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Justice in Judicial Enforcement Law: Comments in the Context of the Decision-Making Model of the Law Application Process*

Sprawiedliwość w sądowym prawie egzekucyjnym. Uwagi na tle modelu decyzyjnego procesu stosowania prawa

ABSTRACT

In the study, which is of a scientific and research nature, the following thesis is adopted: Justice is served in the process of law application but it materializes only at the moment of judgment execution. The article is aimed at answering the question about the understanding of justice in judicial enforcement proceedings (the last stage of the law application process). The subject has not been deeply discussed in the theory of law and, as a result, I believe it is essential to enquire whether the execution of judgment is still an element of justice, while it is a general truth that justice has already been served in the court (court judgment). The thesis presented is corroborated by the European Court of Human Rights decisions, as well as by the Polish Supreme Court case law. Similar conclusions find justification in the European acts of law. Debt repayment is not only a Polish problem, but a problem of many European countries. Certainly, in times of economic crisis and the worldwide problems of inflation, pandemic and wartime, it is more difficult to repay debts, but those simply do not disappear and enforcement is a solution reached for in search of justice.

Keywords: justice; judicial enforcement law; decision-making model of the law application process; bailiff's discretion; judgment execution

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INTRODUCTION

The fundamental thesis that this article shall attempt to substantiate can be summarized in the following statement: Justice is served in the process of law application but it materializes (fulfils) only at the moment of judgment execution. First of all, in order to justify such an assumption it is essential to clarify the meaning of the notion of justice (which is very wide-ranging in terms of content) and to specify that the focus is on the understanding of this concept in the decision-making processes of law application.[1] From the perspective of effectiveness, (voluntary) execution of a law application decision is desirable, but enforcement is ultimately this stage in the process of applying law[2] that guarantees the fulfilment of the value of justice (especially in its formal aspect[3]).

I would like to emphasize that in the law application processes we typically associate justice with the court and with these actions that lead to a decision (e.g. judgment, payment order, resolution) or other ruling provided for by the legislation.[4] In the popular discourse, it is commonly said: "The court has issued a judgment – justice has been done", and further consequences recede into the background, i.e. what happens to a judicial decision later, whether and how it is executed (voluntarily or forcibly). This aspect of coercive execution of a law application decision defines justice which I intend to analyse in the context of the judicial application of law.

THE CONCEPT OF JUSTICE AND THE BASIC DIVISIONS

The notion of justice is regarded as one of the fundamental concepts of the legal sciences, including, in particular, the philosophy of law.[5] Since ancient times, deliberations on justice have focused on the relations between people and their

[1] On the decision-making processes, see L. Leszczyński, *Types of Application of Law and Decision Making Model*, "Studia Iuridica Lublinensia" 2015, vol. 24(2), pp. 27–47.

[2] I presume that the complete law application process always includes the 'execution stage' which, if there is no voluntary execution of a judicial decision, turns into the enforcement stage of applying law.

[3] On formal justice, see C. Perelman, *O sprawiedliwości*, Warszawa 1959. By formal justice he means "a principle of action in accordance with which people belonging to the same essential category should be treated equally". Substantive justice does not always materialize in judicial enforcement (see section IV point 3).

[4] See Article 777 in conjunction with Article 776 of the of the Act of 17 November 1964 – Civil Procedure Code (Journal of Laws 1964, no. 43, item 296), hereinafter: CPC.

[5] See J. Rawls, *Teoria sprawiedliwości*, Warszawa 2013; R. Tokarczyk, *Filozofia prawa w perspektywie prawa natury*, Białystok 1996; idem, *Sprawiedliwość: próba syntetycznej systematyzacji zagadnień*, "Gdańskie Studia Prawnicze" 2016, vol. 35, p. 15 ff.; M. Szyszkowska *Zarys filozofii prawa*, Białystok 2000, p. 67 ff.

activities in various spheres of life.[6] At the same time, there have also been views treating justice as a higher value than statute law. Such an approach to justice is characteristic, e.g., of Plato and fits into the natural law concepts.[7] The idea of justice was presented in a similar way in the constitution of Emperor Constantine the Great: *Placuit, in omnibus rebus praecipuam esse iustitiae aequitatisque quam stricti iuris rationem* ("It is accepted in all matters to take more account of justice and equity than of the strict wording of a rule"; C.J. 3.1.8)[8].

