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Dilemmas of the amendment to the Code of Civil Procedure of 4 July 2019 as seen in the case of Article 186[1] of the Code of Civil Procedure – selected issues

Abstract

The subject of this paper involves issues related to the statics of the lawsuit. Herein, defective legislative technique applied in the contents of Article 186[1] of the Code of Civil Procedure is indicated. The use of indefinite phrases lacking an explicit designation of terminology is pointed out: "the writ (…), the contents of which do not imply the request to recognise a civil-case litigation" or "exceptional circumstances justifying initiation of proceedings". It is stated within that allowing the possibility of returning by the president the writ filed as an action stipulated in Article 186[1] of the Code of Civil Procedure should be *de facto* and *de iure* considered as a potential possibility of depriving the party of any path to assert claims and thus, limits their constitutional right to court. It is also underlined herein that such a situation can lead to too far-reaching and undesirable discrepancies in court practice in the scope of application thereof, since particular judges and judging panels (in recognition of e.g. a complaint) can interpret this norm differently. This may lead to situations where civil proceedings become an unforeseeable and disordered activity, as well as to situations where the loss of a guarantee to a fair trial is of significance for the participants thereof.

Keywords: the Code of Civil Procedure, acts of legal procedure, procedural writ, action, return, complaint

Introduction

The often expressed, especially nowadays, slogan of the need of establishing quick and reliable court-based jurisdiction, according to F. Carnelutti[1], contains a *contradictio in adiecto* error; if, in fact, jurisdiction is reliable, then, in the assumption it shall not be quick, if, on the other hand, it is quick, it shall certainly not be reliable.

Theoretical and legal analysis

In Chapter 2, Section II, Title VI, First Book of the First Part of the Code of Civil Procedure, a situation not previously known to the Polish civil procedure law has been regulated. The added Article 186[1] of the Code of Civil Procedure regulates a situation in which a court receives a writ, which even if it has been called "an action", it shall not *de facto* constitute by the president's will a type of a procedural writ, since, in his or her opinion it does not include a demand for settling a litigation of a civil case character pursuant to Article 1 of the Code of Civil Procedure.

The literal wording of Article 186[1] of the Code of Civil Procedure implies that the president can return such a writ to the petitioner "(…) without undertaking any further activities, unless exceptional circumstances justify initiating proceedings". In compliance with the above regulation, the president of the division shall decide whether the case has a character of a civil case or not, which until now used to constitute a court prerogative. As a result, the president shall not have to undertake any activities to strive to settle the case even if the other party is a citizen deprived of professional aid.

The quoted contents do not completely allow specification of the situation referred to in the provision and, in particular, of how the phrase: "the writ (…), the contents of which do not imply the demand to recognise a civil-case litigation" and the concept: "exceptional circumstances justifying initiation of proceedings" should be understood.

A doubt arises whether by increasing the formality of proceedings, this provision does not, at the same time, disclose the attempt to improve the proceedings understood as a lack of interferences in the course thereof, of simultaneous burdening parties with consequences for undertaking activities divergent from the model course of a lawsuit.[2]

It should be remembered that excessive rigours and formalisation of the proceedings have not worked well in practice and have not achieved the aim thereof.

1 Carnelutti, F., *Diritto e processo*. *Trattato del processo civile*, Napoli, 1958, p. 154.

2 See: Judgement of the Constitutional Tribunal of 20 May 2008, P 18/07, Legalis No. 98265.

Procedural formalism should be perceived as exercising the principle of equality of arms, and not requirements that are onerous for the parties of concern.[3] Therefore, it does not constitute proper means to ensure the efficient course of court proceedings.[4]

At this point, an opinion exists that the quality of the "transparent" law consists in the fact that it ensures reliability, and, in consequence, also predictability. While drawing up legal provisions, one should be aware that they have to be legible so that the persons applying them have not doubts regarding the type of procedural activities they have to undertake and so that parties to proceedings could foresee which activities shall be undertaken by the adjudicating court.[5]

Therefore, there is a fundamental doubt whether this regulation is compliant with the constitutional right to court, since the person requesting legal aid is refused thereof without studying details of the given case and without providing any aid.

It should be reminded that the Constitutional Tribunal in its resolution of 25.01.1995, W 14/94[6] stated that "in the rule of law, the right to court cannot be understood only in formal terms as availability of the recourse to law in general, but also in substantive terms, as the possibility of legally effective protection of rights by the recourse to law."

The justification of the Bill[7] allows realising that "(…) it concerns a return of the writ, the author of which has a negative approach to a phenomenon or a person and does not formulate any demand of providing him or her with legal protection." Furthermore, it has been pointed out that this provision extends the scope of the judge's discretionary authority.

