

La prise à partie in the French Code of civil procedure of 1806 and the question of the extent of judges' legal liability in the first half of the 19th century in the Polish territories¹

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Introduction

The French Code of civil procedure of 1806 became effective in the Polish territories in the early years of the 19th century. It was, however, implemented in breach of constitutional principles and it contained a host of solutions and institutions alien to the Polish society, and thus it was subject to constant criticism followed with a number of attempts to repeal it. Despite the fact that it was originally to be introduced as a temporary law, it was maintained until 1876, when the Russian procedure took effect in the Kingdom of Poland. This code provided, among others, for an institution of judges' civil liability, heretofore unknown in the Polish territories («prise à partie»). The objective of the present article is to analyze the reactions to this institution of the Polish (Russian) legislator and representatives of the legal science – to analyze how, on these two planes, «prise à partie» was handled and what shape this institution

took upon its transplanted onto the Polish substrate.

1. «*Prise à partie*» in France – evolution from the royal ordinances of 16th and 17th centuries until the 1806 Code

According to the 19th century definition by Merlin, which was an almost verbatim copy of the one contained in the 1784 work by Guyot², in the drafting of which he actually had a part, «prise à partie» was understood as «le recours qu'exerce une partie contre son juge dans le cas prévu par la loi, à l'effet de le rendre responsable du mal jugé, et de tous dépens, dommages et intérêts»³. Similarly, Carré defined it as «une action ouverte dans les cas prévus par la loi, soit contre un tribunal entier, soit contre un juge, en réparation du dommage qu'il aurait causé par abus de son ministère»⁴. The institution, not very fortunately, was

stipulated in the 1806 Code of Civil Procedure (*Code de procédure civile*, from here on: CCP), in its Book IV, along with the extraordinary measures of challenging judgements («voies extraordinaires pour attaquer les jugements»)⁵, as it did not result in reversing the judgement; it was merely an action to redress damage against the judge, and not against the judgement itself.

It is worth mentioning that in France this institution was a time-honoured one that had been in place for centuries, and its roots can be traced back to the ancient custom of judicial duel («combat judiciaire») of judges accused of having issued a "bad judgement" («mauvais jugement»). Action against judges was admitted, among others, by the 1579 Ordinance of Blois, most frequently cited by various authors writing about pre-revolutionary provisions concerning «prise à partie», (Art. 135⁶, 143⁷, 147⁸ and 154⁹), but this issue had been also already addressed by the 1498 ordinance (Art. 26) or by the Ordinance of Francis I from August 1539 - in Art. 142 and 143¹⁰. The Ordinance of Louis XIV from 1667 envisaged «prise à partie» in cases where justice had been denied¹¹, where a judgement contrary to the law was issued¹², where the competences of the judge had been breached (where they evidently had no jurisdiction)¹³ and in cases where the course of instance had been breached¹⁴. It was also addressed in the *Code de délits et des peines* of 3 brumaire an IV (art. 565)¹⁵.

In the 1806 Code of civil procedure, this institution was regulated with more precision by Art. 505-516, stipulating that a judge could be held accountable if he committed

1. "deceit, fraud or misappropriation" («dol, fraude ou concussion»), and not

only at delivering the judgement, but throughout the entire course of the case.

2. In situations clearly defined by the law – they were not enumerated in the CCP. French legislation included these provisions in many other legal acts, issued both before the CCP took effect and after its promulgation – a few such provisions were placed in the *Code d'instruction criminelle* of 1808¹⁶ (e.g. Art. 77, 112, 164, 271, 358, 370, 593), but it was never implemented in the Polish territories.

3. If the law stipulated judge's liability under pain of redress of damages and lost profits; as, for example, under Art. 15 (if, at the fault of a deputy judge, the 4-month peremptory period of an interlocutory judgement has lapsed) or Art. 928 (if seals are lifted before the legally prescribed time limit has lapsed) of the CCP.

4. Where justice has been denied; this is mainly addressed by the 1804 Civil Code, which stipulates that judges who refuse to determine cases under pretext of the silence, obscurity, or insufficiency of the law, are to be proceeded against as guilty of a denial of justice. Art. 506 of the CCP also provides for other cases: where judges do not respond to applications or do not hear cases in the order resulting from the agenda¹⁷.

Depending on whom a party wanted to be held liable, the CCP stipulated submission of a complaint either to the Appellate Court (in the case of justices of the peace, commercial tribunals and courts of first instance or any of their members, appellate judges and criminal judges), or to the High Imperial Court («Haute Cour impériale»), as per Art. 101 of the Constitution dated 28

floréal XII (18 May 1804). Yet the initiation of proceedings each time hinged on the consent of the court, which was to examine the complaint. To this end, it was necessary to file an application signed by the party or its representative. The application had to be accompanied with supporting evidence. Its contents could not include offensive words under a pain of fine as established by the court. If an application was rejected, the applicant was fined with 300 francs, regardless of the fact that he could also be ordered to "pay damages and interest to the parties" («sans préjudice des dommages et intérêts envers les parties» – Art. 513). If the application was accepted, a copy of it, along with acceptance decision, had to be submitted to the judge or judges against whom the complaint was filed, and they had 8 days to prepare their defence (Art. 514)¹⁸. Both judgements could be appealed to the Court of Cassation¹⁹.

The judge against whom the complaint was filed was removed from hearing the case underlying the complaint, even until the final judgement delivered in the dispute to hold him liable. Such a judge was also required to withdraw from any other cases pending with the participation of the complainant, his direct relatives and spouse, under pain of nullity of the judgement.

The complaint concerning holding a judge liable was not subject to any reconciliation proceedings. It was brought to audience based on a simple summons («portée à l'audience sur un simple acte»), but always in a different division than the one that decided on the acceptance of the complaint. This is because the accepting division, by the very act of considering it worth examination, made it clear that it deems the complaint justified.

Where the complaint was rejected, the petitioning party was fined with 300 francs, besides the additional pecuniary redress to the party, if any. In the event of the opposite judgement, finding the complaint justified, the judge would be ordered to pay damages and lost benefits, and besides, depending on the circumstances of his breach, he could also be subject to penalization by the relevant court.

Within the context of the consequences of such a decision for the judgement that had been the source of complaint, the provisions did not stipulate that this judgement, even for the winning party, would lose its binding effect²⁰. Thus, in order to challenge such a judgement, the interested party would have to go through with ordinary measures or with trial review based on civil request («requête civile»). Especially this last resort could be taken if, upon acceptance of the complaint against the judge, it turned out that the judgement had been delivered as a result of collusion with another party, which had bribed the judge or convinced him otherwise to rule in its favour.

We should also mention that the practical performance of the second sentence of Art. 509 was very problematic also in France. Pursuant to its provision, criminal and appellate courts or any of their divisions could only be held liable provided that the provision of Art. 101, n^o 7 *sénatus-consulte du 28 floréal an XII* was satisfied. The High Imperial Court stipulated in this provision never functioned and thus did not perform the competences it had been entrusted with. Art. 133 of this constitution stipulated the issuance of a «nouveau sénatus-consulte» addressing «le surplus des dispositions relatives à l'organisation et à

l'action de la Haute Cour impériale», but this never actually happened. Nevertheless, as underscored by Merlin, to assume that the legislator intended for criminal or appellate courts not to hold any liability in this scope would be absurd²¹. In the earlier periods, the competences concerning «prise à partie» were in the hands of the Court of Cassation (Cassation Tribunal)²², which, in the situation whereas the High Imperial Court was not established not only *de facto* but also *de iure*, could exercise the competences reserved for the latter in the CCP²³. The Constitutional Charter of 4 June 1814 did stipulate the creation of organs composed of the representatives of the executive, legislative and judicial powers; it also did not address the «prise à partie» on the constitutional level. We should also note that in France the institution of judges' civil liability is not at present regulated on the constitutional level, and the attempt to move it to this level, undertaken in the year XII, failed.

Importantly, what is significant in the publications discussing «prise à partie», of which the mentioned works by Guyot, Merlin or Carré are just a miniature part, is the way in which this institution has been characterized. In addressing its individual aspects, the authors referred to legal acts issued throughout centuries (the old ordinances or provisions of the revolutionary law), as well as to the views of representatives of the doctrine and to the judicial decisions.

Thus, the complete regulation of the institution of «prise à partie» in the 19th century French law, was made up not only of elements originating from various legal bills (such as the Civil Code, the Code of Civil Procedure, the Code of Criminal Proce-

dures), but also of interpretations based on time-honoured legislative, doctrinal and judicial traditions. The French regulation of this institution resembled a multi-sided geometric figure, where each of the listed elements constituted one side. Thus it must be underscored that it is difficult to speak of «prise à partie» exclusively within the context of the CCP, as its provisions were just one of those elements.