Nowadays, the concept of justice is discussed extensively in the context of its main forms, that is substantive and formal justice, and theories of distributive and retributive justice.[9] It is worth noting various 'justice formulas' introduced by C. Perelman and their applicability in decision-making processes.[10] The development of this concept has been strongly influenced by the theory of justice as impartiality formulated by J. Rawls,[11] or the libertarian entitlement theory of justice presented by R. Nozick.[12]

In the current discussion, I depart from strictly doctrinal analyses of justice and instead I focus on its practical dimension, especially on the understanding and meaning of this term from the perspective of the final stage of the law application process, identified by me with coercive execution of an enforcement title. My analysis is concerned with the so-called formal (procedural) justice,[13] which in

[6] As M. Szyszkowska (*op. cit.*, p. 67 ff.) writes, "the problem of justice is the subject of many scientific disciplines and is not only a theoretical issue, but one of considerable practical significance. It comes to the fore in the administration of justice, legislation, political decisions and, above all, in the relations between people". Cf. M. Kuryłowicz, *Aequitas i iustitia w rzymskiej praktyce prawnej*, "Annales UMCS sectio G (Ius)" 2019, vol. 61(1). As W. Dziedziak (*An Essay on Natural and Distributive Justice*, "Studia Iuridica Lublinensia" 2020, vol. 29(4), pp. 71–72) writes, "justice is a value closely related to law, it is crucial for law. The types of essential importance in law are distributive justice and corrective justice. Since Aristotle's times, the dichotomous meaning of justice understood both as distributive justice (*iustitia distributiva*) and corrective justice (*iustitia commutativa*) has been widely accepted in European philosophy, followed by law and legal sciences.

[7] See M. Szyszkowska, *op. cit.*, p. 112. As R. Tokarczyk (*Sprawiedliwość jako naczelna wartość prawa*, "Annales UMCS sectio G (Ius)" 1997, vol. 44, p. 148) writes, "the natural law always contains a concept of justice with which the statute law must be reconciled if it aspires to be a fair law".

[8] See A. Dębiński, *Rzymskie prawo prywatne. Kompendium*, Warszawa 2021, p. 26.

[9] See R. Tokarczyk, *Sprawiedliwość: próba syntetycznej systematyzacji*…, p. 25 ff.; J. Rawls, *op. cit.*, p. 105; G. Maroń, *Formuły sprawiedliwości dystrybutywnej*, "Resovia Sacra. Studia Teologiczno-Filozoficzne Diecezji Rzeszowskiej" 2010, vol. 17, pp. 195–218.

[10] See C. Perelman, *op. cit.*, p. 22 ff.

[11] See J. Rawls, *op. cit.*, p. 29 ff.

[12] More on Nozick's theory of justice, see G. Maroń, *Sprawiedliwość według Roberta Nozicka w perspektywie libertarianizmu*, "Resovia Sacra. Studia Teologiczno-Filozoficzne Diecezji Rzeszowskiej" 2007–2008, vol. 14–15, pp. 319–337.

[13] See J. Rawls, *op. cit.*, p. 98 ff.

judicial enforcement specifically serves the realization of substantive justice and fulfils the principle of fair execution.[14]

In these relations, the definition of a meaning of justice cannot be separated from the primary purpose of judicial enforcement proceedings.[15] Already Cicero's ancient formula of justice: *Justitia cernitur in suo cuiqe tribuendo*[16] – partly follows these guidelines and can serve as the starting point for further research.[17]

From the perspective of the law application stage I deal with, this formula needs to be narrowed down, and – following Perelman's conception – it should be indicated that the point is to render what is due to anyone according to law.[18] This is directly associated by me with a law application decision and a resolution (e.g. judgment, payment order, ruling, court settlement) which specifies what is due to whom and to what extent. It is worth adding that it must be a resolution complying with the rules of a democratic state of law.[19]

In the fulfilment of the expectations of judicial enforcement, limiting oneself only to the substantive form of justice, that is returning the due good (tangible or intangible) specified in the enforcement title to the creditor would indicate that all cases of ineffective enforcement are unjust.