In literature it is indicated that the discretion of the judge's authority in the broad understanding comprises the right to make decisions which cannot be directly deducted from the legal text, whereas, the stage of applying the referred

3 Ereciński, T., *O potrzebie nowego Kodeksu postępowania cywilnego*, "Państwo i Prawo" 2004, No. 4, p. 10.

4 Helwig, K., *Justizreform*, Berlin 1910, p. 10 – as quoted in: Waśkowski, E., *Zasady procesu cywilnego* (*z powodu Projektu Polskiej Procedury Cywilnej*), "Rocznik Prawniczy Wileński" 1930, No. 4, p. 283 – claimed that: "(…) with regard to the interpretation of provisions concerning keeping formality, it should be presumed that they are introduced to regulate the proceeding and not to ambush parties and prevent the court from determining and protecting the law."

5 Jarra, E., *Ogólna teoria prawa*, Warszawa 1922, pp. 271–272; Wróblewski, J., *Pragmatyczna jasność prawa*, "Państwo i Prawo" 1988, No. 4, p. 8 ff.

6 OTK 1995, part I, p. 219 ff.

7 Parliamentary paper No. 3137.

law which those decisions concern, is irrelevant.[8] Moreover, this authority has certain limitations.[9]

Indeed, it is difficult to understand how the contents of Article 186[1] of the Code of Civil Procedure can be associated with reinforcement of the judge's discretionary authority.

It raises no doubts that procedural writs submitted to the court, the contents of which either include a description of certain personal events of the petitioner or have a nature of a complaint. Nevertheless, it does not mean that the petitioner does not intend to initiate civil proceedings, although the writ does not include a demand from the court to settle a litigation that, in the petitioner's opinion, exists between him or her and indicated persons.

It is hard not to get the impression that the legislator relied in this scope on the resolution (7) of the Supreme Court of 20 April 1970, III CZP 4/70[10] in compliance with which: "writs of the discussed type that are not actions cannot constitute grounds for initiating civil proceedings and provisions allowing supplementing formal shortcomings do not apply thereto."

However, for this reason the writs in question were dealt with by the president, but in the non-procedural mode by giving the sender a relevant reply with explanation. He or she did not return such a writ pursuant to Article 130 of the Code of Civil Procedure, since application of this norm was excluded.[11]

Simultaneously, in the quoted resolution, the Supreme Court indicated that it "(…) refers to the first writ submitted in the case on the grounds of which it cannot be determined which claim is asserted by the plaintiff and what he or she requests of the court." In the conclusion, the Supreme Court stated that "(…) the recourse to law shall not be acceptable in case the statements made by the plaintiff or circumstances quoted by him or her clearly imply that there is no legal relationship between the plaintiff and the defendant, which could provide grounds for demanding an action" (Article 199 § 1 point 1 of the Code of Civil Procedure).

8 Czarnik, Z., *Prawotwórcza rola sądu a dyskrecjonalność sędziowska*, in: Dębiński, M. et al. (eds.), *Dyskrecjonalna władza sędziego. Zagadnienia z teorii i praktyki*, Tarnobrzeg 2012, p. 16.

9 Kozak, A., *Granice prawniczej władzy dyskrecjonalnej*, Wrocław 2002, pp. 99–101.

10 OSN 1970, No. 9, item 146.

11 Cagara, J., *Zwrot i odrzucenie pisma procesowego*, Instytut Badania Prawa Sądowego, Warszawa 1988, p. 34.

The position presented in the aforementioned resolution was not at that time approved by legal scholars. Hence, the validity of the aforementioned theses was questioned by W. Siedlecki[12] and E. Wengerek and J. Sobkowski.[13]

W. Siedlecki expressed an opinion that, if the case was given in the action a character of a civil case by reference to the civil-law provisions and in reality no legal relationship occurs, then, the submitted procedural claim should be rather assessed as unjustified,[14] which cannot receive legal protection not only by the recourse to law, but also in general, in no other manner, and, therefore, the action should be dismissed and not rejected. The inadmissibility of the recourse to law can only be discussed when the specific civil-law claim cannot be recognised by an ordinary court, since other non-court authority is authorised to recognition thereof.

According to E. Wengerek and J. Sobkowski, the court can properly assess whether the asserted claim is of a civil-law character only after a hearing and can only express this assessment in the issued judgment. Furthermore, the outcome cannot be prejudged by a court in proceedings dealing with formal preliminaries pursuant to Article 199 of the Code of Civil Procedure, even if, according to the court, this shortage is obvious. The arguments presented herein, thus retain full substantive value.

Provision of Article 186^1 of the Code of Civil Procedure appears to be the legislator's return to the situation when not even the court, but a president shall single-handedly assess the asserted procedural claim from the point of view of a specific civil-law relationship actually existing between the parties.

Meanwhile, currently, it is evident that, which E. Waśkowski has already noticed,[15] in order to institute an action, it is completely not necessary for the subjective right to objectively exist, and it is only necessary to state the existence thereof. In other words, the fact of "having" the right, the protection of which is demanded, is necessary not to initiate, but to possibly win the lawsuit.[16] Indeed,

12 Siedlecki, W., *Przegląd orzecznictwa SN z zakresu procesu cywilnego*, "Państwo i Prawo" 1971, No. 7, p. 130.

13 Wengerek, E. and Sobkowski, J., *Przegląd orzecznictwa SN odnośnie procesu cywilnego*, "Nowe Prawo" 1971, No. 5, pp. 744–745.

