Słowa kluczowe: proces karny, kontrola operacyjna, prawo dowodowe, prawo do prywatności, ochrona tajemnicy komunikowania się

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1. Zagadnienia wstępne

Tytułem wstępu warto wskazać, że kontrola operacyjna jest jedną z form czynności operacyjno – rozpoznawczych. W doktrynie, z uwagi na brak definicji legalnej czynności operacyjno-rozpoznawczych, można spotkać się z wieloma próbami wyjaśnienia, jak należy je rozumieć. Za przykład można podać definicję, w której przyjęto, że są to „pozaprocesowe czynności techniczne i taktyczne ukształtowane przez praktykę organów ścigania karnego, służące profilaktycznej walce z przestępczością" (Łyżwa, Tokarski 2015). Charakteryzuje się je również jako czynności pełniące rolę subsydiarną względem procesu karnego, gdyż ich zadaniem jest dostarczenie uzasadnienia dla wszczęcia postępowania przygotowawczego (Eichstaedt 2003: 28). Uprawionymi organami do przeprowadzania kontroli operacyjnej w obecnym stanie prawnym są: Policja, Biuro Nadzoru Wewnętrznego, Straż Graniczna, Służba Ochrony Państwa, Agencja Bezpieczeństwa Wewnętrznego, Służba Kontrwywiadu Wojskowego, Żandarmeria Wojskowa, Centralne Biuro Antykorupcyjne oraz Krajowa Administracja Skarbowa (Kosmaty 2008: 88). Dopuszczalność stosowania kontroli operacyjnej na potrzeby danej służby regulują poświęcone im ustawy szczególne. Wskazuje się, że celem kontroli operacyjnej jest zapobieżenie popełnieniu przestępstwa umyślnego, ściganego z oskarżenia publicznego lub wykrycie i ustalenie sprawców takiego czynu, lub uzyskanie i utrwalenie dowodów popełnienia takiego przestępstwa.

Mając na uwadze definicję czynności operacyjno – rozpoznawczych oraz cele kontroli operacyjnej można stanąć na stanowisku, że kontrola operacyjna jest czynnością służącą zwalczaniu przestępczości. Jednakże oprócz zwalczania

negatywnych, niepożądanych przez państwo i społeczeństwo zjawisk przestępczych, konsekwencją zarządzenia kontroli jest wkroczeniem w sferę chronionych praw i wolności, w szczególności prawo do prywatności, określonym w art. 8 ust. 1 Europejskiej Konwencji Praw Człowieka (Dz. U. z 1993 r. Nr 61, poz. 284 z późn. zm.) i art. 47 Konstytucji RP (Dz. U. Nr 78, poz. 483 z późn. zm.) oraz ochronę tajemnicy komunikowania się, określonych w art. 8 ust. 1 EKPC i art. 49 Konstytucji RP. Za słuszne można uznać stanowisko, że niejawne formy inwigilacji jednostek dotykają materii niezwykle wrażliwej społecznie. Są one jednymi z najbardziej drastycznych form ingerencji w wolność osobistą (Tomkiewicz 2016: 117).

Zatem wymaga podkreślenia, że kontrola operacyjna oceniana jest jako pewnego rodzaju środek inwazyjny, czyli bezsprzecznie łączący się z ingerencją uprawnionych organów władzy publicznej w sferę osobistą osoby objętej kontrolą operacyjną. Ponadto ingeruje ona w sferę prywatności wszystkich innych uczestników kontrolowanych procesów komunikacji międzyludzkiej. Z uwagi na inwazyjny charakter, słusznie wskazuje się, że czynności operacyjno - rozpoznawcze, w tym kontrola operacyjna „winny być subsydiarnym środkiem pozyskiwania informacji o jednostkach, gdy nie da się ich uzyskać w inny, mniej dolegliwy dla nich sposób" (Kusak, Wiliński 2020).

W ramach kontroli operacyjnej za niezwykle sporny uchodzi art. 168b k.p.k, regulujący dopuszczalność wykorzystania zebranych w toku jej stosowania informacji jako dowodów w polskim procesie karnym. Przede wszystkim z uwagi na nieprecyzyjność treści tego przepisu spór skupia się na rodzaju stosowanej wykładni literalnej lub systemowej. Jednakże, co kluczowe w obranym temacie, dostrzegalny

jest we współczesnym świecie konflikt wartości, nieodzownie towarzyszący normom prawa karnego procesowego. Wynika to ze stale postępującego rozwoju technologicznego, co w konsekwencji prowadzi do przenoszenia procesów komunikowania się, stanowiących prywatną sferę naszego życia, do środków porozumiewania się na odległość. Konflikt ten dotyczy praw i wolności jednostki oraz jej ochrony przed nadmierną ingerencję w jej sferę prywatności oraz skutecznego zwalczania przestępczości w ramach obowiązków państwa z art. 5 Konstytucji RP, tj. zapewnienia wolności i praw człowieka i obywatela oraz bezpieczeństwa obywatelom. Słusznie dostrzega się, że proces karny, dla zrealizowania swoich podstawowych funkcji, nieodzownie ingeruje w sferę praw i wolności jednostki. Powyższy proces ważenia obranych wartości ma decydujące znaczenie dla kształtowania stosunków między państwem a obywatelem (Najman 2016: 361). Relewantne pozostają również cele procesu karnego obrane przez ustawodawcę, a wskazane art. 2 § 1 k.p.k, w szczególności wskazana w art. 2 § 1 pkt 1 k.p.k zasada trafnej reakcji karnej. Trafna reakcja karna to wymóg, aby co najmniej niewinny nie poniósł odpowiedzialności, a winny był zawsze do niej pociągnięty, osoba winna poniosła odpowiedzialność nie mniejszą niż tę, na którą zasłużyła i nie większą od tej, którą ponieść powinna (Cieślak 1984: 214).

Mając na uwadze aktualność sporu o granice wykorzystania materiałów z kontroli operacyjnej jako dowodów w polskim procesie karnym, na którą się wskazuje w związku z wnioskiem Prokuratora Generalnego do Trybunału Konstytucyjnego dotyczącego jego interpretacji (Daniluk 2020: 5), oraz fakt, że kwestia ta w sposób znaczący wpływa na ukształtowanie statusu osoby inwigilowanej, interpretacja treści normatywnej art. 168b k.p.k jawi się jako istotny

przedmiot analizy czynności inwazyjnych dopuszczalnych na gruncie ustawodawstwa krajowego.

2. Zakres stosowania kontroli operacyjnej na przykładzie uprawnień Policji

Jak wyżej wskazano kontrola operacyjna jest jedną z form czynności operacyjno-rozpoznawczych. W doktrynie wskazuje się, że z danych udostępnionych przez Prokuratora Generalnego w 2016 roku „ogromną większość stanowiły podsłuchy prowadzone Policję (4697 osób)" (Rogalski 2019). Stąd można określić ramy kontroli operacyjnej na przykładzie Policji.

Kontrola operacyjna charakteryzuje się szerokimi ramami. W art. 19 ust. 6 Ustawy o Policji (t.j. Dz. U. z 2020 r. poz. 360 z późn. zm.) wskazano, że kontrola operacyjna może polegać na następujących czynnościach: uzyskiwaniu i utrwalaniu treści rozmów prowadzonych przy użyciu środków technicznych, w tym za pomocą sieci telekomunikacyjnych; uzyskiwaniu i utrwalaniu obrazu lub dźwięku osób z pomieszczeń, środków transportu lub miejsc innych niż miejsca publiczne; uzyskiwaniu i utrwalaniu treści korespondencji, w tym korespondencji prowadzonej za pomocą środków komunikacji elektronicznej; uzyskiwaniu i utrwalaniu danych zawartych w informatycznych nośnikach danych, telekomunikacyjnych urządzeniach końcowych, systemach informatycznych i teleinformatycznych; uzyskiwaniu dostępu i kontroli zawartości przesyłek. Wskazuje się, że kontrola operacyjna pozwala w szczególności na podsłuch osób i pomieszczeń, w tym chodzi o rozmowy za pośrednictwem telefonii stacjonarnej, bezprzewodowej (komórkowej) i internetowej, pozyskiwanie treści wiadomości tekstowych i multimedialnych

przesyłanych za pomocą urządzeń telefonicznych oraz innych urządzeń służących do komunikowania się (Wyrok TK z 30.07.2014 r., K 23/11). W doktrynie słusznie podsumowuje się zakres kontroli, twierdząc, że „pojęcie kontroli operacyjnej jest bardzo pojemne" (Rogalski 2019).

Ponadto warto zauważyć, że szeroki zakres potencjalnych czynności podejmowanych przez Policję powiązany jest z zakresem przedmiotowym stosowania kontroli tj. katalogiem przestępstw, które uzasadniają jej zarządzenie. Na zakres przedmiotowy wskazuje wprost art. 19 ust. 1 Ustawy o Policji. W zakresie przedmiotowym zawarto takie przestępstwa pospolite jak: zabójstwa, dzieciobójstwa, zabójstwa eutanatycznego, spowodowanie ciężkiego uszczerbku na zdrowiu, a także ciężkiego uszczerbku na zdrowiu, bezprawne pozbawienie wolności, handel ludźmi. Zakresem objęto również przestępstwa mogące mieć związek z terroryzmem, np. zawładnięcia statkiem wodnym lub powietrznym oraz sabotaż komputerowy. Dodatkowo są to przestępstwa przeciwko wymiarowi sprawiedliwości, m.in. składanie fałszywych zeznań, czy fałszywe oskarżenia. Nie mniej istotne okazały się dobra chronione prawem składające się na szeroko rozumiane bezpieczeństwo finansowe, gdyż w zakresie zawarto przestępstwa przeciwko obrotowi gospodarczemu i interesom majątkowym w obrocie cywilnoprawnym, np. łapownictwo na stanowisku kierowniczym, pranie pieniędzy oraz przestępstwa przeciwko obrotowi pieniędzmi i papierami wartościowymi, np. fałszowanie pieniędzy i innych środków płatniczych albo dokumentów równoznacznych. Ustawodawca bierze również pod uwagę konieczność zwalczania nowych form przestępczości popełnianych w sferze Internetu, dopuszczając kontrolę operacyjną w przypadku, np. gdy treści pornograficzne, o których mowa w art. 202 k.k, obejmują udział małoletniego.

Jednakże ustawodawca dopuszcza stosowanie kontroli operacyjnej nie tylko z Kodeksu karnego (t.j. Dz. U. z 2020 r. poz. 1444 z późn. zm.) i Kodeksu karno-skarbowego (t.j. Dz. U. z 2021 r. poz. 408), ale również w przypadku przestępstw z ustaw szczególnych. W art. 19 ust. 1 zawarto ich aż 9 tj. ustawa z dnia 25 czerwca 2010 r. o sporcie (Dz. U. z 2019 r. poz. 1468, 1495 i 2251), ustawa z dnia 29 lipca 2005 r. o obrocie instrumentami finansowymi (Dz. U. z 2018 r. poz. 2286, 2243 i 2244), ustawa z dnia 29 lipca 2005 r. o ofercie publicznej i warunkach wprowadzania instrumentów finansowych do zorganizowanego systemu obrotu oraz o spółkach publicznych (Dz. U. z 2019 r. poz. 623, 1655, 1798 i 2217), ustawa z dnia 23 lipca 2003 r. o ochronie zabytków i opiece nad zabytkami (Dz. U. z 2018 r. poz. 2067 i 2245 oraz z 2019 r. poz. 730 i 1696), ustawa z dnia 14 lipca 1983 r. o narodowym zasobie archiwalnym i archiwach (Dz. U. z 2019 r. poz. 553, 730 i 2020), ustawa z dnia 21 listopada 1996 r. o muzeach (Dz. U. z 2019 r. poz. 917 i 1726), ustawa z dnia 27 czerwca 1997 r. o bibliotekach (Dz. U. z 2019 r. poz. 1479),ustawa z dnia 25 maja 2017 r. o restytucji narodowych dóbr kultury (Dz. U. z 2019 r. poz. 1591), ustawa z dnia 1 lipca 2005 r. o pobieraniu, przechowywaniu i przeszczepianiu komórek, tkanek i narządów (Dz. U. z 2019 r. poz. 1405).