Justice in the procedural sense introduces a kind of correction and directly departs from the result by prioritizing the fairness of the procedure as a 'synonym' for justice in enforcement.[20] A desirable procedure is the one that guarantees, to the greatest extent possible, the achievement of the goal of enforcement, that is effective execution of a judicial decision, and thus the fulfilment of substantive (corrective) justice. Judicial enforcement, in its current form, does not always lead to corrective justice, the aim of which is to redress damage in a broad sense (in judicial enforcement it will be damage to the creditor's property), which cannot be the basis for regarding it as an element of a system of law operating outside of justice.[21]

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[14] See Article 1 (1) of the Act of 22 March 2018 on court bailiffs (Journal of Laws 2018, item 771, as amended) – fair judicial enforcement directive.

[15] See A. Marciniak, *Sądowe postępowanie egzekucyjne*, Warszawa 2013, p. 15 ff.

[16] See M. Kuryłowicz, *op. cit.*, p. 175. After M. Kuryłowicz, this definition is formally attributed to Ulpian according to D. 1.1.10,1, but Cicero's statement is its earlier version.

[17] Justice is not only distribution of goods as commonly understood; in the approach I am interested in, justice refers to the dimension of sanctions and their enforcement.

[18] See C. Perelman, *op. cit.*, p. 50 ff.

[19] See R. Tokarczyk, *Sprawiedliwość jako naczelna wartość…*, p. 164.

[20] Whether such an assumption actually fits into the concept of a democratic state of law requires a separate analysis, which is not the subject of this article.

[21] More in section IV point 3

PROCEDURAL JUSTICE AND DIRECTIVES OF ITS INTERPRETATION IN JUDICIAL ENFORCEMENT

In addition to normative justification, a law application decision (shaping the legal situation of the parties to the proceedings) and the entire process preceding it, have a clear axiological basis that extends to the executive decision-making process (realizing procedural justice) which – from the perspective of judicial enforcement in Poland – is conditioned by the principles of efficient, effective and fair enforcement,[22] as well as by proper administration of justice and public interest.[23]

On the one hand, efficiency and fairness are such universal guidelines that they refer to the entire civil procedure.[24] On the other hand, their very understanding goes beyond the normative element of the law application process. Hence, in his analysis of the efficiency of judicial proceedings, T. Wiśniewski points out explicitly that "it depends equally on appropriate procedural solutions and on correct practice of their implementation. In brief, this efficiency should be considered not only in terms of specific legislative guidelines, but also from the perspective of actual practice of courts, their organization and structure, taking into account also the mentality and habits of the judiciary. Thus, it is an issue connected in particular with such legal instruments that would shape an ethically and axiologically desirable level of the judiciary's work".[25]

Similarly, fairness in this list refers more to the axiological than the strictly normative sphere.[26] Discussing the principle of fairness, J. Rawls associates it with a condition of fair institution and indispensable voluntary actions.[27]

Effectiveness as the supreme value of judicial enforcement fits into this element of justice that is the most desirable from the creditor's perspective (refers to

[22] See Article 1 (1) of the Court Bailiff Act.

[23] See Article 2 (3) of the Court Bailiff Act.

[24] See K. Flaga-Gieruszyńska, *Szybkość, sprawność i efektywność postępowania cywilnego – zagadnienia podstawowe*, "Zeszyty Naukowe KUL" 2017, vol. 60(3), p. 5 ff.

[25] T. Wiśniewski, *Reguły koncentracji materiału procesowego (pozew, odpowiedź na pozew, pisma przygotowawcze)*, [in:] *System Prawa Handlowego*, vol. 7: *Postępowanie sądowe w sprawach cywilnych z udziałem przedsiębiorców*, ed. T. Wiśniewski, Warszawa 2013, p. 76.

[26] The concept of 'fair trial', both in its strictly substantive and formal sense, is deeply embedded in the axiological sphere. Therefore, values are central throughout the fair trial narrative, with focus either on values that relate to procedures (in line with the postulate of procedural justice) or on the very substance of the law applied by the court (in line with the fair play postulate). This is why, the axiological perspective acquires a status that is both fundamental and initial for all other attempts at reconstruction of the 'fair trial' concept. See J. Szymanek, *Rzetelny proces sądowy. Doktryna, prawo, praktyka*, Warszawa 2021.

