

Conversion of invalid legal acts – functional and comparative analysis

Civil law enforces the principle of private autonomy. As a consequence, courts shall respect the will and interests of parties expressed by them in undertaken legal act unless public policies demand otherwise. The principle of private autonomy is not only a foundation of civil law but also a crucial basis for effectiveness of free market. Every democratic legal system has developed legal mechanisms aimed at realization and protection of private autonomy. However, some instruments which are being used in practice might be questionable from the perspective of private autonomy. Conversion of invalid legal acts can stand as an example of one of these doubtful institutions.

Conversion is a specific legal mechanism that allows a court to "save" the validity of legal act although it was, for instance, concluded in wrong form or it contains some provisions prohibited by law. While using this institution, courts shall consider what the parties would have done, had they known about invalidity of concluded legal act. Would they have concluded another functionally similar legal act that would at least partially satisfy their economic interests? Or would they have cancelled the whole transaction? In many cases, the answer to these questions would not result from a given set of facts nor the evidence. Reasoning conducted by court would be purely abstract.

German law allows such hypothetical reasoning - conversion is explicitly regulated in the German Civil Code. Although the Polish Civil Code does not contain a similar provision, conversion finds its application in judicial practice and is approved by legal doctrine. For example, void transfer of copyrights may be considered as valid non-exclusive license agreement or an invalid guarantee on bill of exchange can be treated as a civil surety. This raises the questions of both legal basis and the very nature of conversion.

Absence of precise legal regulation of conversion has led some scholars to treat this institution as a method of interpretation of legal acts. This approach may be questionable because interpretation should aim to determine parties' intentions which were expressed by them in the content of legal act. Since the parties have not expressed their assent what they would have done in case of nullity of transaction, it is hard to claim that this kind of hypothetical reasoning is a method of interpretation of parties' words and behavior in factual context (as this is the proper subject of interpretation). The question of the basis and legal nature of conversion still remains valid.

Described doubts justify proposed research as the issue of conversion has not been extensively examined by Polish doctrine in monographs studies. Conversely, in foreign literature – even in these jurisdictions which do not provide specific provision for conversion (Austria, Switzerland) – conversion has become a subject of thorough and detailed analysis. Especially the latest Swiss literature justifies the need to look at conversion from the perspective of private autonomy. The question whether private autonomy speak for or against conversion shall be answered.

The project aims to clarify that conversion is a specific institution of civil law which shall be distinguished from interpretation. Its source and limits result from the principle of private autonomy. The project proposes a critical look at examples of conversion, revision of its prerequisites and establishing its boundaries under Polish law. Both the literature as well as case law is full of considerable controversies and disagreements within that field.

In order to reach these objectives the research proposes functional approach. It is essential to clarify the functions which conversion is bound to perform and the values that shall be protected by conversion. Furthermore, the research includes a comprehensive analysis of foreign legal systems, starting with German law where conversion finds clear statutory regulation. German literature is an invaluable source of knowledge about the nature and purposes of conversion. Abundant jurisprudence provides examples necessary to prove the research project hypotheses.

Moreover, the project also intends to examine Austrian and Swiss law as these legal orders face a similar to Poland problem of lack of legal basis for conversion. An important part of the study is an analysis of English and American law. Although these legal systems have not developed the concept of conversion, they have recognized the problem of establishing limits to court's competences to interfere into private autonomy.

Functional and comparative analysis of conversion seems to be particularly needed in the age of Civil Law Codification Commission studies as the prepared draft of new civil code provides legal regulation for conversion. In this field the study aims to clarify the nature and direction of proposed changes which will allow for a better understanding of the potential consequences of postulated codification of Polish civil law.