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The European Union and Fundamental Rights/Human Rights: Vanguard or Villain?

The early days

The protection of fundamental rights and human rights in the European Union has witnessed several phases and fluctuations. In the early days of European integration, whilst it would be exaggerated to brand the then Communities[1] a 'villain,'[2] there was no explicit recognition of fundamental rights/human rights as being part of Community law. In some cases of the late 1950s and early 1960s where the European Court of Justice[3] was invited to apply national constitutional fundamental rights, the Court not only declined to apply a given provision of a national constitution[4] but also abstained from developing a fundamental rights regime at Community level.[5]

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1 Hereinafter: EU. The European Coal and Steel Community, founded in 1951 (and abolished in 2002), and the European Economic Community (EEC) and the European Atomic Energy Community (Euratom), both founded in 1957. On the historical development of the Communities and subsequently the EU v., e.g., A. Rosas, L. Armati, *EU Constitutional Law: An Introduction*, Oxford 2012, pp. 9-12.

2 Which, to cite the Oxford Dictionary, is a person 'guilty or capable of great wickedness.'

3 Hereinafter: ECJ.

4 Such application of a national constitutional provision would have been difficult as the Court's competence was limited to EEC law and also as the then six national constitutions (Belgium, France, Germany, Italy, Luxembourg and the Netherlands) were quite different in status and content.

5 A. Rosas, *The European Union and Fundamental Rights/Human Rights*', in *International Protection of Human Rights: A Textbook*, ed. C. Krause, M. Scheinin, Turku – Åbo 2012, pp. 481.

But such an approach proved untenable in the long run. The famous judgment of the ECJ in *Stauder*, delivered in 1969, set the stage for a system of the protection of fundamental rights as general principles of Community law.[6] In later judgments, the Court specified that, with a view to determining which rights form part of the general principles of Community law, inspiration could be sought from the 'constitutional traditions common to the Member States'[7] and guidelines could be found in 'international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories.'[8] It was later added that the European Convention on Human Rights[9] was not only one such international treaty but also that it enjoyed 'special relevance.'[10]

These developments in case law, which undoubtedly can be characterized as 'judge-made law,' were not only prompted by concerns about fundamental rights and human rights in themselves. There is every reason to believe that the ECJ also took into account the need to uphold the principle of the primacy of Community law over the laws of Member States, which the Court had explicitly confirmed in *Costa v ENEL* in 1964, five years before *Stauder*.[11] If a Community law bereft of rules on fundamental rights always prevailed over the national law of the Member States, including their constitutional Bills of Rights, there was a clear risk that national constitutional and other courts would begin to restrict the application of rules of Community law which posed a problem from the point of view of their own constitutionally protected fundamental rights. The solution at which the ECJ arrived was to advance the protection of fundamental rights at Community level, corresponding to the national Bills of Rights.[12]

It may be equally exaggerated, however, to consider the EEC and the other Communities of those days as a 'vanguard' (to cite once more the Oxford Dictionary, the 'leader of a movement or of opinion') of fundamental rights. The initial Community fundamental rights regime fell somewhat short of the national systems, consisting in

6 Case 29/69 *Stauder* EU:C:1969:57.

7 Case 11/70 *Internationale Handelsgesellschaft* EU:C:1970:114, §§ 3-4.

8 Case 4/73 *Nold v Commission* EU:C:1974:51, § 13.

9 Hereinafter: ECHR.

10 V., e.g. Joined Cases 46/87 and 222/88 *Hoechst v Commission* EU:C:1989:337, § 13. Cf. A. Rosas, *Fundamental Rights in the Luxembourg and Strasbourg Courts*, in *The EFTA Court: Ten Years On*, ed. C Baudenbacher et al., Oxford 2005, pp. 163, 168-169; A. Rosas, *The European Union...*, *op. cit.*, p. 497.

11 Case 6/64 *Costa* EU:C:1964:66; Case 26/62 *Van Gend & Loos* EU:C:1963:1.

12 V. notably the seminal article by one of the then judges of the ECJ, P. Pescatore, *Les droits de l'homme et l'intégration européenne*, "Cahiers de droit européen" 1968, pp. 629-673, which, in fact, outlined the approach the Court would ultimately take, starting the following year with *Stauder*, *supra* note 6. Cf. A. Rosas, *The European Court of Justice and Fundamental Rights: Yet Another Case of Judicial Activism?*, in *European Integration through Interaction of Legal Regimes*, ed. C. Baudenbacher, H. Bull, Oslo 2007, pp. 34, 36-37.

most cases of a constitutional Bill of Rights as well as of adherence to the ECHR and other international human rights treaties. Moreover, as noted above, *Stauder* and subsequent judgments can at least partly be seen as a reaction to the risk that the principle of primacy of Community law would be called into question by national judges rather than as being prompted by human rights considerations in their own right. That said, it can be held that the judicial branch of the Communities (the ECJ) acted as a kind of a vanguard as compared to the other Community institutions or to the Member States in their capacity of authors of the basic Treaties. As has been the case also in some other instances, it was the Court that acted as an initiator and the other actors mainly followed suite.[13]

These other actors, on the other hand, did follow suite and so the seminal judgments of the Court did not remain isolated phenomena but were soon confirmed or reaffirmed by political declarations and Treaty changes. But in 1974, before the political declarations and Treaty changes, the German Constitutional Court still held that the Communities had not yet developed a full-fledged fundamental rights system. In its first *Solange* decision of 1974,[14] the Court reserved a right to verify the applicability of Community legislation in Germany under the national Bill of Rights contained in the *Grundgesetz* 'as long as' (*solange*) no equivalent system had been developed at Community level.[15] This was precisely the kind of situation the ECJ had tried to avoid by launching its own fundamental rights case law but these efforts were not considered sufficient by the German Constitutional Court, which thought that the Communities were still a bit of a villain as far as the protection of fundamental and human rights were concerned.

One of the main conclusions to be drawn from these early days of an EU fundamental rights regime is that the question of fundamental rights as part of EU law has from the very beginning been a markedly constitutional question, with consequences for the relationship between the legal orders of the Union and those of its Member States. At stake have been primordial questions of competence and powers. It is a story of developing fundamental rights for the Union and its citizens internally rather than of promoting human rights in a worldwide or broader regional setting. Hence the term 'fundamental rights' has from the beginning been preferred for these developments, whilst 'human,

13 There is an extensive literature on the role played by the ECJ in the European integration process. For two recent contributions initiated or published by the ECJ itself: *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law – La Cour de justice et la Construction de l'Europe: Analyses et Perspectives de Soixante Ans de Jurisprudence*, ed. A. Rosas et al., The Hague 2013; *Van Gend en Loos 1963-2013: 50ème Anniversaire de l'arrêt – 50th Anniversary of the Judgment*, ed. A. Tizzano et al., Luxembourg 2013.

14 Decision of 29 May 1974, BVerfGE 37, 271.

15 V., e.g. D. Thym, *Attack or Retreat? Evolving Themes and Strategies of the Judicial Dialogue between the German Constitutional Court and the European Court of Justice*, in *Constitutional Conversations in Europe: Actors, Topics and Procedures*, ed. M. Claes et al., Cambridge 2012, pp. 235.

rights' has become a term used in the context of EU *external* relations.[16] This is also the terminology that will guide us in the ensuing discussion.

Consolidation and Refinement

The Joint Declaration issued by the European Parliament, the Council and the Commission in 1977,[17] in which the three main political institutions underlined the primary importance they attach to the protection of fundamental rights as derived in particular from the constitutions of the Member States and the ECHR, was meant to further alleviate fears of the Community as a fundamental rights-free-zone. In parallel, the ECJ continued to develop and refine its own case law. These developments led the German Constitutional Court to reverse its *Solange* I decision in 1986 ("*Solange* II").[18] The German Court now held that Community fundamental rights law had developed to such an extent that it would not exercise its competence to control the compatibility of Community law with the fundamental rights provision of the German Constitution 'as long as' the Communities guarantee an equivalent system for the effective protection of fundamental rights.

The Maastricht Treaty of 1992 implied that some basic provisions on fundamental and human rights were brought into the remit of binding Community primary law. The provision relating to fundamental rights as part of the general principles of Community law, as guaranteed by the ECHR and as they result from the constitutional traditions of the Member States, has survived until our days and is now expressed in Article 6(3) TEU. In this way, the Member States as 'Masters of the Treaties'[19] have accepted that the *Nold* approach, used by the ECJ already in 1974, has been incorporated into binding primary law (with the exception that Nold referred to human rights treaties in general whereas Article 6(3) TEU and its previous versions mention the ECHR only).

The Maastricht Treaty also contained some provisions relating to the promotion of human rights in the external relations of the Communities. In 1996, in *Portugal v Council*, the ECJ ruled that insertion of a general human rights clause in agreements with third States was compatible with Community law. The fact that the Court explained the legality of the human rights clause by observing that it does not create new human rights but rather confirms some basic principles and provides for the taking of countermeasures against third States in case of violation of those principles is indicative of the

16 A. Rosas, *The European Union*..., *op. cit*., p. 481.
17 [1977] OJ C103/1.
18 Decision of 22 October 1986, BVerfGE 73, 339. Cf. the Banana market regulation decision of 7 June 2000, BVerfGE 102, 147.
19 V. *EU Constitutional Law*..., *op. cit*., pp. 32-51.

fact that there were at the time doubts about the extent of an external competence in this field.[20]

These doubts came to the surface in connection with the plans to enable the Communities to accede to the ECHR. Many Member States and the Legal Service of the EU Council were still in the 1990s generally of the opinion that the Communities did not have a veritable external competence in the field of human rights and the ECJ was requested to give an opinion as to whether accession to the European Convention was compatible with the Treaties. In its Opinion 2/94, delivered in 1996, the Court held that as Community law stood at the time, the Communities lacked competence to adhere.[21]

The Court in this context referred to the specific nature of the ECHR, considering that accession would have such important institutional and constitutional implications that there was no sufficient legal basis in the existing Treaties to enable accession and that accession would require amending the Treaties. This left the question of accession in abeyance for a long time to come. I shall come back to this question after a while, in the context of some remarks on the recent Opinion 2/2013, in which the Court this time held that the draft accession agreement which had been negotiated by the European Commission, on behalf of the EU, and the Member States of the Council of Europe is not as to its substance compatible with the Treaties.

The situation after Opinion 2/94 of 1996 thus remained more or less as it had been before. In other words, the dominant factor in the *internal* fundamental rights regime continued to be the case law of the ECJ, inspired by the ECHR and Strasbourg case law in particular, and supplemented by the general provisions of the Maastricht Treaty. As to *external* relations, the main legal element was the human rights clause, combined with some Community legislative acts providing for financial assistance to human rights activities in third countries or the possibility to suspend financial assistance or trade preferences more generally if a third country was deemed to violate basic human rights principles.[22]

The Charter of Fundamental Rights

Especially with regard to the internal fundamental rights system, the situation was not considered to be entirely satisfactory. If a citizen wanted to know exactly what funda-

20 Case C-268/94 *Portugal v Council* EU:C:1996:461. Cf. B. Brandtner, A. Rosas, *Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice*, "European Journal of International Law" 1998, vol. 9, pp. 468-490, 472-473, 483.

21 Opinion 2/94 *Accession to the European Convention on Human Rights* EU:C:1996:140.

22 B. Brandtner, A. Rosas, supra note 20; B Brandtner, A. Rosas, *Trade Preferences and Human Rights*, in *The EU and Human Rights*, ed. P. Alston, Oxford 1999, p. 699; A. Rosas, *The European Union...*, *op. cit.*, pp. 489-491, 505-507.

mental rights he or she enjoyed under Community law, it was probably not so helpful to be told that one should consult a few thousand pages of the Court's case law.

And referring to the ECHR was not sufficient. First of all, the ECHR, whilst constituting an important guideline for determining the fundamental rights which were considered to form part of the general principles of Community law, was not an integral part of Community law and so was not applied directly.[23] Secondly, the ECHR, even taking into account its Protocols, is not a complete codification of human rights; the initial Convention of 1950 was prepared after the Second World War and it does not fully reflect today's human rights agenda. That is probably why the ECJ in its case law did not limit itself to refer to the ECHR but sometimes cited some other international human rights instruments, such as the European Social Charter and, as to universal instruments, the Universal Declaration of Human Rights, the two Covenants of 1966 or the Convention on the Rights of the Child.[24]

The need to clarify the situation was again raised soon after Opinion 2/94 and some Member States, Germany in particular, advanced the idea that the EU should have its own Bill of Rights, corresponding to the national constitutional Bills of Rights. After some rather difficult discussions it was decided to proceed along this path, whilst not excluding the idea of accession to the ECHR. On the basis of a text prepared by a Convention, consisting not only of Member States' governments but also of representatives of the national parliaments as well as of the European Parliament and the Commission, the three main political institutions, the European Parliament, the Council and the Commission, adopted the Charter of Fundamental Rights of the European Union.[25]

The Charter was at first adopted in 2000 as a 'solemn proclamation'. This version of the Charter was not considered legally binding at least in the strict sense and whilst Advocates General of the ECJ and the then Court of First Instance (now the General Court) soon started to refer to it, the ECJ itself was more cautious and made such a reference for the first time only in 2006.[26] The Treaty for the Establishment of a Constitution for Europe, signed in Rome in 2004 but which because of negative referendums in two Member States never entered into force, included the Charter as Part II of the

23 Also recently, the ECJ has recalled that the ECHR does not form an integral part of Union law: Case C-617/10 Åkerberg *Fransson* EU:C:2013:105, § 44; Opinion 2/13 *Draft Accession Agreement ECHR* EU:C:2014:2454, § 179.

24 A. Rosas, *The European Union and International Human Rights Instruments*, in *The European Union and the International Legal Order: Discord or Harmony*, ed. V. Kronenberger, The Hague 2001, p. 53; *idem*, *The European Union: In Search of Legitimacy*, in *60 Years of the Universal Declaration of Human Rights in Europe*, ed. V. Jaichand, M. Suksi, Antwerp 2009, p. 415; *idem*, *The Charter and Universal Human Rights Instruments*, in *The EU Charter of Fundamental Rights: A Commentary*, ed. S. Peers et al., Oxford 2014, p. 1685.

25 [2000] OJ C364/1.

26 Case C-540/03 *Parliament v Council* EU:C:2006:429, § 38. Cf. A. Rosas, *The European Union...*, *op. cit.*, pp. 499-500.

Constitutional Treaty.[27] The Lisbon Treaty of 2007, which entered into force on 1 December 2009, completed this process by amending Article 6 TEU and inserting in it a § 1 providing that the Charter 'shall have the same legal value as the Treaties'. It was, in other words, made part of binding primary EU law, despite the fact that the text of the Charter, unlike the Constitutional Treaty of 2004, was not included in the TEU itself but appears as a separate instrument. As indicated in Article 6(1), this instrument is an 'adapted' version of the Charter as proclaimed in December 2000, containing some minor modifications above all to the general provisions contained in Title VII.[28]

And so the EU had finally given itself a true Bill of Rights, a constitutional instrument which prevails over EU legislative and other legal acts. If we look at the content of the Charter we shall find that the EU was here somewhat of a forerunner. The Charter is a modern fundamental rights instrument, which is inspired by not only the ECHR but also other European and universal instruments as well as national constitutions and taking into account a more recent human rights discourse.

Unlike the divide between civil and political rights, on the one hand, and economic, social and cultural rights, on the other, which can be seen in the split between the ECHR and the European Social Charter, and between the two universal Covenants of 1966,[29] the EU Charter combines in one single instrument basically all human rights considered to be worthy of such elevated status. It is true that the so-called economic, social and cultural rights occupy a somewhat more modest position than the so-called civil and political rights. But the way these two categories, to the extent we really can speak of categories, are interwoven in the text of the Charter points to the principle of the indivisibility of human rights and also illustrates the difficulties in making a sharp distinction between the two categories – in which category should we, for instance, put Article 26 on the rights of persons with disabilities or Article 28 on the right of workers and employers to take collective action to defend their interests, to name but two examples? Whilst there is not yet much case law on social rights in the narrow sense of the term, the two Articles mentioned figure among the Charter rights which have already been examined by the ECJ.[30]

27 [2004] OJ C310/1.