2. *The legislative version of «prise à partie» on the Polish territories*

The constitutional act octroyed by Napoleon to the Duchy of Warsaw established as a French protectorate, guaranteed the adoption of the 1804 *Code Civil* and this could not be stopped even by the numerous protests by wealthy nobility, clergy and members of the government²⁴. Yet the issue of adoption of other French legal acts had not been articulated quite as clearly. The Code of Civil Procedure was introduced on 23 May 1808 by virtue of a ministerial instruction, issued by the minister of justice Feliks Łubieński, in contravention of the proper legislative path set out in the Constitution, which required the approval of the Council of State, of the King and of the Sejm, as well as the confirmation of the Senate (Art. 15, 18, 21, 22 and 27)²⁵. Having ran into the resistance of the Council of State, Łubieński single-handedly decided to adopt the French procedure²⁶, for which he obtained the royal approval of Frederic August, initially also against it, *post factum* (on 4 July 1808). Without a doubt, this path of implementation – illegal, as underscored many times afterwards – contributed to the fact that the

Code of Civil Procedure was in fact the most criticized part of the introduced French legislation. What is more, the organization of the judiciary was done in "the French fashion", but with some important differences²⁷.

The Constitution of the Duchy of Warsaw guaranteed the "independence of the court order"²⁸ and the option of "removal" of a judge in the event of his "exercise of official duties in breach of law"²⁹. The Constitutional Charter did not address the issue of their civil liability directly. Similar was the case of the Organization of the Civil Judiciary (*Oragnizacya sądownictwa cywilnego*)³⁰ of 13 May 1808 or of the Internal Organization of the Appellate Court (*Oragnizacya wewnętrzna Sądu Apellacyjnego*) dated 28 October 1809³¹.

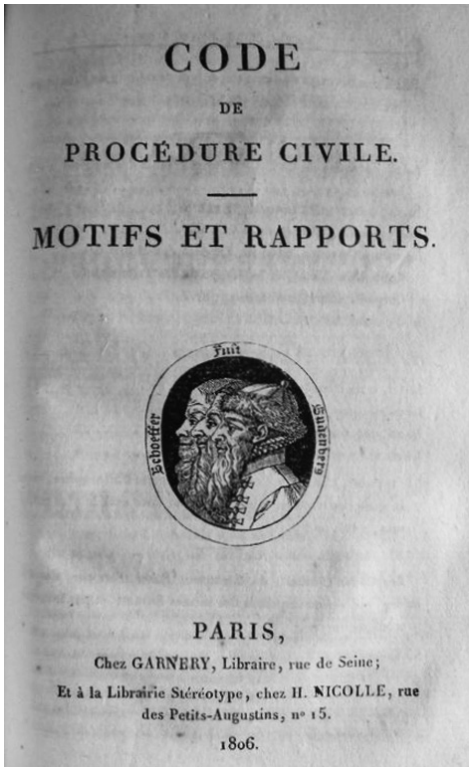
The French Code of civil procedure was adopted without any changes that would account for the specificity of the Polish territories³². For example, in the Duchy of Warsaw, there was not even the idea to establish the High Imperial Court, but the contents of Art. 509 was not modified at the time of adoption of the CCP. Also from this article followed, as already mentioned, the jurisdiction of the Court of Appeals in cases concerning liability of justices of the peace, commercial tribunals and tribunals of the first instance and their members, appellate and criminal judges. However, on 3 April 1810, Frederic August issued a decree concerning the organization of the Court of Cassation, whose responsibilities in the Duchy were handled by the Council of State³³. Its Title V («O złożeniu Sędziego Apellacyjnego, lub Sędziego Pokoju» [On the Removal of an Appellate Judge or Justice of the Peace]), addressed not only "misdemeanours and offences committed

in office" by "a president, prosecutor, appellate judge or justice of the peace", in cases in which the complaint was to be filed ex officio (Art. 93), but it also stipulated that «Parties can submit their direct complaints to the Court of Cassation, but only if they are pursuing claims for damages connected to a misdemeanour or offence committed in office, or if the complaint is submitted in the ordinary way in a case already pending cassation» (Art. 94)³⁴.

Therefore, there emerged a situation whereas parties who moved for holding an appellate judge or a justice of the peace liable under «prise à partie» could apply with the Court of Cassation to remove such a judge from office. Thus, within this context, their liability acquired the nature of disciplinary liability, and the aforementioned judges did not have any recourse against the judgement of the Court of Cassation. At the same time, the issue of which body would adjudicate in those cases where the CCP did not stipulate the jurisdiction of the appellate court (regarding the appellate court³⁵, criminal courts or any of their divisions), was not decided.

On 27 October 1812, a rescript of the Minister of Justice was issued which regulated the issues of disciplinary proceedings against court officials, pursuant to which, explicitly

disciplinary proceedings are the same as prescribed in Arts. 95 to 101 of the decree dated 3 April 1810 [concerning the organization of the Court of Cassation - AK] and they differ from proceedings in cases of «prise à partie», as prescribed in Arts. 505 and subsequent of the Code of Civil Procedure, because the consequence of the former is disciplinary action and the consequence of the latter is civil damages awarded to the party seeking them (point 8)³⁶.



French Code of civil procedure of 1806

Above-mentioned Art. 94 has been left out. Point 7 of the instruction also stipulated an option to report breaches of officials by private parties only in cases listed under Art. 94 of the decree dated 3 April 1810³⁷, meaning if they initiated «prise à partie» proceedings (ex officio, these were handled by presidents of individual courts and prosecutors). On the one hand, the instruction clearly differentiated the disciplinary proceedings laid down in it from the French institution concerning holding a judge liable, but on the other hand this instruction used some of the rules connected with the «prise à partie» as set out in the CCP, such

as the order for “the official against whom a complaint has been filed not to exercise office”, in reference to Art. 514 of the CCP (point 11)³⁸.

Moreover, the Court of Cassation stopped functioning upon the collapse of the Duchy of Warsaw³⁹. Its duties as regarded civil cases were performed by the established by virtue of a decision of the Provisional Government of 21 September 1815, High National Court («Sąd Najwyższej Instancji»), whose competences, however, entailed to adjudicating *in merito*, as they combined cassation and review elements⁴⁰. Moreover, its composition (senators and judges) meant that this organ combined judicial and administrative functions.

Similarly to the Constitution of the Duchy of Warsaw, the Constitution of the Kingdom of Poland octroyed by Alexander I on 27 November 1815 did not address the issue of civil liability of court officials directly; it only mentioned “independence of the judiciary (judge)”, “removal of a judge from office” in the case of “breaches in office or other offences” and the right of the “Supreme Tribunal [whose establishment was provided for in Art. 151 – AK] [...] to discipline magistrates and restrain the deviations that might be committed by them, as to the accuracy of the public service”⁴¹. The provision of Art. 151 of the Constitution was never observed, and the function of the disciplinary court for judicial officials, provided for in Art. 143, was taken over by the Court of High Instance⁴².

A division into various kinds of liability of court officials did emerge, however, as two separate decisions were issued introducing the option to appeal against judgments delivered in those cases. The royal decree dated 8 (20) May 1817⁴³ dealt with

“criminal disciplinary liability”, while the one from 6 (18) April 1820⁴⁴ addressed “civil disciplinary liability”. Both have been indicated as an elaboration of Art. 143 of the Constitutional Charter. The civil disciplinary cases concerned “the graver breaches committed by court officials in services, which do not have features of misdemeanours or criminal offences”⁴⁵, but the parties thereto were the accused judge and prosecutor. Thus, they had nothing to do with the French institution of «prise à partie», and despite the name, they did not resemble proceedings concerning civil liability.

Moreover, by way of a decision of the Provisional Government dated 27 November (9 December) 1831, it was clearly established that

Deputy justices of the peace, as well as those presiding in Courts of Correctional Police, heretofore subject to the Court of Appeals in what concerns discipline, from now on will be divided; and so civil deputy justices of the peace will be subject to the disciplinary superintendence of the Civil Tribunals, while criminal justices of the peace and those presiding in Courts of Correctional Police, to the Courts of Criminal Justice of their respective Voivodships; both the accused and the Royal Prosecutor maintains the right of appeal against judgements delivered in civil disciplinary cases, pursuant to the Royal Decree dated 6 (18) April 1820. (Art. 1)⁴⁶.

Already the decree of 6 (18) April 1820 stipulated that the aforementioned courts could issue judgements in such cases, but as Heylman noted, the practice in this respect was not uniform⁴⁷. It should also be underscored that this mode of proceedings applied to any and all “court magistrates and officials”, at first only in ordinary proceedings, and from 1832, in the case of the lower-ranking officials, also by way of shortened proceedings⁴⁸; this means that

unlike in the «prise à partie» proceedings, under which a judge, prosecutor, court or its division could be held liable, under this institution also a court *bedel* could be proceeded against⁴⁹. Also, the French institution did not provide for any form of shortened procedure in such case.

And so, a separate form of disciplinary procedure – called “civil disciplinary” procedure – against court officials emerged in the Polish territories, but it was based on principles completely different from those of «prise à partie» and it had an entirely different objective: to penalize a functionary of the judiciary system, and not to redress damages to a party caused by a judgement. The departure from the French model was in this case most likely motivated by the fact that following the collapse of the Duchy of Warsaw, intensive legislative works were undertaken with the aim of adopting a national code of civil procedure and of abrogating *Code de procédure civile*, whose fate seemed to have been decided by then⁵⁰.