[27] See J. Rawls, *op. cit.*, p. 177 ff.

substantive justice). In the literature on the theory of law, this corresponds to the achievement of the goal set and the idea of finitistic effectiveness.[28]

Nowadays, the issue of procedural justice has also been reflected in jurisdiction, especially of the highest instance courts. The Supreme Court directly links this category with the right to court.[29] On the other hand, selected judicial decisions of the Constitutional Court unequivocally point out these elements of procedural justice which can be classified as the so-called benchmarks of fair procedure. The Constitutional Court indicates directly that "various concepts of procedural justice still have the common crux, which can be summarized as: an opportunity to be heard; clear disclosure of the reasons for a judicial decision, to the extent enabling verification of the court's way of thinking (even if the decision itself is not subject to appeal – legitimacy through transparency), and hence avoiding latitude or even arbitrariness in the court's operation; ensuring predictability for participants of the proceedings, by means of appropriate coherence and internal logic of the mechanisms to which they are subjected".[30]

The European jurisdiction, e.g. the Court of Justice of the European Union, does not refer to the notion of procedural justice.[31] Instead, there are such terms as 'the right to a fair trial', 'the right to a fair procedure' and, as described by J. Helios, procedural justice in the EU law is an outcome of the following elements: organization, a course of the procedure, and the rule of law respecting the fundamental rights.[32]

In judicial enforcement proceedings, the benchmarks for equitable enforcement have been formulated (either explicitly or they require decoding) in the normative acts regulating strictly judicial enforcement proceedings[33] and the technical organization of judicial enforcement in Poland.[34]

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[28] See J. Wróblewski, *Skuteczność prawa i problemy jej badania*, "Studia Prawnicze" 1980, no. 1–2, p. 12. Cf. M. Stefaniuk, *Skuteczność prawa i jej granice*, "Studia Iuridica Lublinensia" 2011, vol. 16, p. 60.

[29] See decision of the Supreme Court – the Civil Chamber of 28 July 2020, IV CO 55/20, Legalis no. 257649.

[30] See judgment of the Constitutional Court of 16 January 2006, SK 30/05, Journal of Laws 2006, no. 15, item 118.

[31] J. Helios, *Aksjologia procedur Unii Europejskiej – szkic problemu*, "Acta Universitatis Wratislaviensis" 2015, no. 3661, p. 652.

[32] *Ibidem*, p. 653.

[33] See Act of 22 March 2018 on court bailiffs; Act of 28 February 2018 on enforcement costs (Journal of Laws 2018, item 770, as amended).

[34] See Regulation of the Minister of Justice of 18 December 2018 on the definition of detailed rules for management of office work, accounting and records of financial operations of bailiffs' offices (Journal of Laws 2018, item 2517); § 8. 1. Cases shall be entered into repertories, (…) in the order in which they are received. An entry in the repertory should be made immediately, not later than within 3 days from the date the case was received in the bailiff's office; § 19. 1. Immediately after the case is received, the bailiff shall open a file to which all documents pertaining to the case shall be attached.

In order to define what justice is in judicial enforcement, the teleological interpretation directive[35] and a reference to the purpose of enforcement (effective execution of a law application decision) are particularly useful. This is especially due to the fact that judicial enforcement in Poland has been shaped according to a new dimension of law axiology since the 'binding enforcement law' entered into force in 2019, and has been particularly guided by the principles of good administration of justice and the public interest[36] for the purpose of "due performance of the state's tasks in terms of efficient, effective and reliable judicial enforcement".[37]

Furthermore, it should be remembered that the Supreme Court in Poland took a restrictive approach to departure from linguistic directives of interpretation until 2019.[38]

The current jurisdictional practice (after 2019) provides grounds to conclude that, in many decision-making processes, linguistic directives of interpretation are an insufficient argument to take a decision in the judicial enforcement law, and an authority applying the law (a court bailiff) is obliged to draw on the systemic and teleological directives of interpretation, thus fulfilling the formula *omnia sunt interpretanda*.