28 For a detailed commentary to the Charter: *The EU Charter...*, *op. cit.* Cf. e.g. *Fundamental Rights Protection of the European Union*, ed. J. Barz, Warsaw 2009; *The EU Charter of Fundamental Rights: From Declaration to Binding Instrument*, ed. G. Di Federico, Dordrecht 2011.

29 On this divide and the problems related to it v., e.g. *Economic, Social and Cultural Rights: A Textbook*, ed. A. Eide, C. Krause, A. Rosas, Dordrecht 2001.

30 On Article 26 of the Charter: Case C-356/12 *Glazel* EU:C:2014:350, §§ 74-79, which also refers (§§ 67-71) to the UN Convention on the Rights of Persons with Disabilities, [2010] OJ L23/35. In other judgments relating to the rights of persons with disabilities the Court has, apart from the UN Convention, based itself on Council Directive 2000/78/EC of 27 Novem ber 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L303/16; cf. e.g. Joined Cases C-335/11 and C-337/11 *HK Danmark*

There are also some other elements in the Charter which could be regarded as innovations or at least progressive developments as compared to most earlier human rights/fundamental instruments. I am thinking for instance of Article 3(2), which prohibits, inter alia, the reproductive cloning of human beings. Another example could be Article 21, which prohibits discrimination generally and includes as examples of what is prohibited discrimination on the grounds of, inter alia, genetic features, disability, age and sexual orientation. The reference to membership of a national minority, and the reference to the rights of persons belonging to minorities in Article 2 TEU, are novelties in an EU context, even if minority protection, of course, has previously received much attention in other contexts such as the Council of Europe.[31] Among other provisions of the Charter which are have not as such received much attention elsewhere can be mentioned Article 37 on environmental protection and Article 38 on consumer protection.[32] Finally, it is worth mentioning that Article 47 on the right to an effective remedy and a fair trial has a wider scope of application than Article 6 of the ECHR, in the sense that Article 47 is applicable to all alleged violations of rights and freedoms guaranteed by Union law whereas Article 6 of the European Convention is limited to penal proceedings and situations involving 'civil rights and obligations.'[33]

The reference in Article 47 of the Charter to rights and freedoms 'guaranteed by EU law' on the other hand points to a general limitation of the applicability of the Charter spelled out in general terms in its Article 51. At Member States' level, the Charter is applicable only when the Member State concerned is 'implementing Union law.' The Charter in other words has not obtained the status of the US Bill of Rights, which may be applied at sub-federal level also when state law rather than federal law is involved. That said, the difficulties in drawing a sharp line between Union law and national law in the EU context are also present when the applicability of the Charter at national level is at stake and the ECJ has had to struggle with these difficulties in a number of cases.[34]

EU:C:2013:222; C. O'Brien, *Article 26: Integration of Persons with Disabilities*, in *The EU Charter...*, *op. cit.,* p. 709. As to Article 28 of the Charter: Case C-438/05 *International Transport Workers' Federation* ('Viking Line') EU:C:2007:772, §§ 43-44; Case C-341/05 *Laval un Partneri* EU:C:2007:809,§§ 90-91. Cf. C. Barnard, *Article 28: Right of Collective Bargaining and Action*, in *The EU Charter...*, *op. cit.*, p. 773.

31 On the prohibition of discrimination and the right of minorities in the Charter v., e.g. *EU Constitutional Law...*, *op. cit.*, pp. 174-177. On Article 21 specifically: C. Kilpatrick, *Article 21: Non-Discrimination*, in *The EU Charter...*, *op. cit.*, p. 579.

32 On Article 37: E. Morgera, G. Marín Durán, *Article 37: Environmental Protection*, in *The EU Charter...*, *op. cit.*, p. 983. On Article 38: S. Weatherhill, *Article 38: Consumer Protection*, in *The EU Charter...*, *op. cit.*, p. 1005.

33 P. Aalto et al., *Article 47: Right to an Effective Remedy and to a Fair Trial*, in *The EU Charter...*, *op. cit.*, p. 1197.

34 V., e.g. A. Rosas, *The Applicability of the EU Charter of Fundamental Rights at National Level*, "European Yearbook on Human Rights" 2013, vol. 13, pp. 97-112; A. Ward, *Article 51: Field of Application*, in *The EU Charter...*, *op. cit.*, p. 1413.

To the extent that the scope of Union law is expanding, the scope of application of the Charter will expand accordingly.

The EU and the ECHR

In situations where the Charter is not applicable the Member State concerned of course remains bound by the ECHR and other human rights conventions and individuals may complain to the European Court of Human Rights or, where applicable, other human rights complaint bodies. But the ECHR and other human rights conventions are not only relevant in the context of the national law of the Member States but they also play a role in the application of EU fundamental rights, be it under the Charter of Fundamental Rights or as general principles of Union law. As I noted before, the ECJ started to apply fundamental rights as general principles of Union law already in 1969 and the Court soon followed suit by holding that the international instruments may serve as guidelines in this respect.

These international instruments, and the ECHR in particular, are also present in the Charter context. First of all, the Charter, as is obvious from its Preamble and from the Explanations to the Charter, is to a large extent inspired by these instruments (the Preamble singles out the ECHR and the European Social Charter). Secondly, Article 52(3) of the Charter provides that the rights of the Charter which 'correspond to' rights guaranteed by the ECHR shall be given the 'same meaning and scope' as the corresponding rights in the Convention. Thirdly, Article 53 of the Charter contains a reserve habitual in human rights contexts according to which nothing in the Charter shall be interpreted as restricting or adversely affecting human rights as recognized, inter alia, by international law or by international agreements to which the Union or all the Member States are party.

In the light of the Court's case law, it seems that the latter provision (Article 53) cannot compromise the principle of primacy of Union law.[35] In case of a conflict, the Charter as primary law would prevail over human rights conventions, even if they have been concluded by the Union itself.[36] Article 52(3), on the other hand, is of greater importance and has already been applied by the Court several times, despite the fact that the EU is not a party to the ECHR.[37] In this way, the Charter transforms, as it were, the minimum protection afforded by the ECHR into Union law and the Charter more specifically. But Article 52(3) is no obstacle to the more progressive elements of the Charter in that,

35 V., in particular, Case C-399/11 *Melloni* EU:C:2013:107. Cf. Opinion 2/13, *Draft Accession Agreement...*, *op. cit.*, §§ 191-194.

36 In the EU hierarchy of norms, primary law prevails, in principle, over international agreements while the latter prevail, in principle, over regulations, directives and other acts of secondary law, v., e.g. *EU Constitutional Law...*, *op. cit.*, pp. 53, 59-61.

37 For example: Case C-279/09 *DEB* EU:C:2010:811 §§ 35-36.

first, the provision itself spells out that it shall not prevent Union law from providing 'more extensive protection' than that offered by the ECHR, and second, the Charter, as noted earlier, contains a number of rights which are not to be found or go beyond what is contained in the Convention. Moreover, EU legislation may contain provisions which provide more extensive protection than the ECHR, even in cases where this is not expressly spelled out in the Charter itself.

In view of this progressive feature of EU fundamental rights law it should perhaps not come as a great surprise that there are cases where the European Court of Human Rights has been inspired by a Charter provision, another rule of EU law or an ECJ judgment in arriving at a progressive development of an earlier interpretation of a provision in the ECHR. Examples are the right to marry in the context of change of sex,[38] the right to a lighter penalty provided by a law passed subsequent to the commission of the crime,[39] and the right to interim measures in the context of Article 6 of the ECHR.[40]

In some instances, such as the question of asylum seekers asserting discrimination on grounds of homosexuality, it still remains to be seen whether the Strasbourg Court will follow the line taken in the recent A, B and C judgment relating to the verification of the sexual orientation of applicants.[41]

EU accession to the ECHR?

Between the ECJ and the European Court of Human Rights there has, in other words, been a two-way street, where both Courts have taken into account the case law of the other. This interaction has taken place and, in my view, functioned fairly well without the EU being a Contracting Party to the ECHR. As noted earlier, the question of EU accession to the ECHR has been on the agenda quite some time.[42] Article 6(2) TEU, as amended by the Treaty of Lisbon, provides that the Union shall accede to the ECHR. It is added, however, that accession should not affect the Union's existing competences as defined in the Treaties. And, as is recognized in Article 218(8) TFEU, accession, to become operative, requires the conclusion of an accession agreement with the Member States of the Council of Europe[43] as well as amendments to the ECHR itself. Protocol

38 Case of *Goodwin v United Kingdom*, Eur.C.H.R., judgment of 11 July 2002 (Application No. 28957/95), referring to the wording of Article 9 of the Charter.

39 Case of *Scoppola v Italy*, ECHR, judgment of 17 September 2009 (Application No. 10249/03), referring to Article 49(1) of the EU Charter of Fundamental Rights and the ECJ judgment in Joined Cases C-387/02, C-391/02 and C-404/02 *Berlusconi* EU:C:2005:270.

40 Case of *Micallef v Malta*, ECHR, judgment of 15 October 2009 (Application No 17056/06), where a reference was made to ECJ case law.

41 Joined Cases C-148/13 to C-150/13 A, B and C EU:C:2014:2406.

42 Opinion 2/94 *Accession to the European Convention...*, *op. cit*.

43 According to Article 218(8) TFEU, the adoption of the Council decision concluding the accession agreement requires unanimity in the Council.

No 8 annexed to the TEU and the TFEU requires that the accession agreement 'shall make provision for preserving the specific characteristics of the Union and Union law' and contains some other conditions which this agreement must meet.

The draft accession agreement which was negotiated between the European Commission and the 47 Council of Europe Member States and which was finalized at negotiators' level in April 2013[44] was subsequently referred to the ECJ for a binding opinion, under Article 218(11) TFEU, as to whether the draft agreement was compatible with Union law. In its Opinion of 17 December, the Court gave a negative answer, referring to a number of issues which needed to be corrected or clarified in order to make an accession agreement compatible with Union law.[45] The Court stressed that one fundamental problem arose from the fact that the draft agreement was to a large extent based on the assimilation of the EU with States Party to the Convention, thus sidestepping some of the institutional and technical problems which arise mainly from the fact that the EU would not join the Convention replacing its Member States but alongside them.

To mention here just one of the problems which the Court underlined in its Opinion: The draft accession agreement contains no provisions providing for some special rules applying to the EU Member States in their internal relations in the fields of Union law based on mutual recognition and mutual trust.[46] Especially in these areas, to cite Opinion 2/13, 'the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States.[47] In this regard, there has been a certain tendency in the case law of the European Court of Human Rights to treat the relations between EU Member States more or less in the same way as the relations between them and other contracting parties to the ECHR, or even between contracting parties and third States.[48]

Such an approach would pose a serious problem for the proper functioning particularly of the EU area of freedom, security and justice, which sometimes requires the speedy and quasi-automatic transfer of a person from one Member State to another.

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44 Draft Revised Agreement, Final Report to the CDDH, Fifth Negotiation Meeting Between the CDDH Ad Hoc Negotiation Group and the European Commission, Council of Europe.

45 Opinion 2/13, supra note 23. There is already an abundance of articles and case notes on Opinion 2/13; for a fairly detailed analysis: D. Halberstam, *It's the Autonomy, Stupid! – A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward*, "Public Law and Legal Theory Research Paper Series," Paper No. 432, Michigan Law, University of Michigan, February 2015, http://ssrn.com/abstract=2567591.

46 The concept of mutual recognition appears, apart from secondary law, in the TFEU in the context of the 'area on freedom, security and justice': Articles 67(3), 67(4), 81(1), 81(2), 82(1) and 82(2) TFEU. Cf. Article 67(2) TFEU, which refers to 'a common policy on asylum, immigration and external border control, based on solidarity between Member States.'

47 Opinion 2/13 *Draft Accession Agreement*..., *op. cit.*, § 192.

48 V., e.g. Case of *Tarakhel v Switzerland*, judgment of 4 November 2014 (Application No. 29217/12). Cf. D. Halberstam, *It's the Autonomy, Stupid!*..., *op. cit.*, pp. 23-27.

It is not a question of lowering the standard of fundamental rights protection required. However, the main responsibility, in the context of the EU, for ensuring the protection of the person's fundamental rights should be on the receiving Member State, which is the one that should principally deal with the matter (such as treating an asylum request, ordering an unlawfully abducted child to be returned to the receiving State and the protection of the child in the receiving State, or prosecuting a person handed over on the basis of the European arrest warrant).[49]

In other cases, however, the European Court of Human Rights has shown more understanding for the special nature of the EU internal market and area of freedom,, security and justice and has recognized that EU legislation based on mutual recognition and mutual trust should, as a rule, be applied as it is meant to be in the relations between the Member States. At the same time, ECJ case law can be said to have come closer to the approach of the European Court of Human Rights, as the ECJ has recognized that there may be exceptional circumstances where the sending Member State should not blindly execute a transfer of a person to the requesting Member State if there are serious concerns about the treatment he or she is likely to receive in the latter (a concrete risk of inhumane or degrading treatment).[50]

This rapprochement between ECJ and Strasbourg case law could make it less difficult to find an acceptable solution to EU accession to the ECHR. Moreover, it is also true that EU accession to the ECHR might reinforce the idea of the EU forming, in these matters, a single area rather than several disparate jurisdictions, which could make it easier for the Strasbourg Court to recognize fully the principles of mutual recognition and mutual trust in EU law. As this is pure speculation, however, and as Strasbourg case law seems partly based on a stricter control also of the decision to transfer than what should be allowed under EU law, the ECJ in Opinion 2/13 insisted that this issue be dealt with in the accession agreement rather than be left to the vicissitudes of future case law.

It is now too early to say what will happen next, in other words what consequences will be drawn by the European Commission, the EU Council and the Member States as to the way forward. Let me only stress here that the Opinion should not be seen as a step

49 Case of *Povse v Austria*, ECHR decision of 18 June 2013 (Application No. 3890/11), §§ 82-86, in which the Court of Human Rights (correctly it is believed) observed that the transferring State (Austria) had no more than fulfilled its strict obligations flowing from its membership of the EU (§ 82), that is the Dublin Regulation (EC, No. 343/2003), and that the applicants should have relied on their ECHR rights before the courts of the receiving State (Italy) and could have ultimately lodged an application with that Court against Italy (§ 86). See also *the Case of Avotiņš v Latvia*, judgment of 23 May 2016 (Grand Chamber) (Application No 17502/07).

50 Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldărău* EU:C:2016:198 (concerning the European arrest warrant); Joined Cases C-411/10 and C-493/10 *NS and ME* EU:C:2011:865 (concerning the Dublin Regulation on the Member State competent to deal with asylum requests).

back in the Court's approach to the substance of fundamental rights. Already a few years before the Opinion, as the Lisbon Treaty entered into force, the Court shifted somewhat its focus from the ECHR to the EU Charter.[51] This was inevitable, as the Charter, as I said earlier, now came to constitute the EU's own Bill of Rights and is also a more modern and more comprehensive fundamental rights instrument than the ECHR.

Concluding remarks

The case law adopted on the basis of the Charter demonstrates in my view that both the ECJ, and the EU more generally, take fundamental rights seriously and are not particularly shy at the possibility of progressive development either. The post-Lisbon case law also includes some judgments declaring EU legislative acts invalid in whole or in part as constituting violations of Charter provisions. The most well-known case is the judgment of 2014 in *Digital Rights Ireland*, finding the whole EU Directive on data retention invalid as being incompatible with Articles 7 (respect for private life) and 8 (protection of personal data) of the Charter.[52] More generally, the Court in its case law relating to the Charter will no doubt take into account developments not only at the national constitutional level but also in the international human rights arena, notably with respect to the ECHR and other Council of Europe instruments and, as the case may be, in a more universal context.