14 As in: Kruszelnicki, Ś., *Kodeks postępowania cywilnego z komentarzem, część 1*, Poznań 1938, pp. 168–169, on the grounds of the Code of Civil Procedure of 1930.

15 Waśkowski, E., *Skarga, powództwo i prawo do ochrony sądowej*, "Polski Proces Cywilny" 1937, No. 9–10, p. 261.

16 Korzan, K., *Roszczenie procesowe jako przedmiot postępowania cywilnego w kontekście prawa dostępu do sądu i prawa do powództwa*, in: Marciniak, A. (ed.), *Symbolae Vitoldo Broniewicz dedicatae. Księga pamiątkowa ku czci Witolda Broniewicza*, Łódź 1998, p. 186.

according to J. Lapierre,[17] in contemporary procedural systems, "(…) an action can be initiated by anyone who claims that he or she is vested with a right resulting from a substantive-law relationship."

The trial is, in fact, intended to show whether the statements providing grounds for the plaintiff's demand are justified in substantive-law provisions.[18]

Therefore, in principle, any request with regard to providing legal protection submitted to the court by an entity that may have specific procedural burdens, results in establishing a valid (flawless) civil-procedural legal relationship, and initiating proceedings that are always – at least until a certain stage – objective proceedings.[19] The court has to accept for recognition any procedural claim submitted in compliance with procedural provisions and state its position in the form of a decision made in the case irrespectively of its validity or groundlessness.[20] Hence, there is no direct and necessary connection between the civil case pursuant to Article 1 of the Code of Civil Procedure and the substantive relationship. The civil case cannot exist without any substantive grounds, whereas the substantive relationship can be established and executed while never becoming the subject of a lawsuit.[21]

Admissibility of the recourse to law does not depend on proving the existence of a substantive-law claim or the feature of the legal relationship actually existing between the parties. This admissibility depends only on factual circumstances (statements) stated by the plaintiff as the grounds for the asserted claim.[22]

Only initiation of the proceedings, the course and ending thereof can verify those statements and determine whether they are based on substantive law provisions,

17 Lapierre, J., in: Jodłowski, J. et al., *Postępowanie cywilne*, Warszawa 2003, p. 242.

18 Trammer, H., *Następcza bezprzedmiotowość procesu cywilnego*, Kraków 1950, p. 14; Siedlecki, W., *Prawo procesowe cywilne a prawo cywilne materialne*, "Krakowskie Studia Prawnicze" 1969, No. 3–4, p. 78; Murray, P.L. and Stürner, R., *German Civil Justice*, Durham–North Carolina 2004, p. 190.

19 Osowy, P., *Powództwa o ukształtowanie stosunku prawnego*, Warszawa 2015, p. 75.

20 Siedlecki, W., *Zasady wyrokowania w procesie cywilnym*, Warszawa 1957, p. 37. Also: Resich, Z., *Przesłanki procesowe*, Warszawa 1966, p. 25 ff.) indicates the obligation of the court's acceptance of any claim asserted in a suit for recognition, but from the point of view of the constitutional right to judicature.

21 Siedlecki, W., *Zasady wyrokowania…*, p. 92. In foreign literature e.g. Schwab, K.H., *Noch einmal: Bemerkungen zum Streitgegenstand, Festschrüft für G. Lüke zum 70. Geburstag*, München 1997, p. 793.

22 See: Decision of the Supreme Court of 21 May 2002, III CKN 53/02, OSNC 2003, No. 2, item 31; Judgement of the Supreme Court of 3 July 2003 in the case III CKN 564/01 (not published).

possibly leading to a binding determination of the existence or non-existence of a specific civil-law relationship between parties to the proceedings.[23]

Such understanding hitherto justified with procedural arguments is supported with the contents of Article 177 of the Constitution of the Republic of Poland, in compliance with which: "ordinary courts administer justice in all cases with the exception of cases statutorily reserved for jurisdiction of other courts."[24] Also in judicature,[25] it has been stated that the constitutional presumption stipulated in this provision implies that the ordinary court should recognise the case in substantive terms whenever there is no explicit indication that in the particular case brought by the interested party to the ordinary court, another court is competent.

In the view thereof, it is justified to assume that recourse to law is admissible whenever the petitioner (possible plaintiff – applicant) bases his or her claim on legal events that can result in civil-law consequences, even potentially. Thus, the admissibility of recourse to law is not and should not be conditioned with the existence of the claim.[26]

In consequence, the Supreme Court[27] expressed the opinion that: "(…) in principle, any procedural claim in the form of the stated substantive-law claim formulated as the request to award, determine or shape the legal relationship irrespectively of its substantive validity, is covered by the recourse to law – if it concerns entities whose position within this legal relationship or legal ties established therein, is equivalent.

Therefore, the contents of the submitted writ, which has been filed as an action, should be assessed with particular prudence and rejection thereof due to the inadmissibility of recourse to law and the more so, return thereof due to the subjective assessment of the lack of characteristics of a civil case should be considered as

23 See: Decision of the Supreme Court of 22 April 1998, I CKN 1000/97, OSNC 1999 no. 1, item 6 and of 10 March 1999, II CKN 340/98, OSNC 1999, No. 9, item 161.