Powyższe wskazuje na niezwykle szeroki zakres kontroli operacyjnej, a dobrami usprawiedliwiającymi wkroczenie w sferę praw i wolności jednostki, jest próba zapobiegnięcia przestępstwu lub uzyskania dowodów na popełnienie przestępstwa, które godzi w życie, zdrowie, mienie człowieka, a ponadto w dobro wymiaru sprawiedliwości oraz szeroko rozumianego bezpieczeństwa finansowego państwa. W istocie, z uwagi na pojemny zakres przedmiotowy, kontrola operacyjna jest środkiem, który sprzyja realizacji obowiązków

państwa wskazanych w art. 5 Konstytucji, tj. zapewnieniu wolności i praw człowieka i obywatela oraz bezpieczeństwa obywatelom.

Można stanąć na stanowisku, że dotychczasowa analiza dostarcza wniosków, że z uwagi na szeroki katalog czynności stosowanych w ramach kontroli operacyjnej, szeroki zakres przedmiotowy oraz tajny charakter tej czynności stanowi ona współcześnie jedną z najbardziej skutecznych środków zapobiegania i zwalczania przestępczości. W doktrynie od lat zwraca się uwagę, że czynności operacyjno - rozpoznawcze spełniają ważną rolę w walce z przestępczością (Kotowski 2021). Wskazuje się, czynność te „wielokrotnie urzeczywistniają społecznie oczekiwany skutek w postaci zapobiegnięcia popełnieniu groźnego przestępstwa, ujawnienia okoliczności popełnionego przestępstwa, ustalenia sprawców tych czynów, a także pozyskania i utrwalenia niezbitych dowodów przestępstwa, pozwalających na pociągnięcie do odpowiedzialności sprawców i eliminację szeroko rozumianych powiązań charakteryzujących przestępczość zorganizowaną" (Kotowski 2021). W istocie uważa się, że za jeden z najskuteczniejszych instrumentów walki z przestępczością i terroryzmem uznaje się przechwytywanie i rejestrowanie transmisji telekomunikacyjnych i teleinformatycznych, a więc również rozmów telefonicznych. Twierdzi się, że mowa głównie o podsłuchu telefonicznego oraz podsłuchu komputerowego (Kosmaty 2008: 34–48).

Powyższe rozważania w pełni odzwierciedla ukazująca *clou* wspomnianego konfliktu wartości teza, że „poszukiwanie skutecznych metod efektywnej ochrony demokratycznych społeczeństw przed zagrożeniem ze strony zorganizowanej przestępczości oraz terroryzmu prowadzi też do znacznego pomniejszenia zakresu prywatności człowieka"

(Skorupka 2013). W istocie ustawodawca, aby zagwarantować jednostce ochronę praw i wolności oraz wprowadzić poczucie względnego bezpieczeństwa przed zagrożeniami, jakie niesie dla niej stale rozwijająca się i doskonaląca się poprzez korzystanie z dorobku technologicznego przestępczość, zakreślona w omówionym zakresie przedmiotowym kontroli operacyjnej, korzysta z mechanizmu wskazanego w art. 31 ust. 3 Konstytucji RP, ograniczającego prawa i wolności w państwie.

3. Kontrowersje wokół treści art. 168b k.p.k

3.1. Zagadnienia wprowadzające

Powyższe rozważania dotyczące pojemnego pojęcia kontroli operacyjnej i szerokiego zakresu przedmiotowego jej stosowania są niezwykle istotne, z uwagi na konieczność zweryfikowania, czy rozumienie treści art. 168b k.p.k może w konsekwencji spowodować powstanie nieograniczonych ram korzystania z tego skutecznego środka dowodowego.

Uregulowania wskazujące na warunki wprowadzenia informacji zebranych w toku kontroli operacyjnej jako dowodów w polskim procesie karnym nie zostały zawarte w Kodeksie Postępowania Karnego z roku 1997. Na wykorzystanie dowodów wskazywały ustawy szczególne regulujące daną służbę uprawioną do stosowania kontroli operacyjnej, np. był to art. 19 ust. 15c ustawy o Policji. W przepisie wskazywano, że zgodę na wykorzystanie dowodów w procesie karnym wyraża sąd, tzw. zgoda następcza sądu. Ponadto w doktrynie stoi się na stanowisku, że ówcześnie „nie było wątpliwości, że zgoda ta może dotyczyć tylko przestępstwa wymienionego w art. 19 ust. 1 ustawy o Policji, czy też w odpowiednikach

tego przepisu w ustawach o innych służbach (tzw. przestępstwa katalogowego)" (Janczukowicz 2019).

Przepis art. 168b k.p.k został wprowadzony przez art. 1 pkt 35 ustawy z dnia 11 marca 2016 r. (Dz.U.2016.437) zmieniającej min. ustawę z dniem 15 kwietnia 2016 r. W obecnym stanie prawnym reguluje on sytuację o wykorzystaniu zebranych w wyniku kontroli operacyjnej dowodów popełnienia przez osobę, wobec której kontrola była stosowana, innego przestępstwa ściganego z urzędu lub przestępstwa skarbowego niż przestępstwo objęte zarządzeniem kontroli oraz popełnienia przez inną osobę niż objętą zarządzeniem kontroli przestępstwa ściganego z urzędu lub przestępstwa skarbowego. W tych sytuacjach dochodzi do pozyskania dowodów na popełnienie przestępstwa niewskazanego w postanowieniu sądu o zastosowaniu kontroli operacyjnej, a więc niejako „przy okazji" jej stosowania. W obecnym stanie prawnym podjęcie decyzji w przedmiocie wykorzystania tego dowodu w postępowaniu karnym zostało przyznane prokuratorowi.

W pierwszej kolejności warto wskazać, że ustawodawca posłużył się sformułowaniami nieprecyzyjny „o wykorzystaniu dowodów w postępowaniu karnym decyduje prokurator" oraz „inne przestępstwo ścigane z urzędu". Nie wskazano na jakim etapie postępowania, w jakiej formie oraz do kiedy prokurator podejmuje decyzję o wykorzystaniu informacji jako dowodów. Co więcej nie odniesiono wprost sformułowania „inne przestępstwo ścigane z urzędu" do katalogu przestępstw składającego się na zamknięty zakres przedmiotowy. W doktrynie wskazuje się, że przepis art. 168b k.p.k. od początku obowiązywania wywoływał mnóstwo wątpliwości. Przede wszystkim uwagę skupiono na tym „czy zgoda następcza z art. 168b k.p.k. dotyczyć może wszystkich

przestępstw ściganych z urzędu, czy tylko przestępstw katalogowych" (Janczukowicz 2019).

Mając na uwadze akcentowaną problematykę użytego zwrotu „inne przestępstwo ściągane z urzędu" oraz powyższe omówienie szerokich zakresów stosowania kontroli operacyjnej z uwzględnieniem zakresu przedmiotowego stosowania kontroli operacyjnej, poniższe rozważania ograniczono do analizy orzecznictwa oraz poglądów doktryny dotyczących użytego sformułowania „inne przestępstwo ścigane z urzędu". W istocie interpretacja tego sformułowania ściśle powiązana jest z zakresami stosowania kontroli.

3.2. Postulat precyzji prawa

Odnosząc się do powyższego stwierdzenia o braku precyzji użytych w art. 168b k.p.k sformułowań, warto poczynić wstępne rozważania co do ogólnych dyrektyw stawianych przez Europejski Trybunał Praw Człowieka, Trybunał Konstytucyjny, sądy powszechne oraz przedstawicieli doktryny. Postulat ten nabiera szczególnego znaczenia przy regulacjach niejawnych działań organów władzy publicznej, polegających na pozyskiwania informacji o jednostkach.

W pierwszej kolejności można wskazać, że Europejski Trybunał Praw Człowieka akcentuje tzw. jakość prawa. Rozumie ją jako postulat, że „prawo krajowe nie tylko jest dostępne i przewidywalne w stosowaniu" oraz wskazuje na konieczność skutecznej kontroli nad stosowaniem tajnych środków poprzez „zapewnienie odpowiednich i skutecznych zabezpieczeń i gwarancji przed nadużyciami" (Wyrok ETPC z 12.01.2016 r., 37138/14, SZABÓ I VISSY v. WĘGRY). Na tle orzecznictwa ETPC wskazywano również, że ustawy krajowe powinny być uregulowane tak, aby zachować precyzję,

zrozumiałość oraz dostępność dla adresatów norm oraz klarowność zakreślenia granic swobodnego uznania organów władzy publicznej. Co więcej niejednokrotnie akcentowano, że „ustawa musi w sposób jasny i precyzyjny formułować prawo do inwigilacji obywateli" (Szczechowicz 2009: 24). Przyjmuje się, że wobec braku spełnienia tego wymogu „takie przepisy można uznać za niezgodne z zasadą praworządności" (Zielińska 2017: 39). Słusznie wskazuje się, ze precyzja i przewidywalność odnosi się również do kwestii wykorzystania informacji zebranych w doku niejawnych działań służb. ETPC stwierdza, że „ustawa musi wskazywać w sposób wystarczająco wyraźny zakres takiej swobody decyzyjnej przyznanej właściwym organom władzy oraz sposób jej wykonywania, z uwzględnieniem uzasadnionego prawnie celu przedmiotowego środka, tak aby jednostka uzyskała odpowiednią ochronę przed arbitralną ingerencją" (Wyrok ETPC z 4.12.2015 r., 47143/06, ZAKHAROV v. ROSJA,). Również w orzecznictwie TK wskazuje się, że „niezbędne jest sprecyzowanie sposobu niejawnego wkroczenia w sferę prywatności jednostki". Co więcej ustawa powinna „precyzyjnie wskazywać zakres wykorzystania danych pozyskanych w toku czynności" (Wyrok TK z 30.07.2014 r., K 23/11).

W orzecznictwie słusznie wskazano, że stosowanie kontroli „jest jednym z najbardziej ingerencyjnych uprawnień państwa w konstytucyjnie chronione dobra obywatela, takie jak prawo do ochrony życia prywatnego – art. 47 Konstytucji, wolność i ochrona tajemnicy komunikowania się – art. 49 Konstytucji, autonomia informacyjna jednostki – art. 51 Konstytucji" (Wyrok Sądu Apelacyjnego w Białymstoku z 29.09.2017 r., II AKa 82/17). Zauważono, że powinna być stosowana wyjątkowo oraz stosowana w ściśle określony w ustawie sposób. Ponadto zaakcentowano, że „obywatel

ma prawo wiedzieć, w jakim zakresie materiały pozyskane w wyniku takiej kontroli mogą być w stosunku do niego (przeciwko niemu) użyte" (Wyrok Sądu Apelacyjnego w Białymstoku z 29.09.2017 r., II AKa 82/17).

Wskazuje się, że art. 168b k.p.k nie odpowiada standardom, które nakazują, aby „ustawa dopuszczająca niejawną ingerencję organów władzy publicznej w sferę chronionych praw i wolności jednostki winna precyzyjnie określać przypadki, zakres i sposób niejawnej kontroli, a nadto wskazywać także, jakich sfer życia kontrola ta dotyczy" (Wyrok Sądu Apelacyjnego w Białymstoku z 29.09.2017 r., II AKa 82/17).

Z kolei w doktrynie definiuje się przewidywalność jako swego rodzaju stan osiągnięcia dostatecznie zrozumiałego prawa. Prawo jest zrozumiałe, wtedy gdy adresat kierowanej do niego normy jest w stanie z brzmienia jego treści wyinterpretować wskazówki m.in. odnoście do okoliczności i warunków, w jakich kontrola ze strony państwa może mieć względem niej zastosowanie (Szczechowicz 2009: 24).

Co prawda przepis art. 168b k.p.k jest przepisem technicznym, który reguluje procedurę wprowadzania informacji jako dowodów do procesu karnego, a nie nadaje kompetencji do jej zarządzania, jednakże z uwagi na jego wpływ na status osoby inwigilowanej nie jest on miej ważny od przepisów gwarancyjnych w postaci zakresów stosowania kontroli operacyjnej. Stąd też ww. przewidywalność użycia środków również jest związana z postulatem przewidywalności. Zarządzenie kontroli operacyjnej jest czynnością celową, gdyż organ dąży do realizacji obranych w ustawach szczególnych celów. Mając na uwadze kluczowe znaczenie regulacji objętej art. 168b k.p.k, można stanąć na stanowisku, że precyzyjne granice wykorzystania zebranych w toku stosowania

kontroli operacyjnej informacji mieszczą się w ww. warunkach i okolicznościach jej stosowania.