On 6 (18) September 1841, by virtue of a Tsar’s ukase, both courts that had substituted the Court of Cassation in the Kingdom of Poland were abolished. These were the High National Court (civil matters) and the Cassation Department of the Court of Appeals (penal matters)⁵¹. They were replaced by, respectively, the 9th and 10th Departments of the Russian Governing Senate as an ordinary third instance. The same ukase also replaced the Council of State of the Kingdom of Poland with the General Meeting of the Warsaw Departments of the Governing Senate. It is deemed yet another element of the centralizing policy of Russian authorities in regard of the Kingdom, clearly on the rise since the late ’30s and early ’40s of

the 19th century⁵². Both Departments delivered final rulings, and there was no appeal against their judgements⁵³.

The failure of the works on the national code of civil procedure, as an effect of which the maintenance of the French code became a fact, was likely one of the reasons why the erstwhile legislator began to make references to «prise à partie», which could be a useful instrument. Within this context, the contents of the Act on Warsaw Departments of the Governing Senate, Ninth and Tenth, and their General Meeting (*Ustawa o Warszawskich Departamentach Rządzącego Senatu, Dziewiątym i Dziesiątym, i Ogólném ich Zebrauiu*), dated 26 March 1842, are very telling:

Art. 56. At sessions of the entire Ninth Department, conducted by the most senior Chair of the Division, by nomination or by rank, the following cases shall be heard and adjudicated:

- a) Complaints to hold a Judge or another civil judiciary official liable, brought in by private parties (Art. 505 of the Code of civil proceedings), pursuant to the provisions in effect;
- b) Complaints against higher ranking officials of civil judiciary, concerning breaches in the exercise of their office, pursuant to the same provisions [...]⁵⁴.

And the contents of the Internal Regulation for the Warsaw Departments of the Governing Senate (*Urządzenie wewnętrzne dla Warszawskich Rządzącego Senatu Departamentów*) dated 8 (20) September 1842:

In elaboration of the Act on Warsaw Departments of the Governing Senate Departments, Ninth and Tenth, and their General Meeting, dated 26 March 1842, approved by Highest Authority, and the decision on the manner of lodging and examination of complaints against judgements heretofore issued in the final instance, approved by the Highest Authority on the same date, the following provisions concerning the internal course of actions in the said Departments are hereby adopted:

[...] III. Holding a Judge civilly liable.

Art. 72. Appeals against judgements of the Court of Appeals concerning holding a Judge liable, shall be lodged with the Senate, according to the procedure applied to other cases.

Art. 73. A complaint against the President and Members of the Court of Appeals, shall be lodged with the Senate, upon previous satisfaction of the requirements of Arts. 507 and 508 of the Code of procedure, and upon securing the consent required by Art. 510 of the Code.

Art. 74. The application for the consent, mentioned in the previous article, shall be submitted to the Ninth Department, directly to the Chief Prosecutor, and signed, both by the party or its legal representative authorized by way of official and specific power of attorney, and by one of the Senate Attorneys. The application shall be accompanied, under pain of nullity, by: the complaint, summary of evidence, records and power of attorney as mentioned hereinabove.

Art. 75. Upon securing the consent, the complaint shall be submitted, within three days from the issuing of the consenting decision, along with the lawsuit, copy of the decision, summary of the documents and statement by the Clerk confirming the fee payment; following which the instruction and the judgement shall be delivered in the ordinary order.

Art. 76. The provisions of Arts. 512, 513, 514, 516 of the Code of procedure shall be observed⁵⁵.

Exclusive jurisdiction in cases concerning civil liability of high-ranking functionaries of the judiciary was assigned to the 9th Department (thus depriving appellate judges of recourse to appeal they were entitled to under the French model), and in other cases, the competences of the appellate court were confirmed and an appeal to the Senate was admissible. By virtue of these provisions, the institution provided for in the Code of civil procedure in force was used to some extent. It was a move beyond the earlier approach, which focused on disciplinary and penal liability.

3. «*Prise à partie*» and Polish scholars

Also the position of the Polish scholars, who tended to avoid discussing the institution of *prise à partie*, which certainly made it even more difficult to understand and apply it, requires some examination. Besides Antoni Łabęcki's Polish translation of the Code of Civil Procedure, published first in 1807 and then again in 1810⁵⁶, in 1829 judge Damazy Dzieżoński published his translation of Rogron's commentary: *Kodex postępowania cywilnego, wyłuszczoney przez swoje powody – i przez przykłady; z rozwiązaniem pod każdym artykułem trudności, a oraz głównych zagadnień, nastręczających się w texcie; jako też z opisaniem znaczenia wszelkich wyrazów prawnych. Dzieło, przeznaczone dla uczących się prawa i dla osób trudniących się przystosowaniem przepisów procedury, i dla wszystkich innych, którzy życzą poznać takowe, a nie mogli oddawać się szczególnej ich nauce, podług drugiey edycyi przez J.A. Rogrona, Adwokata w Radzie Królewskiej i przy Sądzie Kassacyinym z francuzkiego – przelożone na polski język z zastosowaniem do zmian zaszytych w prawodawstwie polskim, i własnem staraniem i nakładem wydane* [Code of Civil Procedure Explained Through its Motives and Examples; With a Solution of Difficulties Under Each Article and Clarification of Main Issues in the Text, as Well as With Description of the Meaning of All Legal Terms. Publication Addressed to All Students of Law and Professionals Dealing with the Adjustment of Procedural Provisions, as Well as For All Others Who Wish to Understand Them, But Could Not Study Them in Detail, According to the Second Edition of the Work by J.A. Rogron, Advocate in the Royal Council and in the French Court of Cassation, Translated into Polish With Applica-

tion of the Modifications Introduced in the Polish Legislation, Own Publication and Print] (Warsaw, w druk. Łątkiewicza, 1829, vol. I-II). Despite the title, which promised that "the modifications introduced in the Polish legislation" would be taken into account, the work left a lot to desire in this respect. In the part devoted to «*prise à partie*» the author practically limited himself to Rogron's commentary, not addressing in any way the changes in the organization of the judiciary that had occurred in the Polish territories, even though by the time of publication the Court of Cassation had not existed for 15 years, and from the very beginning there was only one Court of Appeals; he also did not provide any information on the practical application of this institution in the Kingdom, even though as a judge of the Mazovian and Kaliskie Voivodships, and a lawyer at the High National Court he certainly had access to it⁵⁷.

Two years later, «*Rozmaitości naukowe*» magazine published a text by Adam Krzyżanowski⁵⁸ entitled *O granicach niepodległości sądownictwa i odpowiedzialności sędziego* [On the Boundaries of Judiciary Independence and Judges' Liability]⁵⁹, which was a collection of the author's loose thoughts on the topic. He did offer a distinction of "Judge's liability depending on the type of breach, be it criminal or civil for redress, or disciplinary", but the boundaries between these types of liability were not clearly drawn; the text is chaotic and very far from a complex elaboration⁶⁰; it also contains some mistakes⁶¹.

Regardless of the wealth of valuable information in the aforementioned works by August Heylman⁶², they are wrought with chaos and lack of understanding of the French institution of «*prise à partie*». The

author himself, in 1834 mentions it only in two passages⁶³, as a side note to disciplinary issues. He indicates that "this procedure stems from various sources, but not always from clear regulations". He believes that the "most important basis in this regard" are Arts. 505-516 of the CCP, but right after he notes that "later on, disciplinary issues were also governed by instruction from the Minister of Justice dated 27 October 1812" (with which, as we already know, he connects «prise à partie» in both cases)⁶⁴. In his 1844 *Rys procesu dysplinarnego sądowego* [Outline of the Court Disciplinary Procedure], (Warsaw, druk. J. Kaczanowskiego), he focused on "order, disciplinary and criminal penalization", of which, according to him, only the second has anything to do with the French system⁶⁵, and he classified «prise à partie», besides "ordinary and shortened disciplinary procedure", as one of its three forms⁶⁶.

Heylman's tendency to throw in some remarks on «prise à partie» while discussing the disciplinary procedures concerning judiciary officials recurs also in his 1861 *History of the Organization of the Judiciary in the Kingdom of Poland*⁶⁷, although in this work, as well as in the previous one, he clearly indicates:

in this manner, in the spirit of constitutional and organic assumptions of the Franco-Polish judiciary, besides the action of «prise à partie», a permanent theory for two different ways of carrying out disciplinary procedures has been established, and namely: a) through formal disciplinary procedure, pursuant to the organic provisions of the Court of Cassation and some other detailed dispositions of ministerial instructions; b) through separate disciplinary procedure pursuant to the Code of civil procedure and certain provisions of the Civil code and acts on the organization of the profession of notaries or other auxiliary act⁶⁸.

The leading magazines concerning legal issues, «Themis Polska» and «Biblioteka Warszawska», did not publish any articles devoted to the institution of «prise à partie».

