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NEW UNDERSTANDING OF DOCUMENT FORM IN THE CONTEXT OF HUMAN RIGHTS GUARANTEES (IN MODERN SOCIETIES)

Recently, strong tendencies to modify the legal system in Poland are to be observed - changes are made within the area of penal law,[1] criminal proceeding,[2] administrative law,[3] civil law[4] and civil proceeding.[5]Polish legislator undertakes initiatives to adjust legal mechanisms to both – European Union standards and changing socioeconomic reality. Such trends are not isolated initiatives but can be seen in most of the European countries. Legislators tend to diminish incongruity between law and the reality of the contemporary world. Law is changed to meet the challenges shaped by the development of technology, new social trends or economic habits.

However, it is not the aim of the paper to present modern legislative trends but to indicate a possible breach of human rights guaranteesthat till now seem to pass unnoticed by the legislators as well as the doctrine. Being driven by the need to cope with the new issues, one does not take into consideration possible risks of inducing a provision of such wording. Focus on the issue leads to undermining of the withdrawals that become clearly visible when the holistic perspective is adopted.

The scope of analysis of the article shall remain limited to the upcoming amendment of Civil Code – regarding a form of act of will.

The new regulationof an act of will is supposed to adjust tomodern market tendencies – especially to the ongoing digitalisation in both: area of trade and private relations. The EU legislator demanded acceptance of electronic form in an act of will in order to align statement of intent made electronically with the declaration of intention put in writing. However, the amendment in its current form fail to achieve its objective, inciting serious doubts as to the compliance with the human rights guarantees.

First and foremost the amendment that entered into force on 8 September 2016 states that:

Article 77^3 The document is an information carrier enabling a person to get to know its content.[6]

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1 Upcoming novel of Kodeks karny is to enter into force on the 23th of May 2016.Ustawa z dnia 9 października 2015 r.o zmianie ustawy - Kodeks karny oraz niektórych innych ustaw (Dz.U.2015.1855).

2 Upcoming novel of Kodeks postępowania karnego is to enter into force on the 4th of April 2016. Ustawa z dnia 28 stycznia 2016 r. Przepisy wprowadzające ustawę - Prawo o prokuraturze (Dz.U.2016.178).

3 Ustawa z dnia 10 stycznia 2014 r. o zmianie ustawy o informatyzacji działalności podmiotów realizujących zadania publiczne oraz niektórych innych ustaw (Dz. U.2014.183).

4 Ustawa z dnia 5 sierpnia 2015 r. o kształtowaniu ustroju rolnego (Dz. U.2015.1433, z późn. zm.); ustawa z dnia 10 lipca 2015 r. o zmianie ustawy - Kodeks cywilny, ustawy - Kodeks postępowania cywilnego oraz niektórych innych ustaw (Dz. U.2015.1311).

5 Ustawa z dnia 10 lipca 2015 r. o zmianie ustawy - Kodeks cywilny, ustawy - Kodeks postępowania cywilnego oraz niektórych innych ustaw (Dz. U.2015.1311, z późn. zm.).

6 Original wording in the language of origin: “Dokumentem jest nośnik informacji umożliwiający zapoznanie się z jej treścią.”

It is assumed that documenting a legal action of a person is enough to create a statement of intent in a form of document as long as a carrier of the recorded information enables one to perceive its content and the person submitting the declaration can be identified.

The wording of this provision suggests that Polish legislator, instead of aligning statement of intent filed electronically with the declaration of intention filed in writing, introduced a new form of act of will – a document form. Such form shall induce similar legal effects as the statement of intend made in writing. In case when the form of document is required, the consequences of failing to comply with this requirement are to be regulated similarly to the consequences of failure to comply with requirement of form in writing. Form of document will be a form of *ad solemnitatem* only when the rigor of nullity is clearly defined in the law (Art. 73 § 1 of the Civil Code). Otherwise, the form of document will have the character of *ad probationem* form (Art. 74 of the Civil Code).

A cursory analyse brings one to conclusion, that if legal effects of statement of intent in writing and included in a document within the meaning of Article 77^3 are analogical then there is no point for distinction. The EU legislator's objective is achieved. However, this statement proves itself to be unfounded as the mentioned forms of recording a statement of will differ substantially. Why those forms cannot be considered equal nor of the equal importance?

First and foremost, the form of document regulated in the new provisions cannot be considered equivalent to the written form, as such an interpretation can lead to absurd effect and even infringement of human right guarantees.The full regulation of this newly introduced institution is deficient and because of that, having in consideration human rights guarantees, the following issues should be raised:

Should the statement of will be recorded by the person submitting the act of will or its receiver to constitute an act of will in the form of document?