Alongside these developments, the EU has focused on its *external* human rights agenda which consists of not only the human rights clauses referred to earlier but also a string of programmes and structured dialogues with third States.[53] In this context, the EU is often cooperating closely with international organizations such as the UN and the Red Cross movement. Some of the sanctions (called 'restrictive measures') taken against third States have been resorted to because of perceived violations of basic principles relating to human rights, democracy and the rule of law. And whilst the EU is not a Contracting Party to the ECHR, it fairly recently became the first non-State entity to conclude a human rights convention, the UN Convention on the Rights of Persons with Disabilities.[54] In this way the EU has increasingly become to be seen not only as a trading bloc but also as an actor exercising 'soft' power.

That said, I would like to emphasize that the EU should not be seen as a human rights organization, nor should the ECJ be seen as a human rights court.[55] The exclusion of

51 V., e.g. A. Rosas, H. Kaila, *L'application de la Charte des droits fondamentaux de l'Union européenne par la Cour de justice: Un premier bilan*', "XVI Il diritto dell'Unione Europea" 2011, pp. 1-28.

52 Joined Cases C-293/12 *Digital Rights Ireland* and C-594/12 *Kärntner Landesregierung and Others*, EU:C:2014:238.

53 V., e.g. A. Rosas, *The European Union...*, *op. cit.*, pp. 505-518.

54 V. supra note 30.

55 A. Rosas, *Is the EU a Human Rights Organisation?*, "CLEER Working Papers" 2011, no. 1.

the applicability of the Charter when solely national law is at stake is an illustration of this. And more generally, the EU is an economic and political union of States, not an intergovernmental organisation such as the Council of Europe, which is centred on the promotion and protection of human rights.

It is true that fundamental rights and human rights figure prominently among the values and objectives of the EU but there are many other objectives of the EU as well, for instance the creation of a single market and an area of freedom, security and justice, both 'without internal frontiers.'[56] And it is indicative that the TEU, when referring to the external objectives of the Union, mentions not only the values of the Union but also its 'fundamental interests, security, independence and integrity' (Article 21 TEU). As is demonstrated for instance by the sanctions policy of the EU, including with regard to some European States such as Byelorussia and Russia, the Union action in some respects resembles that of independent States (in fact, in the field of sanctions, the Union has replaced its Member States as the entity instigating the restrictive measures).[57] At the same time, as the *Kadi* I and II judgments of 2008 and 2013 and the case law of the Union Courts more generally demonstrate, such sanction decisions are subject to a fairly strict judicial control in accordance with basic principles of fundamental rights and the rule of law.[58]

To come back to the initial question, is the EU in the human rights field a vanguard or a villain? I hope it should have become clear by now that the Union does not fit particularly well into any of these two extremes. But by comparison to the other EU institutions, the Court of Justice has been somewhat of a forerunner, taking the first steps towards a fundamental rights system already in 1969 and contributing in many respects to its further development. Also outside the EU framework, there seems to be an increasing tendency among courts and other actors to take note of, and sometimes even cite, ECJ judgments in the fundamental rights/human rights area.[59] And in some

56 Article 3(2) TEU and Article 26(2) TFEU.

57 V., e.g. A. Rosas, *Counter-Terrorism and the Rule of Law: Issues of Judicial Control*, in *Counter-Terrorism: International Law and Practice*, ed. A. M Salinas de Frías et al., Oxford 2012, pp. 83, 88-93. On sanctions undertaken against Russia, in particular, see Case C-72/15 *Rosneft* EU:C:2017:236.

58 Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* ('Kadi I') EU:C:2008:461; Case C-584/10 P *Commission and Others v Kadi* ('Kadi II') EU:C:2013:518. On the other hand, the intensity of the control may vary depending on the nature of the sanctions and the factual circumstances of each case. V., e.g. Case C-348/12 P *Council v Kala Naft* EU:C:2013:776.

59 As to the European Court of Human Rights, v. *supra* notes 38-40. For an example of a national judgment citing *Kadi I*: A. Rosas, *Counter-Terrorism...*, *op. cit.*, p. 101, citing the judgment of the UK Supreme Court of 27 January 2010 in *Ahmed and Others*, [2010] UKSC 2, [2010] AC 534. In the United Nations, *Kadi I* led to some improvements in the monitoring of Security Council sanctions decisions: A. Rosas, *Counter-Terrorism...*, *op. cit.*, p. 102.

respects the Union itself, too, whilst having been almost silent on fundamental and human rights in the 1960s, has been more of a forerunner in adopting, with the Treaty of Lisbon, a veritable constitutional Bill of Rights, that is, the Charter of Fundamental Rights. The Union has also, since the 1990s, developed an external human rights policy which seems more visible than that pursued by many States. It is my belief that in so far as EU fundamental rights and human rights are concerned, we have not come to the end of the story and that there will also in the future be many interesting developments to witness and to digest, both at the political and judicial level.

Literature

Aalto P. et al., *Article 47: Right to an Effective Remedy and to a Fair Trial*, in *The EU Charter of Fundamental Rights: A Commentary*, ed. S. Peers et al., Oxford 2014.

Barnard C., *Article 28: Right of Collective Bargaining and Action*, in *The EU Charter of Fundamental Rights: A Commentary*, ed. S. Peers et al., Oxford 2014.

Brandtner B., Rosas A., *Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice*, "European Journal of International Law" 1998, vol. 9.

Brandtner B., Rosas A., *Trade Preferences and Human Rights*, in *The EU and Human Rights*, ed. P. Alston, Oxford 1999.

Economic, Social and Cultural Rights: A Textbook, ed. A. Eide, C. Krause, A. Rosas, Dordrecht 2001.

Fundamental Rights Protection of the European Union, ed. J. Barz, Warsaw 2009. Halberstam D., *It's the Autonomy, Stupid!" – A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward*, "Public Law and Legal Theory Research Paper Series," Paper No. 432.

Kilpatrick C., *Article 21: Non-Discrimination*, in *The EU Charter of Fundamental Rights: A Commentary*, ed. S. Peers et al., Oxford 2014.

Morgera E., Marín Durán G., *Article 37: Environmental Protection*, in *The EU Charter of Fundamental Rights: A Commentary*, ed. S. Peers et al., Oxford 2014.

O'Brien C., *Article 26: Integration of Persons with Disabilities*, in *The EU Charter of Fundamental Rights: A Commentary*, ed. S. Peers et al., Oxford 2014.

Pescatore P., *Les droits de l'homme et l'intégration européenne*, "Cahiers de droit européen" 1968.

Rosas A., *Counter-Terrorism and the Rule of Law: Issues of Judicial Control*, in *Counter-Terrorism: International Law and Practice*, ed. A.M Salinas de Frías et al., Oxford 2012.

Rosas A., *Fundamental Rights in the Luxembourg and Strasbourg Courts*, in *The EFTA Court: Ten Years On*, ed. C Baudenbacher et al., Oxford 2005.

Rosas A., *Is the EU a Human Rights Organisation?*, "CLEER Working Papers" no. 1, The Hague 2011.

Rosas A., *The Applicability of the EU Charter of Fundamental Rights at National Level*, "European Yearbook on Human Rights" 2013, vol. 13.

Rosas A., *The Charter and Universal Human Rights Instruments*, in *The EU Charter of Fundamental Rights: A Commentary*, ed. S. Peers et al., Oxford 2014.

Rosas A., *The European Court of Justice and Fundamental Rights: Yet Another Case of Judicial Activism?*, in *European Integration through Interaction of Legal Regimes*, ed. C. Baudenbacher, H. Bull, Oslo 2007.

Rosas A., *The European Union: In Search of Legitimacy*, in *60 Years of the Universal Declaration of Human Rights in Europe*, ed. V. Jaichand, M. Suksi, Antwerp 2009.

Rosas A., *The European Union and Fundamental Rights/Human Rights*', in *International Protection of Human Rights: A Textbook*, ed. C. Krause, M. Scheinin, Turku – Åbo 2012.

Rosas A., *The European Union and International Human Rights Instruments*, in *The European Union and the International Legal Order: Discord or Harmony*, ed. V. Kronenberger, The Hague 2001.

Rosas A., Armati L., *EU Constitutional Law: An Introduction*, Oxford 2012.

Rosas A., Kaila H., *L'application de la Charte des droits fondamentaux de l'Union européenne par la Cour de justice : Un premier bilan*', "XVI Il diritto dell'Unione Europea" 2011.

The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law – La Cour de justice et la Construction de l'Europe: Analyses et Perspectives de Soixante Ans de Jurisprudence, ed. A. Rosas et al., The Hague 2013.

The EU Charter of Fundamental Rights: From Declaration to Binding Instrument, ed. G. Di Federico, Dordrecht 2011.

Thym D., *Attack or Retreat? Evolving Themes and Strategies of the Judicial Dialogue between the German Constitutional Court and the European Court of Justice*, in *Constitutional Conversations in Europe: Actors, Topics and Procedures*, ed. M. Claes et al., Cambridge 2012.

Ward A., *Article 51: Field of Application*, in *The EU Charter of Fundamental Rights: A Commentary*, ed. S. Peers et al., Oxford 2014.

Weatherhill S., *Article 38: Consumer Protection*, in *The EU Charter of Fundamental Rights: A Commentary*, ed. S. Peers et al., Oxford 2014.

Van Gend en Loos 1963-2013: 50ème Anniversaire de l'arrêt – 50th Anniversary of the Judgment, ed. A. Tizzano et al., Luxembourg 2013.

Case 4/73 *Nold v Commission* EU:C:1974:51, § 13. Case 6/64 *Costa* EU:C:1964:66.

Case 11/70 *Internationale Handelsgesellschaft* EU:C:1970:114, §§ 3-4. Case 26/62 *Van Gend & Loos* EU:C:1963:1.

Case 29/69 *Stauder* EU:C:1969:57.
Case C-268/94 *Portugal v Council* EU:C:1996:461. Case C-279/09 *DEB* EU:C:2010:811.
Cases C-293/12 *Digital Rights Ireland*.
Case C-341/05 *Laval un Partneri* EU:C:2007:809, §§ 90-91. Case C-348/12 P *Council v Kala Naft* EU:C:2013:776.
Case C-356/12 *Glazel* EU:C:2014:350. Case C-399/11 *Melloni* EU:C:2013:107.
Case C-438/05 *International Transport Workers' Federation* ('Viking Line') EU:C:2007:772
Case C-540/03 *Parliament v Council* EU:C:2006:429.
Case C-584/10 P *Commission and Others v Kadi* EU:C:2013:518.
Case C-594/12 *Kärntner Landesregierung and Others* EU:C:2014:238. Case C-617/10 Åkerberg *Fransson* EU:C:2013:105.
Case of *Goodwin v United Kingdom*, Eur.C.H.R., judgment of 11 July 2002 (Application No. 28957/95).
Case of *Micallef v Malta*, ECHR, judgment of 15 October 2009 (Application No. 17056/06).
Case of *Povse v Austria*, ECHR judgment of 18 June 2013 (Application No. 3890/11).
Case of *Scoppola v Italy*, ECHR, judgment of 17 September 2009 (Application No. 10249/03).
Case of *Tarakhel v Switzerland*, judgment of 4 November 2014 (Application No. 29217/12).
Cases 46/87 and 222/88 *Hoechst v Commission* EU:C:1989:337. Cases C-148/13 to C-150/13 A, B and C EU:C:2014:2406. Cases C-335/11 and C-337/11 *HK Danmark* EU:C:2013:222.
Cases C-387/02, C-391/02 and C-404/02 *Berlusconi* EU:C:2005:270.
Cases C-402/05 P C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* EU:C:2008:461.
Cases C-411/10 and C-493/10 *NS and ME* EU:C:2011:865. Constitutional Treaty [2004] OJ C310/1.
Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.
Decision of 7 June 2000, BVerfGE 102, 147.
Decision of 22 October 1986, BVerfGE 73, 339. Decision of 29 May 1974, BVerfGE 37, 271.
Opinion 2/94 *Accession to the European Convention on Human Rights* EU:C:1996:140. Opinion 2/13 *Draft Accession Agreement ECHR* EU:C:2014:2454.
UN Convention on the Rights of Persons with Disabilities [2010] OJ L23/35.

SUMMARY

The European Union and Fundamental Rights/Human Rights: Vanguard or Villain?

The protection of fundamental rights and human rights in the European Union has witnessed several phases and fluctuations. In the early days of European integration, whilst it would be exaggerated to brand the then Communities a 'villain,' there was no explicit recognition of fundamental rights/human rights as being part of Community law. I hope it should have become clear by now that the Union does not fit particularly well into any of these two extremes. But by comparison to the other EU institutions, the Court of Justice has been somewhat of a forerunner, taking the first steps towards a fundamental rights system already in 1969 and contributing in many respects to its further development.

Keywords: Europan Union Law, human rights/fundamental rights

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The Principle of Self-Determination in the Context of Human Rights

Introduction

The principle of self-determination, along with the principle of respect for human rights and fundamental freedoms, belongs to the fundamental principles of international law that have the character of peremptory norms. Such norms, as defined in Article 53 of the 1969 Vienna Convention on the Law of Treaties, being *jus cogens* norms, give rise to *erga omnes* obligations. There is no doubt that both of these principles occupy a very important place in the system of modern international law, and particularly in the hierarchically constructed catalogue of the fundamental principles of this law. It is therefore necessary to draw attention to the very clear connection and interdependence between these two principles. The doctrine holds that there is a kind of bilateral dependence between the principle of self-determination and human rights law. This means that on the one hand the principle of self-determination is essential for the effective guarantee of human rights, while on the other hand the guarantee of human rights is ensured by the principle of self-determination[1]. Therefore, such an understanding of the interdependence between the principle of self-determination and human rights entails that in practice it is possible to implement the principle of self-determination in a national legal system as *lex generalis*, through application of the norms of international human rights law as *lex specialis*.[2]

In highlighting these issues, it should be noted that in the norms of international law, which include the norms of international human rights law, and in the doctrine of international law, two concepts are present: the principle of self-determination and the

1 U. Barten, *Minorities, Minority Rights and Internal Self-Determination*, Heidelberg – New York – Dordrecht – London 2015, p. 81 *et seq*.; A. Michalska, *Interpretacja Międzynarodowego Paktu Praw Cywilnych i Politycznych w świetle raportów Komitetu Praw Człowieka*, RPEiS 1986, no. 2, pp. 13–14.

2 M. Perkowski, *Samostanowienie narodów w prawie międzynarodowym*, Warszawa 2001, p. 131.

right of peoples to self-determination. With this borne in mind, it is necessary to stress that the theoretical construct of the right to self-determination is very interesting, since on the one hand it is conceived of as a principle of international law, and on the other hand it can be seen as a crucial law in the inventory of human rights. The inventory of human rights is based on general principles that apply to all the provisions for rights and freedoms, and which are essential in both their interpretation and application.[3] One of these principles is the principle of self-determination, and a fundamental element of this principle, which enables its practical implementation, is the right of peoples to self-determination.[4]

The principle of self-determination was for a long time regarded as purely political and was thus deprived of legal character.[5] The political dimension of the principle was clearly formulated in President Woodrow Wilson's Declaration, which in practice significantly contributed to the emergence of new states after the First Word War, particularly in Central Europe.[6] Of course, the emergence of these new states did not entail that the principle of self-determination was implemented in the sense defined in the later provisions of international law, particularly within the United Nations system. The principle was absent from the provisions of the Covenant of the League of Nations, which established the mandate system, and which was a kind of compromise between the political principle of self-determination and the political and economic interests of the colonial powers. It should be borne in mind that in the practice of the League of Nations the relevant legal aspects of the principle of self-determination were discussed by two committees that were set up to investigate the issue of the Åland Islands. The committees recognised the principle of self-determination, but ruled out the possibility of secession as a road to implementing self-determination in practice.[7] The principle of self-determination only finally attained the status of a positive, universal principle of international law in the United Nations Charter, two provisions of which merit close attention, namely Article 1 § 2 and Article 55.[8] Article 1 outlines the basic purposes of the United Nations, and just after defining the organisation's primary purpose – which is to strive for the maintenance of international peace and security – § 1 states that the aim of

3 A. Michalska, *Prawa człowieka w systemie norm międzynarodowych*, Warszawa – Poznań 1982, p. 67.

4 For an often cited commentary *v.*: B. Saul, D. Kinley, J. Mowbray, *The International Covenant on Economic, Social and Cultural Rights. Commentary, Cases and Materials*, Oxford 2014, p. 12 *et seq*.