3.3. Poglądy doktryny i orzecznictwo odnośnie treść art. 168b k.p.k

W doktrynie, poprzez analizę orzecznictwa, wskazuje się, że sądy w zależności od przyjętej wykładni art. 168b k.p.k, wykształciły trzy poglądy na temat, jak należy rozumieć sformułowanie „inne przestępstwo ścigane z urzędu". Pierwszym z nich jest teza, że „artykuł 168b k.p.k. nie powinien być stosowany w ogóle ze względu na jego niezgodność z Konstytucją RP" (Wyrok Sądu Apelacyjnego w Białymstoku z 29.09.2017 r., II AKa 82/17). Drugim poglądem stojącym w opozycji do pierwszego jest teza, że „zgoda następcza z art. 168b k.p.k. dotyczyć może wszystkich przestępstw ściganych z urzędu" (Wyrok Sądu Apelacyjnego w Poznaniu z 7.07.2017 r., II AKa 63/17). Poglądem niebędącym jednym ze skrajnych, jest ten, że „zgoda następcza z art. 168b k.p.k. dotyczyć może tylko przestępstw katalogowych" (Uchwała Sądu Najwyższego z dnia 28 czerwca 2018 r. I KZP 4/18).

W doktrynie trafnie ujmuje się ten problem, wskazując, że przyjęcie interpretacji opartej na zastosowaniu wykładni językowej będzie skutkowało wnioskiem, że „możliwość wykorzystania materiałów uzyskanych „przy okazji" legalnie prowadzonej kontroli operacyjnej może wykraczać poza katalog przestępstw ujętych w art. 19 ust. 1 ustawy o Policji" (Kurowski 2021). Z kolei przyjęcie wykładni całościowej i systemowej będzie prowadziło do wniosku, że przepis art. 168b k.p.k jest powiązany z katalogiem wskazanym w art. 19 ust. 1 ustawy o Policji, a więc na gruncie art. 168b k.p.k umożliwiono „wykorzystanie uzyskanego w toku kontroli operacyjnej materiału jako dowodu przestępstw co prawda innych niż

te, których dotyczyła kontrola, ale mieszczących się w katalogu" (Kurowski 2021).

W doktrynie można spotkać stanowisko, że „wbrew literalnemu brzmieniu systemowa i prokonstytucyjna wykładnia tych regulacji nakazuje uznać za niedopuszczalne korzystanie z materiałów uzyskanych w wyniku kontroli operacyjnej w sprawie o przestępstwa, które nie należą do tych wymienionych w art. 237 § 3 lub w katalogu ustaw branżowych" (Kulesza 2020). Wskazuje się również, że „zasadne jest przyjęcie, że art. 168b obejmuje tylko dowody przestępstw określone w katalogu przestępstw, co do których może być zarządzona kontrola operacyjna, a nie dotyczy dowodów przestępstw spoza tego katalogu" (Stefański, Zabłocki 2019). Twierdzi się, że „należy przychylić się do stanowiska, wedle którego użyte w art. 168b sformułowanie „innego przestępstwa ściganego z urzędu lub przestępstwa skarbowego innego niż przestępstwo objęte zarządzeniem kontroli operacyjnej" obejmuje swoim zakresem wyłącznie te przestępstwa, co do których sąd może wyrazić zgodę na zarządzenie kontroli operacyjnej" (Wyrok SA w Poznaniu z 1.9.2017 r., II AKa 63/17). Powyższe wskazuje, że pogląd „kompromisowy" wykształcony przez orzecznictwo jest akceptowany.

Z goła inaczej wypowiedziano się na obrany temat, twierdząc, że „należy stwierdzić, że wykładnia językowa art. 168b k.p.k nie budzi wątpliwości". Wskazuje się, że „zamiarem ustawodawcy było umożliwienie szerokiego wykorzystania materiałów z kontroli operacyjnej" i podkreśla się, że „*de lege lata* ograniczać pojęcie przestępstwa ściganego z urzędu do czynów katalogowych" (Wyrok SA w Poznaniu z 1.9.2017 r., II AKa 63/17). Jednakże tym samym nie neguje się potrzeby zmiany treści przepisu art. 168b k.p.k, stojąc na stanowisku, że „uzasadnione względy przemawiają

za zmianą tego stanu rzeczy i zawężenia zgody następczej do czynów katalogowych" (Boratyńska, Czarnecki, Królikowski i in. 2020). Powyższe pokazuje, że szereg racji wskazuje za tym, aby zastosować jednak wykładnię literalną przepisu i maksymalnie rozszerzyć możliwości dowodowe kontroli operacyjnej. Jednakże nieprecyzyjność tego przepisu prowadzi do przekonania, że konieczna jest ingerencja ustawodawcy w celu powiązania art. 168b k.p.k wprost z katalogiem przestępstw, w sprawach o które dopuszczalne jest stosowanie kontroli operacyjnej.

Za niezwykle istotną ocenia się uchwałę Sądu Najwyższego z 28.06.2018r. (Uchwała SN z 28.06.2018 r., I KZP 4/18), której warto poświęcić więcej uwagi. W uchwale użyte w art. 168b k.p.k sformułowanie „innego przestępstwa ściganego z urzędu lub przestępstwa skarbowego innego niż przestępstwo objęte zarządzeniem kontroli operacyjnej" wprost odniesiono do zakresu tych przestępstw, co do których sąd może wyrazić zgodę na zarządzenie kontroli operacyjnej. Należy więc stwierdzić, że ta interpretacja sądu wskazuje kierunek interpretacji art. 168bk.p.k w taki sposób, że wykorzystanie dowodu uzyskanego w wyniku kontroli może dotyczyć wyłącznie przestępstw katalogowych (Uchwała SN z 28.06.2018 r., I KZP 4/18). Istotnie należy powiązać tę uchwałę, w której zastosowano wykładnię prokonstytucyjną, zarówno z deklarowanymi na gruncie Konstytucji RP– prawem do prywatności, zawartym w art. 47 Konstytucji RP oraz ochroną tajemnicy komunikowania się, określoną w art. 49 Konstytucji RP, jak również z przesłankami i zasadami ograniczania praw i wolności jednostki wskazanymi w art. 31 ust. 3 Konstytucji RP (Janczukowicz 2019). *Clou* tego orzeczenia oddaje teza, że „wspomniana uchwała proponuje rozwiązanie kompromisowe" (Uchwała SN z 28.06.2018 r., I KZP 4/18).

Ponadto przytacza się, że „w uzasadnieniu uchwały mocno podkreślono, że stosowanie art. 168b k.p.k. do wszystkich przestępstw ściganych z urzędu absolutnie nie da się pogodzić ani z Konstytucją RP, ani z logiką" (Janczukowicz 2019). Dodatkowo SN zauważa, że „całkowite wyeliminowanie stosowania art. 168b k.p.k. oznaczałoby nieakceptowalne osłabienie skuteczności ścigania przestępstw" (Uchwała SN z 28.06.2018 r., I KZP 4/18).

Racje wskazane w uchwale zostały dostrzeżone również przez Rzecznika Praw Obywatelskich. zasługują Na pełną aprobatę zasługują argumenty zawarte we wniosku z 29.04.2016r. (www.rpo.gov.pl). Ów wniosek wskazywał na fakt, że w literalnym brzmieniu art. 168b k.p.k i 237a k.p.k są niezgodne z art. 47, 49, 50, 51 ust. 2 Konstytucji RP w zw. z art. 31 ust. 3 Konstytucji RP, a także z art. 45 ust. 1, art. 51 ust. 4 i art. 77 ust. 2 Konstytucji RP. W opinii Rzecznika wprowadzone rozwiązanie, w wyniku którego prokuratorowi przyznano uprawnienie w zakresie decydowania o wykorzystaniu materiału dowodowego dotyczącego przestępstw spoza katalogu, nie spełnia standardów określonych w Konstytucji.

W wyżej przytoczonym wniosku oraz w uchwale SN opowiedziano się za ochroną prawa do prywatności, zawartego w art. 47 Konstytucji RP, ochroną tajemnicy komunikowania się, z art. 49 Konstytucji RP, za należytym respektowaniem zasady niezbędności uzyskiwania danych o obywatelach, określonej w art. 51 ust. 2 Konstytucji RP. Ww. prawa są w istocie powiązane z zauważalnym zagrożeniem ich ograniczania, przy niespełnianiu ukonstytuowanych przesłanek z art. 31 ust. 3 Konstytucji RP.

Niezwykle istotne było powiązanie zamkniętego katalogu przestępstw z art. 19 ust. 1 Ustawy o Policji z art. 168b k.p.k.

Istotą zakresów kontroli operacyjnej jest stworzenie gwarancji dla osób inwigilowanych. Słusznie wskazuje się, że „ścisły, zamknięty, katalog umyślnych przestępstw, których podejrzenie uzasadniało zastosowanie technik operacyjno - rozpoznawczych, był wyrazem woli roztropnego ustawodawcy (Wyrok Sądu Apelacyjnego w Warszawie z 17.01.2018 r., II AKa 331/17). Ustawodawca jest bowiem świadomy, że użycie pewnych nadzwyczajnych środków, które są metodami wykrywania groźnej przestępczości, ale stanowią również ingerencję w sferę konstytucyjnych i konwencyjnych praw i wolności jednostki.

W istocie przyjęcie literalnego brzmienia przepisu i brak powiązania go z zamkniętym katalogiem najpoważniejszych, zdaniem ustawodawcy, przestępstw i uznanie, że dla zarządzenia kontroli operacyjnej konieczne jest wykazanie zagrożenia wystąpienia przestępstwa katalogowego, a dla wykorzystania informacji zebranych w toku kontroli operacyjnej nie jest to konieczne, niweczyłoby gwarancyjny charakter zakresu przedmiotowego. Słusznie zauważa się, że „taka interpretacja podważałaby sens istnienia w ustawach regulujących czynności operacyjno-rozpoznawcze katalogu przestępstw, co do których jest możliwe ich zarządzenie, skoro i tak mogłyby być wprowadzone do postępowania karnego dowody dotyczące każdego innego przestępstwa" (Stefański, Zabłocki 2019).

Co więcej zwraca się uwagę na inny potencjalny i zarazem negatywny aspekt, wskazując, że przyjęcie innego niż ww. rozwiązania prawnego, wiązałoby się z zagrożeniem w postaci tzw. kontroli pozornych. Na powyższe zagrożenie wskazuje się zarówno w doktrynie, jak i orzecznictwie. Twierdzi się, że przyjęcie takiego rozumienia przepisu art. 168b k.p.k „mogłoby prowadzić do nadużyć w postaci prób dopuszczenia

do procesowego wykorzystania materiałów pochodzących z kontroli operacyjnej, dla której nie było prawnych podstaw, bo dotyczyła ona czynów nieskatalogowanych, a tym samym prób samodzielnego zalegalizowania przez dowolnego prokuratora efektów dowodowych takich bezprawnych ingerencji w podstawowe prawa i wolności konstytucyjne" (Gruszecka 2020). Sąd Najwyższy słusznie, od początku obowiązywania art. 168b k.p.k, dostrzegał potencjalne zagrożenie stosowania podsłuchu wobec osoby, co do której istnieją podejrzenia, że popełniła przestępstwo „pozakodeksowe" pod pozorem bezzasadnych podejrzeń o popełnienie przestępstwa katalogowego. Konsekwencjami byłoby to, że cała regulacja jest nieefektywna i zmierza do szerszego niż najmniejsze możliwe ograniczenie praw i wolności konstytucyjnych jednostki (Uchwała SN z 23.03.2011 r., I KZP 32/10).

Powyższe rozważania na temat poglądów prezentowanych przez doktrynerów prawa karnego procesowego oraz orzecznictwo prowadzą do wniosku, że art. 168bk.p.k budzi liczne wątpliwości interpretacyjne. Ponadto warto zaakcentować także to, że art. 168b k.p.k sam w sobie nie spełnia minimalnych, ogólnych kryteriów należytej precyzyjności i zrozumiałości prawa. W obecnym stanie prawnym jedynie w oparciu o poglądy doktryny i orzecznictwo, które stoją na straży zachowania gwarancji jednostki, wobec której skierowana jest ta inwazyjna czynność dowodowa, można tak naprawdę określić granice kompetencji prokuratora, przysługujących na podstawie art. 168b k.p.k, związanych z wykorzystaniem dowodów pozyskanych „przy okazji" prowadzenia kontroli operacyjnej.