The second half of the 19th century, generally marked by a significant rise in the number of publications concerning the legal science, also saw a greater number of more voluminous commentaries to the civil procedure, drawing upon a host of works penned by the representatives of the continuously developing French legal science. Some of the works released around the time included *Zasady postępowania sądowego cywilnego* [Principles of Civil Court Procedure], (Warsaw, nakł. autora, 1864) by Hieronim Krzyżanowski, *Wykład kodeksu postępowania cywilnego* [Explanation of the Code of Civil Procedure], (Warsaw, S. Orgelbrand, 1866, vol. I-II) by Jan Szymanowski or *Wykład kodeksu postępowania cywilnego* [Explanation of the Code of Civil Procedure], (Warsaw, drukiem S. Orgelbranda synów, 1874, vol. I-II) by Hipolit Chwalibóg.

In the work by Krzyżanowski⁶⁹, which imitated the work by Édouard Bonnier, the institution of «prise à partie» was completely marginalized. The author lists it among the remaining extraordinary measures of challenging judgements as stipulated in the CCP: civil request, cassation and opposition by a third party («la tierce opposition»)⁷⁰. He names the first two as the most important, and finds the opposition by a third party to be "less relevant", as it serves the interests of a third party and only modifies the judgement in relation to this party, without reversing it. Krzyżanowski still discusses all these extraordinary measures. As regards «prise à partie», on the

other hand, it was only devoted a single sentence: «Lastly, there is holding a judge civilly liable, which is entirely wrongly placed among measures of challenging judgements, as this institution is not aimed against judgements, but rather against the judges who have issued them»⁷¹.

Within this context, one has to remember the introduction to this work, in which the author underscores that he has left out everything that «does not find practical application in our country»⁷². I would be cautious in concluding based on this that «prise à partie» had no practical application on the Polish territories, since the legislator found it necessary to address this institution in the '40s, specifically in the already mentioned Act on Warsaw Departments of the Governing Senate, Ninth and Tenth, and their General Meeting and in the Internal Regulations of the Warsaw Departments of the Governing Senate.

Explanation of the Code of Civil Procedure by Jan Szymanowski, member of the Council of State of the Kingdom of Poland and law professor at the Main School of Warsaw, published in two volumes (I - pp. 742, II - pp. 601), which addresses the judges' liability in exactly one sentence⁷³, focuses almost exclusively on discussing the opposition by a third party in the book devoted to extraordinary measures of challenging judgements.

In comparison to others, Hipolit Chwalibóg, professor of the Main School of Warsaw, prosecutor of the Warsaw Governing Departments and senator, who devoted about 4 pages to «prise à partie» in his commentary to the CCP, covered this subject relatively broadly. And yet his elaboration, which is an extract of French commentaries, addresses the specificity of the

Polish territories with only two remarks (the author mentioned that the French Code of Criminal Procedure was not effective in Poland and the Senate's jurisdiction in cases against high-ranking officials)⁷⁴. Moreover, this work was published just before abrogation of the CCP in July 1876, when – along with the new organization of the judiciary – also the 1864 Russian Act on Civil Procedure was adopted.

It is telling that even such renowned lawyers who held important posts avoided any complex exploration of the «prise à partie» in their works concerning the civil procedure or the organization of the judiciary, especially since, given the nature of their functions, they had broad access to information concerning the practice of its application. Meanwhile, this element is necessary for giving a full picture of this institution on the Polish territories.

4. Summary

Despite the fact that modifications to the very Code of Civil Procedure from the moment it took effect in the Polish territories were virtually insignificant⁷⁵, changes in the organization of the judiciary, which had direct impact on procedure, were considerable. Already right after the Duchy was established, the adopted solutions were not identical to the French model, they were merely “fashioned” after it, resulting in what August Heylman referred to as “Franco-Polish judiciary”⁷⁶. By way of replacement of the Court of Cassation with the National High Court, which had distinct competences, a third instance was established and thus the principle of two

instance court procedures was abandoned. The differences between the French system and the one effective in the Polish territories were multiplied by the establishment of the Ninth Department of the Governing Senate in place of the former National High Court in 1841. For this reason, despite the similar original text of the act, it is difficult to speak of similar shape of the discussed institution in real life.

Moreover, there was a number of fundamental issues that posed an obstacle not only to the adoption of «prise à partie», but also to the transplantation of all legal institutions of the French law. Above all, the amendments of various acts, implemented in France, never took effect in the Polish territories, which meant that the individual institutions did not evolve in the same direction⁷⁷. These differences were deepened with the passage of time by the legislative bodies in the Polish territories, which modified the original version of laws on its own (in civil procedure, for example, the principle of two instances was abandoned, as already mentioned). Yet the issue of greatest significance for the differences in the real shape of a given institution between the French system and Polish territories was certainly

the degree to which theory exerts an influence [...] on the texts of legal acts in both countries, despite their identical wording. In France, this theory, expounded by the relevant channels, that is oral lectures delivered by scholars of law, numerous academic works and specialized periodicals, giving great significance to the so-called jurisprudence, that is application of this theory in practice, has contributed to the progress of legislation in this part, facilitating the application of permanent principles to new needs as they arise in the society, needs that were not foreseen, and could not ever be foreseen, in any legislation. In our country, it is the opposite; ju-

risprudence, in even its most narrow meaning as defined by the modern French authors, has not gained any importance so far and does not have the position that it deserves by virtue of the legislation in effect. Calling court judgements jurisprudence is not justified. This is because court judgements only acquire scientific value when they are based on properly supported theories. Judgements, in and of themselves, are mere facts that prove nothing and that cannot have, without the aforementioned condition being met, influence on the general legislation, as their orders do not apply to third parties unrelated to the cases. Indeed, we cannot even assume that the obligation to provide grounds to judgements, required by the effective procedure, does not further the emergence of more or less justified theories in our country, but these theories, so far restricted to the sphere of court tradition, cannot bring the desired benefits to legislation or to science unless they are published as works of properly elaborated works of legal literature. And one way or another, the direction of these traditional theories in our country is as diverse as the formation of lawyers who practice this profession, as diverse the sources from which they draw information needed in their work⁷⁸.

Thus, the problem of great significance in the Polish territories as regarded the transplantations of French legal institutions was the absence of a uniform direction in the development of the science of law as a monolith, the absence of its authority and an understanding of the role of *jurisprudence* (fr.) that was completely different to the one in French culture. We also cannot overlook the diametrically different level of development in the French and Polish legal terminology at the time when the Polish territories first came into contact with the institutions of the French system⁷⁹, which had a direct impact on their understanding and application. And thus, even though the shape of certain institutions was at times approximated to its French original, for example by way of translating French com-

mentaries or by analyzing the significance of terms based on the analysis of French case law and literature, even when they had no binding effect on the Polish soil, it is still necessary to closely examine the shape that a given institution transplanted from the French system took on in Poland, as – besides the text of the act – all the other elements that could complement its meaning were sometimes missing. This applies primarily to the practice of law, which for the substantial part cannot be studied owing to destruction of a great part of Polish archives during World War II.

In the case of «prise à partie», however, a number of conclusions can be drawn. In light of the hastiness and negligence that accompanied the introduction of civil procedure in the Duchy of Warsaw, just like in the case of *Code de commerce*⁸⁰, there was no selection of French institutions to be adopted, nor any modification of their shape to adjust them to the local conditions. As an effect, by sheer inertia, «prise à partie» was adopted, and deformed from

the very beginning by the Polish legislator, who placed emphasis on penal and disciplinary liability. The Polish judges who would be found liable under «prise à partie» had no option to appeal to another judicial authority, and thus the entire procedure of legal redress of a party could be misused as a disciplinary procedure (unlike in the French original). The further law-making and conceptual chaos practically impeded its effective application⁸¹. As a result, which is testified to by the discussed 19th-century publications, even lawyers had serious trouble with understanding it properly and with classifying it within the context of the French CCP and other legal acts that were in effect. The legislator noticed its potential once again in the '40s, as it did not pose an obstacle to enforcing penal and disciplinary liability. Yet still appellate judges were deprived of all recourse to appeal.

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² J.N. Guyot (edited by), *Répertoire universel et raisonné de jurispru-*

dence civile, criminelle, canonique et bénéficiale; ouvrage de plusieurs jurisconsultes; Nouvelle édition corrigée, & augmentée tant des lois nouvelles que des arrêts rendus en matière importante par les parlements & les autres cours du royaume, depuis l'édition précédente. Paris, Visse, 1784, vol. XIII, p. 654.

³ P.A. Merlin, *Répertoire universel et raisonné de jurisprudence, ouvrage de plusieurs jurisconsultes, réduit aux objets dont la connaissance peut encore être utile, et augmenté 1^o des changemens apportés aux lois anciennes par les lois nouvelles, tant avant que depuis l'année 1814; 2^o de dissertations, de plaidoyers et de ré-*

quisitoires sur les unes et les autres, cinquième édition. Paris, Garnery, J.P. Roret, 1828, vol. XIII, p. 120.