5 L. Dembiński, *Samostanowienie w prawie i praktyce ONZ*, Warszawa 1969, p. 35 *et seq*.

6 K. Kocot, K. Wolfke, *Wybór dokumentów do nauki prawa międzynarodowego*, Wrocław – Warszawa 1978, p. 45.

7 M. Kałduński, *Samostanowienie (zasada samostanowienia narodów)*, in *Leksykon ochrony praw człowieka*, ed. M. Balcerzak, S. Sykuna, Warszawa 2010, p. 442.

8 T. Gadkowski, *Narody i inne podmioty uprawnione w ramach prawa do samostanowienia*, in *Ubi ius, ibi remedium. Księga dedykowana pamięci Profesora Jana Kolasy*, ed. B. Krzan, Warszawa 2016, p. 144 *et seq*.

the United Nations is: "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace." Whereas Article 55 of the Charter, from Chapter IX – which is devoted to international economic and social cooperation – states that there is a need to create "conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples."[9] This clear and unambiguous expression of the principle of self-determination in the provisions of the Charter undoubtedly contributed to the strong position the principle holds today. It should be borne in mind, however, that in the first years after the adoption of the Charter this principle had lex imperfecta character, due to the geopolitical situation, the distinguishing feature of which was the continued existence of the colonial system.[10]

The international law sources of the principle of self-determination

These provisions from the United Nations Charter mark the introduction of the principle of self-determination into the normative system of international law. The principle was further defined and developed in subsequent regulations of international law, in its various forms – thus both in treaty regulations and regulations of a *soft law* character. There is no doubt that the principle was originally interpreted to support the process of decolonisation, and to this end the most authoritative and purposeful interpretation of the Charter provisions cited above can be found in the Declaration on the Granting of Independence to Colonial Countries and Peoples, adopted on 14 December 1960, as a resolution of the UN General Assembly.[11] The provisions of the Declaration can be viewed as constituting a broader interpretation of the United Nations Charter provisions, being based on the assumption that: "The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation." Accordingly, the Declaration goes on to state, in § 2, that: "All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." When the title of this Declaration is taken into consideration, along with the general political context that accompanied its adoption, it is apparent

9 United Nations, Charter of the United Nations, 24 October 1945, Ch. IX, Article 55, 1 UNTS XVI.

10 M. Perkowski, *op. cit.*, p. 29

11 UNGA Res. 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples.

that the principle of self-determination was unambiguously linked to the observance of human rights, and the right to self-determination stipulated in the Declaration clearly refers to the holders of these rights: peoples from colonized and subjugated territories. It is also noteworthy that the clearly formulated principle of self-determination in the provisions of the United Nations Charter, and its interpretation in the provisions of Resolution 1514 (XV), gave weight to the arguments for including the principle in the International Covenant on Human Rights, which was prepared by the Commission on Human Rights. Proponents of this inclusion even asserted the primacy of the right to self-determination over other human rights, pointing out that in many cases individuals are unable to exercise their individual rights effectively, since their society has no guaranteed right to self-determination and cannot establish its own state. And yet it is precisely states that are able to guarantee the legal and institutional protection of human rights and the fundamental freedoms.[12] It goes without saying that this position was not universally accepted, with critics holding that since the right to self-determination is a collective right, and therefore applies to entities of a collective nature, it should not be a component of a legal regulation that is based on an individualist conception of human rights.[13] Ultimately, in Resolution 545 (VI) the General Assembly decided to include the right to self-determination in the International Covenant on Human Rights. However, subsequent discussion focused on two distinct and opposing conceptions of this right. The concept of internal self-determination was based on the assumption that this right is the right of peoples organised as states to freely decide on the political, social and economic system that their state should adopt. In contrast, the concept of external self-determination entailed the right of peoples subjugated by colonial powers to gain their own statehood.[14]

In Article 1, section 1 of both Covenants, the following statement can be found: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[15] The interpretation of these provisions leads to two important conclusions. Firstly, the Covenants presented the universal character of the principle of self-determination and, secondly, the provisions clearly associate human rights with the rights of nations, par-

12 L. Antonowicz, *Samostanowienie narodów jako zasada prawa międzynarodowego*, "Annales UMCS" 1996, no. 43, p. 70 *et seq*.; J. Symonides, *Międzynarodowa ochrona praw człowieka*, Warszawa 1977, p. 45.

13 A. Michalska, *Komitet Praw Człowieka. Kompetencje, funkcjonowanie, orzecznictwo*, Warszawa 1994, p. 101.

14 UNGA Third Committee, A/3077 and UNGA Res. 2158 (XXI), Permanent Sovereignty over Natural Resources.

15 UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Part 1, Article 1, UNTS, vol. 993, p. 3.

ticularly the right to self-determination.[16] For this reason, the Covenants should be seen as having crucial significance for the formulation and development of the concept of collective human rights, which are defined as 'third generation' human rights. This thesis appears to be all the more plausible if it is borne in mind that in the later work of the General Assembly, and in discussion within this organ, there was a clear tendency to connect the right to self-determination with the category of collective human rights. Examples of this are provided by the provisions of the Declaration on Social Progress and Development, of 11 December 1969,[17] and the provisions of the Charter of Economic Rights and Duties of States, of 14 December 1974.[18]

The most representative interpretations of the principle of self-determination – as well as representative interpretations of other fundamental principles of international law – can be found in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, which was adopted as a resolution of the General Assembly on 24 October 1970.[19] This Declaration, similarly to the Declaration of 1960, explicitly connects the principle of self-determination with human rights, stating that: "subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter." When defining the essence of the principle of self-determination, the Declaration goes on to state that: "By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter." However, when it comes to the potential means for implementing this right, the Declaration states that: "The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people." It should be borne in mind, however, that the Declaration's interpretation of the United Nations Charter provisions that concern the principle of self-determination is only a *sui generis* authentic interpretation. This is because it was not formulated in an international agreement, but rather in a General Assembly resolution. It should also be emphasized that this Declaration interprets the right to self-determination in a broader

16 A. Cassese, *Self-Determination of Peoples – A Legal Reappraisal*, Cambridge 1995, p. 159 *et seq*.
17 UNGA Res. 2542 (XXIV).
18 UNGA Res. 3281 (XXIX).
19 UNGA Res. 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

context, rather than only in the colonial context, in such a way that it extends the scope of entities who are entitled to exercise this right.[20]

The principle of self-determination was also formulated in normative acts outside of the UN system. A good example of this is provided by the Helsinki Final Act of the Conference on Security and Co-operation in Europe, of 1 August 1975. The doctrine of international law emphasizes that this Act introduced the principle of self-determination to Europe, which consists of states of national and ethnic diversity.[21] The Helsinki Final Act proclaimed the ten principles of international law, placing the principle of respecting human rights and fundamental freedoms alongside the principles of equality and national self-determination. In contrast, the right of peoples to self-determination, which follows from this principle, was defined as follows: "The participating States will respect the equal rights of peoples and their right to self-determination, acting at all times in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States. By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development."[22] Interpretation of these provisions leads to the conclusion that, in contrast to the majority of regulations adopted under the United Nations system which are concerned with the principle of self-determination, the European dimension of this principle referred primarily to internal self-determination. These provisions were reflected in international practice. For example, UN General Assembly resolution 48/49 acknowledged the right of the Palestinians and the people of South Africa to internal self-determination.[23] Similarly, Opinion no. 2 of the Badinter Commission invoked the right to self-determination in the case of the states formed after the break up of Yugoslavia.[24]

Discussion on the nature of the principle of self-determination would not be complete without reference to its customary law sources. This is due to the fact that international

20 W. Czapliński, A. Wyrozumska, *Prawo międzynarodowe publiczne. Zagadnienia systemowe*, Warszawa 2014, p. 182.

21 L. Antonowicz, *op. cit*., p. 70 *et seq*.; M. Perkowski, *op. cit*., p. 38.

22 Organization for Security and Co-operation in Europe (OSCE), Conference on Security and Co-operation in Europe (CSCE): Final Act of Helsinki, 1 August 1975, chap. VIII, www.osce.org [access: 22.10.2016].

23 UNGA Res. 48/94, Importance of the universal realization of the right of peoples to self-determination and of the speedy granting of independence to colonial countries and peoples for the effective guarantee and observance of human rights.

24 A. Pellet, *The Opinions of the Badinter Arbitration Committee. A Second Breadth for Determmination of Peoples*, "European Journal of International Law" 1992, no. 3, p. 178 *et seq*.; P. Łaski, *Dezintegracja Zwiazku Radzieckiego i Jugosławii w świetle prawa międzynarodowego*, "Annales UMCS" 1992, no. 39, p. 57 *et seq*.

custom, as a typical source of the rights and obligations, still occupies a prominent place in the system of the formal sources of international law. It can therefore be claimed that, despite the prevailing role of agreements in various areas of international co-operation, discussion on the basic institutions of this law frequently requires reference to international custom. As was mentioned previously, until the establishment of the United Nations, there was no positive convergence of *usus* and *opinio juris* on the issue of the self-determination of peoples. Consequently, the principle of self-determination took on a political character.[25] However, there was a fundamental change after the founding of the United Nations, which assigned itself a leading role in shaping customary law with regard to self-determination. This is clear from the fact that the General Assembly resolutions mentioned above, despite only having the status of 'soft law', frequently invoke the principle of self-determination[26]. This situation indicates not only that the UN attempted to coordinate the behaviour of states in this regard, but also that this practice paved the way for customary law to be introduced to the field of human rights protection[27]. As a consequence, many authors are of the opinion that the customary law roots of the principle of self-determination – which was eventually incorporated into the UN Charter and confirmed in other treaty regulations – is beyond doubt.[28] For some authors, the General Assembly resolutions that were adopted in accordance with Articles 10, 13 and 14 of the UN Charter, and which affirm the principle of national self-determination, thereby established customary law, which can be best seen in the aforementioned resolution 2625 (XXV).[29] Mention should also be made of the UN Security Council's resolutions on Namibia,[30] East Timor[31] and Western Sahara.[32] It should be remembered, however, that this way of shaping the customary norms of international law conferred the right to self-determination on colonized peoples, since international practice at this time in principle referred exclusively to the process of decolonisation. In this context, therefore, the process of decolonisation unambiguously determined the formation of customary law norms, entailing the right of colonized peoples to self-determination.

25 A. Cristescu, *The Right to Self-determination. Historical and Current Development on the Basis of the United Nations Instruments*, New York 1981, p. 23 *et seq*.

26 Na temat mocy prawnej uchwał organów organizacji międzynarodowych: K. Skubiszewski, *Czy uchwały Zgromadzenia Ogólnego ONZ są źródłem prawa?*, "Państwo i Prawo" 1981, no. 2, p. 24 *et seq*.

27 V., e.g., R. Higgins, *The Development of International Law through the Political Organs of the United Nations*, New York 1963, p. 104 *et seq*.

28 J. Tyranowski, *Integralność terytorialna, nienaruszalność granic i samostanowienie w prawie międzynarodowym*, Warszawa 1990, p. 206; W. Czapliński, *Aktualne problemy prawa do samostanowienia*, "Toruński Rocznik Praw Człowieka i Pokoju 1994–1995" 1996, vol. 3, p. 87.

29 M. Perkowski, *op. cit*., p. 34.

30 UN SC Res. 301/1971.

31 UN SC Res. 377/1975.

32 UN SC Res. 1598/2005.

This right was codified and developed in the texts of both the International Covenants on Human Rights. At this point it is worth emphasizing that the customary character of international law norms, which affirmed the right of peoples to self-determination, was also invoked by the International Court of Justice, whose case-law delineates and continues to delineate important directions in the development of this right. For example, in the advisory opinion on the Namibia case, the Court confirmed the legal merits of the General Assembly resolution 1514 of 1960, and incorporated the right of peoples to self-determination into the system of modern international law.[33] In the advisory opinion on the Western Sahara case, the court recognized the principle of self-determination to be a fundamental principle of international law in the context of the decolonisation process. The court also decided in favour of the principle of self-determination if there should be conflict with the principle of territorial integrity.[34] A broader context for the right to self-determination can be found in the Court's judgment in the Portuguese-Australian conflict over the East Timor case, which emphasized that, for both Portugal and Australia, East Timor constituted a non-self governing territory, and held that both Parties in the dispute should respect the right of the people living in the territory to self-determination. As has been previously stated, in this judgment the Court also emphasised the *erga omnes* character of the obligations of all states, resulting from the right of peoples to self-determination.[35] The *erga omnes* character of such obligations was later confirmed by the ICJ in the advisory opinion in the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, in which the Court recognised the right of the Palestinian people to self-determination. At the same time, the Court ruled that no state could claim any situation to be contrary to this right, or undertake or support any action that would violate a nation's right to self-determination.[36] To sum up the Court's position, it must be emphasized that states are obliged to assist peoples to achieve their right to self-determination and to refrain from recognizing a state of affairs which would in practice constitute a violation of this right.[37] It would seem that the Court's deliberations followed a similar vein in the advisory opinion on whether Kosovo's declaration of independence was compatible with international law. When investigating and assessing the legality of Kosovo's declaration of independence in the context of Security Council resolution 1244 (1999), the Court ruled that there is no general prohibition on declara-

33 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion*, ICJ Reports 1971, pp. 31–32.

34 *Western Sahara Advisory Opinion*, ICJ Reports 1975, pp. 31–33, 52–53 and 122.

35 *East Timor Case (Portugal v. Australia), Judgment*, ICJ Reports 1995, pp. 102 and 29.

36 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, ICJ Reports 2004, pp. 171–172 and 88.

37 M. Kałduński, *op., cit.*, p. 448.

tions of independence in international law, considering the development of international law with regard to self-determination.[38]

Concluding remarks

There is no doubt that the principle of self-determination is a particularly important universal norm of international law of a peremptory character, which gives rise to *erga omnes* obligations. The essential element is the right of peoples to self-determination, the exercise of which is realized in the right to establish their own state, the right to integrate through unification with another state, and the right to free economic, social and cultural development.[39] From the above analysis of the regulations of modern international law, it is evident that there is a clear connection between the principle of self-determination and human rights law. Despite the fact that the right to self-determination is classed as a collective human right, it is necessary to analyse and assess this right in a much broader context. Its implementation is a prerequisite for the proper exercise, promotion and development of all individual human rights which have been defined in the norms of universal international human rights law. This position has been put forward in the discussions of the various organs of the United Nations, which can be seen from both numerous General Assembly resolutions[40] and the invaluable general commentaries of the Human Rights Committee, the treaty body of the International Covenant on Civil

38 *Accordance with International Law of the Unilateral Declaration of Independence In Respect of Kosovo, Advisory Opinion*, ICJ Reports 2010, p. 403. ("During the second half of the twentieth century, the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation [...] A great many new States have come into existence as a result of the exercise of this right. There were, however, also instances of declarations of independence outside this context. The practice of States in these latter cases does not point to the emergence in international law of a new rule prohibiting the making of a declaration of independence in such cases.") For commentary v., e.g., A. Potyrała, *Niepodległość Kosowa w świetle opinii doradczej Międzynarodowego Trybunału Sprawiedliwości*, "Środkowoeuropejskie Studia Polityczne" 2010, no. 3, p. 27 *et seq*. In this regard, v. also the position of the Canadian High Court in the case of the secession of Quebec: Canadian Supreme Court, Secession of Quebec (1998) 2 SCR 217 § 112.

39 M. Perkowski, *op. cit.*, p. 137.

40 For example: in resolution 637 A (VII) of 16 December 1952 The General Assembly recognized that: "the right of peoples and nations to self-determination is a prerequisite to the full enjoyment of all fundamental human rights", and in resolution 49/148 of 23 December 1994 the General Assembly confirmed that: "the universal realization of the right of all peoples, including those under colonial, foreign and alien domination, to self-determination is a fundamental condition for the effective guarantee and observance of human rights and for the preservation and promotion of such rights."

and Political Rights.[41] The literature also puts forward the position that there is a kind of interdependence between the principle of self-determination and human rights law[42]. All this allows the following conclusion to be drawn: that, just as in the past, in the near future the evolution of the principle of self-determination in international practice will primarily take place in the context of the development of international human rights law. Of course, nowadays the opportunities for exercising the right to self-determination in practice are significantly more limited than they were in the second half of the twentieth century, but the principle of self-determination will remain an essential element in the process of implementing the norms of international human right law.