4. Uwagi końcowe

Powyżej opisany spór na pierwszym tle dotyczy stosowania wykładni literalnej i systemowej nieprecyzyjnego w swego treści art. 168b k.p.k. Jednakże na drugim tle tego sporu dostrzec można sedno, w postaci wciąż aktualnego konfliktu między dążeniami organów władzy publicznej do efektywnego zwalczania przestępczości za pomocą skutecznych środków pozyskiwania dowodów w celu zapewnienia bezpieczeństwa obywatelom i praw i wolności jednostki, a zagwarantowaniem jednostkom należytych gwarancji w zakresie wkraczania w ich konstytucyjnie i konwencyjnie chronioną sferę wolności i praw, w tym przypadku sferę prawa do prywatności i ochrony tajemnicy komunikowania się. W istocie oba obowiązki państwa wynikają z art. 5 Konstytucji RP i w przypadku kontroli operacyjnej nieodzownie wymagają ważenia obranych wartości.

Słusznie *clou* problemu wskazane na początku rozważań potwierdza teza, że „ingerencja czynności dowodowych w konstytucyjne i konwencyjne prawa podstawowe jednostki sprawia, że pojawia się konflikt pomiędzy interesem społecznym w realizowaniu ścigania karnego i wymiaru sprawiedliwości a interesem indywidualnym w zachowaniu wolności i praw osobistych" (Skorupka 2017).

Konflikt ten jest, tym bardziej widoczny, im zwiększają się zagrożenia przestępczością i terroryzmem we współczesnym świecie, w którym ciągle postępuje rozwój technologiczny i w którym to doskonalą się formy popełniania przestępstw w sferze Internetu. Wraz ze zwiększeniem się zagrożeń ustawodawca dąży do nowelizowania inwazyjnych, a zarazem skutecznych z uwagi na ich niejawny charakter, czynności dowodowych. Nowelizacje te dotyczą w pierwszej kolejności

rozszerzania zakresów stosowania tych czynności, w szczególności zakresu przedmiotowego, który, jak wskazano powyżej, ma niezwykle szeroki charakter, gdyż umieszczono tam nie tylko szereg przestępstw z k.k i k.k.s, ale również odsyła on do szeregu ustaw szczególnych.

Jednakże na gruncie polskiego ustawodawstwa, nowelizacje doprowadziły do wprowadzenia art. 168b k.p.k, który, jak wykazały powyższe rozważania, nie spełnia podstawowych dyrektyw ugruntowanych w orzecznictwie ETPC, TK i sądów powszechnych oraz aprobowanych przez przedstawicieli doktryny.

Słusznie zauważa się, że „normatywne uregulowanie postępowania karnego i stosowanie przepisów postępowania musi być zgodne z postanowieniami Konstytucji RP, zapewniając zwłaszcza uwzględnienie podstawowych praw i gwarancji konstytucyjnych" (Skorupka 2017). Wskazany pogląd „kompromisowy" sprzyja w istocie ochronie praw i wolności jednostki i to za nim opowiadają się w większości przedstawiciele doktryny i orzecznictwa. Nie należy również negować poglądu, że „uzasadnione względy przemawiają za zmianą tego stanu rzeczy i zawężenia zgody następczej do czynów katalogowych" (Boratyńska, Czarnecki, Królikowski i in. 2020). W istocie można poprzeć pogląd, że regulacja z art. 168b k.p.k wymaga ingerencji ustawodawcy i wprost odniesienia kontrowersyjnego sformułowania „inne przestępstwo ścigane z urzędu" z zamkniętym katalogiem przestępstw, które uzasadniają zarządzenie kontroli operacyjnej. Z pewnością przyczyniłoby się to zwiększenia gwarancyjności kontroli operacyjnej względem osób, wobec których ta tajna czynność jest stosowana.

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The issue of space and existence in the context of the Heideggerian concept of dwelling and the Arendtian figure of a stateless person

Abstract

The article presents Heidegger's concept of dwelling and Arendt's figure of a stateless person in order to show a more profound existential dimension of the issue of the occupied territory. The juxtaposition of the above philosophical perspectives allowed for fully stressing the fact that the issues concerning refugees, migrants, repatriates are undoubtedly associated not only with legal or economic aspects, but primarily with how are we able to think about human existence in the context of the dwelling space.

Keywords: stateless person, refugees, migration, assimilation, human rights, space, territory, dwelling, building, existential, belonging.

1. Introduction

In Martin Heidegger's opinion the Cartesian *ego cogito* opened up an abyss between the spiritual entity and the material world. Thus it has become a ballast for modern philosophy, which has since started to look for the certainty of the knowledge of substantiveness which was alien to Ancient philosophy. Therefore, against the 19th and 20th century transcendentalism, the philosopher states that man is first a "being-in-the-world", and only then the consciousness capable of constructing any sense. Hence the world is not a correlate of consciousness, but a structure of meanings and references, the structure of sense, within the framework of which the beings we encounter become meaningful. This leads to a conclusion – fundamental to this discussion – that according to the author of *Sein und Zeit* the world is a place we feel at home in.[1] That is why from among the abundancy of works by Heidegger we shall be primarily interest in *Building, Dwelling, Thinking*,[2] in which the philosopher in detail discusses the concept of dwelling from the ontic perspective, connected with space understood as territory. In this article, I shall obviously make no attempt to synthetically present the concept of dwelling entangled in the ontological domain or comprehensively outline Heidegger's philosophical project. Therefore, I shall leave out the perspective of the marriage of dwelling with Being, expounded on e.g.

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[1] A. Przyłębski: *Hermeneutyczny zwrot filozofii*, WN UAM, Poznań 2005, p. 126, see also

[2] M. Heidegger: *Budować, mieszkać, myśleć* [in:] *Budować, mieszkać, myśleć. Eseje wybrane*, transl. K. Michalski, Czytelnik, Warszawa 1997.

in *Sein und Zeit*,[3] in which dwellin in the truth of being constitutes the essence of *being-in-the-world*.[4] I shall also omit the interpretation contained in *Letter on Humanism*, connected with homelessness, which Heidegger associated with being grounded in metaphysics, and consequently being entangled in technology.[5]

Having said that, in this article I shall look at the problem of dwelling expounded on by Heidegger in *Building, Dwelling, Thinking* and show its practical conditions which are hard not to be noticed in the situation of stateless persons, which is in turn theorized by Hannah Arendt in *The Origins of Totalitarianism*.[6] The abovementioned analyses will show unequivocally that the issue of stateless persons, migrants, or displaced persons is not only of a technical – economic and legal nature, but is connected with how are we able to think about human existence. In the European though it happens to be associated with habitation, sharing space in the ethical, cultural and political sense. Thanks to Arendt's profound analyses of the problem of terror at the beginning of the 20th century, the silent victims of which were all those who by misfortune lost legal protection guaranteed by the status of citizen, it was revealed that the issue of assimilation undoubtedly has an existential dimension the ignorance of which may lease to falsification or trivialisation of the image of social reality.

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[3] Polish translation: M. Heidegger: *Bycie i czas*, transl. B. Baran, WN PWN, Warszawa 1994

[4] Ibidem, pp. 75–84, 149–161.

[5] See M. Heidegger: *List o humanizmie* [in:] *Budować, mieszkać, myśleć. Eseje wybrane*, transl. J. Tischner, Czytelnik, Warszawa 1997.

[6] H. Arendt, *Korzenie totalitaryzmu*, transl. D. Grinberg, Wydawnictwo Akademickie i Profesjonalne, Warszawa 2008, vol. I.

2. Building, dwelling, preserving

At the beginning of the essay *Building, Dwelling, Thinking*, Heidegger asks two fundamental questions: "What is it to dwell?" and: "How does building belong to dwelling?"[7] It may be initially recognised that it is one of the forms of the question about *being*, that is according to the author of *Sein und Zeit*: The first task of human thought. By posing those two questions the philosopher problematizes issues that are apparently of secondary importance: dwelling and building, and at the same time explains that although they may seem an ordinary everyday experience with no relation to our existence, as a matter of fact they are the essence of being. In pursuing an answer to the question about what is to dwell the philosopher starts with the etymological level. He indicates the dual meaning of the Old High German word "buan", which means to dwell, stay, remain, but also build. Then he traces the word "buan" to its etymological roots: "bin", and German "Ich bin" means "I am" in English. Thus, for the author of *Sein und Zeit* the manner in which I am on the earth means dwelling/building. Dwelling is the manner in which mortals are on the earth. But this old word also means caring, tilling the land; thus we learn that building at the same time spares and preserves – because it provides care.[8]

Already at the beginning it should be stressed that from Heidegger's perspective we do not dwell because we have built something, but we are building and have built because

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[7] M. Heidegger: *Budować, mieszkać, myśleć* [in:] *Budować, mieszkać, myśleć. Eseje wybrane*, op. cit., p. 316.

[8] Ibidem, pp. 318–319.

we dwell, more precisely: because we are dwellers.[9] To confirm this thesis the philosopher again employs the etymological method: he emphasises that the word "Friede" (English: peace) means the same as "das Freie" (English: free space, the sky), while the root "fry" means: preserved from harm and danger, preserved from something, safeguarded. W preserve somethings when we leave it in peace, for example by enclosing it we leave it in its nature.[10]

Summing up, to dwell actually means to remain enclosed in free space, which preserves everything in its nature. Thus preservation is a fundamental characteristic of dwelling.[11] What is more, from Heidegger's perspective human existence consists in dwelling, while dwelling is the stay of "mortals on the earth", while being "on the earth" we are at the same time "under the sky." Both of these also mean "remaining before the divinities", but at the same time belonging to men's being with one another. It is to be noted that those four abovementioned modalities form something called *the fourfold* (*Geviert*), which at the same time is the oneness of what is divine, mortal, earthy, heavenly. Existing on the earth we move around within those four spheres and each of our activities is at the same time included in the simplicity of them all and cannot be accomplished beyond the limits of its influence. Since we dwell, and in accordance with the above we exist in this *fourfold*.[12]

According to what has been said at the beginning, to dwell actually means to remain enclosed in free space, which preserves everything in its nature. In turn, the essence of dwelling

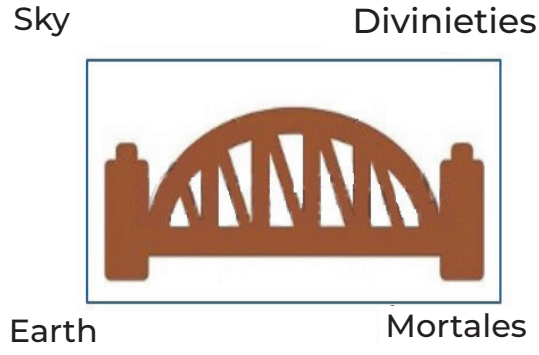
[9] Ibidem, p. 320.
[10] Ibidem, p. 320.
[11] Ibidem, p. 322.
[12] Ibidem, p. 321.

is to spare, to preserve. Mortals dwell preserving the four – that is giving free space to its essence, one may say: to its *fourfold*. Already at this juncture a conclusion may be drawn that mortals dwell in the way that they save the earth. Heidegger emphasizes that the fact of saving the earth cannot mean to master it or subjugate it – on the contrary: Mortals dwell in that they receive the sky as sky, "they leave (...) to the seasons their blessing and their inclemency; they do not turn night into day nor day into a harassed unrest. (...) They do not make their gods for themselves and do not worship idols."[13] In this context it is also important that mortals dwell if they obey their own nature, that is they live in concord with their own mortality. What is important, dwelling is not only being in the four: earth – sky – divinities – mortals, but is also staying with things. Things themselves secure the *fourfold* only when they themselves as things are let be in their presencing, that is when "mortals nurse and nurture the things that grow, and specially construct things that do not grow."[14]

In this place Heidegger passes to the second question of those asked at the very beginning of *Building, Dwelling, Thinking*, namely: In what way does building belong to dwelling? In order to answer it the author invokes an example of a built thing that is a bridge which by connecting the banks of a river causes that they start relate to each other. Moreover, it gathers the land around itself, brings stream and bank and land into each other's neighbourhood, provides also for mortals a way to cross from one side to the other. Its firmament shades the current of the stream as it is under the sky. In other words it is a structure inherent in the fourfold

[13] Ibidem, p. 322.
[14] Ibidem, p. 323.

postulated by Heidegger, or in other words in the space of the four. "The bridge gathers to itself in its own way earth and sky, divinities and mortals."[15] The embedding of artefacts such as a bridge into the fourfold roots or four different modalities is presented by the following graph:



Such a thing as a bridge by gathering in it the above mentioned fourfold, at the same time allows a space for it, a potential location.[x] In Heidegger's opinion space becomes grasped and perceived only thanks to things – constructions (brought out thanks to building), which - when they become locations – provide an enclosure for an area. A space is something that has been made room for, something that lies within a boundary. A boundary is not that at which something stops but (...) the boundary is that from which something begins its presencing. That for which room is made is always granted and hence is joined, that is, gathered, by virtue of a location, that is, by such a thing as the bridge."[16] Thus, the location of the fourfold of mortals, divinities, sky and earth in space is of necessity connected with ma's activity which consists in building.[17]

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15 Ibidem, p. 324.
16 Ibidem, p. 326.
17 Ibidem, p. 326–327.