⁴ G.L.J. Carré, A. Chauveau, *Les lois de la procédure civile, ouvrage dans lequel l'auteur a refondu son analyse raisonnée, son traité et ses questions sur la procédure, nouvelle édition, dans laquelle ont été examinées et discutées: 1^o les opinions de Carré; 2^o les décisions rendues jusqu'à 1840; 3^o les questions pré-vues par MM. Tromine-Desmazures, Pigeau, Dalloz, Boitard, Boncenne, etc.; augmentée de la législation et de la jurisprudence des Pays-Bas et de la Belgique, jusqu'à ce jour, avec renvois aux éditions belges,*

- Bruxelles, Société Typographique Belge, Adolphe Wahlen et C^{ie}, 1841, vol. IV, p. 258.
- ⁵ *Code de procédure civile. Édition originale et seule officielle*, Paris, De l'Imprimerie Impériale, 1806, pp. 112-114.
- ⁶ *Ordonnance rendue sur plaintes et doléances des états-généraux assemblés à Blois en novembre 1576, relativement à la police générale du royaume*, registered by the Parliament of Paris in May 1579: «Art. 135. Suivant l'édit fait à Paris au mois de Janvier 1563, avons défendu aux Juges Présidiaux de procéder à la visitation et jugemens d'aucuns procès par commissaires, sur peine de nullité des sentences et jugemens qui seront par eux donnés, et des dépens, dommages et intérêts des parties, pour [par] lesquelles ils pourront estre pris à partie en leur propre et privé nom»; Isambert, Decrusy, Taillandier (edited by), *Recueil général des anciennes lois françaises: depuis l'an 420, jusqu'à la Révolution de 1789*, Paris, Belin-Leprieur, Verdrière, 1829, vol. XIV, part I, p. 414.
- ⁷ «Art. 143. Défendons à nosdits conseillers de se charger d'aucunes informations, si elles ne leur sont distribuées par les présidens: et aussi d'interroger les appellans, soit d'un décret de prise de corps, ou d'ajournement personnel, si par notredite cour n'est ordonné; sur peine de nullité et de répétitions des dépens, dommages et intérêts des parties en leur propre et privé nom»; Ivi, p. 415.
- ⁸ «Art. 147. Défendons à tous juges, pardevant lesquels les parties tendront à fin de non procéder, de se déclarer compétens, et dénier le renvoy des causes, dont la connoissance ne leur appartient par nos édits et ordonnances, sur peine d'estre pris à partie, au cas qu'ils ayent ainsi jugé par dol, fraude ou concussion, ou que nos cours trouvent qu'il y ait faute manifeste du juge, par laquelle ils doivent estre condamnés en son

nom»; Ivi, pp. 416-417.

- ⁹ «Art. 154. Les fins de non procéder seront jugées sommairement par nos juges sans appointer les parties à mettre pardevers eux. Aussi sera fait préalablement droit sur les fins de non recevoir, proposées et alléguées par les défendeurs auparavant que régler et appointer les parties en contrariété et preuve de leur faits sans en faire aucune réservation; et au cas de contravention, pourront lesdits juges estre intemez et pris à partie en leur propre et privé nom»; Ivi, p. 418.
- ¹⁰ *Ordonnance sur le fait de la justice*, Villers-Cotterêts août 1539: «Art. 142. Que les juges qui seront trouvés avoir fait fautes notables en l'expédition des procez criminels, seront condamnés en grosses amendes envers nous pour la première fois, et pour la seconde seront suspendus de leurs offices pour un an, et pour la troisième, privez de leursdits offices, déclarés inhabiles à tenir les offices royaux.
- Art. 143. Et néanmoins seront condamnés en tous les dommages et intérêts des parties qui seront taxés et modérés selon la qualité des matières.»; Isambert, Decrusy, Armet (edited by), *Recueil général des anciennes lois françaises: depuis l'an 420, jusqu'à la Révolution de 1789*, Paris, Belin-Leprieur, Verdrière, 1828, vol. XII, part 1-2, p. 629.
- ¹¹ «Titre 25, Art. 1. Enjoignons à tous juges de nos cours, jurisdictions et justices, et des seigneurs, de proceder incessamment aux jugemens des causes, instances et procès qui seront en estat de juger, à peine de répondre en leur nom, des dépens, dommages & intérêts des parties.»; D. Jousse, *Nouveau commentaire sur l'ordonnance civile du mois d'avril 1667. Nouvelle Edition, augmentée de l'Idée de la Justice Civile*, Paris, Debure, 1767, vol. II, p. 62. Yet, as evidenced in next footnotes, the 1667 ordinance stipulated that a judge could be held liable not only

in cases where a party had been denied justice, contrary to what Hipolit Chwalibóg claimed. Cf. H. Chwalibóg, *Wykład kodeksu postępowania cywilnego* [Explanation of the Code of Civil Procedure], Warsaw, Drukiem S. Orgelbranda Synów, 1874, vol. II, p. 141.

- ¹² «Titre 1, Art. 8. Déclarons tous Arrests & Jugemens qui seront donnez contre la disposition de nos Ordonnances, Edits & Déclarations nuls, & de nul effet & valeur; & les Juges qui les auront rendus, responsables des dommages & intérêts des Parties, ainsi qu'il sera par Nous avisé»; Jousse, *Nouveau commentaire cit.*, vol. I, pp. 6-7.

- ¹³ «Titre 6, Art. 1. Défendons à tous nos Juges, comme aussi aux Juges Ecclésiastique, & des Seigneurs, de retenir aucune Cause, Instance ou Procès, dont la connoissance ne leur appartient: mais leur enjoignons de renvoyer les Parties pardevant les Juges qui doivent en connoître, ou d'ordonner qu'elles se pourvoient, à peine de nullité des Jugemens; & en cas de contravention, pourront les Juges estre intemez, & pris à partie»; Ivi, p. 67.

- ¹⁴ «Titre 6, Art. 2. Défendons aussi à tous Juges, sous les mesmes peines, & de nullité des Jugemens qui interviendront, dévouer les Causes, Instances & Procès pendans aux Sièges inférieurs, ou autres Jurisdictions, sous prétexte d'appel ou connexité, si ce n'est pour juger diffinitivement en l'Audience, & sur le champ par un seul & mesme Jugement»; Ivi, p. 70.

- ¹⁵ «Art. 565. Il y a lieu à la Prise a partie contre un juge dans les cas suivans seulement: 1^o Lorsqu'elle est ouverte à son égard par la disposition expresse et textuelle d'une loi; 2^o Lorsqu'il est exprimé dans une loi que les juges sont responsables, à peine de dommages intérêts; 3^o Lorsqu'il y a eu, de la part d'un juge, dol, fraude, ou prévarication commise par inimitié personnelle; 4^o Lorsqu'il

est dans le cas de la forfaiture.»; *Bulletin des lois de la République Française*, 1795, vol. VI, p. 106.

- ¹⁶ *Code d'instruction criminelle, édition conforme à l'Édition originale du Bulletin des Lois; suivi Des Motifs exposé par les Conseillers d'État, et des Rapports faits par la Commission de Législation du Corps Législatif, sur chacune des lois qui composent le Code; Avec une Table Alphabétique et Raisonnée, qui réunit sur chaque matière toutes les dispositions relatives, et qui indique, à l'article de chaque fonctionnaire ou officier public, toutes les fonctions qui lui appartiennent, ou qu'il est tenu de remplir, en matière criminelle, correctionnelle ou de simple police*, Paris, Garnery, De l'Imprimerie de Mame, frères, 1809.
- ¹⁷ The provisions, however, indicate when undue delay of judges may result in finding that justice has been denied. Pursuant to Art. 507 and 508 of the CCP, denial of justice may be found where two applications have been filed with judges, via the relevant court clerks, after the lapse of three days in the case of deputy judges and commercial judges, and after the lapse of 8 days in the case of other judges. Only upon two such ineffective applications, a motion concerning denial of justice may be lodged. In order to make sure that court bedels did not avoid delivering such applications, the law stipulated a penalty in the form of suspension in duties if they refused a party's request in this respect.
- ¹⁸ This time limit could be prolonged at the discretion of the court. It would also in fact be prolonged every time when the petitioning party is in delay with providing evidence. The only consequence of this time limit is that upon its lapse, the petitioning party could present its case to the court in default of the defendant.
- ¹⁹ Merlin, *Répertoire universel* cit., vol. II, pp. 52-54.
- ²⁰ Contrary to the consequences

stipulated in the case of «désaveu» – Art. 352 et seq.