Literature

Antonowicz L., *Samostanowienie narodów jako zasada prawa międzynarodowego*, "Annales UMCS" 1996, no. 43.

Barten U., *Minorities, Minority Rights and Internal Self-Determination*, Heidelberg – New York – Dordrecht – London 2015.

Cassese A., *Self-Determination of Peoples – A Legal Reappraisal*, Cambridge 1995.

Cristescu A., *The Right to Self-determination. Historical and Current Development on the Basis of the United Nations Instruments*, New York 1981.

Czapliński W., *Aktualne problemy prawa do samostanowienia*, "Toruński Rocznik Praw Człowieka i Pokoju 1994–1995" 1996.

Czapliński W., Wyrozumska A., *Prawo międzynarodowe publiczne. Zagadnienia systemowe*, Warszawa 2014.

Dembiński L., *Samostanowienie w prawie i praktyce ONZ*, Warszawa 1969.

Gadkowski T., *Narody i inne podmioty uprawnione w ramach prawa do samostanowienia*, in *Ubi ius, ibi remedium. Księga dedykowana pamięci Profesora Jana Kolasy*, ed. B. Krzan, Warszawa 2016.

Higgins R., *The Development of International Law through the Political Organs of the United Nations*, New York 1963.

41 For example: in general commentary no. 12 of 12 April 1984 the Human Rights Committee stated that "In accordance with the purposes and principles of the Charter of the United Nations, article 1 of the International Covenant on Civil and Political Rights recognizes that all peoples have the right of self-determination. The right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. It is for that reason that States set forth the right of self-determination in a provision of positive law in both Covenants and placed this provision as article 1 apart from and before all of the other rights in the two Covenants." V. HRC, General Comment no. 12, Article 1 (Right to self-determination), § 1.

42 Cf. A. Michalska, *Interpretacja...*, *op. cit.*, pp. 13–14; U. Barten, *op. cit.*, p. 81 *et seq*.

Kałduński M., *Samostanowienie (zasada samostanowienia narodów)*, [in] *Leksykon ochrony praw człowieka*, ed. M. Balcerzak, S. Sykuna, Warszawa 2010.

Kocot K., Wolfke K., *Wybór dokumentów do nauki prawa międzynarodowego*, Wrocław – Warszawa 1978.

Łaski P., *Dezintegracja Związku Radzieckiego i Jugosławii w świetle prawa międzynarodowego*, "Annales UMCS" 1992, no. 39.

Michalska A., *Interpretacja Międzynarodowego Paktu Praw Cywilnych i Politycznych w świetle raportów Komitetu Praw Człowieka*, RPEiS 1986, no. 2.

Michalska A., *Komitet Praw Człowieka. Kompetencje, funkcjonowanie, orzecznictwo,* Warszawa 1994.

Michalska A., *Prawa człowieka w systemie norm międzynarodowych*, Warszawa – Poznań 1982.

Mik C., *Zbiorowe prawa człowieka. Analiza krytyczna koncepcji*, Toruń 1992.

Pellet A., *The Opinions of the Badinter Arbitration Committee. A Second Breadth for Determmination of Peoples*, "European Journal of International Law" 1992, no. 3.

Perkowski M., *Samostanowienie narodów w prawie międzynarodowym*, Warszawa 2001.

Potyrała A., *Niepodległość Kosowa w świetle opinii doradczej Międzynarodowego Trybunału Sprawiedliwości*, "Środkowoeuropejskie Studia Polityczne" 2010, no. 3.

Saul B., Kinley D., Mowbray J., *The International Covenant on Economic, Social and Cultural Rights. Commentary, Cases and Materials*, Oxford 2014.

Self-Determination in International Law, ed. R. Mc Corquodale, Dartmouth 2000.

Skubiszewski K., *Czy uchwały Zgromadzenia Ogólnego ONZ są źródłem prawa?*, "Państwo i Prawo" 1981, no. 2.

Symonides J., *Międzynarodowa ochrona praw człowieka,* Warszawa 1977.

Tyranowski J., *Integralność terytorialna, nienaruszalność granic i samostanowienie w prawie międzynarodowym*, Warszawa 1990.

SUMMARY

The Principle of Self-Determination in the Context of Human Rights

The essay presents the issue of the principle of self-determination from the perspective of international human rights law. The author highlights the close relationship between the principle of self-determination and the principle of respect for human rights and fundamental freedoms. In practice, the principle of self-determination is a prerequisite for the effective guarantee of human rights, and, at the same time, guaranteed protection of human rights is a prerequisite for implementing the principle of national self-determination. The author presents the issue of self-determination in the context of the basic

regulations of international human rights law, considering regulations of both a 'hard' and 'soft' law character.

Keywords: public international law, human rights, the principle of self-determination

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On the Judicialisation of International Law

Introduction

International law developed for centuries, in the form of binding rules between states, despite the lack of permanent courts to decide on the violation of those rules and settle disputes between states. For Hugo Grotius, international law in terms of rules for conduct outside the state was conceivable without judicialisation, although arbitration between sovereigns was mentioned in earlier works that he had read, such as Albertico Gentili's *Law of War*.[1]

However, in discussion on the juridical nature of international law dating back to the 19th century, the lack of an international judiciary contributed to doubts concerning the legal character of international law. For writers such as Hart, in the absence of institutions – such as an international legislature, courts with compulsory jurisdiction, and centrally organized sanctions – international law resembles "that simple form of social structure, consisting only of primary rules of obligation, which, when we find it among societies of individuals, we are accustomed to contrast with developed legal system."[2] According to Hart, the important source of doubt as regards the legal character of international law was the absence of the secondary rules of change and adjudications which provide for a legislature and courts, and also "a unifying rule of recognition specifying 'sources' of law and providing general criteria for the identification of its rules."[3] It is thus clear that the existence of courts in international law was for Hart one of the conditions

1 B. Kingsbury, *International courts: uneven juidicialisation in global order*, in *The Cambridge Companion to International Law*, ed. J. Crawford, M. Koskenniemi, P. Ranganathan, Cambridge 2012, p. 203.

2 H. L. A. Hart, *The Concept of Law*, Oxford 1984, p. 209.

3 *Ibidem*.

for recognizing that international law is "really law."[4] It is also important to note that for Hart it was not simply courts, but courts with compulsory jurisdiction that mattered.

The international judiciary is a relatively young institution in international law, as it only appeared at the beginning of the 20th century. Earlier, international disputes could be resolved by political means, or diplomatic methods of dispute settlement, or by using international arbitration, however recourse to these was limited to only some countries.

Until the 1990s there were only a few international courts, however in the last decade of the 20th century new international courts began to emerge with increasing frequency. At one time, this phenomenon was referred to as the proliferation or multiplication of international courts.[5] This trend continued into the first decade of the 21st century. The main issue associated with this phenomenon, which has been the subject of numerous analyses in the doctrine of international law, concerned whether this dynamic – yet uncoordinated – multiplication of international courts constituted a threat to the unity of international law. This issue tends to be analysed though the prism of two types of conflict: the conflict of jurisdiction and the conflict of jurisprudence.

Currently, however, other problems associated with the phenomenon of judicialisation are growing in significance. Both the quantitative and qualitative characteristics of this phenomenon are interesting, but its increasing significance is primarily due to its influence on international law, understood as a system. This influence is very noticeable and varied. The development of international courts is directly tied up with the aforementioned discussion on the juridical nature of international law. A comprehensive analysis of all the aspects of this issue is beyond the scope of this article. Therefore, the subsequent sections will focus firstly on issues concerning the features of the process of the multiplication of international courts, the threats associated with it, and the importance of the proliferation of international courts for international law.

The development of the international courts

The development of the international judiciary emerged from the use and experience of arbitration, the modern history of which dates back to the Jay Treaty of 1794, between the United States of America and Britain. This treaty envisaged the creation of three permanent, mixed committees, consisting of American and British citizens, whose task was to settle disputes between these countries.

4 *Ibidem*.

5 V. also, *inter alia*, in the Polish source literature a very interesting article on this issue: W. Czapliński, *Multiplikacja sądów międzynarodowych – szansa czy zagrożenie dla jedności prawa międzynarodowego*, in *Rozwój prawa międzynarodowego – jedność czy fragmentacja*, ed. J. Kolasa, A. Kozłowski, Wrocław 2007, pp. 77–130.

Under the auspices of the Hague Conventions of 1899 and 1907 efforts were made to establish permanent international courts, but ultimately only the Permanent Court of Arbitration came into being. The first international court of universal character – The Permanent Court of International Justice – was established on the basis of the Covenant of the League of Nations. The PCIJ first sat on 30 January 1922 and by 1940 it had issued 18 judgments. After Second World War, the PCIJ was replaced by the International Court of Justice, which the UN Charter established as the main judicial body of the UN. The ICJ is recognized as the most important international court currently in operation. The Court consists of 15 judges, who are elected for 9 years, and its purpose is to settle legal disputes between states. It also issues advisory opinions at the request of the UN and its specialized organizations. The jurisdiction of the ICJ, similarly to other international courts, is based on the consent of states.

In the period following WW2, regional courts also began to appear. In 1951, the Court of Justice of the European Coal and Steel Community was established, and in 1957, at the same time as the Treaties establishing the European Economic Community and Euratom, an agreement to create common institutions for the three Communities was signed, among which was the Court of Justice of the European Communities. Furthermore, in 1959 the European Court of Human Rights was established on the basis of the European Convention on Human Rights, which had been adopted by the Council of Europe.

Until the 1990s there were only 6 international courts. The sudden increase in the development of international judiciary in the start of the 1990s is associated with the collapse of the communist system. It was in this period that the term "the proliferation of international courts" first appeared. Such courts came into existence as: the International Tribunal for the Law of the Sea (established in 1996 on the basis of the United Nations Convention on the Law of the Sea, which was signed at Montego Bay in 1982), the AB of the WTO, the EFTA Court, the Central American Court of Justice, the Economic Court of the Commonwealth of Independent States, and the Court of Justice of the Common Market for Eastern and Southern Africa.

In the 1990s, courts were also established not on the basis of international agreements, but rather following resolutions from the bodies of international organisations. In 1993 the International Criminal Tribunal for the former Yugoslavia was established by Resolution 827 of the UN Security Council, to prosecute war crimes committed in the territory of the former Yugoslavia. In 1994 the International Criminal Tribunal for Rwanda was established by Resolution 955 of the UN Security Council, to investigate and settle crimes committed in Rwanda during the genocide that took place from 1 January 1994 to 31 December in 1994.

This proliferation of international courts continued into the next decade. In 2003 the International Criminal Court began operating, as the first permanent court in history

responsible for prosecuting individuals who committed the most serious crimes (e.g. genocide, crimes against humanity), after 1 July 2002. In this same period other courts were also established, including the Court of Justice of the Economic Community of West African States (ECOWAS), the Caribbean Court of Justice, and the African Court on Human and Peoples' Rights.

This dynamic multiplication of international courts and tribunals that occurred in the 1990s was described by some authors as "some of the most significant changes in international law (and, correspondingly, international relations) of our time."[6] In the course of just 20 years, the number of international courts and tribunals increased to over 20 permanent international courts, four of which have universal jurisdiction: the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS), the Appellate Body of the World Trade Organization (the AB of the WTO), and the International Criminal Court (ICC). Other courts and tribunals with regional jurisdiction were established in Africa (9), Europe (6) and Latin America (5).[7]

The appearance of dozens of international judicial bodies has meant that they have been classified in a variety of ways. For example, they have been divided into, *inter alia*, courts of general and specialized jurisdiction, and courts of universal and regional jurisdiction.

In the source literature, it is suggested that international courts be divided into five distinct types, on the basis of criteria that consider their fundamental jurisdictional or institutional characteristics. Although at the outset the primary purpose of international courts was the peaceful resolution of international conflicts, at present there are only three courts with the competence and necessary universal jurisdiction. The most important of these is the International Court of Justice, the primary judicial body of the UN, which has the general jurisdiction to settle all the legal disputes that are submitted to it by states. The other two courts, namely ITLOS and the AP of the WTO, have more specialized jurisdiction *ratione materiae*. The International Tribunal for the Law of the Sea has jurisdiction to settle all disputes concerning the interpretation or application of the UN Convention on the Law of the Sea, while the AB of the WTO hears appeals from reports issued by panels in disputes brought by members of the WTO. Some authors refer to these judicial bodies as "old-style ICs."[8]

The second type of international court comprises human rights courts, which have the competence to hear cases that concern violations of the human rights protected by

6 C. P. R. Romano, *The Shift from the Consensual to the Compulsory Paradigm in International Adjudication: Elements for A Theory of Consent*, "International Law and Politics" 2007, vol. 39, p. 794.

7 K. J. Alter, *The Muliplication of International Courts and Tribunals After the End ot the Cold War*, in *The Oxford Handbook of International Adjudication*, ed. C. P. R. Romano, K. J. Alter, Y. Shany, Oxford 2013, p. 65.

8 K. J. Alter, *The New Terrain of International Law: Courts, Politics, Rights*, Princeton 2014.

international law. Currently, there are three such courts: The European Court of Human Rights (ECtHR), and the Inter-American Court of Human Rights (IACHR) and the African Court on Human and Peoples' Rights (ACHPR) – both based on the model of the ECtHR. The majority of cases heard by these courts are initiated by individual complaints which are filed by the aggrieved person. Interstate complaints are very rare, as can be seen from activity of the ECtHR.

The third type of international court is represented by the courts established within the framework of regional integration organisations which are involved in economic cooperation. This constitutes the largest group of international judicial bodies in the world. Many of them emerged from the experience of the CJEU, which is widely held to be the most effective transnational judicial body. However, some organisations adopted the model of dispute resolution based on the WTO, while others opted for a mixed model.[9] The most distinctive feature of these courts is the complexity of their jurisdiction *rationae materiae*. These courts handle cases brought directly by parties alleging that their rights have been violated by the body of a given organization, and cases brought against a particular country for failure to comply with the laws of the organization. Some of these courts operate as international administrative courts and also deal with issues concerning the interpretation of community law raised by domestic courts.[10]

The fourth group consists of international criminal courts which rule on the liability of individuals accused of committing international crimes, who tend to be high-ranking politicians and military commanders. These are the only international bodies that decide on the liability of individuals. The first permanent international court established to prosecute individuals accused of committing such crimes was the International Criminal Court (ICC). Previously, international criminal courts had been established *ad hoc*. In addition to the International Military Tribunal (IMT) held at Nuremberg, and the Tokyo War Crimes Tribunal, which were established to punish the crimes committed during the course of the Second World War, two similar tribunals were established in the 1990s. The first of these was the International Criminal Tribunal for the former Yugoslavia (ICTY), created by Security Council Resolutions 808 and 827 in 1993, for the prosecution of crimes committed in the territory of the former Yugoslavia, while the second was the International Criminal Tribunal for Rwanda (ICTR), established by Resolution 955 of November 1944.

9 For example, the North American Free Trade Agreement dispute settlement relies on ad hoc arbitral panels, whereas the Andean Tribunal of Justice is cited as an example of a more mixed model. Cf. *The Oxford Handbook of International Adjudication*, *op. cit.*, pp. 13–14.

10 C.P.R. Romano, K.J. Alter, Y. Shany, *Mapping International Adjudicative Bodies, The Issues, The Players*, in *The Oxford Handbook of International Adjudication*, ed. C.P.R. Romano, K.J. Alter, Y. Shany, Oxford 2013, p. 13.