The selected fragments of judicial decisions, given below, are just some examples to support this reasoning. The Supreme Court points to:

a) a need to supplement the results of linguistic interpretation: "The linguistic interpretation of the term of 'manifest inexpediency' does not make it possible to resolve conclusively whether in this case the legislator had in mind the objective reasons for inexpediency of enforcement proceedings, existing at the time when the enforcement application was submitted, or whether the

[35] See O. Bogucki, *Sprawiedliwość wykładni prawa*, "Acta Iuris Stetinensis" 2019, no. 2, pp. 7–22.

[36] See Article 2 (3) of the Court Bailiff Act.

[37] See Article 1 (1) of the Court Bailiff Act.

[38] See resolution of the Supreme Court of 23 May 2012, III CZP 11/12, Legalis no. 468018: "Subsidiary methods of interpretation in the procedural law should be used with utmost caution, because the addressees of this law's regulations should rely primarily on what the legislator has actually expressed. The legislator's message directed in the form of a legal regulation to procedural authorities and participants of the proceedings should be understood unambiguously, in a strict manner resulting directly from the content of the provision, i.e. the signs (words) constituting the normative statement. (…) The literature emphasizes that the establishment of clear rules of procedure, their unambiguous reading and absolute observance constitute the fundamental element of the so-called procedural justice correctly understood. These remarks apply in particular to the enforcement regulations which – due to their restrictive, 'coercive' nature – require a strict, declarative interpretation, guaranteeing the sameness of results and thus uniformity of the enforcement practice, as well as stability and legal certainty".

legislator took into account elements of a subjective attitude of the creditor who, in exercising his or her procedural right, in fact abuses it"[39];

b) an opportunity to depart from the linguistic meaning of a regulation: "An interpretation of Article 52 in conjunction with Article 29 of the Act on enforcement costs, coupled with the weighing of fundamental constitutional values and principles, lead to a conclusion that there are important reasons justifying a departure from the linguistic sense of an analysed provision (cf. justification of the resolution of the full panel of the Civil Chamber of the Supreme Court of 14 October 2014, III CZP 37/04, OSNC 2005, no. 3, item 42, and of the resolution of a panel of seven judges of the Supreme Court of 17 August 2021, III CZP 79/19, OSNC 2021, no. 12, item 79)"[40];

c) reference to the rules of broad interpretation and using *analogia legis* in this respect: "(…) it is legitimately pointed out in the literature that this does not mean a complete prohibition on the use of broad interpretation or analogy when construing the provisions of the Act on enforcement costs. Such a broad interpretation should also be applied with reference to Article 18 (2) of the Act on enforcement costs".[41]

The aforementioned directions of interpretation are further substantiated by the axiological determinants of judicial enforcement, e.g. by the explicit introduction of general clauses[42] into the executive decision-making process, and a duty of their proper application as a normative construct by an enforcement authority, indicated directly in the provisions of the judicial enforcement law.[43]

Adapting the broad principles of the application of a general clause developed in legal theory[44] into the field of judicial enforcement, there is no doubt that the presence of such constructs, on the one hand, imposes on an enforcement authority an obligation to determine to what extent the extra-legal criteria indicated by the legislator are applicable in the process of issuing a decision. On the other hand, the presence of these constructs delineates the scope of discretion within which a law applying authority (a court bailiff) operates, and the said clauses constitute an absolute limit of discretion in the process of applying the enforcement law.

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[39] See resolution of the Supreme Court of 27 January 2022, III CZP 36/22, Legalis no. 2669417.

[40] See resolution of the Supreme Court of 7 October 2021, III CZP 52/20, Legalis no. 2613170.

[41] See resolution of the Supreme Court of 26 April 2022, III CZP 91/22, Legalis no. 2688354.

[42] The issue of general clauses in the Polish theory of law is discussed particularly in the works of L. Leszczyński who as early as in 1986 presented a comprehensive study analysing the issue of a general clause in the law application process (see L. Leszczyński, *Klauzule generalne w stosowaniu prawa*, Lublin 1986). In the following years, the author elaborated on this issue in his scientific work several times, especially in a study *Stosowanie generalnych klauzul odsyłających* (Kraków 2001) and in a monograph *Kryteria pozaprawne w sądowej wykładni prawa* (Warszawa 2022).