3. Space dwelled with thought

In this context, there are other questions that need to be answered. First: What is the relation between location and space? Second, which seems to be most important from the viewpoint of this article: What is the relation between man and space?[18] It is important that space founded by such locations as edifices is different from that which is delineated mathematically or expressed in analytical and algebraic relations. The former is directly cohered with man. Heidegger notes: "for when I say <a man>, and in saying this word think of a being who exists in a human manner-that is, who dwells-then by the name <man> I already name the stay within the fourfold among things."[19] Even when we think about faraway things, the essence of this thinking is being right here and "by no means at some representational content in our consciousness;" what is more, thinking about the bridge "we may even be much nearer to that bridge and to what it makes room for than someone who uses it daily as an indifferent river crossing."[20] Explaining the relation of mortals to space from a slightly different perspective, Heidegger notes: „ Spaces open up by the fact that they are let into the dwelling of man."[21] As a result if we are – that is dwell, spaces become locations of our stay. We never occur in them as isolated bodily figures since even our thoughts independently move through space – I am here and at the same time I am where I am going to; in the worlds of the author of *Sein und Zeit*: "When I go toward the door

[18] Ibidem, p. 327.
[19] Ibidem, p. 329.
[20] Ibidem, p. 329.
[21] Ibidem, p. 329.

of the lecture hall, I am already there, and I could not go to it at all if I were not such that I am there.[22]

Moreover, human activity such a building bring to daylight the location which not only provides shelter to human stay, but also "admits the fourfold and it installs the fourfold", is its housing.[23] The things such as buildings, that is locations "preserve the fourfold, save the earth, receive the sky, await the divinities, escort mortals - this fourfold preserving is the simple nature, the presencing, of dwelling."[24] From Heidegger's perspective dwelling is the fundamental characteristic of being, it is actually "impossible to stop dwelling just as it is impossible to suspend participation in one's own life."[25] What is more, thinking belongs to dwelling in the same degree as building. But building and thinking alone are insufficient for dwelling; they should listen to one another and only then they form proper dwelling.[26]

4. Is it possible to "be" without dwelling?

In connection with the outlined above concept of dwelling of necessity bound with the occupied territory, migration of people or for example forced resettlements become problematic. A question arises: What about stateless people transferred to the locations with which they have no bonds, which are not their home, with which they do not identify themselves? Do stateless people, deprived of legal status and place

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22 Ibidem, p. 329.

23 Ibidem, p. 330.

24 Ibidem, p. 331.

25 K. Zabokrzycka: *"Etos" jako miejsce w filozofii Martina Heideggera*, Pisma Humanistyczne 2014, no. 12, p. 154.

26 M. Heidegger: *Budować, mieszkać, myśleć*, op. cit., p. 333.

of permanent residence, actually exist? Obviously, "do they exist?" according to Heidegger, who believes that in order to exist one should dwell responsibly, care for the location, respond to the essence and whatever happens in space, which has been "always" utilised by somebody, whereas migrants and resettlers are deprived of such possibilities.

The situation of stateless people becomes additionally problematic in the context of Heidegger's understanding of *ethos*, expounded on in the *Letter on Humanism*. He notes that the word originally meant whereabouts, place of residence, more precisely: the place in which man lives.[27] In turn ethics (the term originates from Greek ἦθος), as Heiddeger claims, concerns the stay of man in a space that is open to the presentation of God.[28] The return to the etymological roots of both ethics and ethos shows that the customs observed in a given community differ depending on the inhabited territory. In this way the philosopher emphasises the difference between communities coming from different geographical locations and shows that social order may be disturbed as a result of migrations. It happens because incoming groups, even unconsciously, having enrooted diverse codes of values, sanction a code of ethics difference than the one binding in the place where they arrived. Mostly because they have not absorbed from birth with the customs of the indigenous community and have had no impact on the share of the rules and emergence of the local ethos, as a result of which they may not understand, may not sense or share ethical norms that are alien to them.

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[27] M. Heidegger: *List o humanizmie* [in:] *Budować, mieszkać, myśleć. Eseje wybrane,* op. cit., pp. 118–119.

[28] Ibidem, p. 119.

The text of *Building, Dwelling, Thinking* may be interpreted as an anti-imperialist or even anti-consumptionist one, as in an obvious manner it negates the fact of occupying a territory without dwelling on it, without being in the space which has been actually captures from the indigenous population. For the German philosopher colonialism would mean depriving the people inhabiting an occupied territory of authentic being and reducing them to a biological thoughtless form of life. However, it is impossible to omit the essence of the view contained in the text presented above. On one hand, as a naturalist – living close to nature in a hut in Schwarzwald – Heidegger seems to have denounced war and annexation of conquered territories proclaiming peace and concerns for one's immediate vicinity. On the other hand, however, Heidegger's text seems to inscribe itself in the German thinking in the categories of race, in Arendt's opinion originating from political romanticism, which in turn comes from the striving to unite the nation against foreign domination which emerged after the defeat inflicted on German by Napoleon.[29] However, the question: "Does somebody who does not dwell and does no tend to a given location actually exist? Since – according to Heidegger – dwelling is the fundamental characteristic of being and stateless people have never dwelled on the territory they have been tossed to by history and fate, since they are repatriates, refugees, emigrants – do stateless people exist? Of course, do they exist in the existential sense of being, though evidently this question arouses concern, especially when compared with the events that took place during World War II, such as the extermination of people stripped of their citizenship.

[29] H. Arendt, *Korzenie totalitaryzmu*, op. cit., vol. I, p. 240.

5. Human rights vs territory

The repercussions of looking at being from the viewpoint of dwelling, belonging to a location, are on a more practical plane shown by Arendt in *The Origins of Totalitarianism* discussing the issues of citizenship and human rights inseparably linked with territory. She explains that "Not only did the loss of national rights in all instances entail the loss of human rights; the restoration of human rights (...) has been achieved so far only through the restoration or the establishment of national rights. In her opinion "The conception of human rights, based upon the assumed existence of a human being as such, broke down at the very moment when those who professed to believe in it were for the first time confronted with people who had indeed lost all other qualities and specific relationships—except that they were still human. The world found nothing sacred in the abstract nakedness of being human."[30] Moreover, Arendt notes that already Edmund Burke expressed concern in connection with inalienable natural rights, which can only confirm "the right of the naked savage, because only savages have nothing more to fall back upon than the minimum fact of their human origin, people cling to their nationality all the more desperately when they have lost the rights and protection that such nationality once gave them."[31]

Arendt's reflections on the issue of stateless people deprived of their rights many a time lead her to a conclusion corresponding with the essence of Heidegger's concept of

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[30] Ibidem, p. 416.

[31] E. J. Payne: *Foreword* [in:] E. Burke: *Reflections on the Revolution in France*, London 1790, quoted after H. Arendt: *Korzenie totalitaryzmu*, op. cit., vol. I, p. 417.

dwelling. The philosopher notes, among others, that "The first loss which the rightless suffered was the loss of their homes, and this meant the loss of the entire social texture into which they were born and in which they established for themselves a distinct place in the world."[32] She notes that in accordance with the sense of the classical Greek thought "Our political life rests on the assumption that we can produce equality through organization, because man can act in and change and build a common world, together with his equals and only with his equals."[33] It is in line not only with the thinking of Ancient Greeks, but also with the way of Heidegger's understanding of ethos. Moreover, the philosopher notes that "The <alien> is a frightening symbol of the fact of difference as such, of individuality as such,"[34] which of necessity reveals the limits of human actions and thus puts "the alien" in the animal realm. This conclusion allows us to reveal the Greek core contained in Heidegger's thought – acting within a given territory ("looking after" it) puts himself into the *fourfold*, only the existence in which makes him human. It is exactly like the Aristotelian conviction that there is human nature which is characterised by two basic categories: zoon logon echon (rational animal), and zoon politikon (political animal), while man is not able to live outside of a political community. In his *Politics* he outlines a thesis that the state is a creation of nature and man has been by nature created to live in the state, while he who lives outside of the polis must be either a beast or a god.[35] Such an approach to humanity without

[32] H. Arendt, *Korzenie totalitaryzmu*, op. cit., vol. I, p. 408.
[33] Ibidem, p. 418.
[34] Ibidem, 419
[35] Arystoteles: *Polityka*, [in:] *Dzieła wszystkie*, transl. L. Piotrowicz, Wydawnictwo Naukowe PWN, Warszawa 2001, vol. 6, Book I, p. 27.

doubt provides a solid basis for excluding whatever seems alien in relation to free citizens covered by laws they have themselves adopted.

A seemingly innocent conception of dwelling presented by Heidegger, inspired by the thought of Classical Greece, becomes particularly dangerous in the face of events which cause migrations of people, such as forced repatriations, exile, emigration. In Arendt's opinion "The great danger arising from the existence of people forced to live outside the common world is that they are thrown back, in the midst of civilization, on their natural givenness, on their mere differentiation," since they remain not only without citizenship, but also without any trade, without activity which shapes the world and provides it with meaning.[36] People deprived of their homeland appear as a symptom of a possible move away from civilisation since only those feature will remain which can be expressed only in the private sphere, as "Since the Greeks, we have known that highly developed political life breeds a deep-rooted suspicion of this private sphere, a deep resentment against the disturbing miracle contained in the fact that each of us is made as he is—single, unique, unchangeable. This whole sphere of the merely given, relegated to private life in civilized society, is a permanent threat to the public sphere, because the public sphere is as consistently based on the law of equality as the private sphere is based on the law of universal difference and differentiation."[37] What is more, in the philosopher's opinion, we are not born equal, we become equal as members of a group on the strength of our decision to guarantee ourselves mutually equal rights, and

[36] H. Arendt, *Korzenie totalitaryzmu*, op. cit., vol. I, p. 419.
[37] Ibidem, p. 418.

depriving anybody of the right prevailing on the territory they stay in in consequence may lead and and in certain historical period did lead first to herding them into ghettos and concentration camps, and when no country would claim these people – to the gas chambers.[38]

Even human rights that have been enacted in order to emancipate, include the outlaws from the very beginning were paradoxical since they addressed an abstract human being that does not exist in any given place. For this reason they may be exercised only territorially; what is more, they occur in a strict relation with sovereign nation-states. Arendt concludes that even the rights of man based on law rather than the divine commandment or historical custom, regardless of privileges of social strata, are also attributed to a sovereign state.[39] The Declaration of Human Rights acts as a protection, but within the framework of a definite political order it is guaranteed by the government and the constitution of a given state; This, moreover, had next to nothing to do with any material problem of overpopulation; it was a problem not of space but of political organization. Nobody had been aware that mankind, for so long a time considered under the image of a family of nations, had reached the stage where whoever was thrown out of one of these tightly organized closed communities found himself thrown out of the family of nations altogether.[40] Whoever as a result of the figment of fate lost the government and at the same time its legal protection, lost it not only in his own country but at the same time in all other countries. Although international agreement between the existing countries many a time

38 Ibidem, p. 411.
39 Ibidem, p. 404–406.
40 Ibidem, p. 408–409.

imposed certain difficulties, "for instance, a German citizen under the Nazi regime might not be able to enter a mixed marriage abroad because of the Nuremberg laws." However, the situation of stateless people was incomparably worse as they found themselves "out of any legality."[41]