- ²¹ Merlin, *Répertoire universel* cit., p. 127.
- ²² Cf. *Loi sur l'organisation des tribunaux du 27 ventose an VIII de la République française, une et indivisible*, *Bulletin des Lois*, n° 15, p. 13.
- ²³ In fact, the High Imperial Court was to be composed also of the judges of the Court of Cassation.
- ²⁴ More on this topic: T. Mencil, *L'introduction du Code Napoléon dans le Duché de Varsovie (1808)*, in «*Czasopismo Prawno-Historyczne*», vol. I/2, 1949, pp. 141-198.
- ²⁵ *Ustawa Konstytucyjna Xięstwa Warszawskiego* [The Constitutional Charter of the Duchy of Warsaw]; «*Dziennik Praw Księstwa Warszawskiego*» [Journal of Laws of the Duchy of Warsaw] (hereinafter: DPKW), vol. I, pp. VIII-XII.
- ²⁶ The Minister tried to counter the argument on the unconstitutionality of the issued instruction by raising that the procedural regulations are part of the "internal organization of courts" and as such are subject to his competence. The Council of State disagreed, however. Łubieński at the same time underscored that the Code of Civil Procedure was complementary to the Civil Code and that adoption of the former was indispensable for the application of the latter. Correspondence between Łubieński and Frederic August concerning this matter was published in: H. Crynwaser, *Niedoszły polski Kodeks postępowania cywilnego (1820)* [The Would-Be Polish Code of Civil Procedure (1820)], Warsaw, [s.n.], 1918, pp. 2-3.
- ²⁷ The Constitutional Charter of the Duchy of Warsaw; DPKW, vol. I, pp. XXXVI-XL; The Napoleonic Code, in effect since 1 May 1808, decrees of Frederic August dated 12 December 1807 and 27 January 1808 (DPKW, vol. I, pp. 2-3, 46-47); *Organizacja sądownictwa cywilnego w Księstwie Warszawskim* [The Organization of the

Civil Judiciary in the Duchy of Warsaw], issued by the Minister of Justice on 13 May 1808, Zbiór przepisów administracyjnych Królestwa Polskiego. Wydział Sprawiedliwości [A collection of the administrative provisions of the Kingdom of Poland. Justice Department (hereinafter: ZPA WS)], Warsaw, W Drukarni Jana Jaworskiego, 1867, vol. VI, p. 11 ff.); *Przepisy dotyczące Organizacji oraz attrybucji Władz sądowych i osób do składu Sądownictwa* [Provisions Concerning the Organization and Attributions of the Judiciary Authorities and Their Members], issued by the Minister of Justice on 23 May 1808, S. Zawadzki, *Prawo cywilne obowiązujące w Królestwie Polskiem* [Civil Law of the Kingdom of Poland], Warsaw, w druk. K. Kowalewskiego, 1863, vol. III, pp. 345-354; and the decree of Frederic August dated 26 July 1810 - *Organizacja Sądów kryminalnych, Wydziałów policyi poprawczej i Sądów policyjnych* [Organization of Criminal Courts, Divisions of Correctional Police and Police Courts]; DPKW, vol. II, pp. 291-303. These courts functioned until 30 June 1876.

²⁸ «Art. 74. L'ordre judiciaire est indépendant.»; DPKW, vol. I, p. XXXIX.

²⁹ «Art. 76. La Cour d'appel peut, soit sur la dénonciation du Procureur Royal, soit sur celle d'un des Présidens, demander au Roi la destitution d'un juge d'un tribunal de 1ère instance ou d'une Cour criminelle, qu'elle croit coupable de prévarication dans l'exercice de ses fonctions. La destitution d'un Juge de la Cour d'appel peut être demandée par le Conseil d'Etat faisant les fonctions de Cour de cassation. Dans ces cas seuls la destitution d'un Juge peut être prononcée par le Roi.»; Ivi, p. XLI.

³⁰ «Art. 1. The judiciary is independent, and thus We wish for the judgements of Courts, even in cases of Us the King or the Nation having an interest, to be free

from any external influences and subject solely to the law and conscience of the Judge, which however does not exclude the court magistracies from the supervision and oversight as prescribed by the law.

Art. 2. The Minister of Justice has the right of supervision and of issuing reprimands to the Members of the Court of Appeal, Justices of the Peace and Members of the Tribunals of First Instance. The Court of Cassation, in the presence of the Minister of Justice, may reprimand and penalize the Judges of the Court of Appeals and Justices of the Peace. The Court of Appeals has the right of oversight over the Tribunals of First Instance and Commercial Tribunals. The Tribunals of First Instance have oversight over the Deputy Judges of the Peace and officials of the Registrar's Office. Judicial clerks, Assessors, Junior Judicial Clerks and Burgraves, as well as court magistrates, are under the oversight of their respective courts.

Art. 6. The Court of Appeals may, either on the denunciation of Our Prosecutor or on that of one of the Presidents, ask Us the King for the dismissal of a Judge of a Tribunal of first instance or of a commercial court, if it believes him guilty of prevarication in the exercise of his functions. The dismissal of a Judge of the Court of Appeals or of a Justice of the Peace may be requested by the Council of State acting as Court of Cassation. Therefore, at such denunciation of the Prosecutor or President, the Court of Appeals may suspend a Judge of the Tribunal of first instance or of a Commercial Tribunal, for reasons as prescribed by the law, and order him to stand before an indicated Member of his Court to be heard and to expound his actions. The Court of Cassation is entitled to suspend a Judge of a Court of Appeals or a Justice of the Peace for such reasons, and order him

to stand before the Minister of Justice and report on his actions. Complaints against Presidents of these Courts are presented by the Court and by the General Prosecutor to the Council of State, which, acting in the capacity of the Court of Cassation, proceed in the same manner as against Appellate Judges. Investigations pursued as above are sent by the Court of Appeals, via the Minister of Justice, and the Court of Cassation directly, to Us the King to be resolved. Only in such events We the King will pronounce in cases concerning the removal of a Judge, Judicial Clerks, Assessors, Junior Judicial Clerks, Burgraves and magistrates are suspended by their relevant Courts and their cases examined by the Court as prescribed by the law, if not by their own Court.»; ZPA WS, vol. VI, pp. 11-31.

³¹ ZPA WS, vol. VIII, pp. 57 ff.

³² It was also adopted in the French language, and the translation by Antoni Łabędzki was of purely informational nature. See supra 56. This problem also applied to the remaining codes – civil and commercial. The Civil Code was adopted *en bloc*, in the wording of the French law of 3 September 1807; DPKW, vol. II, pp. 84-85. The original French text was to remain in force until the publication of an authentic Polish translation «provided that it is not in contravention of the original»; *ibidem*. The Duchy's authority wanted official translations to be issued and ordered their preparation. Yet the subsequent versions were not to their satisfaction. Despite long-lasting works, none of the codes were published in an official translation. It is worth mentioning that some parts of the Civil Code remained in force until World War II and *Code de commerce* until the implementation of the Polish Commercial Code of 1933. See: W. Sobociński, *Historia ustroju i prawa Księstwa Warszawskiego* [History of the Political

System and Law in the Duchy of Warsaw], Toruń, TNT, 1964, pp. 199-202; A. Klimaszewska, *Influence of French Legalese on the Development of Polish Legal Language Within the Area of Commercial Law*, in E. Veress (edited by), *Multilingualism and Law*, Sapientia Hungarian University of Transylvania - Forum Iuris - Robert Schumann Association, Cluj-Napoca/Kolozsvár 2016, pp. 173-184; Klimaszewska, *O tłumaczeniach francuskiego Kodeksu handlowego z 1807 roku na język polski* [On translations of the French Commercial Code of 1807 into Polish], in «Czasopismo Prawno-Historyczne», vol. LXIV/1, 2012, pp. 139 ff.; A. Rosner, *Pierwsze polskie tłumaczenia Kodeksu Napoleona* [The First Polish Translations of the Napoleonic Code], in K. Sójka-Zielińska, *Kodeks Napoleona. Historia i współczesność* [The Napoleonic Code. History and Present], Warsaw, LexisNexis, 2008, pp. 271-294; P. Pomianowski, *Application Problems of Foreign Language Legal Sources: Reception of the French Law in Poland*, in A. Katancevic, M. Vukotic, S. Vandenbogaerde, V. M. Minale (ed. by), *History of Legal Sources: The Changing Structure of Law*, Belgrade, University of Belgrade, 2018, pp. 143-151. The drafting of official translations immediately after the establishment of the Duchy was not made any easier by the hurry in which legislative works were conducted. Sometimes the competences of people appointed for this job were also questionable (see Władysław Skorochód-Majewski, who overtly admitted lack of knowledge of commercial law in the introduction to his translation of *Code de commerce*). Yet the fundamental problem was the dramatic difference between the level of legal French and Polish languages. The former, which had developed gradually over centuries, contained many words and phrases that did not have equivalents in Polish. This served as

an enormous impulse to build up Polish terminology in this area, yet the equivalents of some terms, referring to institutions transplanted *ad hoc* from a foreign system, were not devised until a few decades later. Also in the case of the Constitutional Charter of the Duchy of Warsaw, imposed by Napoleon and published in French and Polish, the «French text [was to be] deemed the correct one»; DPKW, vol. I, p. I.

³³ DPKW, vol. II, pp. 151–185.

³⁴ Ivi, pp. 181–182.

³⁵ Only 1 was established in the Duchy.

³⁶ This instruction has been published in: A. Heylman, *Historia organizacji sądownictwa w Królestwie Polskim* [History of the Organization of the Judiciary in the Kingdom of Poland], Warsaw, w druk. Banku Polskiego, 1861, vol. I, pp. 160–164. In his work from 1834, Heylman did not publish its entire text, but only cited parts of point 8, without the last words: «because the consequence of the former is disciplinary action and the consequence of the latter is civil damages awarded to the party seeking them». A. Heylman, *O sądownictwie w Królestwie Polskim: wykład historyczny* [On the Judiciary in the Kingdom of Poland: A Historical Lecture], Warsaw, w Druk. przy ulicy Długiej no 591, 1834, p. 137.

³⁷ Heylman, *Historia organizacji* cit., p. 162.

³⁸ Cf also: point 14 of the instruction referring to Art. 514 of the CCP. Ivi, p. 163.