There are no legal conditions for restricting the provision against its literal meaning so to conclude that only a determined group of persons is allowed to record a statement of will. Polish legislator does not differentiate between state of intent recorded by its originator, recipient the third party, *lege non distinquente*, those situations are to be treated as equal.

Can then the statement of will be recorded by the third party?

In dubio pro libertate, as the law does not impose any limitations when the person recording the act of intend is considered, the document containing an act of will recorded by the third partyshould be treated equally as the document prepared by the party.

3. If it can be recorded by the third partycan it be done without a consent of the person submitting the act of will:

-without his knowledge?

-against his will?

There are no legal grounds to narrow the definition of the document stated in article 77^3 of Code Civil and if only the wording of provision are taken into account there is no reasonto deprive one of the possibility of recording the statement of will of another person for posterior use – i.e. when determining the legal status of a person.

Such a wording of the provision opens an immensescopefor fraud and abuse of rights. First and foremost, a person might not be aware of the fact that some third party records her actions so to present them as an act of will. There are no limits as to the person recording the statement according to the provision. Because of that a document prepared by the person stating her will and one containing words of a

person not being aware of stating an act of will and cunningly recorded are to have the same legal power.Therefore, appears the risk of attributing a statement that has no characteristics of an act of will or whatsoever a binding legal powerby a person who was not its addressee but simply can take advantage of it.As the legal significance of an act of will stated in writing and in a document form should be analogical according to the legislator, lack of regulation as to the person recording the act of will makes one extremely vulnerable in case of fraudulent behaviours of others. It increases the likeliness of stating an act of will by a person without her knowledge.

The problem which arose here is connected with fulfilment of human rights standards'. What is worth elaborating on is the meaning of this phrase, also in the context of newly adopted amendments in Polish civil law. Also the issues of the freedom of speech and the right to privacy should be mentioned. The problem of responsibility for recording the act of will given in the document form can interfere with guarantees of the right to privacy. The problem of exercising freedom of speech, one of the basic human rights, may become actual in relation to presented above changes in the civil law.

Human rights guarantees expressed in the most important covenants, such as *Convention for the Protection of Human Rights and Fundamental Freedoms* and *International Covenant on Civil and Political Rights* create the base for other more detailed solutions. In aforementioned problems, there are not only the issues connected with the role of originator, but also recipient of the act of will. Both parties to the legal action should be protected. The protection can be found not only in national legal system, but also on the international level.

The person whose statement (not necessarily statement of intend, as the statement might have different character – statement of knowledge, comment with no binding power[7]) is recorded can initiate a court proceeding to obtain a court recognition that the carrier does not contain an act of will. However, many legal entities, especially natural persons, will be discouraged to do so due to procedural difficulties and the costs of such proceeding. Similarly, a person that is affected by disloyal behaviour of other entity can accuse the recording one of fraud of mischief. On the other hand, initiating such a proceeding will require substantial law knowledge.

In conclusion a person not fully aware of her rights or unwilling to get involved in time-consuming and difficult proceeding becomes exposed to the fraudulent actions and misconduct of other members of society, not having adequate remedies to defend her rights at her disposal.

Currently, the issue results problematic only when the material law is taken into consideration. However, analogical amendment is to be brought about also in the civil proceeding, drastically endangering persons' right to privacy and autonomy. Aforementioned issues seem also strictly bounded to the right to fair trial.

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[7] Statement of intend is composed of the will of the sender of the message and an understandible action.

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THE JUDICIARY OF CANADA

The judicial system in Canada is defined in the Constitutional Act of 1867 (Act of the British North America in 1867). It consists of the Supreme Court of Canada, the Tax Court of Canada, the federal courts, the courts of the provinces and territories, military courts.

Supreme Court of Canada (The Supreme Court of Canada) is the highest authority in the judicial system of the state. Its content consists of nine judges (among them three judges are appointed by the French-speaking province of Quebec).

The Supreme Court of Canada has the right to consider appeals against decisions of appellate courts of lower instance; provide advice on constitutional issues raised by the federal government; resolve disputes concerning important national issues which can be heard only by the highest judicial body; proclaim the law or any part of it invalid; require all other courts in the country to follow a particular line of a decision by the interaction with those things.

The Tax Court of Canada is the highest judicial body that considers appeals of individuals and companies on issues related to income taxes, taxes on goods and services, and the payment of unemployment benefits. It also provides information for Canadian customs and public meetings on the interpretation of laws within the jurisdiction of the court.

Federal courts are formed by the Federal Court and the Federal Court of Appeal. The Federal Court is a Canadian national court of law, which considers and decides legal disputes arising in Canada, including legal action against the Canadian government and civil cases on matters falling under federal law (disputes in immigration, intellectual property, maritime law, against the executive power and so on.).