In addition to *ad hoc* tribunals, special, mixed and hybrid tribunals have been established to adjudicate on both domestic and international crimes. Such tribunals were established in, *inter alia*, Kosovo, Sierra Leone, East Timor, Bosnia and Herzegovina, Cambodia and Lebanon.[11] Hybrid tribunals are also established *ad hoc*. However, their creation does not result from a decision of the UN Security Council, but rather from the activities of the states concerned, in cooperation with the UN. Furthermore, these tribunals do not operate on the basis of international law, but domestic law as well; their composition is mixed, including both international and domestic judges; and they most often operate in the territory of the country in which the offenses were committed.

The fifth group includes the international administrative tribunals that operate within the framework of a given international organization and have the competence to decide on disputes between the organization and its officials. Although these courts implement international law, they often refer to domestic labor law, to a certain extent.[12]

Characteristics of the multiplication of international courts

The phenomenon of the multiplication of international courts which began in the 1990s was a result of various causes. Without doubt, one of these was the gradual expansion of the scope of international law, and this scope coming to encompass cases which had previously only been dealt with in national law, or which had hitherto been restricted to the exclusive competence of states.[13] The increase in the quantity, as well as the increase of the content and the degree of complexity of the norms of international law required the establishment of extended dispute resolution institutions. The proliferation of international courts was also fostered by the development of integration organisations in Europe and other parts of the world – the establishment of specialized tribunals was supposed to ensure the effectiveness of new regulations adopted by these organisations.[14] Political transformations, particularly those in Central Europe which were brought about by the collapse of the communist system, resulted in reduced political tensions and the new post-communist states were no longer reluctant to submit to the jurisdiction of international courts[15]. Furthermore, the creation of international courts in different parts of the world was certainly encouraged by, on the one hand, the positive experience associated with the work of such judicial bodies as the CJEU or the ECtHR and, on the other hand, the failure of existing tribunals, led by the ICJ, to settle cases that arose on the basis of new, specialized regulations with international application.

11 *Ibidem*, p. 14.
12 *Ibidem*.
13 Czapliński provides a detailed description of these causes. Cf. W. Czapliński, *op. cit.*, pp. 81–85.
14 Y. Shany, *Competing Jurisdictions of International Courts and Tribunals*, Oxford 2003, p. 3.
15 *Ibidem*, p. 85.

An essential feature of the dynamic development of international courts in the 1990s was the fact that the process was neither systematic nor orderly. To a large extent, the proliferation of these courts was uncoordinated, and some authors have described the process as one of trial and error.[16] This lack of coordination chiefly resulted in the emergence of problems tied up with potential conflicts of jurisdiction or jurisprudence, to which we shall return later. It should also be noted that many of the tribunals that were established remain inactive, meaning that they either never went into session, or they heard a few cases before they stopped being active.

Cesare Romano enumerates twenty such courts, including many established in the 1990s or the 2000s, such as the Court of Justice of the African Economic Community (1991), the Court of Conciliation and Arbitration of the Organization for Security and Cooperation in Europe (1994), the Court of the Union State between the Russian Federation and the Republic of Belarus (1999), the Court of Justice of the Central African Economic and Monetary Community (2000), and Court of Justice of the African Union (2003).[17]

There are various reasons why states either did not ratify the instruments that constituted these courts, or why cases are not brought before them. Above all though, the essential prerequisite for international courts to begin and continue their activity is the environment in which they are to function. Conflicts, tensions between states and instability cause significant difficulties for the functioning of international courts.[18] This is why Romano asserts, rightly, that international tribunals can turn out to be fragile institutions, and to a greater extent than most other international institutions. They require both sufficient preparation and a peaceful and stable environment in which to operate.[19] In turn, the success of the ECtHR and the CJEU can be explained by the fact that these courts have operated in a relatively homogeneous environment of states, while African courts have struggled in diametrically opposed circumstances.[20]

From a geographical point of view, the proliferation of courts and tribunals was an uneven process. On the one hand, the most effective international and transnational courts, such as the CJEU or the ECtHR were established and operate in Europe. On the other hand, certain parts of the world, such as Asia, have clearly avoided the tendency to judicialize international relations. This is due to a range of political, cultural and historical factors, but it also results from the international community being based on the idea of sovereign states, states which in some regions successfully oppose the trend of

16 C.P.R. Romano, *Trial and Error in International Judicialization*, in *The Oxford Handbook of International Adjudication*, *op. cit.*, pp. 111–133.
17 *Ibidem*, pp. 113–114.
18 *Ibidem*.
19 *Ibidem*, pp. 132–133.
20 *Ibidem*, p. 133.

recognizing the jurisdiction of international courts. The resistance of Asian countries to the judicialisation tendency can be explained by, for example, the refusal of communist China to submit to the jurisdiction of international courts, or the rivalry between the major powers of the region (India/Pakistan, India/China, Iran/Iraq, Japan/South Korea), or the lack of a reason to unite, etc.

Despite the tendency to judicialise international relations, many cases still remain outside the jurisdiction of international tribunals, or only appear on their case-list sporadically. Benedict Kingsbury enumerates many such cases, including military and intelligence activities, which concern the control of arms, disarmament, nuclear weapons and nuclear energy governance; global financial governance; corruption; environmental protection; political decision making processes; hazardous waste; humanitarian assistance and disaster response; and the majority of problems concerning the lives of people living in third world countries, etc.[21] Although the ICJ, as a court of general jurisdiction, can deal with any case that falls under international law, other international courts have a relatively limited scope of competence.[22] For this reason, there are continual attempts at establishing new international tribunals that could settle at least some of these cases, for example an international environmental court.

Another feature of the proliferation of international courts is their transnational nature. Increasingly, the parties to the cases dealt with by international courts are non-state actors, primarily natural persons. In the case of human right courts, such as the ECtHR, the majority of litigation is initiated by natural persons who file claims against their own states. This fact has a significant impact on the growing case-law of these courts, which is a product not so much of disputes between states, but of proceedings initiated by non-state actors.

The horizontal nature of international courts is also noteworthy. Individual international courts are not interrelated, or in a hierarchical order. They are rather autonomous and distinct from each other. This is largely due to the lack of relationship of subordination between the various special regimes within which individual courts were created.

The institution of compulsory jurisdiction accompanying the process of judicialisation is equally important. The phenomenon of the multiplication or proliferation of courts that began in the 1990s showed that states are more inclined to accept the compulsory jurisdiction of courts with a narrow scope of competence than courts of general competence, such as the ICJ. In this regard, Romano describes a paradigm shift in the international judiciary that took place at the end of the 20th century and the start of the 21st century – from a consensual paradigm requiring the explicit and special consent to the jurisdiction of a given court, to a compulsory paradigm, in which consent is to a large

21 B. Kingsbury, *op. cit.*, p. 212.
22 W. Czapliński, *op. cit.*, p. 98.

extent is formulaic, since it is expressed implicitly through the ratification of treaties creating certain international organizations.[23]

Of course, compulsory jurisdiction thus understood does not entail that a state's consent to the jurisdiction of a given international judicial body has become unnecessary. However, this consent takes on a new importance, becoming rather the condition for a particular state's membership of an international organisation, in the framework of which a given judicial body operates. It is expressed in the initial act, which is most often related to the afore-mentioned ratification of the treaties that constitute organisations and their judicial bodies. However, according to Romano, even though the principle of consent has not disappeared, its importance is gradually diminishing. The expression of consent has become so far removed from the exercise of real jurisdiction that it is natural to wonder whether consent continues to have any real function in the international order.[24] As a result we can talk here about the type of compulsory jurisdiction that Hans Kelsen advocated for in connection with the jurisdiction of the ICJ.[25] However, it should be noted that states would be reluctant to acknowledge compulsory jurisdiction if the courts were to have universal jurisdiction *rationae materiae*, as the ICJ does. The increase in the tendency for states to accept the compulsory jurisdiction of international judicial bodies which was in evidence in the 1990s was inextricably tied to the limited scope of the jurisdiction of these newly-created tribunals.

Conflicts of jurisdictions and judgements

As was previously mentioned, the multiplication of international judicial bodies has raised fears, especially concerning the consequences for the unity of international law. Due to the unsynchronized and decentralized process of creating international judicial bodies, the jurisdictions of these bodies potentially overlap, which can lead to jurisdictional conflicts. An example of this is the fact that the ICJ is the appropriate body for settling all legal disputes between states, however its competence is also covered by the jurisdiction of specialized tribunals, such as ITLOS or the AB of the WTO, and also by the jurisdictions of regional courts, such as human rights tribunals. This has led to a relatively new phenomenon in international relations, namely *forum shopping*. The phenomenon itself is nothing new, but it only became noticeable in international law quite recently, particularly in connection with the multiplication of international judicial bodies. On the one hand, it can be argued that the availability of multiple judicial fora is a blessing for applicants, particularly as until recently in the international sphere these fora were either lacking or few in number. It is also suggested that the plurality

23 C. P. R. Romano, *The Shift...*, *op. cit.*, pp. 794–795.
24 *Ibidem*.
25 H. Kelsen, *The Law of the United Nations*, London 1950, pp. 522–523.

of judicial fora introduces healthy rivalry between particular courts, which can lead to judgments of better quality, expedited proceedings, and even higher levels of legitimacy.[26] The choice of a more favorable judicial forum tends to be appreciated by both parties. However, in practice it is often the case that parties steer their case towards the court before which they have a better chance of winning.

The principle *res iudicata* is of great importance in this context, as it denotes the inadmissibility of re-filing a claim in a case if the identity of the parties, or the legal basis and the substantive content of the claim, are the same. It is accepted that the principle has the status of a general legal principle, as such are defined in Article 38 of the Statute of the ICJ. For this reason, Czapliński holds that the principle should also be applied when the statutes of a given international court are silent on this subject.[27]

The greatest threat associated with the unsynchronized multiplication of international judicial bodies is the danger of them issuing divergent or contradictory judgments, which would therefore entail a conflict in jurisprudence. There is the well-known example of divergent judgments being made when adjudicating on the issue of assigning responsibility to states. In the Nicaragua case, the ICJ held that there would need to be *effective control* in order to assign responsibility for acts in violation of international law. In contrast, in the Tadic case the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia ruled that there should be a less restrictive standard of control, namely *overall control*. This example is important since it addresses the crucial issue of establishing the conditions of state liability.[28] According to Kwiecień, when regional and/or special courts issue judgments that diverge from the jurisprudence of the ICJ, they threaten the unity and universality of international law.[29] Discrepancies in the jurisprudence of international judicial bodies can undoubtedly have a negative impact on the effectiveness of international law and its institutions, and even undermine its legitimacy.

The source literature offers various proposals for ensuring consistency in the jurisprudence of international judicial bodies. One suggestion is that the ICJ should become a kind of appeal court for other international courts, similar to those in domestic legal systems, in order that other international bodies could refer questions to the ICJ for preliminary rulings. It has also been proposed that a new international tribunal be established for the purpose of resolving jurisdictional conflicts.[30] Such institutional solutions would certainly help to increase the rule of law in international relations, but the chances of them being implemented are rather negligible, considering the reluctance of states to

26 J. Paywelyn, L. E. Salles, *Forum Shopping Before Intenrational Tribunals: (Real) Concerns, (Im) Possible Solutions*, "Cornell International Law Journal" 2009, no. 1(42), p. 80.

27 *Ibidem*.

28 R. Kwiecień, *Teoria i filozofia prawa międzynarodowego. Problemy wybrane*, Warszawa 2011, p. 101.

29 *Ibidem*.

30 Czapliński puts forward this proposal in: W. Czapliński, *op. cit.*, pp. 91–97.

accept the authority of such bodies – even in situations when it was the states themselves that appointed specialized courts to deal with specific and complex issues arising within the framework of a given international regime. On the other hand, some authors focus on non-institutional solutions which emphasize the need for dialogue among judges, their readiness to cooperate and openness to the jurisprudence of other courts. As Judge Guillaume observes, judicial dialogue is key to avoiding the dangers associated with the fragmentation of international law.[31] However, it is also noted that divergences in case-law can also be found in the jurisprudence of domestic courts, but the risk of fragmentation in international law is mitigated by the fact that individual international courts can refer to the principles and rules of universal international law in their case-law, while adopting the rules of interpretation provided for in Articles 30 and 31 of the Vienna Convention on the Law of Treaties of 1969.[32]

The implications of the multiplication of international judicial bodes for international law

Determining the full impact of international courts on the system of international law would require a broad, detailed and in-depth analysis, taking the specific characteristics of various international courts into consideration. However, for now this article will only offer a few, preliminary observations.

First of all, it has to be said that – despite fears associated with the threat that conflicts of jurisdiction and jurisprudence poses to the unity of international law – the multiplication of international judicial bodies has generally had a positive impact on international law. The expansion of international courts has led states to appeal more frequently to judicial fora in the event of contentious cases, thereby strengthening the rule of law in international relations.[33] Thus the conclusion can be drawn that the effect of proliferation has been to strengthen the impact of international law on international relations and the behavior of states.[34]

As Shany observes, the proliferation of international judicial bodies brought about a qualitative change, which encouraged states to treat their international obligations more seriously.[35] This change of attitude derives from the fear of confrontation with the judicial body that is to rule on the alleged failure to fulfill obligations. This is inextricably

31 Judge Guillaume, President of the ICJ, at the United National General Assembly, 26.10.2000 http://www.icjcij.org/court/index.php?pr=84&pt=3&p1=1&p2=3&p3=1 [access: 28.04.2016].

32 W. Czapliński, *op. cit.*, pp. 111 and 130

33 Y. Shany, *op. cit.*, p. 283.

34 P.-M. Dupuy, J.E. Vinuales, *The Challenge of 'Proliferation': An Anatomy of the Debate*, in *The Oxford Handbook of International Adjudication*, *op. cit.*, p. 140.

35 Y. Shany, *op. cit.*, p. 5.

tied up with the previously mentioned paradigm shift with regard to compulsory jurisdiction, and the spread of this type of jurisdiction in the 1990s and the 2000s. Withdrawing the consent expressed in the ratification of a treaty constituting a given organisation is becoming particularly difficult, as the costs – political, reputational, social etc. – are prohibitive. Credibility and considerations of reciprocity are of crucial importance to states, since if states accept the jurisdiction of an international tribunal, it makes their obligations more credible. Similarly, states are more inclined to implement the rulings of international courts because refusal to do so would undermine their credibility.[36]

Along with the states' more serious attitude to their international obligations, there is another important effect of the multiplication of international judicial bodies – namely that international norms have attained an 'objective' character, as they have been freed from the will of individual states.[37] This is a result of taking the business of interpreting and applying the norms of international law away from the exclusive competence of states and their subjective discretion in these matters, and assigning it to an independent judicial authority. This objectivisation of the norms of international law has been bolstered by the development of the case-law of international courts, which has gradually evolved a specific way of interpreting the norms of a given treaty and become binding on the states parties to the treaty. A good example of this is provided by the extensive case-law of the ECtHR, which confers the rights provided for in the European Convention of Human Rights, and which are expressed there in a framework and general manner, in a concrete, content-filled form. Naturally, the process of interpreting international norms is a rather complicated process. For example, although the ECtHR employs dynamic interpretation and treats the Convention as a 'living instrument,' when the Court interprets these norms it takes the local, specific circumstances of a given country into account, in the application of the margin of appreciation doctrine.[38] This is a key aspect of the unique judicial diplomacy of this important European court.

Undoubtedly, the activity of individual international courts plays an important role with regard to the interpretation and application of norms within the various organisations (regimes) in which they operate – this particularly applies to human rights courts and courts established under various types of integration organizations, with the EJEU at their head. In this context, the case-law of the ICJ plays a special role, as according to Professor Lauterpacht it made a clear contribution to the development and clarification of international norms.[39] The judgments of the ICJ are treated as authoritative state-

36 B. Kingsbury, *op. cit.*, p. 217.

37 Cf. P.-M. Dupuy, J. E. Vinuales, *op. cit.*, p. 139.

38 A. Wiśniewski, *Koncepcja marginesu oceny w orzecznictwie Europejskiego Trybunału Praw Człowieka*, Gdańsk 2008.

39 H. Lauterpacht, *The Development of International Law by the International Court*, London 1958, pp. 4–5.

ments on international law that influence not just treaty law but above all customary law.[40]

Since, as was mentioned, the emergence of international courts has led to the norms of international law attaining an objective dimension, their interpretation and application has ceased to be dependent on the will of states or the subjective recognition of the sovereignty of states. However, international courts have also begun to control the states' prerogatives to define for themselves what falls under the *domaine réservé*, and therefore what constitutes the internal affairs of a given state. Some authors compare this to the development of the powers of domestic courts to decide whether or not acts of state power are constitutional.[41] The encroachment of international courts into internal affairs is in any case contingent upon states being attached to the principle of non-interference in internal affairs. In this area, conflict frequently results from the activities of various tribunals, particularly those issuing judgments on violations of human rights. Undoubtedly, the encroachment of international courts into the sphere of 'domaine réservé' results in the curtailment of a state's discretionary authority to exclude certain cases from the control of international judicial bodies.