³⁹ In fact the Court of Cassation operated for a very short time. Its inauguration took place on 19 June 1810. Formally, the Duchy of Warsaw existed until 1815. Yet in reality, the Russian army, following the remnants of the French forces, arrived in its territory already in January 1813. Its judicial output entails rulings issued until 16 October 1812. See: *Dziennik Wyroków Sądu Kasacyjnego Xięstwa Warszawskiego*

[Journal of Judgements of the Court of Cassation of the Duchy of Warsaw], Warsaw, Drukarnia Rządowa, 1810–1812, vol. I–II. More on this topic: A. Korobowicz, *Rys dziejów kasacji w polskim systemie sądownictwa* [An Outline of History of Cassation in the Polish Appellate System], in L. Antonowicz *et al.* (edited by), *Polska lat dziewięćdziesiątych. Przemiany państwa i prawa* [Poland of the Nineties. Transformations of the State and Law], Lublin, Wyd. UMCS, 1998, vol. II, pp. 397–414; J.J. Litauer, *Sąd Kasacyjny Xięstwa Warszawskiego* [Cassation Court of the Duchy of Warsaw], in «Themis Polska», 2nd ser., vol. V, 1918; W. Sobociński, *Historia ustroju* cit., pp. 238 ff.; W. Sobociński, *Rada Stanu Xięstwa Warszawskiego jako Sąd Kasacyjny (zarys ustrojowy)* [Council of State of the Duchy of Warsaw as a Cassation Court (Outline of the System)], in «Archeion», vol. LXXVII, 1984; W. Sobociński, *Sądownictwo Xięstwa Warszawskiego a problem kasacji. Pierwsze pomysły i zaczątki organizacji kasacyjnej* [The Judiciary of the Duchy of Warsaw and the Problem of Cassation. First Ideas and Beginnings of Cassation Organization], in «Czasopismo Prawno-Historyczne», vol. XXXIV/2, 1982. More on the changes in the organization of the judiciary in the Kingdom of Poland: A. Korobowicz, *Zmiany ustroju sądownictwa najwyższego w Królestwie Polskim w latach 1815–1876* [Changes in the System of Supreme Judiciary in the Kingdom of Poland in the Years 1815–1876], in «Czasopismo Prawno-Historyczne», vol. XXIV/2, 1972; A. Korobowicz, *Polskie Sądy Najwyższe w XIX stuleciu* [Polish Supreme Courts in the 19th Century], in A. Korobowicz (edited by), *Sąd Najwyższy Rzeczypospolitej Polskiej. Historia i współczesność. Księga Jubileuszowa 90-lecia Sądu Najwyższego 1917–2007* [Supreme Court of the Republic of Poland. Then and Now. Jubilee

Book Celebrating the 90 Years of the Supreme Court 1917–2007], Toruń, Dom Organizatora, 2007, pp. 75–118; J.J. Litauer, *Z dziejów sądownictwa kasacyjnego w Polsce. Sąd Najwyższej Instancji* [From the History of Cassation Judiciary in Poland. High National Court], in «Kwartalnik Prawa Cywilnego i Handlowego», Yearbook 2, 1917.

⁴⁰ Cf.: *Organizacja Sądu Najwyższej Instancji* [Organization of the High National Court], introduced by a resolution of the Provisional Government of the Kingdom of Poland dated 21 September 1815 (ZPA WS, vol. VIII, p. 265 ff.), internal regulation of the HNC dated 19 October 1815 (ZPA WS, vol. VIII, p. 289 ff.) and decisions of 21 December 1815 r. (ZPA WS, vol. VIII, p. 313 ff.), 26 July 1817 (DPKP, vol. III, p. 375 ff.), 13 (25) November 1817 (DPKP, vol. IV, p. 77 ff.) and 13 January 1818 (ZPA WS, vol. VIII, p. 318 ff.). Regarding the criminal cases, the duties of the Court of Cassation were performed by the Appellate Court until 1842. Cf: Resolution of the Provisional Supreme Council dated 22 March 1814; DPKP, additional volume, p. 7.

⁴¹ The Constitutional Charter was promulgated in Polish and French. For the obvious reasons, I quote the version that is more accessible to readers who do not speak Polish.

«Art. 138. L'ordre judiciaire est constitutionnellement indépendant.

Art. 139. On doit entendre par l'indépendance du juge, la faculté qu'il a d'émettre librement son opinion lors du jugement, sans pouvoir être influencé ni par l'autorité suprême, ni par celle ministérielle, ni par aucune considération quelconque. Toute autre définition ou interprétation de l'indépendance du juge, est déclarée abusive.

Art. 142. Aucun juge ne peut être destitué que par arrêt d'une Instance judiciaire compétente, dans le cas de prévarication prouvée ou

de tout autre délit constaté.

Art. 143. La discipline des Magistrats nommés et choisis, ainsi que la répression des écarts qui pourraient être commis par eux, quant à l'exactitude du service public, ressortira au Tribunal suprême»; DPKP, vol. I, pp. 84-87.

⁴² Which retained competences in this regard even after the promulgation of the Organic Statute of 1832 that dissolved the Sejm of the Kingdom of Poland, as an effect of which the original composition of senators and judges was changed.

⁴³ DPKW, vol. III, pp. 216-219.

⁴⁴ «Considering that the full elaboration of Article 143 of the Constitutional Charter, placing the discipline of the Court Officials in the hands of the High National Court, cannot be proceeded with without acts inseverably connected to it, such as: the Organic Statute on the Judiciary and Codes of Court Procedures; desiring to facilitate gradual transformation from the existing order of Court discipline to the Constitutional order, and considering the provisions of our decision de data 8/20 May 1817, pursuant to which a judgement of a Court against a magistrate or official for offences committed in line of service may be appealed to a higher Instance both by the accused official and by the Prosecutor, only partially respond to the intended objective if it is not possible to appeal judgements concerning disciplinary cases against officials and magistrates, from which clearing or penalties depend, or removal, or submission to a Court for graver offences; at the request of the Justice Commission, and having conferred with the Council of State, we have decided to establish what follows:

Art. 1. Judgements of Civil Tribunals, Criminal Courts and of the Court of Appeal, delivered in civil disciplinary cases, may be appealed both by the accused official or court magistrate and by the

Royal Prosecutor.

Art. 2. Prosecutors serving in these Courts are obliged to immediately send such judgements issued in civil disciplinary cases, along with case files, to the Government Justice Commission, with a view of receiving from it the relevant instructions, be it with a purpose of filing an appeal or of upholding the judgement delivered.

Art. 3. The time limit for lodging an appeal shall be three months from the date of delivery of the judgement and respectively from the date of its receipt by the Government Justice Commission.

Art. 4. The High National Court and the Court of Appeals have jurisdiction in disciplinary cases referred to them by way of appeal, to order additional explanations, to change the appealed judgements, and to make the disciplinary penalties more lenient or more severe. Their judgements shall be final. [...]»; DPKP, vol. VII, pp. 3-7.

⁴⁵ Heylman, *O sądownictwie* cit., p. 135.

⁴⁶ DPKW, vol. XIII, pp. 260-264.

⁴⁷ Heylman, *O sądownictwie* cit., p. 135.

⁴⁸ Cf: rescript of the Government Justice Commission dated 27 March 1832, providing for shortened proceedings, without a formal civil disciplinary trial, during which a «decision was made in an economic way by the full bench» in cases against «court secretaries, clerks, full-time bedels, part-time bedels and court servants». Quoted after: *ivi*, p. 137, 138. As clarified by Heylman, an ordinary procedure that required various formalities and legal time limits was unnecessary, as their breaches «could be easily noticed and verified and thus did not require explanations with broad instructions». *Ivi*, p. 137.

⁴⁹ J.A. Rogron, *Code de procédure civile expliqué par ses motifs, par des exemples et par la jurisprudence, avec la solution, sous chaque ar-*

ticle, des difficultés, ainsi que des principales questions que présente le texte, et la définition de tous les termes de Droit; suivi d'un formulaire des actes de procédure. Ouvrage destiné aux étudiants en droit, aux personnes chargées d'appliquer les lois de la procédure, et à toutes celles qui, désirant les connaître, n'ont pu en faire une étude spéciale, Paris, Alex-Gobelet, Videcoq, 1837, pp. 589-590.

⁵⁰ See: A. Klimaszewska, M. Gałędek, *The Implementation of French Codes on the Polish Territories as Instrument of Modernization - Identifying Problems with Selected Examples*, in A. Albarian, O. Moréteau (edited by), *Le droit comparé et.../Comparative Law and... Actes de la conférence annuelle de Juris Diversitas*, Aix-en-Provence, Presses Universitaires d'Aix-Marseille, 2015, pp. 80-81; M. Gałędek, *The Problem of Non-Adaptability of National Legal Heritage. Discussion on the Reform of Civil Law in Poland in the Course of Work of Reform Committee in 1814*, in «Romanian Journal of Comparative Law», 8, 2017, pp. 19-21.

⁵¹ See *infra* 40. ZPA WS, vol. 6, pp. 211 ff.