24 See: Judgement of the Constitutional Tribunal of 10 July 2000, SK 12/99, OTK-A 2000, No. 5, item 143. In the same judgement, the Constitutional Tribunal stated that: "(…) the right to court is vested irrespectively of the fact, whether parties to the litigation are actually bound with the substantive law relationship or, despite the claim of one party to the contrary, in the specific case, no legal relationship binds such parties" (ibidem, p. 300).

25 As the Supreme Court in the Resolution of 8 June 2010, II PZP 5/10, OSNP 2010, No. 23–24, item 279.

26 See: Resolution of the Supreme Court of 3 December 2014, III CZP 91/14, OSNC 2015, No. 10, item 111 and previous judicial decisions referred to therein.

27 See: Decision of the Supreme Court of 4 November 2011, I CSK 50/11, LEX No. 1133782.

unjustified, if the petitioner presented circumstances and events that can constitute the civil-law source for his or her demands.[28]

At the same time, it should be pointed out in this context that the introduction of Article 186[1] of the Code of Civil Procedure did not result in the simultaneous amendment of Article 199 of the Code of Civil Procedure, which in § 1 point 1 includes the absolute, favourable prerequisite for court proceedings in the form of admissibility of recourse to law.[29]

Therefore, when the contents of stated circumstances can correspond (even hypothetically) with the specific substantive-law right that is subject to recognition under civil proceedings, such a writ should be treated as an action and should be initiated and not "automatically" returned pursuant to Article 186[1] of the Code of Civil Procedure. As a matter of fact, it should be remembered that the function of the right to court is not to provide the litigant party with a favourable result, but to enable effective possibility of requesting from the court issuance of a just decision (*sententia iusta*) according to the hearing of evidence and in compliance with the contents of substantive law.[30] Since, as noticed by L. Garlicki:[31] "(…) the principle of the right to court means that limiting citizens' rights is only possible on the grounds of a judicial settlement issued upon conducting formalised proceedings and in the subjective aspect it formulates the right of the citizen, whose rights have been violated in his or her opinion, to request final determination of his or her legal situation by the judicial authority."[32]

28 See: Decision of the Supreme Court of 24 June 2010, IV CSK 554/09, OSNC 2011, No. 2, item 29 and judicial decisions referred to therein.

29 Jędrejek, G., *Kilka uwag dotyczących planowanych zmian przez MS w cywilnym postępowaniu rozpoznawczym*, in: Jędrejek, G. et al. (eds.), *Postępowanie cywilne – wprowadzone i projektowane zmiany 2019*, Warszawa 2019, p. 19; also the Decision of Supreme Court of 21 May 2002, op. cit.

30 Czeszejko-Sochacki, Z., *Prawo do sądu w* świetle *Konstytucji Rzeczypospolitej Polskiej* (*Ogólna charakterystyka*), "Państwo i Prawo" 1997, No. 11–12, p. 89; Ereciński, T. and Weitz, K., *Prawda i równość w postępowaniu cywilnym a orzecznictwo Trybunału Konstytucyjnego*, in: Ereciński, T. and Weitz, K. (eds.), *Orzecznictwo Trybunału Konstytucyjnego a Kodeks postępowania cywilnego*, Warszawa 2010, p. 43; Grzegorczyk, P., *Immunitet państwa w postępowaniu cywilnym*, Warszawa 2010, pp. 309–310; Judgement of the Supreme Court of 4 October 2000, III CKN 1006/00, Legalis No. 58088; Resolution of the Supreme Court of 27 June 2007, III CZP 152/06, OSNC 2007, No. 12, item 175; Judgement of the Constitutional Court of 10 June 2003, SK 37/02, OTK-A 2003, No. 6, item 53.

31 Garlicki, L., *Prawo do sądu*, in: Wieruszewski, R. (ed.), *Prawa człowieka. Model prawny*, Wrocław–Warszawa–Kraków 1991, p. 538.

32 As in: Osowy, P., *Problemy dotyczące dostosowania polskiego prawa sądowego cywilnego do prawa europejskiego – ochrona praw i wolności na przykładzie prawa do sądu*, "Rejent" 2000, No. 12, p. 83.

In reinforcement of the above, A. Jakubecki,[33] by indicating the predominant characteristics of the lawsuit, that is, the principle of availability (faculty to dispose), states that: "(…) the substantive availability *sensu stricto* comprises indications of the parties' autonomy of will in the field of procedural law, demonstrated in the monopoly of initiating and continuing the suit."