The jurisprudence of international courts has also led to the emergence of an institutional judicial layer, which has entailed that international law has become 'less horizontal'. The activity and activism of international courts has substantially enriched international law. A kind of normative surplus has been produced from their activity, resulting in international law becoming undoubtedly richer and more mature. It is often said that international courts develop international law, and they do this not just through elucidating the meaning of norms, which are incomplete and lacking in clarity, and through clarifying the fundamental principles of international law, but also through developing certain key institutions of international law, from the perspective that views this law as a system. This also applies to, *inter alia*, the concept of peremptory norms (*ius cogens*) or *erga omnes* norms. The jurisprudence of international courts, particularly the ICJ, plays a crucial role in the shaping the customary norms of international law. As Cassese observes "once the ICJ has stated that a legal standard is part of customary international law, few would seriously challenge such a legal finding." This court therefore plays an essential role in the process of creating international law.[42]

It can thus be concluded that thanks to international judicial bodies the regulatory function of international law is becoming increasingly important in the international

40 Ch. J. Tams, *The ICL as a 'Law-Formative Agency': Summary and Synthesis*, in *The Development of International Law by the International Court of Justice*, ed. Ch. J. Tams, J. Sloan, Oxford 2013, pp. 377–378.

41 P.-M. Dupuy, J. E. Vinuales, *op. cit.*, p. 139.

42 A. Cassese, *The International Court of Justice: It is High Time to Restyle the Respected Old Lady*, in *idem*, *Realizing Utopia. The Future of International Law*, Oxford 2012, p. 240.

community. International judicialization can also be viewed as a process that attempts to tame the Leviathan and gradually put it under the control of international law. At one time this phenomenon was known as 'legalization.'[43]

Judicialisation has always been viewed with scepticism and suspicion from the perspective of classical international law. It was believed that it was incompatible with the fundamental principle or the idea of sovereignty. And the idea of sovereignty is expressed in the requirement that states consent to submitting to the jurisdiction of any international tribunal. This conflict was particularly noticeable in the struggle involved in introducing general compulsory jurisdiction into international law. There has been considerable controversy over the issue of sovereignty and the international judiciary, and no doubt this controversy will continue in the future. The influence of international courts on the conduct of states can be seen as a dialectical process, which is uniquely dynamic and is gradually changing the image of international law and its juridical nature.

Concluding remarks

In the last pages of *The Concept of Law*, Hart writes "perhaps international law is at present in a stage of transition towards acceptance of this and other form of which would bring it nearer in structure to municipal system."[44] According to Hart, only by making international law similar to domestic law can doubts concerning the legal nature of international law be dispelled. The development of the international judiciary can thus be viewed with a certain amount of optimism, as this development has brought international law closer to being a mature legal system than it was at the turn of the twentieth century.

However, if there is indeed a process of change occurring in international law, it must be remembered that this process is unfolding in the face of fundamental contradictions. The essentially state-centric nature of the international community makes it impossible – or at least very difficult – to shape the international judiciary into a centralized, homogenous and hierarchical system; neither is this orientation around states conducive to the development of the institution of compulsory jurisdiction along the lines imagined by the Kelsenite proponents of this institution.

Nevertheless, the impact of multiplication in the last two or three decades should not be overestimated. It should be borne in mind that the process of judicialisation has been uneven in different parts of the world, and the same can be said of the scope of cases covered by the jurisdiction of international tribunals, which often have specialized jurisdiction *rationae personae*. It also cannot be forgotten that there are frequent references to

43 P.-M. Dupuy, J. E. Vinuales, *op. cit.*, pp. 138–156.
44 H. L. A. Hart, *op. cit.*, p. 231.

conflicts of jurisdiction and jurisprudence. Lastly, it is not at all certain whether the trend towards judicialisation will continue in the future. The specific geo-political situation in the world in the 1990s was conducive to the proliferation of international judicial bodies, and the situation in the second decade of the 21st century is rather different. Despite this fact, according to some authors there are reasons for optimism. For example, Kingsbury argues that currently international judicialisation is still dominated by a reformist tendency, rather than any counter movement against the development of international courts.[45] Although the future prospects for judicialisation remain uncertain, as it depends on many political factors, the influence of international courts on international law will not be negligible.

In all likelihood, the development of international judicial bodies will continue to be horizontal, heterogeneous and uneven. However, this should rather be seen as being a specific feature of the legal order that international law constitutes, and being due to the specific needs of members of the international community. It is nevertheless vital that the activity of international courts and tribunals, despite the shortcomings and deficiencies associated with their proliferation, is gradually transforming the face of international law as it develops into an ever richer and more mature system of law.

Literature

Alter K.J., *The Muliplication of International Courts and Tribunals After the End ot the Cold War,* in *The Oxford Handbook of International Adjudication*, ed. C.P.R. Romano, K.J. Alter, Y. Shany, Oxford 2013.

Alter K.J., *The New Terrain of International Law: Courts, Politics, Rights*, Princeton 2014.

Cassese A., *The International Court of Justice: It is High Time to Restyle the Respected Old Lady,* in *idem*, *Realizing Utopia. The Future of International Law*, Oxford 2012.

Czapliński W., *Multiplikacja sądów międzynarodowych – szansa czy zagrożenie dla jedności prawa międzynarodowego,* in *Rozwój prawa międzynarodowego – jedność czy fragmentacja*, ed. J. Kolasa, A. Kozłowski, Wrocław 2007.

Dupuy P.-M., Vinuales J.E., *The Challenge of 'Proliferation': An Anatomy of the Debate*, in *The Oxford Handbook of International Adjudication*, ed. C.P.R. Romano, K.J. Alter, Y. Shany, Oxford 2013.

Hart H.L.A., *The Concept of Law*, Oxford 1984.

Judge Guillaume, President of the ICJ, at the United National General Assembly, 26.10.2000, http://www.icjcij.org/court/index.php?pr=84&pt=3&p1=1&p2=3&p3=1 [access: 28.04.2016].

Kelsen H., *The Law of the United Nations*, London 1950.

45 B. Kingsbury, *op. cit.*, p. 224.

Kingsbury B., *International courts: uneven juidicialisation in global order,* in *The Cambridge Companion to International Law, ed.* J. Crawford, M. Koskenniemi, P. Ranganathan, Cambridge 2012.

Kwiecień R., *Teoria i filozofia prawa międzynarodowego. Problemy wybrane*, Warszawa 2011.

Lauterpacht H., *The Development of International Law by the International Court*, London 1958.

Paywelyn J., Salles L.E., *Forum Shopping Before Intenrational Tribunals: (Real) Concerns, (Im)Possible Solutions*, "Cornell International Law Journal" 2009, no. 1(42).

Romano C. P. R., *Trial and Error in International Judicialization*, in *The Oxford Handbook of International Adjudication*, ed. C. P. R. Romano, K. J. Alter, Y. Shany, Oxford 2013.

Romano C. P. R., *The Shift from the Consensual to the Compulsory Paradigm in International Adjudication: Elements for A Theory of Consent*, "International Law and Politics" 2007, vol. 39.

RomanoC. P. R., Alter K. J., Shany Y., *Mapping International Adjudicative Bodies, The Issues, The Players*, in *The Oxford Handbook of International Adjudication*, ed. C. P. R. Romano, K. J. Alter, Y. Shany, Oxford 2013.

Shany Y., *Competing Jurisdictions of International Courts and Tribunals*, Oxford 2003.

Tams Ch. J., *The ICL as a 'Law-Formative Agency': Summary and Synthesis,* in *The Development of International Law by the International Court of Justice*, ed. Ch. J. Tams, J. Sloan, Oxford 2013.

Wiśniewski A., *Koncepcja marginesu oceny w orzecznictwie Europejskiego Trybunału Praw Człowieka*, Gdańsk 2008.

SUMMARY

On the Judicialisation of International Law

The judicialisation of international law is a relatively recent phenomenon that gained momentum in the 1990s and 2000s. Coupled with the trend towards widespread compulsory jurisdiction, it has been crucial in strengthening the commitment of states to adhere to their international obligations. Another important effect of judicialisation on international law is that at least certain international norms have acquired an "objective" nature, detached from the will of states. This is because the interpretation and application of these norms is no longer dependent solely upon the subjective discretion of states, but is subject to consideration and examination by independent judicial bodies. The process of judicialisation, while contributing to the international rule of law, has undoubtedly changed the face of international law a great deal as a result of some other factors. The multiplication of international courts has led to the expansion of the judicial

institutional layer, making international law less horizontal. Also, as a result of the growing case-law of these courts, the system of international law is becoming more complex and developed, and thus also more mature. The natural aspect of the judicial function is the development of international law. Despite the problems and risks involved, the proliferation of international courts and tribunals can be perceived as one of the important components of the dynamic transformation of international law during the recent decades.

Keywords: public international law, jucicialisation, multiplication of international courts

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Individual Communications Against Poland Before the Human Rights Committee: a Review and Tentative Conclusions

Introduction

The International Covenant on Civil and Political Rights (the Covenant) was adopted on 16 December 1966.[1] Poland became a party thereto on 18 June 1977.[2] The statement of consent to be bound by the Covenant did not contain reservations. However, Poland made other declarations of will, influencing the direction of interpretation and application of the Covenant, including opposition to the reservations made by Mauritania and Pakistan.[3]

The ratification imposes on Poland the obligation to submit to the Human Rights Committee (the Committee) reports on the implementation of the Covenant. On 25 September 1990 the Republic of Poland recognized the competence of the Committee to examine communications by other parties to the Covenant concerning any possible violations of the provisions thereof by the Polish State (Article 41). No State has complained about Poland under this procedure.

Poland has been a party to the Optional Protocol to the International Covenant on Civil and Political Rights of 16 December 1966 (the Protocol)[4] since 7 February 1992. Thus, the Polish State has recognized the competence of the Committee to accept and examine the communications from individuals (Article 1).[5] The Republic of Poland decided to accede to the Protocol, with the reservation excluding the procedure provided for in Article 5 § 2(a) thereof, if the matter has already been examined under another procedure of international investigation.[6]

1 999 United Nations Treaty Series (UNTS) 1971, I-14668.
2 Dz.U. of 1977 no. 38 item 167.
3 https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en#EndDec [access: 30.03.2017].
4 Dz.U. 1992 no. 23 item 80; 999 UNTS 171: A-14668.
5 http://indicators.ohchr.org/ [access: 22.10.2016].
6 Dz.U. 1992 no. 23 item 80.

As of the day of the 31st March, 2017, the Committee has received 11 communications submitted pursuant to Article 1 of the Protocol.

In two cases, namely those of Jan Piwowarczyk[7] and Mirosław Getke,[8] the Committee has concluded the proceedings in the case. In the first case, there has been a discontinuation of the proceedings as a result of the inability to contact the author of the communication.[9] The fact that there was no answer by the lawyer of the applicant in the latter case, despite the repeated attempts by the Committee, put an end to the proceedings.[10]

Inadmissibility decisions have been made in five cases. These were the communications addressed to the Committee by Janusz Kolanowski,[11] Eugeniusz Kurkowski,[12] Zdzisław Bator,[13] Barbara Wdowiak[14] and M.G.[15]

In another three cases, the Committee ruled on their merits. Only in one of them did the Committee find a violation. That was the case of Bożena Fijałkowska.[16] In the cases of Wiesław Kall[17] and Tatyana Rastorgueva[18] the Committee did not find a violation of the rights of the applicants.

Taking into account that this year, 2017, is the fortieth anniversary of the Covenant entering into force for Poland, and twenty five years since Poland agreed to be bound by the Protocol, it would be interesting to have a look at the Polish applications, not only in terms of statistics but also as a special measure for the implementation of the human rights laid down in the treaties indicated.

The decisions on inadmissibility

Janusz Kolanowski

Janusz Kolanowski (J.K.) claimed that Article 14 § 1 and Article 26 of the Covenant were violated because he had been refused the access to the court, on the basis that the

7 No. 955/2000.

8 No. 1025/2001.

9 Report of the Human Rights Committee, Volume I, Seventy-ninth session (20 October–7 November 2003), Eightieth session (15 March–2 April 2004), Eighty-first session (5–30 July 2004), United Nations, New York 2004, § 87.

10 Report of the Human Rights Committee, vol. I, Eighty-eight session (16 October–3 November 2006), Eighty-ninth session (12–30 March 2007), Ninetieth session (9–27 July 2007), United Nations, New York 2007, § 98.

11 Human Rights Committee (HCR), *Kolanowski v. Poland*, no. 837/1998, Date of decision on admissibility: 6 August 2003.

12 HCR, *Kurkowski v. Poland*, no. 872/1999, Date of decision on admissibility: 18 March 2003.

13 HCR, *Bator v. Poland*, no. 1037/2001, Date of decision on admissibility: 22 July 2005.

14 HCR, *Wdowiak v. Poland*, no. 1446/2006, Date of decision on admissibility: 31 October 2006.

15 HCR, *M.G. v. Poland*, no. 2183/2012, Date of decision on admissibility: 23 July 2015.

16 HCR, *Fijałkowska v. Poland*, no. 1061/2002, Date of adoption of views: 26 July 2005.

17 HCR, *Kall v. Poland*, no. 552/1993, Date of adoption of views: 14 July 1997.

18 HCR, *Rastorgueva v. Poland*, no. 1517/2006, Date of adoption of views: 28 March 2011.

refusal to promote him to the aspirant rank in the Police was not considered an administrative decision and therefore it was not subject to the judicial review of the High Administrative Court (HAC).

According to the applicant, his communication on the refusal of appointment and nondelivery of an administrative decision involved a determination of his rights and obligations in a suit at law, since Article 14 § 1 should be interpreted broadly in that respect. What is more, in his opinion, the bias of the judges of the HAC and the fact that he had been deprived of the possibility to lodge an extraordinary appeal, either through the Minister of Justice or through the Ombudsman, who had failed to process his request in a timely manner, were further violations of Article 14 § 1.

The author of the communication claimed that the issuance of an administrative decision was required in similar situations, such as in cases of lowering of the military ranks of the professional soldiers of the Polish Army or when a university granted an academic degree. Since soldiers and academic candidates can appeal such decisions before the court, the author claimed that the fact that such a remedy was not available to him constituted a violation of Article 26.

The applicant argued that he had exhausted domestic remedies available, and that the same matter was not examined under another procedure of international investigation.

The Committee ascertained that pursuant to Article 5 § 1(a) of the Protocol, the case of J.K. was not being examined under another procedure of international investigation or settlement, and that pursuant to Article 5 § 1(a) the applicant had exhausted all the remedies available. The standpoint of the applicant in the respect indicated was not contested by the Polish State.

In the case of J.K., the defending State Party claimed that the communication should be inadmissible *ratione temporis*, as well as due to the lack of substantiation of an alleged violation of Article 14 § 1 and Article 26 of the Covenant. The Committee agreed with the opinion of the State Party and considered the communication inadmissible under Article 2 and Article 3 of the Protocol.