What is more important, Arendt notes something extremely significant: it is not backwardness, but, on the contrary, because there was no longer any uncivilized spot on earth connected with the arrangement of practically all of humanity into organized communities led to a situation whereby millions of people were deprived of their belonging to the communities enjoying political rights.[42] After World War I, practically each political event resulted in the exclusion of a new group from citizenship. Beginning with the collapse of Austria-Hungary, to the expulsion of one and a half million people by Soviet Russia, to the cancellation of naturalization of Germans of Jewish descent and sending them to concentration camps. There were such places as Vilnius where after World War II the registered nationality of its inhabitants was changed every year. It frequently happened that people took refuge in statelessness in order to remain where they were and avoid being deported to a "homeland" where they would be foreigners.[43]

Although in the 19th and 20th century it was a widespread practice that "civilized countries did offer the right of asylum to those who, for political reasons, had been persecuted by their governments. The trouble arose when it appeared that the new categories of persecuted were far too numerous to be handled by an unofficial practice destined for exceptional

41 Ibidem, p. 409.
42 Ibidem, p. 412.
43 Ibidem, p. 387–388.

cases."[44] The situation of the masses of the excluded became so absurd that since one was an exception from the norm in a civilized country unforeseen in the law of that country, it was frequently better to become a criminal in order to regain legal protection. In this context Arendt notes that "This is one of the reasons why it is far more difficult to destroy the legal personality of a criminal, that is of a man who has taken upon himself the responsibility for an act whose consequences now determine his fate, than of a man who has been disallowed all common human responsibilities."[45]

6. The existential dimension of statelessness, exile, migration

Both Arendt's diagnoses of the issue of statelessness which may constitute efficient tools for analysing and assessing the political reality of the 20th century, as well as Heidegger's conception of dwelling understood as the fundamental characteristic of being, undoubtedly bear signs of the Greek philosophical tradition. However, both thoughts, both philosophical perspectives are also focused on today's man and contemporary world, though on different levels of theoreticality, the one and the other try to find an answer or make diagnoses as regards man entangled in the history of the world. Therefore, combining the narrations of both philosophers, a question should be asked: Taking into account the abovementioned theses put forth by Heidegger, is a stateless person excluded because he does not have the basic characteristics of being? In light of their reflections it seems that even today it is impossible to detach oneself

[44] Ibidem, p. 409.
[45] Ibidem, p. 417.

from the Greek thinking about humanity based on belonging to a definite political community. Does not the above statement explain our everyday perception of the world and intuitive perception of a stateless person, a migrant, a repatriate as a stranger – that is somebody coming from the outside, from a different, incomprehensible world. Magdalena Środa notes that the perception according to the categories of "one of ours" and "a stranger" is a part of our substantiveness, it is in this manner that we learn and understand the world.[46] Notwithstanding whether the thinking in the categories "one of ours – a stranger" is the legacy of the Greek intellectual tradition rooted in culture or figures necessary for political consolidation of a community, it should not leave out the existential weight of migration and its inseparable lack of the sense of belonging and communion with the indigenous population.

Reflecting on the today's reality through thinking in the Greek spirit Arendt notes a threat to the contemporary civilization: The danger in the existence of such (stateless – K.Z.) people is twofold: first and more obviously, their ever-increasing numbers threaten our political life, our human artifice, the world which is the result of our common and co-ordinated effort in much the same, perhaps even more terrifying, way as the wild elements of nature once threatened the existence of man-made cities and countrysides.[47] What is interesting, the mechanism or – in other words – social anxiety presented by Arendt includes the way of seeing the problem proclaimed by Heidegger: association of being with dwelling, that is in fact the affirmation of belonging

[46] M. Środa, *Obcy, inny, wykluczony*, Słowo / obraz terytoria, Warszawa 2020, p. 5.

[47] Ibidem, p. 420.

to land. In the early 20th century practically anyone could become a stateless person, not only because of origin, but also political views. What is more, in Nazi Germany a citizen could have been deprived of citizenship even on the same day he or she were sent to a concentration camp. In this context, Heidegger's linking of being with dwelling on a concrete area where one has been born seems to give rise to come concern. It means that outside of its native territory man ceases to be human, the ethos by which he lives is no longer binding. In other words, such an approach to dwelling in consequence embodies man who has been stripped of his native land, his homeland, into the living conditions of "savages" who are ensnared in nature. Arendt notes that "Man, it turns out, can lose all so-called Rights of Man without losing his essential quality as man, his human dignity. Only the loss of a polity itself expels him from humanity."[48] Both Heidegger, affirming the marriage of humanity with territory, as well as Arendt, pointing to activity as a sense-generating area, assume the perspective of the Greek thought. However, Heidegger seems to focus exclusively on the existential aspect, ignoring the political order, which only in the context of Arendt's texts turns out to be indispensable to the full disclosure and presentation of all consequences of the former.

Analysing totalitarianisms not only from the philosophical, but also sociological, historical and politological perspective Arendt recognised that it is impossible to guarantee protection of human rights in separation from a sovereign nation-state. She also stresses that the figure of a stateless persons was in a sense a legacy of the Minority Treaties

[48] Ibidem, p. 413.

established by the League of Nations,[49] which may be regarded as the offspring of the modern European emancipation thought. As it is known, this thought was based on the universalist narrations of the Enlightenment, such as for example Kant's *foedus pacificum* project,[50] i.e. such that are based on the conviction that man is a subject constructing sense in the world, is a pure transcendental consciousness constituting substantiveness. Being an opponent of universalist narrations, in particular Kant's transcendentalism, Heidegger claimed that man is primarily a "*being-in-the-world*", the structure of sense, meanings and references, and only them, at the point of arrival – consciousness.[51] It is important since Heidegger transfers the weight of the discourse concerning occupation of a given territory onto the existential grounds since a purely economic and legal discourse does not solve any problems concerning migration, exile, repatriation, assimilation or integration. Reducing important existential problems to the issue of social matter and living conditions in the longer run does not favour any more profound reflection on the problem of statelessness and exile, which not only now but without doubt also in the future will constitute a significant issues from not only the social but also political and moral points of view.

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[49] Ibidem, p. 381–384.

[50] I. Kant: *Do wiecznego pokoju*, [in:] *Rozprawy z filozofii historii*, transl. M. Żelazny, T. Kupś, D. Pakalski, A. Grzeliński, Wydawnictwo Antyk, Kęty 2005, p. 175.

[51] A. Przyłębski: *Hermeneutyczny zwrot filozofii*, WN UAM, Poznań 2005, pp. 127–133.

7. Conclusion

The article presents how Heidegger regarded dwelling, which he convincingly linked with *being*. The explication of this unobvious relationship between man and the territory he occupies reveals the importance of the sphere which is especially nowadays treated as trivial. It turns out that this domain which apparently does not give any greater meaning to human life many a time defines the essence of being, and actually makes man human since it allows him to "be". Being (also with things) founded by "building" and "nurturing", that is dwelling is equivalent to giving meaning to the world, i.e. participation in the community of people. It is important since for Heidegger the combination of belonging to earth with being not only constructs sense, but is also is a special relationship with the constitution of the subject.[52]

The presentation of Heidegger's conception as compared with Arendt's figure of a stateless person even more powerfully shows the existential, and in consequent ethical aspect of the issue of space occupied by man. In Arendt's opinion people gain equality by co-acting with their equals. Stateless people, refugees, migrants are naturally excluded from such sense-generating activity as by losing their homes and occupations they also lost the social communities in the midst of which they used to function. In accordance with Heidegger's and Arendt's thesis, due to uprooting they are unable to shape the world, give it some sense and co-create for it the legally sanctioned rules to be followed in their conduct. What's worse, even human rights are applicable and

[52] See St. Łojek, *Hermeneutyczna koncepcja podmiotu Martina Heideggera*, "Analiza i Egzystencja" 40 (2017), pp. 6–8.

sanctioned only in a strict relationship with the nation-state. In other words, to enjoy legal protection guaranteed by human rights an individual must have a country which would enforce those rights.

The juxtaposition of the above philosophical perspectives revealed the fact that the issues concerning refugees, migrants, repatriates, assimilation are associated not only with legal or economic, but existential aspects. At present, when the issues linked with broadly conceive statelessness are becoming a pressing political and social problem, which will undoubtedly have it consequences in the future, it is important to realise the complexity of the above outlined problem, its existential and ethical dimension. The way in which we recognise man's existence in the context of the space within which he dwells may be directly translated onto our attitude to people forced to settle on a foreign land.

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Evolution of Polish Building Law 1928–1939 as an Example of Spatial Policy Development

Abstract

The text is devoted to the evolution of construction law in the period of the Second Polish Republic as one of the tools of the broadly understood policy of the State. The basic research problem is the rationalization of regulations and their functioning in the legal system. The analysis allowed us to formulate research conclusions. The policy regarding construction law and spatial development in the Second Polish Republic was subordinated to the overarching goals, i.e. the unification of regulations in the country and building the image of a strong state by organizing space. In terms of specific objectives, the evolution of the law was aimed at rationally increasing the amount of affordable housing, strengthening co-responsibility of private entities for spatial development, smart management of available resources, and intensive support for new housing.

Keywords: Polish Building Law; Urban Coding; Development Plan;

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1. Introduction

1.1. Scope of the issue

The aim of the analysis is to present the evolution of construction law in the period of the Second Republic of Poland as one of the tools of the broadly understood policy of the then Polish State. The basic research problem is the rationalization of regulations enabling effective spatial policy. A rational and effective spatial policy is understood as the process of spatially planning the development of cities and settlements, subordinated to the most effective use of resources (i.e. land, landscape, technical infrastructure) and taking into account a fair distribution of spatial development costs, but also profits from its implementation.

The article focuses primarily on construction law and related regulations. Typically, technical issues related to town planning, architecture and construction are of secondary importance. As an element indirectly related to spatial policy, regulations supporting housing construction have been also discussed, including the financial tools for controlling and supporting this construction.

The issues of the evolution of construction law in the period of the Second Polish Republic have been discussed sporadically so far, and most of the works on this subject are of a contributory nature.[1] The book by Czesław Krawczak from the 1970s is the only one that deals directly with the history of Polish building codes in a cross-sectional manner.[2] On the other hand, the issue of construction law as a tool

[1] Bratkowski (2013); Smarż (2018)
[2] Krawczak (1975)

of state policy has never been the subject of scientific research in Poland so far.

1.2. General conditions of rational spatial policy

The order and harmony of public space, and thus *sine qua non* - of buildings, is an emanation and a visible sign of the general order in the state. For this reason, the issues of spatial development management should also be a subject of political science studies. The way of regulating and controlling buildings stems from the mutual relationship between private and public law - it depends on the level of autonomy of the two spheres: the power of the state and the power resulting from ownership (private property).

The spatial development control policy (construction), like any public policy, should be guided by the common good (*bonum publicum*), which in this particular case means:

1. Efficient management of resources, construction areas as well as existing buildings and infrastructure;
2. Financial co-responsibility of private entities (property owners) and public entities (local governments, the state) for spatial development;
3. Support for new construction by the state and local authorities.

Only the combined application of these principles can produce satisfactory results from the perspective of the development policy of the state.

After the partitions, the Second Polish Republic inherited not only diversified construction laws, but also a heterogeneous system of spatial development planning.[3] Although in all

[3] Kumianiecki (1914); Rozważania nad rządowym projektem ustawy budowlanej; Krawczak (1975): 117.

the partitioning countries, the construction of roads and utilities (technical infrastructure) was the responsibility of local governments and / or the state. However, e.g. in Prussia, private participation was required in the costs of implementing public goals related to, among others, the establishment of new parks, streets and squares. On the other hand, the technical underdevelopment of the territories annexed by Russia, which accounted for almost 70% of the area, contributed to the perception of Poland as a backward country, without roads and infrastructure - a "wooden" country on the outskirts of Europe. This fact significantly weakened the image of the reborn Republic of Poland, which was particularly unfavorable in the context of cultural diversity within Poland and the hostility, or at least distrust of the vast majority of national minorities in the State.[4] Therefore, the reconstruction of the country, its modernization and development, in the first place, required improvement of building regulations, especially in the lands of the former Russian partition. In this way, the reform of construction law served to build the image of Poland as an orderly, ergo strong and stable country.