[43] As L. Leszczyński (*Generalne klauzule odsyłające*, Lublin 2023, p. 106) points out, "a clause is a normative construct that is included in the binding legal regulations".

[44] *Ibidem.*

PRACTICAL ASSUMPTIONS OF JUSTICE IN JUDICIAL ENFORCEMENT

The starting point for the formulation of the thesis presented at the beginning of this article was the adoption of three universal assumptions in the judicial enforcement law.

1. The right of any entity to enforcement (as the right to compulsory execution of a judgment or other law application decision)

Even though this principle has not been clearly expressed by the legislator in the legal regulations, such an assumption is primarily linked to the broadly understood right to court[45] and is extended to the right to enforcement. The jurisdiction of the European Court of Human Rights (ECHR) in the context of cases related to Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950[46] is an excellent example.[47]

In its significant judgment in *Hornsby v. Greece* (application no. 18357/91), the ECHR states that the right of access to court "would be illusory if (…) a domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. It would be inconceivable that Article 6 § 1 should describe in detail procedural guarantees afforded to litigants (…) without protecting the implementation of judicial decisions. (…) Execution of a judgment given by any court must therefore be regarded as an integral part of the 'trial' for the purposes of Article 6".

The established position of the 'right to enforcement' issue in the ECHR's jurisdiction, coupled with the requirements of the right to a fair trial, has led to further measures that contribute to the fulfilment of procedural justice. In European law, it is the work of the Council of Europe that has produced results in this area, e.g. in the form of the Recommendation of the Committee of Ministers of the Council of Europe to the Member States on enforcement.[48] Further activity of the European

[45] The right to enforcement is derived from Article 45 of the Polish Constitution. The right to execute a final and binding judicial decision in enforcement proceedings falls within the right to court guaranteed by Article 45 (1) of the Polish Constitution. See judgment of the Constitutional Court of 4 November 2010, K 19/06, Legalis no. 258407. Similarly, judgment of the Constitutional Court of 4 April 2001, K 11/00, Legalis no. 49672; judgment of the Constitutional Court of 24 February 2003, K 28/02, Legalis no. 56404.

[46] Journal of Laws 1993, no. 61, item 284.

[47] See judgment of the ECHR of 19 March 1997 in the case of *Hornsby v. Greece*, application no. 18357/91; judgment of the ECHR of 27 May 2003 in the case of *Sanglier v. France*, application no. 50342/99; judgment of the ECHR of 27 May 2010 in the case of *Papuc v. Romania*, application no. 44476/04; judgment of the ECHR of 18 October 2010 in the case of *Romańczyk v. France*, application no. 7618/05.

[48] See Recommendation Rec(2003)17 of the Committee of Ministers to Member States on enforcement (adopted by the Committee of Ministers on 9 September 2003 at the 851st meeting of the

institutions has resulted, e.g., in the Guidelines for a Better Implementation of the Existing Council of Europe's Recommendation on Enforcement adopted by the CEPEJ at its 14th plenary meeting (Strasbourg, 9–10 December 2009), where one of the principles formulated involves the requirement of flexibility of the enforcement procedure and appropriate discretion of a bailiff. Further 'fair enforcement' guidelines are reflected, e.g., in the Good Practice Guide on Enforcement of Judicial Decisions adopted at the 26th CEPEJ Plenary Session 10–11 December 2015.[49]

The aim of these recommendations is to establish the common European standards on judicial enforcement to which Member States of the Council of Europe should refer when drafting or amending domestic enforcement laws, and which law enforcement authorities should take into account in their decision-making processes.

2. Execution of judicial decisions is a necessary element of justice

First of all, this pertains to substantive justice that is the most desirable in enforcement (with a focus on its corrective aspect).[50]

On the other hand, there is an aspect of procedural justice which serves the implementation of substantive law.[51] The decision-making model of the law application process, including in particular its procedural aspect,[52] used by me for the analysis of the enforcement law application, enables the development of an enforcement model of law application on this basis, identified at least with its three-phase character: the phase of instituting enforcement proceedings, the phase of enforcement initiation and execution actions as application of law, and the phase of conclusion of the proceedings (enforcement decision of law application, its control and execution).[53] The most elaborate part of this model is enforcement and execution actions taken as part of it, which form the fundamental part of the decision-making process.