⁵² See, e.g.: M. Rutkowski, *II Rada Stanu Królestwa Polskiego 1833-1841: struktura i działalność: studium uzależnienia prawno-państwowego* [Second Council of State of the Kingdom of Poland 1833-1841: Structure and Operations: A Study in Legal and State Subordination], Białystok, Wydaw. WS-FiZ, 2001; T. Demidowicz, *Statut Organiczny Królestwa Polskiego w latach 1832-1856* [Organic Statute of the Kingdom of Poland in the Years 1831-1856], «Czasopismo Prawno-Historyczne», vol. LXIX/2010, fasc. 1, pp. 135-165; M. Rutkowski, *Zmiany strukturalne w Królestwie Polskim wczesnej epoki paskiewiczowskiej: studium efektywności administracyjnej, społecznej i gospodarczej zniewolonego państwa* [Structural Changes in the Kingdom of Poland in the Early Period of Ivan Paskevich:

- Study on Administrative, Social and Economic Effectiveness of an Enslaved State], Białystok, Wydawn. WSFiZ, 1997; *Królestwo Polskie w okresie namiestnictwa Iwana Paskiewicza (1832-1856) System polityczny, prawo i statut organiczny z 26 lutego 1832 r.* [Kingdom of Poland in The Period of Namestnik Ivan Paskevich (1832-1856). The Political System, Law and Organic Statute of 26 February 1832], ed. L. Mazewski, Poznań, Wydawnictwo von Borowiecky, 2015. It must be emphasized, however, that the Warsaw Departments of the Governing Senate, established with the aim of doing away with the separate highest court instance in the Kingdom of Poland, did not fulfill this task, as they were not subordinate to the Minister of Justice of the Russian Empire, they applied separate law in their judicial decisions, they were located in Warsaw and the majority of its members were Poles. A. Korobowicz, W. Witkowski, *Historia ustroju i prawa polskiego (1772-1918)* [History of Polish Political System and Law (1772-1918)], Warsaw, Lex a Wolters Kluwer business, 2012, p. 125.
- ⁵³ Nevertheless, it must be stressed that the unfamiliarity with the French-Polish civil law in force in the Kingdom, as well as maintaining Polish as the official language in the Departments until September 1873, was a barrier for Russian lawyers and affected the national composition of these organs.
- ⁵⁴ ZPA WS, vol. VI, pp. 261-263.
- ⁵⁵ Ivi, p. 327, pp. 379-381.
- ⁵⁶ *Kodex postępowania sądowego cywilnego francuzkiego, na polskie przetłumaczony z zlecenia JW. Ministra Sprawiedliwości*, [The French Code of Civil Procedure, Translated into Polish at the Order of the Minister of Justice], Warsaw, w druk. XX. Piarów, 1807; *Kodex Postępowania sądowego cywilnego z zlecenia JW. Ministra Sprawiedliwości, przez Antoniego Łabęckiego, Mecenasu S.K.X.W. [Sądu Kasacyjnego Księstwa Warszawskiego]*, *Członka Komisyyi przez N. Pana do układania Projektów do Praw ustanowionęy, wytłumaczony y poprawiony* [The Code of Civil Procedure, Translated and Corrected at the Order of the Minister of Justice by Antoni Łabęcki, Lawyer or the Court of Cassation of the Duchy of Warsaw, Member of the Commission Established by His Majesty the King to Draft Bills of Law], Warsaw, w druk. Xięży Piarów, 1810.
- ⁵⁷ The only sign of his own initiative was a definition of the «abuse of power in office», contained in Arts. 97 and 98 of the Penal Code of the Kingdom of Poland from 1818 (Dzierożyński, *Kodex* cit., vol. II, pp. 630-631).
- ⁵⁸ From 1811, he headed a team of university professors entrusted with the job of translating the Napoleonic Code. In the years 1814-1816 Krzyżanowski held the function of the Dean of the Faculty of Law of the Main School of Krakow, and subsequently he headed the Institute of Domestic Civil Law and Civil Law of Neighbouring Countries. In the years 1845-1847 he was the Rector of the Jagiellonian University and President of the Krakow Scientific Society.
- ⁵⁹ «Rozmaitości naukowe», n. III, 1831, pp. 1-15.
- ⁶⁰ For example, when discussing the provisions concerning the organization of the Court of Cassation in the Duchy of Warsaw, Krzyżanowski left out the issue of judges' civil liability, which was addressed by those provisions.
- ⁶¹ E.g., on p. 14, according to the author: In the Kingdom of Poland, Art. 145. of the Constitution states that the «The superintendence of the magistrates when named and chosen, and the the repression of the deviations that might be committed by them, as to the accuracy of the public service, belongs to the Cassation Tribunal» Meanwhile, this is the provision of Art. 143, which ended with the words «belongs to the Supreme Tribunal». See *supra* 41.
- ⁶² Subsidiary prosecutor, judge and from 1861 Vice-President of the Court of Appeals in Warsaw.
- ⁶³ Heylman, *O sądownictwie* cit., pp. 93, 137.
- ⁶⁴ Ivi, pp. 92-93.
- ⁶⁵ Heylman, *Rys* cit., p. 6.
- ⁶⁶ Ivi, p. 7.
- ⁶⁷ Heylman, *Historia oragnizacyi* cit., p. 159 ff.
- ⁶⁸ Ivi, pp. 163, 164; the same in his *Rys* cit., p. 6.
- ⁶⁹ Professor who lectured in the so-called Polish institutes at the University of Saint Petersburg; A. Kraushar, *Siedmioletcie Szkoły głównej Warszawskiej 1862-1869. Wydział Prawa i Administracyi. Notatki do historii szkół prawa w Polsce* [Seven Years of the Main School of Warsaw 1862-1869. Faculty of Law and Administration. Notes on the History of Law Schools in Poland], Warsaw-Krakow, Gebethner i Wolff, Gebethner i Spółka, 1883, p. 88.
- ⁷⁰ Krzyżanowski, *Zasady* cit., p. 620.
- ⁷¹ Ivi, p. 621.
- ⁷² «Wishing, to the extent possible, to live up to the scholarly activities beneficial to the civil procedure effective in our country, I have decided to enrich our literature with the main results of French works by such outstanding lawyers as Carré, Pigeau, Boitard, Berriat Saint Prix, Rauter, Boncenne, Bonnier, Mourlon and others. Nevertheless, a simple translation of any of those authors would not offer any practical benefits and would not constitute properly undertaken work, and this owing to the modifications that have been introduced in our country since the introduction of the civil procedure, and not so much in the procedure itself, but in its organization; for this reason I have found it more fitting to expound the main principles of the procedure, with the use of the works by aforementioned authors, leaving out everything that does not find practical application in our country.»; Ivi, pp. III-IV.
- ⁷³ This sentence goes as follows:

«Strictly speaking, holding Judges to liability is not a way of challenging judgements; in cases as these, the party who has lost the case complains against a Judge whose error, fault or corruption caused the party to lose; it is an entirely new action between the party and their Judge, it is not a measure for reversing the judgement.»; Szymanowski, *Wykład* cit., vol. II, p. 311.

⁷⁴ Cf. Chwalibóg, *Wykład* cit., vol. II, pp. 141-145.

⁷⁵ Regardless of numerous postulates and drafts of amendments of the provisions of the French CCP, few were realized. Among those few, we can name amendment of the provisions concerning enforcement of debts out of real estate.

⁷⁶ Heylman, *Historia organizacyi* cit., p. v.

⁷⁷ In commercial law, cf: A. Klimaszewska, *The Reception of the French Commercial Code in Nineteenth-Century Polish Territories - A Hollow Legal Shell*, in M. Gałędek, A. Klimaszewska, *Modernisation, National Identity, and Legal Instrumentalism. Studies in Comparative Legal History*, Brill 2019, forthcoming.

⁷⁸ Krzyżanowski, *Zasady* cit., pp. 41-42.

⁷⁹ In order to avoid repeating remarks in the following works (and the bibliography thereof), Cf: Klimaszewska, *O tłumaczeniach* cit., pp. 139 ff.; Klimaszewska, *Influence of French Legales* cit., pp. 173-184.

⁸⁰ As already mentioned, only the adoption of the Civil Code was stipulated in the Duchy's Constitution. As regarded the other codes, the Polish authorities had more latitude.

⁸¹ Reports of the Government Justice Commission kept in the documents of the Council of State of the Kingdom of Poland cite only the number of disciplinary and penal cases «against judiciary officials initiated in various courts». Most frequently, only

the overall number of cases is given or the number of delivered rulings (most often discontinuance, acquittal, restitution, suspension, suspension followed by reappointment to office, sentencing to degradation or transfer, monetary fine, reprimand, detention). The persons against whom these cases were brought to court are named very seldom. For example in the years 1816-1826 they usually concerned junior justices of the peace, scribes, bedels, bailiffs and attorneys. One president of an unnamed Tribunal was sentenced to degradation. There is no more information concerning cases brought against other judges. Cf.: AGAD, I Rada Stanu Królestwa Polskiego [First Council of State of the Kingdom of Poland], 104, fols. 125, 185, 218, 237-239, 247, 260-261, 292, 306, 315-316, 347-348.