However, at the beginning of the independent Republic of Poland, the focus was not on unifying, but rather on improving the existing regulations left behind by the partitioning powers.[5] That is why the new, uniform and nationwide act on construction and urban planning was being prepared in Poland for several years, but it was only introduced by President Mościcki at the beginning of 1928.[6] Its aim was,

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4 Krawczak (1975): 118–119.

5 Szymkiewicz (1925)

6 Ordinance of the President of the Republic of 16 February 1928 on Construction Law and Development of Housing Estates (Journal of Laws of 1928, No. 23, item 202) [hereinafter: Construction Law 1928]

on the one hand, to unify construction law in the territory of the united Republic of Poland, and on the other, to adapt the regulations to the changing conditions of the present day. The 1928 Act was amended several times, but the biggest changes were made in 1936.[7] The scope of these changes was so extensive that in 1939 a new consolidated text of the Ordinance of the President of the Republic of Poland on construction law and housing development was announced.[8] These regulations functioned with some changes until the beginning of the 1960s, which meant that according to them, the country was rebuilt not only after World War I, but also after World War II.

2. Rational management of resources

2.1. Organizing public space

The issue of prime importance at the dawn of the Second Polish Republic was the reconstruction of the war damage and the fight against spatial chaos, especially in the small

[7] Ordinance of the President of the Republic of 3 December 1930 amending the Ordinance of the President of the Republic of 16 February 1928 on Construction Law and Development of Housing Estates (Journal of Laws of 1930, No. 86, item 663) [hereinafter: Construction Law 1930]

Act of 14 July 1936 amending the Ordinance of the President of the Republic of 16 February 1928 on Construction Law and Development of Housing Estates (Journal of Laws of 1936, No. 56, item 405) [hereinafter: Construction Law 1936]

[8] Announcement of the Minister of the Interior of 28 February 1939 on the publication of the consolidated text of the Ordinance of the President of the Republic of 16 February 1928 on Construction Law and Development of Housing Estates (Journal of Laws of 1939, No. 34, item 216) [hereinafter: Construction Law 1939]

towns of the former Russian partition. Before the introduction of new construction law, in 1927 the Polish President issued a legal act whose main objective was to solve the problem of the shortage of housing and general low quality of living areas in Poland.[9] For the sake of order and proper use of scarce resources, the ordinance «on the expansion of cities» introduced firm restrictions, including expropriation of undeveloped or insufficiently developed land as well as unfinished buildings and buildings in danger of collapsing.[10] It should be remembered that the possibility of expropriating real estate in poor technical condition has its roots in Roman law and is justified by the general principle of good use of property.[11] Initiation of the expropriation procedure was possible only when all administrative measures ordering the construction, renovation or demolition and re-erection of new buildings had been exhausted.

For the purpose of organizing space and rational management of resources, a new cadastral tax, which was aimed to supply the State Fund for Reconstruction Cities was levied.[12] The tax, amounting to a maximum 1% of the property value, covered all unbuilt or "insufficiently developed" private plots suitable for development and located on the areas covered by the development plan.[13] Unfortunately, the aforementioned

[9] Ordinance of the President of the Republic of 22 April 1927 on the Expansion of Cities (Journal of Laws of 1927, No. 42, item 372) [hereinafter: Ordinance on the Expansion of Cities 1927]. Garwicz, Probst (1936): 431–437

[10] Ordinance on the Expansion of Cities 1927: Art. 6; See: Krawczak (1975): 120.

[11] Domińczak (2007): 18–22

[12] Ordinance on the Expansion of Cities 1927: Art. 24

[13] In the soon-to-be-issued executive regulation, the basic tax rate was set at 0.5%. The exception was taxation of building plots located in centers of cities of more than 15,000 inhabitants, where the maximum

fund was discontinued at the beginning of 1936, and the tax on undeveloped plots followed right behind.[14]

The ordinance of 1927 on the expansion of cities was amended several times and finally in 1936 a consolidated text was announced.[15] Despite departing from many of the original assumptions, the right to expropriate poorly built-up or undeveloped real estates in cities was retained.[16] Moreover, in 1937, the government issued one more ordinance aimed at unifying the housing support policy.[17] At the same time, such terms as "bigger city", "housing cooperative", "small apartment" or "workers' house" were coined.[18]

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rate had to be applied. See: Ordinance of the Minister of the Treasury of 3 November 1927 in communication with the Minister of Public Works, Interior and Agricultural Reforms on implementation of the Ordinance of the President of the Republic of 22 April 1927 on the Expansion of Cities (Journal of Laws of 1927, No. 106, item 913), § 29. See: Garwicz, Probst (1936): 438–441

[14] Decree of the President of the Republic of 14 January 1936 on the amendment of the Ordinance of the President of the Republic of 22 April 1927 on the Expansion of Cities (Journal of Laws of 1936, No. 3, item 9): Art. 2

[15] Announcement of the Minister of the Treasury of 22 January 1936 on the publication of the consolidated text of the Ordinance of the President of the Republic of 22 April 1927 on the Expansion of Cities (Journal of Laws of 1936, No. 10, item 107) [hereinafter: Ordinance on the Expansion of Cities 1936]

[16] Ordinance on the Expansion of Cities 1936: Art. 6

[17] Ordinance of the Minister of the Treasury of 9 April 1937 in agreement with the Minister of the Interior and the Minister of Agriculture and Agricultural Reforms on implementation of the Ordinance of the President of the Republic of 22 April 1927 on the Expansion of Cities (Journal of Laws of 1937, No. 34, item 267)

[18] Ibidem: Art. 13

2.2. Planning and control of spatial development

In general terms, namely regarding supervision and regulation of new construction, the law of 1928 mandated cities and towns to prepare so-called development plans.[19] Creating new plots in cities, which means actually spatial development, was made possible by implementation of the development plan only in three cases:

a) on the basis of an approved subdivision plan;

b) by consolidation of undeveloped plots and land unsuitable for development;

e) by joining defectively built-up plots (transformations).[20]

Similarly, creation of municipal streets, roads, squares and all areas intended for public use could take place only under an approved development plan.[21] The plans were divided into the general and detailed category. The former had the character of a functional disposition, although it also contained references to typology and defined the form (profile) of thoroughfare corridors.[22] The detailed plans contained more precise information, including built-to-lines.

The construction law of 1928 adopted very simple and understandable rules for shaping buildings, most of which took into account the best practices found in the regulations of the partitioning states. The minimum width of streets was set at 12 meters, with the exception of the main thoroughfares, which were supposed to be no less than 18 meters

19 Construction Law 1928: Art. 7
20 Ibidem: Art. 3
21 Ibidem: Art. 4
22 Ibidem: Art. 10

wide.[23] 25% of each plot of land had to be left free of buildings.[24] The height of typical buildings could not exceed 22 meters and could not be greater than the width of the street on which they were located.[25] The rules foresaw minor exceptions depending on the location and / or function of the buildings. In terms of caring for public order and the image of the State, there were also seemingly secondary issues, such as the issue of separating the public and private spheres, i.e. the fencing of private plots adjacent to public areas, which was not neglected when creating construction law.[26]

The act completely prohibited the so-called wild-type subdivision: "The division of construction sites not owned by the State or municipalities [...] may only be made on the basis of an approved subdivision plan." [27] Originally, construction sites were considered to be "areas within housing estates, covered by a legally valid development plan or recognized by the authority approving municipalities as construction sites,"[28] and then (from 1936), de facto all private land located "within the administrative boundaries of municipalities."[29] In practice, due to the need to separate streets, the subdivision of larger areas required a development plan because this was the sole basis for delimiting public roads.[30] The local administration (municipality) was obliged to prepare an appropriate

[23] Ibidem: Art. 13–14

[24] Ibidem: Art. 176

[25] Ibidem: Art. 181–182

[26] Ordinance of the Minister of the Interior of 16 March 1938 on Separating Plots and Estates (Journal of Laws of 1938, No. 21, item 182)

[27] Construction Law 1928: Art. 52

[28] Ibidem: Art. 53

[29] Construction Law 1936, Art. 52 letter a). At that time, rural areas - to a limited extent - were also included in the category of areas the subdivision plans of which required approval .

[30] Construction Law 1928: Art. 56

design and geodetic studies, as well as equip development areas with technical infrastructure.

As a rule, responsibility for spatial development rested on the municipalities, but the act confirmed the significant role of state administration (starosts, voivodes) in this process as the authorities responsible for the general order in the State. First of all, municipalities were given the right to establish additional rules and building conditions in local regulations, which were supposed to counteract irrational development and speculative land management.[31] The spatial order and better use of resources could be achieved, for example, by prohibiting erection of residential buildings in unfinished streets in cities, or by setting the minimum permissible height of buildings. The orders and restrictions could include guidelines on the dimensions of streets, the size and method of arranging courtyards, shaping the facades, roofing, types of fences, and even specific conditions for spaces intended for people.[32]

After a subdivision plan had been prepared and approved, the municipality and the State had the right to expropriation of land intended for public purposes (transport, public utility buildings, green areas, sports and recreation, etc.).[33] The owners whose rights had been infringed upon were entitled to compensation, but only in cases where the rights (violated by e.g. the prohibition of building) had really existed and were not "potential" at the time the plans were adopted. The claims expired after three years.[34]

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31 Ibidem: Art. 20, Art. 410 points 1–3
32 Ibidem: Art. 408 point 9
33 Ibidem: Art. 43 letter a)
34 Ibidem: Art. 47

Despite the large (and increasing after 1926) state control, local governments retained their autonomy and great powers in the field of spatial development planning throughout the history of the Second Polish Republic. The municipalities had the right to tighten the statutory provisions to a very large extent. Apart from the described issues concerning the structure or dimensions of buildings, the municipalities could introduce inspections and even impose the obligation to obtain building permits in cases not provided for by the act (sic)[35].

De jure local regulations were issued by government administration, namely the Minister of Public Works in agreement with the Minister of the Interior, at the request of the magistrate (in Warsaw) or the voivode (in other cities), based on the resolutions of municipal self-governing bodies (councils) .[36] Moreover, when there was a need to establish local regulations in the absence of relevant resolutions passed by a council, the government could issue local regulations on its own.[37] Construction law also made it possible for the Minister of the Interior (in Warsaw) or the voivode (in other cities) to order a kind of alternative implementation of the development plan in the municipality, which evaded this obligation and charged the municipality with the related costs.[38]

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35 Ibidem: Art. 410point 10

36 Ibidem: Art. 415. After 1936 and the general reform of the central government, this power was vested in the Minister of the Interior, who could delegate it to voivodes.

37 Construction Law 1928: Art. 416

38 Ibidem: Art. 24

2.3. Political and military conditions

The biggest, or I dare even say revolutionary, changes concerning construction and spatial planning in Poland resulted from the changing political situation in Europe and intensive development of the war effort. However, these changes were not fully implemented in practice because of the outbreak of WWII. In 1938, probably in response to the course of the Spanish Civil War, the Council of Ministers issued an ordinance on the preparation of anti-aircraft and anti-gas defense during peacetime regarding regulation and development of housing as well as public and private construction.[39] The use of air force on an unprecedented scale by both sides of the conflict in Spain was widely discussed around the world. The war began on 18 July 1936, but the greatest intensity of air raids on big cities, both on the republican and national side, intensified in mid-1937. The course of air operations, and in particular the devastating effects of using high-explosive and incendiary bombs in densely built areas, highlighted the problems of ensuring safety in cities.