Therefore, it should not be a problem that a citizen writes a writ (an action-motion) in a manner disclosing ignorance of the law. It is the court that should be bound to find a relevant approach to the issue of a provision that shall provide legal protection. In fact, work on the knowledge of legal provisions constitutes groundwork. However, since the grounds are faulty, it should not be required from the citizen to have full knowledge and be liable for the negative consequences of this ignorance.[34]

Such understanding of the case should result from the fact that the right to court should be, above all, treated as a directive to create it and a hint in the process of interpretation of such a right.[35] With regard to notion of interpretation, the starting point of this consists in the observation that the lawsuit is the most important test of the effectiveness, rationality and accuracy of legislative solutions in the sphere of practical problems encountered by the individual.[36]

Unfortunately, the reality is different. I believe that today in all fields of creativity and thus, also in the field of legislation, novelty is sought at all costs, since this is required by the spirit of the times. Nonetheless, this strive for a new path, greed of originality stemming from the desire to get rid of old forms should remain under logical control. Especially in the legislative field, introducing too risky changes not sufficiently tried or not resulting from domestic experiences can prove not to be as much innovative, but in the long-term a measure raising doubts, which can be multiplied with the clear "impairment" of perceiving rules of the proper legislative technique. This view is confirmed with amendments to the Code of Civil Procedure of the last several years wherein it is clearly visible that consecutive amendments constitute an attempt at repairing what has been destroyed by previous amendments

33 Jakubecki, A., *Naczelne zasady postępowania cywilnego w świetle nowelizacji kodeksu postępowania cywilnego*, in: Ratusińska, I. (ed.), *Czterdziestolecie kodeksu postępowania cywilnego*, Kraków 2006, p. 351.

34 Osowy, P., *Głos w dyskusji*, in: Sawczuk, M. (ed.), *Czterdzieści lat kodeksu cywilnego. Materiały z Ogólnopolskiego Zjazdu Cywilistów w Rzeszowie (8–10 października 2004 r.)*, Kraków 2006, pp. 53–54.

35 Grzegorczyk, P. and Weitz, K., in: Safjan, M. (ed.), *Konstytucja RP. Tom I. Komentarz do art. 1–86*, Warszawa 2016, Legalis, commentary to Article 45.

36 Gutowski, M., *Opinia Komisji Legislacyjnej przy Naczelnej Radzie Adwokackiej do projektu ustawy o zmianie ustawy Kodeks Postępowania Cywilnego oraz niektórych innych ustaw z dnia 27 listopada 2017 r.*, Poznań 2017, p. 8.

and which instead of giving a coherent and logical reply to arising questions (issues), only multiply them (mainly due to the lack of designations introduced to the Code of Civil Procedure).[37]

While drawing up procedural law provisions, the legislator should be aware that they have to be legible so that the persons applying them have no doubts regarding the type of procedural activities they have to undertake and so that parties to the proceedings could foresee which activities shall be undertaken by the adjudicating court.[38] Thus, the principle of moderate formalism shall be preserved,[39] and it shall be possible to assess the proceedings as reliable.[40]

Unfortunately, it seems that it is not like that in the case of the introduction of Article 186[1] of the Code of Civil Procedure which is an example of defective (using an indefinite phrase[41]) and incoherent (used terminology[42]) legislation, application of which can infringe upon the citizen's right to court.[43]

37 Osowy, P., *Prawo procesowe cywilne – tradycja a postęp. Wykład inauguracyjny WSPiA 2014/2015*, Przemyśl 2014, p. 14; idem, *Tradycja a współczesność w nowelizacji kodeksu postępowania cywilnego – (refleksja ogólna)*, in: Marszałkowa-Krześ, E. et al. (eds.), *Kodeks postępowania cywilnego z perspektywy pięćdziesięciolecia jego obowiązywania. Doświadczenia i perspektywy*, Sopot 2016, pp. 216–217.

38 It was already underlined in the Ancient Rome in the legal maxim: "*Ubi ius incertum, ibi ius nullum*" (where the law is uncertain, there is no law); Kuryłowicz, M., *Słownik terminów, zwrotów i sentencji prawniczych łacińskich oraz pochodzenia łacińskiego*, Kraków 1999, p. 124.

39 Osowy, P., *Umiarkowany formalizm procesowy*, in: Flaga-Gieruszyńska, K. and Jędrejek, G. (eds.), *Aequitas Sequitur Legem. Księga jubileuszowa z okazji 75. urodzin profesora Andrzeja Zielińskiego*, Warszawa 2014, p. 437 ff.

40 Góra-Błaszczykowska, A., *Zasada równości stron w procesie cywilnym*, Warszawa 2008, pp. 186–192; idem, *Ekspertyza na temat projektu ustawy o zmianie ustawy – Kodeks postępowania cywilnego oraz niektórych innych ustaw – druk sejmowy nr 3137*, http://www.sejm.gov.pl/sejm8.nsf/opinieBAS.xsp?nr=3137 (accessed 15.5.2019), p. 15.

41 Indescribability of the used term entails its simultaneous vagueness, which being a logical category concerns the scope thereof. The indescribability consists in the fact that despite learning about the features of the used term, we cannot judge whether it is or it is not the *designation* of the specific name and thus, whether it is included in the current scope thereof, or not.

42 In Article 394 § 1 point 1 of the Code of Civil Procedure including the enumeration of decisions and orders with regard to which a complaint can be filed, the legislator used the phrase: "petition for examination of a case", whereas, in Article 186[1] of the Code of Civil Procedure the following phrase has been used: "petition for examination of a civil case litigation" – which raises justified doubts in determination of the subject of the examination of the complaint.