Ministers' Deputies). In the circle of the European states, also the European Commission for the Efficiency of Justice (CEPEJ) confirms that "the enforcement of judicial decisions is an essential element in the functioning of a state based on the rule of law. It constitutes a serious challenge both at national and European level (CM/Monitor(2005)2 of 14 October 2005)" (see CEPEJ, Guidelines for a Better Implementation of the Existing Council of Europe's Recommendation on Enforcement adopted by the CEPEJ at its 14th plenary meeting (Strasbourg, 9–10 December 2009), CEPEJ(2009)11REV2).

[49] See CEPEJ(2015)10.

[50] The aim is to compensate for damage in a broad sense, in judicial enforcement this will be damage to the creditor's assets.

[51] On procedural justice, see section II.

[52] See L. Leszczyński, *Model decyzyjny procesu stosowania prawa*, [in:] A. Korybski, L. Leszczyński, *Stanowienie i stosowanie prawa. Elementy teorii*, Warszawa 2015, p. 135.

[53] See J. Wróblewski, *Zarys procesowego modelu sądowego stosowania prawa*, [in:] *Pisma wybrane*, comp. M. Zirk-Sadowski, Warszawa 2015, p. 336.

The principle of formalism, strongly manifested at this stage, is a directive addressed not only at an enforcement authority, but is also binding on the parties and participants to the proceedings. In judicial enforcement proceedings, formalism is shaped, e.g., by the form and time of the actions taken. On the one hand, this concerns the form of filing applications, making statements and hearing of parties.[54] On the other hand, we can analyse the form of an enforcement action[55] taken by a bailiff and in this respect we can talk about, e.g., a decision, order, notice or report (these may be actions of an adjudicatory or executive character,[56] having the form of enforcement actions, investigative actions, as well as actions taken *ex officio* and upon application).

The strict observance of statutory deadlines by an enforcement authority and parties to the proceedings contributes to the effectiveness of enforcement proceedings and prevents protraction in these cases.[57]

In enforcement proceedings, the application of the principle of formalism should take into account the consequences of the relations between the subjects of these proceedings. Formalism in enforcement proceedings will be viewed differently by enforcement authorities and by parties to the proceedings. Perception of formalism by the debtor will not coincide with the perspective of the creditor for whom it is important to receive the amount due quickly and effectively. From this point of view, conclusion of enforcement proceedings is an important phase in the application of law and, therefore, it is desirable to enforce the claim, which leads to the achievement of justice in its corrective dimension.

3. 'Imperfect' justice as an admissible event in judicial enforcement

Paraphrasing Rawls' words, "even though we have an independent criterion for the correctness of the result, there is no unfailingly feasible procedure leading to it"[58] (imperfect procedural justice). In this approach, a criterion for the correctness of the result is the effectiveness of enforcement, which has not been secured with a reliable procedure by the legislator in the current realities. Moreover, the issue of enforcement effectiveness is also a problem of the philosophical basis for the lack

[54] It can have a written or an oral form (Article 760 CPC).

[55] The issue of enforcement actions is discussed in more detail by A. Marciniak (*op. cit.*, p. 30 ff.). Cf. H. Pietrzykowski, [in:] *Kodeks postępowania cywilnego. Komentarz*, ed. T. Ereciński, Warszawa 2012, p. 28 ff.

[56] This category includes technical operations in the form of manual actions, such as search of premises, clothes, opening of an apartment (Article 814 CPC), taking things from the debtor (Article 1041 CPC), seizure of movables (Article 845 CPC).

[57] For example, Article 824 § 1 (4) CPC, Article 767 § 5 CPC, Article 864 CPC, Article 871 CPC, Article 875 § 1 CPC, Article 942 CPC, Article 950 CPC, Article 952 CPC, or Article 1027 CPC.

[58] See J. Rawls, *op. cit.*, p. 143.

of voluntary execution of a judicial decision, which, in consequence, can lead to imperfect justice. This includes, among others, 'conscientious objection'[59] or so-called 'civil disobedience'[60] which do not improve effectiveness of enforcement.