Therefore, the effect of the regulation was to significantly intersperse urban development with green areas.[40] The minimum width of streets was increased by half, i.e. to 18 meters, and in the case of main thoroughfares - to 60 meters.[41] A very important, also from the point of view of combating

[39] Ordinance of the Council of Ministers on the preparation of anti-aircraft and anti-gas defense during peacetime regarding regulation and development of housing as well as public and private construction (Journal of Laws of 1938, No. 32, item 278), [hereinafter: Ordinance on the Preparation of Anti-aircraft Defense 1938]

[40] Ordinance on the Preparation of Anti-aircraft Defense 1938, §8 section 1), §9. Szymkiewicz (1938): 125–148

[41] Ibidem: §4, §6 section 1) point 1)

chaotic subdivision, a prohibition was introduced to create cul-de-sacs (dead-end streets).[42] The possibility of building on plots was significantly reduced, since they could now be built up to a maximum of 45% of their area.[43] There was also a minimum distance between the buildings on the plot set at 10 meters. The rules formulated in this way de facto led to a gradual elimination of habitable outbuildings.[44]

The regulation - for obvious reasons - could not have had a major impact on urban development in the Second Polish Republic. For unknown reasons, its provisions were not included in the consolidated text of the law written in 1939. The practical effects of the application of the regulation manifested themselves only to a limited extent in some forms of housing from that period, especially in large cities.[45]

The last amendment to the building and spatial regulations took place on 25 August 1939, when President Mościcki issued a decree changing the construction law.[46] The reason was undoubtedly the preparations for the coming war, but the decree provided, inter alia, a significant relaxation of regulations regarding qualifications for construction management during war. In addition, it took into account the "requirements of the state's defense needs," in particular

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42 Ibidem: §7

43 In residential districts it was even less: 35% for compact development and only 25% for scattered development. See: Ordinance on the Preparation of Anti-aircraft Defense 1938: §20(1). For comparison: at that time construction law in Poland allowed up to 75% of the plot area to be built. (Construction Law 1928: Art. 176)

44 Ordinance on the Preparation of Anti-aircraft Defense 1938: §23

45 Domińczak, Zaguła (2016): 143

46 Decree of the President of the Republic of 25 August 1939 on the amendment of the Ordinance of the President of the Republic on Construction Law and Development of Housing Estates (Journal of Laws of 1939, No. 77, item 514)

the dispersion of buildings (sic) when drawing up development plans.[47]

3. Shared responsibility of private entities

In addition to the possibility of expropriation for public purposes, the Act of 1928 provided for the optional possibility of charging property owners with the costs of building road infrastructure in urban areas. After the approval of the plot and development plan, the owners of newly created plots did not have to wait for the street to be built by the municipality and had the right to arrange the streets on their own in accordance with the rules adopted in a given municipality and under its control.[48] The municipal council could burden the owners of adjacent plots and, in special cases, also the owners of other real estates who "acquire special benefits as a result of arranging the street or streets, square or squares" with the costs of the so-called "first arrangement of a street" and squares of up to 20 meters in width.[49] Combined with the absence of exceptions and territorial designations (e.g. the place of the actual residence of the owner or the nature of ownership), it allowed to force those who benefited from it to participate in the costs of infrastructure. The aforementioned expenses included the costs of land, road and pavement construction, lighting, as well as water mains and sewerage systems.

The purpose of the above described mechanism was primarily to relieve local governments of the costs of infrastructure construction at the first stage of creating new

47 Ibidem: Art. 1
48 Construction Law 1928: Art. 64
49 Ibidem: Art. 174; Garwicz, Probst (1936): 96

neighborhoods. Municipalities were obliged to take over streets built at private expense if buildings along them exceeded 1/3 of the total length of the planned frontages on both sides.[50] In such cases, local governments had to cover all costs of their construction incurred by private owners.

The principles of sharing responsibility among owners in the spatial development process were significantly changed by the aforementioned amendment to the construction law of 14 July 1936. It introduced the obligation of direct participation of private entities in the cost of creating development plans. From that time on, the cost of creating plans for plots exceeding 10,000 m^2 (1 ha) had to be borne by their owners.[51] The amendment also specified the rules for allocating the costs of constructing streets. The principles of transferring the costs of arranging streets and squares for public transport were detailed and expanded. These costs could be transferred by a municipality, in whole or in part, onto the owners of the adjacent plots, "taking into account the benefits the owners gained as a result of arranging a street or square, and were dependent on the way of development and its density, as well as the nature of the street or square."[52] Moreover, the entities that could be charged with the construction costs, besides the property owners, also included "owners of enterprises or equipment located on these plots."[53] Therefore, it did not exclude temporary buildings, machines or even parked vehicles (sic).

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50 Construction Law 1928: Art. 66

51 In the cities located at sea ports, i.e. in Gdynia, Władysławowo, Puck and Hel, the limit was twice smaller: ½ ha (5000 m^2). Construction Law 1936: Art. 37 sections 3–4

52 Construction Law 1936: Art. 174 sectiopn 2letter a)

53 Ibidem: Art. 174 section 2 letter b)

In 1936, the scope and method of participation of private entities in the costs of road construction in the areas of existing settlements were partially changed and the technical parameters of any infrastructure that was the subject of a potential cost transfer were detailed.[54] The 20-metre-wide limit for the costs of the first arrangement of streets and squares, applicable since 1928, did not apply to new estates, when the plan covered "an area of at least one hectare."[55] Then, "the authority appointed to approve the subdivision plan [city boards, poviat departments] could mandate the owners of this area to arrange streets and roads at their expense, as well as squares and parks intended for public use, in the way determined by the authority in accordance with the development plan."[56] The total area of such plots, however, could not exceed 25% of the area of building plots provided for in the subdivision plan or 35% of the total area of these plots, where the latter exceeded 15 hectares.[57]

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[54] Ibidem: Art. 174 section 3.

[55] In the cities located at sea ports at least ½ hectare. See: Construction Law 1936: Art. 64 section 1

[56] Construction Law 1936: Art. 64, section 1

[57] The way of description resulted in the de facto higher limit, and the 25% coefficient was used when the subdivision plan covered up to 18.75 hectares.

TA = total area of the subdivided area

PA = area of plots designated in the subdivision plan

PS = area of public land (public space)

TA = PA + PS If PA < 15 hectares, than:

TA = 15 ha + 25% * 15 ha = 15 ha + 3.75 ha

TA = 18.75 ha

If PS = 25% of PA, than TA = PA + 0.25*PA, so: TA = 1.25PA and PA = 0.8TA Because TA = PA + PS, than PS = TA – PA, so: PS = TA – 0.8TA and PS = 0.2 TA

As one can see, due to the method of defining, in practice the max. 20% of the land of area from 1 to 15 hectares and max. 26% of the land of area over 15 hectares could be designated for public use.

The owners were also burdened with the obligation to keep the public areas organized by them "in a condition that is fit for use."[58] On the other hand, the municipality was obliged to take over and continue to maintain private streets and squares without compensation, after developing at least 1/3 of the plots created as a result of subdivision, and not 1/3 of the length of the plots' frontages, as previously.[59]

In order to prevent speculation, the transfer to third parties of the ownership of plots created as a result of subdivision was prohibited before the arrangement of streets, squares and parks for which the owner was obliged to arrange the facilities.[60] The resolution of the municipal council on the sharing of the costs of construction of streets and squares had to be approved by the starost or provincial governor (voivode).

Unfortunately, the rules of sharing the road construction costs adopted in 1936 turned out to be difficult to enforce and encountered social resistance. Probably for this reason, the following year the Minister of the Interior issued two ordinances, which significantly eased the obligation of private owners to participate in the costs of repairing and building roads in the areas of existing housing estates, which resulted from Art. 174 of the construction law ("the first arrangement of a street").[61] The value of the regulation was the first

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[58] Construction Law 1936: Art. 66

[59] Ibidem: Art. 67

[60] Ibidem: Art. 64 section 5)

[61] Ordinance of the Minister of the Interior of 10 June 1937 on Easing the Obligation of Bearing Costs of Arrangement of Streets and Squares as well as Reducing and Postponing Payments on this Account (Journal of Laws. of 1937, No. 46, item 351)

Ordinance of the Minister of the Interior of 15 July 1937 on the Obligation of Property Owners' Participation in Covering the Costs of Replacing a Hardened or Paved Surface of Streets and Squares with a Surface of an Improved Material (Journal of Laws of 1937, No. 55, item 436)

definition of the intensity of development (floor-area ratio) in Polish law and designating the degree of participation of private entities in the costs of infrastructure dependent on it.[62]

4. City development and housing support

From the beginning of the Second Polish Republic, the State pursued a policy of supporting new development. The most acute problem was the reconstruction of towns and villages after the war damage, especially in the eastern provinces, and this was the purpose of the first legal acts concerning development.[63] Therefore, the building law of 1928 was preceded by several legal acts aimed at organizing and supporting the "development of cities." In practice, it meant supporting housing construction, although the first law in this regard, which in 1922 introduced a 15-year period of exemption from property taxes, concerned the construction, extension and reconstruction of all (sic) "residential, commercial and industrial" buildings. [64]

In 1927, in the regulation "on the development of cities" mentioned earlier, when discussing the issue of rational resource management, two special purpose funds were created: the State Construction Fund and the State Fund for Urban Development.[65] Their task was primarily to support broadly understood housing construction. The State

[hereinafter: Ordinance on the Obligation of Property Owners' Participation in Covering the Costs of Replacing of the Surface of Streets 1937]

[62] Ordinance on the Obligation of Property Owners' Participation in Covering the Costs of Replacing of the Surface of Streets 1937: §2, §4

[63] Krawczak Cz. (1975): 117–118.

[64] Act of 22 September 1924 on Reliefs for New Buildings (Journal of Laws of 1924, No. 88, item 786)

[65] Ordinance on the Expansion of Cities 1927: Art. 15

Construction Fund was used to grant short-term loans, and its operation was financed, inter alia, by the State Fund for Urban Development, created from part of the revenues from the real property tax and the aforementioned special tax on construction sites.[66] In terms of indirect support, a number of exemptions and reductions have also been introduced, including the most important ones as follows:

- Exemptions from stamp duties;
- 10-year exemption from tax on income from renting apartments in newly built or expanded residential buildings;
- Possibility to deduct the costs incurred by the construction of residential houses from income for up to 5 years after completion, which was introduced for a period of 8 years;[67]
- Exemption from municipal taxes for building materials intended for housing purposes.[68]

The provisions of the ordinance of 1927 were partially consumed by the Act of 1928, but the efforts to financially support construction activity initiated in 1922 were continued in the following years.[69] In 1933, a new law on construction allowances was introduced, which further expanded the possibilities of supporting construction activities.[70] The 15-year

66 Ibidem: Art. 23–24

67 Ibidem: Art. 33

68 Ibidem: Art. 34

69 Ordinance of the President of the Republic of 12 September 1930 on Tax Reliefs for New Buildings (Journal of Laws of 1930, No. 64, item 508)

70 Act of 24 March September 1933 on Reliefs for New Buildings (Journal of Laws of 1933, No. 22, item 173)

exemption for new buildings (which also included extensions and superstructures) from all property taxes was maintained. The income tax exemption from the rental of flats in new buildings was extended for a period half longer than the previous one, i.e. up to 15 years. The possibility of deducting the costs of building residential houses from income was also maintained. In 1938, the last change in the regulations on financial support for construction took place, when construction allowances were incorporated into a completely new law on investment allowances.[71]

5. Conclusion

The state policy regarding construction law and spatial development in the Second Polish Republic was consistently aimed at making the construction process orderly, rationally increasing the supply of residential areas and forcing those owners of real estate who benefited from it to be responsible for spatial development. In the latter case, it was not only about a fair distribution of costs, but above all about relieving the municipalities for which the costs of building infrastructure, given the enormity of other public tasks, were difficult to bear. Less systematic efforts were made to force rational management of the resources which were located within the boundaries of cities and settlements. A serious mistake was the abandonment - after only 8 years of operation - of the idea of additional, "punitive" taxation of undeveloped plots in cities.

[71] Act of 9 April 1938 on Investment Reliefs for New Buildings (Journal of Laws of 1938, No. 26, item 224), Art. 24–34

As a result of the evolution of Polish construction law which lasted just over a decade, the spatial planning system at the end of the Second Polish Republic was based on four basic principles:

1. Land subdivision, i.e. division of real estate into new building plots, possible only under development plans and / or subdivision approved by the municipality / state;
2. Property owners (and developers) must participate in the cost of road construction and technical infrastructure;
3. Owners of real estate in areas of new development must transfer part of the land for public purposes free of charge;
4. Tax incentives for the construction industry, in particular for new housing in cities are an integral part of the planning.

It should also be emphasized that the State plays a major and de facto decisive role in the spatial development management process in the Second Polish Republic. State administration bodies, and in particular starosts as part of the supervision over municipalities, enjoyed broad rights as regards planning initiative, including the right of substitute implementation of development plans. So it was supervision supported by real legal tools. The state not only initiated changes through legislation, but actively participated in the process of spatial development planning.

Summarizing the changes in the regulations on town planning and construction that took place in the years 1928–1939, it should be stated that the concept of spatial development

planning of the Second Polish Republic presented itself as a coherent and rational system, constituting an integral whole with the general development policy of the state. Therefore, the experience from this period should be widely used during work on the reform of spatial and housing policy in Poland.

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