43 Kościołek, A., in: Gołaczyński, J. and Szostek, D. (eds.), *Kodeks postępowania cywilnego. Komentarz do ustawy z 4.7.2019 r. o zmianie ustawy – Kodeks postępowania cywilnego oraz niektórych innych ustaw*, Legalis, commentary do Article 186[1], who expressly states that "(…) such a solution may lead to the worsening of the procedural situation and infringement of constitutional guarantees, especially of persons who do not have the possibility of benefiting from aid provided by a professional attorney *ad litem*."

First of all, from the logical point of view, the provision of Article 186[1] of the Code of Civil Procedure includes in the first sentence a rule and in its final part an exception.

In compliance with the provision of Article 186[1] of the Code of Civil Procedure *in fine* the writ filed as an action shall not be returned, if "exceptional circumstances justify initiation thereof."

This regulation appears as *inelegantia verbis*.

The legislator has not explained what exceptional circumstances in case of occurrence thereof would result in not returning a writ that is not an action.

In the justification of the project,[44] it has been indicated that "(…) the possibility of processing such a writ should be foreseen in case it is justified with exceptional circumstances (it does not have to be a procedural initiation – the writ can be e.g. forwarded to the competent authority)."

Such an interpretation raises serious doubts.

It seems that the obligation to return the writ shall apply only to those competences of the president of the division that are not included in the obligation of undertaking procedural activities.[45] It should be recognised that this shall usually result from treating the writ as a complaint on activity (negligence) of a particular judicial authority (e.g. a judge, a division official, a judicial enforcement officer, a secretariat employee) or non-judicial authority (e.g. a public administration authority). Relevant processing of the writ can consist in forwarding the writ by the president of the division to a pertinent authority (the president of the court, the Minister of Justice, the public administration authority). Moreover, the president should also forward the writ to the prosecutor's office (Article 304 of the Code of Criminal Procedure), if it includes a description of a criminal behaviour of a specific entity, including a natural person or a legal person not exercising public power (administration). The obligation to notify the guardianship court in cases stipulated in Article 572 of the Code of Civil Procedure[46] is similar.

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44 Parliamentary Paper no. 3137.

45 In compliance with the definition that today seems to reflect common views, an act of legal procedure constitutes such a formal act (in the form of an action or conscious omission) of a procedural subject, which, according to the Procedural Act, can have consequences for the lawsuit (Waśkowski, E., *Istota czynności procesowych*, "Polski Proces Cywilny" 1937, No. 24, p. 740; Siedlecki, W., *Czynności procesowe*, "Państwo i Prawo" 1951, No. 11, p. 704). In foreign literature e.g. Rosenberg, L. et al., *Zivilprozessrecht*, München 2010, pp. 328–329; Simotta, D.A., in: Rechberger, W.H. and Simotta, D.A. (eds.), *Grundriß des österreichischen Zivilprozeßrechts*, Wien 2010, pp. 306–308.

46 As: Kunicki, I., in: Góra-Błaszczykowska, A. (ed.), *Kodeks postępowania cywilnego. Tom I A. Komentarz do art. 1-42412*, Warszawa 2020, Legalis, commentary to Article 186[1].

Secondly, it is worth studying the analysis conducted by the Supreme Court Research and Analyses Office, which in its opinion of 4 January 2018 expressed its doubts regarding the compliance of this provision with Article 45 § 1 and Article 77 § 2 of the Constitution of the Republic of Poland.[47] since, in essence, it comes down to the rejection of recognising the case.[48] It is underlined that this issue can be socially significant, especially in cases in the scope of social insurance, in which it often happens that the party not satisfied with the administrative decision does not formulate any requests and usually acts without any professional plenipotentiary.

B. Czech[49] seems to underestimate these concerns and he indicates the fact that "(…) provided for in Article 186[1] of the Code of Civil Procedure return of the writ is subject to the instance review and the party can easily obtain legal advice, also free of charge, in the case of the need to file an action or a motion and the amount of the judge's work necessary for the aid automatically deprives other parties engagement in their cases."

It seems that the possibility of instance review itself does not reduce the doubts in case such a party is an individual e.g. less educated, who does not use professional legal aid due to a lack of necessary funds or does not obtain such aid as a result of refusing the motion for appointment of a court-assigned attorney.

Furthermore, unfortunately, today's social realities indicate that obtaining free of charge legal aid is more and more often illusive.[50]

In addition, the contents of the filed writ can include inaccurate phrases. This situation does not release the president from attempting to determine the type of settlement requested by the party – or the aim (intention) of filing such a writ.[51] In such a case, the president of the division or the appointed judge reporter should call on the author to supplement formal shortages of the action (Article 130 of the Code

47 It seems that is shall also concern compliance with the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, Dz.U. (Journal of Laws) 1993, No. 61, item 284 – Article 6 § 1 and Article 14 § 1.