The contemporary legislator allows for the presence of ineffective execution in judicial enforcement law, which assumes that substantive corrective justice may not be achieved. The enforcement procedure does not contain a guarantee of effective execution of a judicial decision. Introducing Article 824 § 1 (3) CPC,[61] the legislator assumes that the goal of enforcement shall not be achieved, which is an example of 'imperfect' justice.

At the same time, it is worth noting a directive functioning in the law, which, despite ineffective enforcement, orders the bailiff to continue the proceedings for the purpose of achieving substantive (corrective) justice.[62] In practice, this applies to enforcement of maintenance dues and a privileged position of the maintenance creditor. This approach of the legislator is explained in the preamble to the Act of 7 September 2007 on assistance to people entitled to maintenance.[63] The aforementioned example is a safeguard for substantive justice.

In the process of enforcement of maintenance dues, the role of the bailiff (a decision-making authority) is crucial. The bailiff's decision ('certification of ineffective enforcement') enables the creditor to apply to the Maintenance Fund and obtain compensation from the state (a maintenance benefit). At this stage, the bailiff's discretionary power[64] determines whether substitute substantive justice can be achieved.

CONCLUSIONS

To sum up, nowadays in judicial enforcement the fairness of the procedure is a guarantee of justice as defined by the legislator, including justice that accepts unsuccessful (ineffective) enforcement and is imperfect. The enforcement of maintenance dues can serve as an example in which the legislator consistently seeks to

[59] Conscientious objection is a refusal to comply with a more or less indirect order or administrative decision. It is an objection because an order has been addressed to us and the authorities are naturally aware whether we obey it. See *ibidem*, p. 529.

[60] *Ibidem*, p. 548 ff.

[61] "Proceedings shall be discontinued in whole or in part *ex officio*: (…) 3) if it is obvious that the amount obtained from enforcement shall not exceed enforcement costs".

[62] See Article 1086 § 5 CPC: "Ineffective enforcement is not the basis for discontinuation of the proceedings. The provision of Article 824 § 1 (4) is not applicable".

[63] Journal of Laws 2007, no. 192, item 1378, as amended.

[64] The bailiff must first examine the case *ex officio* to determine the debtor's assets. If these are not found, the bailiff 'rules' that enforcement is ineffective.

redress damage and achieve corrective justice. Such a privilege existed as early as in the ancient law, e.g. pupil's claims against a tutor. Even then, the debtor could be insolvent, but only for non-fault reasons. For centuries, the aim has remained the same: a rational legislator's intervention in the case of unsuccessful enforcement, in order to execute effectively a law application decision.

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ABSTRAKT

W opracowaniu, które ma charakter naukowo-badawczy, przyjęto tezę, że sprawiedliwość jest wymierzana w procesie stosowania prawa, ale materializuje się dopiero w momencie wykonania wyroku. Skoncentrowano się na odpowiedzi na pytanie o rozumienie sprawiedliwości w sądowym postępowaniu egzekucyjnym (ostatnim etapie procesu stosowania prawa). Zagadnienie to nie doczekało się dogłębnego omówienia w teorii prawa, w związku z czym uznano, że ważne jest dociekanie, czy wykonanie wyroku jest jeszcze elementem sprawiedliwości, podczas gdy prawdą powszechną jest, że sprawiedliwość została już wymierzona przez sąd (wyrok sądowy). Przedstawiona teza wynika obecnie z orzecznictwa Europejskiego Trybunału Praw Człowieka oraz Sądu Najwyższego. Podobne wnioski znajdują uzasadnienie w aktach prawa europejskiego. Spłacanie długów to nie tylko polski problem, lecz także wielu krajów europejskich. Oczywiście w czasach kryzysu gospodarczego, ogólnoświatowego problemu z inflacją, sytuacji pandemicznej i wojennej trudniej jest spłacić długi, ale te po prostu nie znikają, a egzekucja jest rozwiązaniem, po które sięga się w poszukiwaniu sprawiedliwości.

Słowa kluczowe: sprawiedliwość; sądowe prawo egzekucyjne; decyzyjny model procesu stosowania prawa; dyskrecjonalność komorników; wykonanie wyroku