48 Konarska, E. et al., *Opinia do projektu ustawy o zmianie ustawy – kodeks postępowaniu cywilnego oraz niektórych innych ustaw*, Warszawa 2018, pp. 3–4.

49 Czech, B., in: Marciniak, A. (ed.), *Kodeks postępowania cywilnego. Tom I. Komentarz. Art. 1–205*, Warszawa 2019, pp. 1217–1218.

50 See: Letter of the Commissioner for Human Rights to the President of the Republic of Poland of 6 July 2017, (IV.510.9.2014.AB, pp. 1–2) regarding free legal assistance and legal education. The contents of the letter imply that, among others: "(…) the system of free legal assistance is inefficient and ineffective, and the number of persons benefiting from free advice within the programme binding as of 1 January 2016 is insignificant."

51 Kunicki, I., op. cit., commentary to Article 187.

of Civil Procedure)[52] by specifying the claim (Article 187 § 1 point 1 of the Code of Civil Procedure) and indicating the facts on which he or she bases their statements (Article 187 § 1 point 2 of the Code of Civil Procedure).[53] The court should return the writ pursuant to Article 186[1] of the Code of Civil Procedure only in the absence of such a supplementation.

It seems that when properly applied, Article 130 of the Code of Civil Procedure does not constitute aid to the potential plaintiff, yet, serves as providing him or her with the right to court resulting from Article 45 § 1 of the Constitution of the Republic of Poland and does not lead to disproportions signalled in the literature, which would entitle, e.g. the defendant, to request analogous aid in formulating the reply to the action or with regard to the doubts in the scope of impartiality of the president (and not the court in this case).[54] The possibility of processing the procedural writ should not be executed at the discretion of the president of the division and without attempting to explain the contents thereof.[55]

Furthermore, a situation wherein the court of the 2nd instance recognising the complaint[56] regarding the ruling[57] on the return (Article 394 § 1 point 1 of the Code of Civil Procedure) shares the opinion of the president and by dismissing thereof shall deprive the person of the possibility to process his or her procedural writ as an action,[58] cannot be excluded. This is significant, since the returned writ shall not result in any legal consequences (neither substantive, nor procedural) even if, in the opinion of the petitioner, the intention was to request recognition of a civil-type of litigation. The second instance court decision dismissing complaints on the return of the writ pursuant to Article 186[1] of the Code of Civil Procedure cannot be complained against to the Supreme Court, since it does not include recognition

52 See: e.g. Decision of the Supreme Court of 22 July 1999, I PZ 33/99, OSNAPiUS 2000, No. 23, item 862.

53 Zieliński, A. and Flaga-Gieruszyńska, K., *Kodeks postępowania cywilnego. Komentarz*, Warszawa 2016, p. 381; see: Decision of the Supreme Court of 18 March 2010, V CZ 10/10, Legalis No. 358181 or Judgement of the Administrative Court in Szczecin of 16 March 2016, I ACa 941/15, Legalis No. 1470191.

54 Czech, B., op. cit., p. 1217.

55 As the Supreme Court in the Decision of 22 July 1999, op. cit.

56 The legislator legitimately did not restrict himself to the horizontal complaint (non-devolutive).

57 Since it concerns the resolution of the president and not the court, it should have the form of an order (Article 47 § 31 of the Code of Civil Procedure).

58 Despite the fact that the contents of Article 394 § 1 point 1 of the Code of Civil Procedure concern the return of the writ submitted as an action, it should be consequently stated that, by the reference included in Article 13 § 2 of the Code of Civil Procedure, this provision shall respectively apply to the president's order on the return of writs initiating proceedings other than the lawsuit.

pursuant to Article 398[1] § 1 sentence 1 of the Code of Civil Procedure[59] as it is neither the decision concluding the proceedings in the case due to the previous lack of the pendency of the litigation (Article 199 § 1 point 2 of the Code of Civil Procedure). However, due to the necessity to protect the constitutional right to court – legitimately in the literature[60] – such an interpretation of Article 398[1] § 1 of the Code of Civil Procedure (if necessary, even with the use of the analogy[61]) is postulated in order to ensure the possibility of the Supreme Court's review over decisions of the second instance courts dismissing complaints on the return of the writ pursuant to Article 186[1] of the Code of Civil Procedure.

As accurately noticed by M. Dziurda:[62] "(…) due to the necessity of guaranteeing the right to court, even if in the course of recognising the complaint on the ruling on return issued pursuant to Article 186[1] of the Code of Civil Procedure, it turns out that the writ can, if fact, be understood as including the request to recognise the civil case pursuant to Article 1 of the Code of Civil Procedure, the court of the second instance should dismiss it in order to ensure recognition of the case in compliance with the provisions of the Code of Civil Procedure."

In the binding classification system of the Code of Civil Procedure, the provision of Article 186[1] shall also apply in non-procedural proceedings (as a result of applying Article 13 § 2 of the Code of Civil Procedure),[63] despite not very precise formulation of the provision "(…) a civil-case litigation,[64]" since litigations can also be recognised in non-procedural proceedings. Therefore, the president should strive to clarify whether the petitioner requests the legal aid that should be provided by the court by issuing a substantive decision.[65] Furthermore, the contents of

59 Dziurda, M., in: Zembrzuski, T. (ed.), *Kodeks postępowania cywilnego. Koszty sądowe w sprawach cywilnych. Dochodzenie roszczeń w postępowaniu grupowym. Przepisy przejściowe. Komentarz do zmian. Tom I i II*, Warszawa 2019, Legalis, commentary to Article 186[1], v. 28.

60 Ibidem, v. 29.

61 E.g. the Supreme Court commented in favour of applying prudent iuris analogy in its Resolution of 22 January 1998, III CZP 69/97, OSNC 1998, no. 7–8, item 111.

62 Dziurda, M., op. cit., v. 27.

63 Differently: Klonowski, M., *Kierunki zmian postępowania cywilnego w projekcie Ministra Sprawiedliwości ustawy o zmianie ustawy – Kodeks postępowania cywilnego oraz niektórych innych ustaw z 27.11.2017 r. – podstawowe założenia, przegląd proponowanych rozwiązań oraz ich ocena*, "Polski Proces Cywilny" 2018, No. 2, p. 188.

64 Two types of being have been differentiated: the ones that are a part of the nature and the ones that have been created by a human. This differentiation was previously introduced by Greeks, who separated what comes from nature (*physei*), and what comes from art, that is, human creation (*nomo, theei*). Therefore, when we are reading and writing about the "character" of a civil case, we intuitively (and thus, nomo) understand its "feature" and therefore, its contents.

65 Szanciło, T., in: Szanciło, T. (ed.), *Kodeks postępowania cywilnego. Komentarz*, Warszawa 2019, pp. 600–601.

such a writ can, e.g. in the enforcement or family proceedings, signal the existence of irregularities.[66]

To sum up, it should be stated that the contents of Article 186[1] of the Code of Civil Procedure can affect obtaining by the party a valid decision on the merits of the case. It also includes indefinite phrases that lack an unequivocal designation of terminology: "the writ (…), the contents of which do not imply the request to recognise a civil-case litigation" or "exceptional circumstances justifying initiation of proceedings."[67] Using indefinite concepts in the procedural act extends the time of work of the judge who should focus on the merits of the case and not on analysing the intention of the drafter and on decoding provisions of the civil proceedings.[68] Such a situation can lead to too far-reaching and undesirable discrepancies in court practice in the scope of application thereof, since particular judges or judging panels (in recognition of a complaint) can interpret this norm differently, which may lead to the situation when civil proceedings become an unforeseeable and disordered activity and it may lose the guarantee significance for participants thereof.[69]

Allowing the possibility[70] of returning the writ filed as an action by the president stipulated in Article 186[1] of the Code of Civil Procedure should be *de facto* and *de iure* considered as a potential possibility of depriving the party of any path to assert claims and thus, limit the constitutional right to court.

66 Marszałkowska-Krześ, E., *Opinia Ośrodka Badań, Studiów i Legislacji Krajowej Rady Radców Prawnych o projekcie ustawy o zmianie ustawy – Kodeks postępowania cywilnego oraz niektórych innych ustaw*, Warszawa 2017, pp. 6–7; Szanciło, T., op. cit., pp. 690–691.

67 Similar position of the "Iustitia" Polish Judges Association on the bill on the amendment to the act – the Code of Civil Procedure and certain other acts (UD 309), Warszawa 2017, p. 7, where the poor linguistic level is underlined.

68 Torbus, A., *Czy projekt nowelizacji Kodeksu postępowania cywilnego pod nazwą „Ustawa o zmianie ustawy – Kodeks postępowania cywilnego oraz niektórych innych ustaw" (druk nr 3137) pozwala zwiększyć efektywności postępowania cywilnego?*, Warszawa 2019, p. 31; is of the opinion that Article 186[1] of the Code of Civil Procedure is a vague provision conflicting with the regulation on the rejection of an action (Article 199 § 1 point 1 of the Code of Civil Procedure), and from the point of view of the effectiveness of proceedings, rather completely redundant.

69 Cieślak, S., *Formalizm postępowania cywilnego*, Warszawa 2008, p. 118.

70 It has been stated in the literature that in compliance with Article 186[1] of the Code of Civil Procedure, sanction in the form of returning the writ without undertaking any further activities does not constitute only a possibility the execution of which would be left to the president's discretion, but it is his or her obligation. Therefore, whenever, in the president's opinion a writ is submitted, which does not include any petition for examination of the case, he or she is obliged to return the writ to the petitioner (Kościołek A., op.cit.).

Conlusion

In conclusion, it should be underlined that obviously the paper does not exhaust all issues related to the concept of a writ filed as an action and return thereof pursuant to Article 186[1] of the Code of Civil Procedure. Moreover, the presented opinion does not aspire to be called "the only right." Writing this paper was dictated by the need to address the topic included in the title. I tried to underline doubts that may arise with regard to the possible interpretation thereof. However, I did so in order to, by underlining the complexity of this issue, indicate the necessity of starting a discussion the subject of which was the described matter.

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