According to established jurisprudence of the Committee, alleged violations of the Covenant are not recognized if they happened before the Protocol entered into force for the State to which they were addressed. The Committee decided in this manner, for example, in the case of the policeman from Togo who had been allegedly wrongfully dismissed from service, and who had lodged 40 complaints in total to the Togolese authorities about the situation in question, and received no reply.[19]

Situations where possible violations of the Covenant that begun before and continue after the Protocol for a particular State enters into force constitute exceptions. Therefore, when the alleged accusations of torture and the ill-treatment of a prisoner, related to

19 HRC, *Kétényuéré Ackla v. Togo*, no. 505/1992, Date of adoption of views: 25 March 1996.

both the period before the Protocol entered into force in Venezuela and after this date, the Committee found the communication admissible *ratione temporis*.[20]

The Protocol entered into force for Poland on 7 February 1992. The applicant J.K. had requested the Chief Commander of the Police to appoint him to the rank of aspirant officer of the Police on 7 January 1991. The proceedings in his case at the domestic forum ended on 2 September 1996, when the Ombudsman rejected to submit an extraordinary appeal for the second time and warned that his accusations against the judges of the HAC might be interpreted as constituting a criminal offence.

There is no doubt that the proceedings in the case of J.K. before the domestic authorities were started before the Protocol entered into force in Poland. The proceedings were continued, upon the initiative of the applicant, after this fact. However, in the opinion of the Committee the proceedings did not constitute any potential violation of the Covenant. Consequently, the Committee could consider the communication inadmissible *ratione temporis*.

As far as the claim of violation of Article 14 § 1 of the Covenant is concerned, its essence was boiled down to the applicant's efforts to contest the decision that refused to promote him to the rank of officer. The applicant was not dismissed and neither did he apply for any specific post where holding such a rank would be required. As was pointed out by the committee, in this aspect his case should be distinguished from the situation of the head of the emergency management centre in Nancy who had been dismissed due to his alleged incompetence, and who also complained about the lack of an effective remedy.[21] The Committee recalled that the right to a fair and public hearing of a case by the court is a concept based on the nature of the rights and obligations claimed, rather than on the status of the parties to the proceedings. According to the Committee, the procedures initiated by J.K., which were aimed at contesting the decision that rejected his request for a promotion to the rank of officer in the Polish Police, were not proceedings relating to the determination of his rights and obligations in the meaning of Article 14 § 1. Thus, this part of the application was held to be incompatible with the wording of the Covenant's provision referred to and was found inadmissible under Article 3 of the Protocol.

In relation to the violation of Article 26 of the Covenant, the Committee only stated that J.K. had failed to substantiate, for the purposes of admissibility, any potential violation. In such cases, communications are considered inadmissible under Article 2 of the Protocol.

In order to substantiate communications, the facts of the case should be presented in a manner that enables the Committee to assess them. The applicant should demonstrate

20 HCR, *Katy Solórzano de Peña and Luis Alberto Solórzano v. Venezuela*, no. 156/1983, Date of adoption of views: 28 March 1996.

21 HCR, *Casanovas v. France*, no. 440/1991, Date of decision on admissibility: 7 July 1993.

that he/she has been a victim of an alleged violation of their rights under the Covenant. If the facts and arguments submitted illustrate the case insufficiently, or they cannot be verified, or they do not indicate a violation of any of the rights provided for by the Covenant, the Committee does not continue the examination of the case in this particular respect.[22] For example, in *J.M. v. Jamaica*, the fact that the applicant failed to submit evidence (e.g. a birth certificate) as proof that he was the citizen of Jamaica entailed that his claim of deprivation of the right to enter his home country was found inadmissible.[23] In *Kolanowski v. Poland*, the claims by the applicant were not substantiated by a comparison with the legal situation of a professional soldier with a lowered rank, which was always the case under an administrative decision pursuant to § 1 of the Ordinance of the Minister of Defence of 27 July 1992, and the internal decisions in relation to policemen under the Police Act, taking into consideration the application of §1 to extraordinary cases. What is more, it is impossible to compare the situation of obtaining an academic degree, which is made under an administrative decision, and being promoted to a higher rank in the Police service, due to different *materiae*.

Eugeniusz Kurkowski

From December 1976 until 1989, Eugeniusz Kurkowski (E.K.) held a post in the Civic Militia. In 1989 he was appointed the Chief of the Regional Office of Internal Affairs in Andrychów. On 31 July he was dismissed pursuant to the Protection of State Office Act of 6 April 1990, under which the secret police had been dissolved by transforming it into a new department.

In Ordinance of 21 May 1990 the Council of Ministers established the qualification procedures and the criteria for reinstatement at a new department of the dismissed officers. The reinstatement could take place only after a positive assessment by the regional qualifying commission was issued, or through an appeal to the Central Qualifying Commission in Warsaw. On 22 July 1990 the Qualifying Commission in Bielsko-Biała held that the author of the communication had not met the criteria for officers or civil employees of the Ministry of Internal Affairs. The Central Qualifying Commission confirmed that opinion on 5 September 1990 after the appeal submitted on 28 July 1990.

On 25 April 1995, the applicant requested that the Minister of Internal Affairs reverse the decision of the qualifying commissions and reinstate him in the Police. In the proceedings before the Committee, E.K. justified the delay in his appeal by explaining his poor health condition, which was only partially confirmed. On 25 May 1995, the Minister of Internal Affairs informed the applicant that he had no competence to change the decisions issued by the qualifying commissions or to employ anyone who had not

22 V., e.g., HCR, *Larry James Pinkney v. Canada*, no. 27/1978, Date of adoption of views: 29 October 1981.

23 HCR, *J.M. v. Jamaica*, no. 165/1984, Date of decision on admissibility: 26 March 1986.

received their positive assessment. On 1 February 1996 the Minister of Internal Affairs upheld the previous opinion. The applicant submitted an appeal to the CAC. That Court held that it was not competent to examine the opinions issued by the qualifying commissions.

The author of the communication claimed that he was a victim of Poland' of Article 25(c) of the Covenant, since he had been dismissed from the Police by the Minister of Internal Affairs for being a member of the Polish United Workers' Party and holding leftist political views. What is more, the applicant claimed that the Minister of Internal Affairs had unjustly classified him as a member of the Security Police, when he had served in the police and had worn a uniform of its officer. The applicant argued that this violation should be considered together with the violation of Article 2 § 1 of the Covenant.

E.K. claimed that his right to access a court and the right to be heard by an independent and impartial court had been violated, since neither the question of his dismissal nor his retroactive classification as a Security Police agent could be reviewed by the court.

The Committee found that the conditions of admissibility of the communication under Article 5 § 2 of the Protocol had been met. The applicant had exhausted the domestic remedies available and his case was not being examined under another procedure of international investigation at that time.

On the other hand, the Polish State claimed that the communication was inadmissible *ratione temporis,* since the qualification proceedings for its author were ended on 5 September 1990, i.e. before the Protocol entered into force for Poland on 7 February 1992. The applicant claimed that the Covenant had been binding upon Poland since 1977, and although the Protocol had entered into force in Poland in 1992, he had taken no action against his dismissal until 1995, i.e. after the Protocol had entered into force.

The Committee noted that the author of the communication had been dismissed in 1990, under the law applicable at that time and that the same year he had submitted himself to the assessment of the qualification commissions in order to determine whether he satisfied the new statutory conditions of employment in the structures of the Ministry of Internal Affairs. The fact that he had not won his case in the proceedings started in 1995, after the Protocol entered into force, did not amount to a violation of the Covenant. The Committee did not conclude that the violation had occurred before the Protocol entered into force in Poland and continued after that. Accordingly, the Committee declared the communication inadmissible *ratione temporis*.

In accordance with established jurisprudence of the Committee, it cannot examine the communication if the alleged violations took place before the Protocol entered into force.[24] The retroactive application of the Protocol could have occurred only if the viola-

24 HCR, *Adimayo M. Aduayom, Sofianou T. Diasso and Yawo S. Dobou v. Togo*, no. 422/1990, 423/1990 and 424/1990, Date of adoption of views: 12 July 1996.

tion of the Covenant or its effects, had taken place since the time preceding the entry into force of the Protocol, and continued or still influenced the situation of the applicant.[25] The applicant could have used the available remedies to alter his legal situation and he had done that. The proceedings in his case ended on 5 September 1990, thus before the Protocol entered into force in Poland. As a result, his case does not make it necessary to apply the Protocol retroactively.

Zdzisław Bator

Zdzisław Bator (Z.B.), an American and Polish citizen, set up a joint venture company in 1986 with his brother Waldemar Bator (W.B.), who was residing in Płock and had Polish citizenship. The company was named Capital Ltd., and its principal place of business was in Płock. The author of the communication held 81% of the shares in the Company and W.B. 19%. The applicant provided funding for the establishment of the Company, which W.B. operated. Although the applicant resided in the USA, he travelled to Poland a few times a year and assisted in managing the business.

In 1994 the applicant discovered that allegedly W.B. and his wife were embezzling money from the Company. The author of the communication spent a few months in Poland trying to save the Company. However, in 1995, he decided that the Company should be dissolved. On 6 November 1995, during the meeting with W.B., the author as the majority shareholder, passed a resolution on dissolution of the Company and appointed himself as a liquidator. W.B. voted against the applicant's candidature and threatened that he would take the steps to remove him from the position concerned.

The author of the communication took several steps aimed at the liquidation of the company's assets. On 18 December, W.B., filed with the District Court in Płock the first request to replace the applicant as liquidator. On 15 March 1996 the District Court in Płock, at the closed hearing, decided that W.B. should replace the applicant in the post of liquidator. In the reasoning, the judge held that the author of the communication had failed to register the liquidation before 3 January 1996 and that his residence in the USA made him less capable of acting as liquidator (either personally or through his representatives). The applicant claimed that neither he nor his lawyer had been notified of the date and place of the hearing, and consequently, nobody was able to contest W.B.'s request.

Pursuant to the above ruling, the name of the applicant had been immediately deleted from the Commercial Register and the details of W.B. were entered there. On 27 May 1996, the decision of 15 March 1996 was reversed, since the judge had exceeded the authority by entering W.B. as liquidator into the Commercial Register. On 27 October 1996, an appeal by W.B. was dismissed and the applicant was entered into the Commercial Register as liquidator.

25 HCR, *Joseph Frank Adam v. the Czech Republic*, no. 586/1994, Date of adoption of views: 23 July 1996.

On 11 July 1997, the same judge of the District Court in Płock heard another request by W.B. for replacing the applicant as liquidator. The applicant was not represented due to failure to notify him. The case was decided in favour of W.B. and the reasons were the same as in the judgment of 15 March 1996. On 30 October 1997, the Regional Court reversed the judgment of 11 July 1997 due to the failure to respect the principle of equality of arms and referred the case to the court of the first instance for reconsideration.

As the applicant was ill and not able to travel and his lawyer could not represent him on the date of reconsidering the case, the applicant applied for the case to be adjourned. According to the applicant, his request was delivered to the Court on the day of the hearing at 8.00 and was not taken into consideration. The District Court in Płock,[26] this time in a different formation, ruled in favour of W.B. for the same reasons as in the previous ruling. All appeal attempts were unsuccessful.

The applicant claimed that he was a victim of Poland's violation of Articles 2 and 14 of the Covenant, since his case had not received a fair hearing by an independent and impartial court and thus, he could not defend himself properly against repeated attempts to dismiss him as liquidator.

When responding to the applicant's allegation that he did not receive a fair hearing of the case, the Committee observed that it related primarily to the evaluation of the facts and evidence by the courts. The Committee recalled the principle of its jurisprudence that it is the competence of the courts of the States and not of the Committee to evaluate the facts and evidence in individual cases, unless the courts' decisions are manifestly arbitrary or amount to denial of justice. The Committee noted that the Polish courts had considered the complaints by the applicant and they found none of the defects mentioned. Therefore, the Committee held that this part of the communication, as unfounded, was inadmissible under Article 2 of the Protocol.

In relation to the claim that the courts examining the applicant's case were neither independent nor impartial, the Committee noted that the applicant had never raised that issue in a domestic forum. Accordingly, it was inadmissible, since the author had not exhausted the remedies available. Eventually, the communication was declared inadmissible under Article 2 of the Protocol.

Barbara Wdowiak

In 1995 the applicant filed an application at the District Court in Kozienice seeking restitution of a small part of property to which, as she claimed, she was entitled. On 28 June 1995, the Court rejected her application for lack of evidence. In March 1998 new facts in the case were discovered, and the author filed a cassation appeal with the Regional Court in Radom on 9 August 1999, seeking to have her case reconsidered.

26 However, the judgment included several elements in the reasons, and held that the claimant had neglected the duties of liquidator.

On 13 August 1999, the Regional Court in Radom dismissed her cassation appeal on the basis that the appeal must be prepared and filed by a qualified lawyer.

The author of the communication appealed the decision of the Radom Regional Court to the Supreme Court, which dismissed it, explaining that the cassation appeal must be prepared by a qualified lawyer or a legal counsel only.

Barabara Wdowiak (B.W.) explained that she could not afford to pay a lawyer to represent her and she had been refused a court appointed lawyer. The applicant also claimed that she had notified the Supreme Court of her difficult financial situation.

On 26 April 2000, B.W. submitted an application to the European Court of Human Rights (the EHCR), setting out the above-mentioned facts therein. On 11 October 2000, that Court found her application inadmissible, on the grounds that she had not exhausted the available domestic remedies.

In the communication addressed to the Committee, the author claimed that she had been deprived of the right to a fair hearing of her rights in a suit of law, which is a violation of Article 14 § 1 of the Covenant.

The foreground criterion of admissibility, in the light of the facts presented, was that resulting from Article 5 § 2(a) of the Protocol, providing that the Committee shall not examine any communication unless it establishes whether the same matter is not being examined under another procedure of international investigation or settlement, since the applicant had submitted a similar complaint to the European Court of Human Rights.

In this regard, it was necessary to establish that when Poland acceded to the Protocol it made the above-mentioned reservation to Article 5 § 2(a) of the Protocol. Therefore, the Committee had to consider whether the decision of the EHCR on the admissibility of the application by B.W. resulted from the examination of the same matter which had been submitted to the Committee.

In the Committee's jurisprudence it is held that an inadmissibility decision which entailed at least implicit consideration of the merits of a case amounts to an examination for the purpose of Article 5 § 2(a) of the Protocol, whereas the Committee claims that finding inadmissibility for purely procedural reasons, without addressing the merits of a case, does not amount to examination of the case for the purpose of admissibility of the communication by the Committee.[27]

In the opinion of the Committee, the decision of the EHCR was strictly procedural in nature, finding only that the author had not exhausted the domestic remedies available. Accordingly, the Committee held that the matter submitted had not been examined by another procedure of international investigation or settlement.

The above conclusions required the examination of another admissibility criterion that was essential for the case of B.W., namely exhaustion of domestic remedies. An un-

27 HCR, *Luis Bertelli Gálvez v. Spain*, no. 1389/2005, Date of decision on admissibility: 25 July 2005.

disputed fact was that the applicant has not complied with the formal requirements for filing a cassation appeal provided for in Polish law. It is equally important that she could not do so due to lack of financial means. In such cases domestic law allows for a request by a party to appoint a lawyer *ex officio*. It is examined by the court with which the cassation appeal is made. In the case of B.W. this was the Radom Regional Court. Notifying the Supreme Court of a difficult financial situation does not meet the requirement specified in that manner. Thus, due to the failure to meet the formal requirements to lodge a cassation appeal, the applicant did not exhaust the domestic remedies available to defend her rights. For that reason the Committee found her communication inadmissible.

The case of B.W. was examined by two international authorities and their decision on admissibility was the same, for the same reasons. Submitting the communication to the Committee was preceded by the author lodging the application to the EHCR. The EHCR held that the applicant had not exhausted the domestic remedies available. The case was subsequently assessed in the same way by the Committee, which arrived at the same understanding of the admissibility condition.

The Supreme Court's decision indicated that inability to pay for the cost of legal assistance was not an exception to the requirement that an appeal should be filed by a qualified lawyer. However, that Court also noted that a difficult financial situation makes a person eligible for application for free legal assistance. However, it was evidentt from the case files that the applicant had not submitted a request seeking the appointment of a lawyer *ex officio* for the purpose of filing a cassation appeal.

The requirement that the cassation appeal must be filed by a qualified lawyer is designed to guarantee the high quality of appeals, and to protect the Supreme Court from a backlog of appeals that do not meet the basic formal and substantive requirements. Taking into account that in the civil proceedings the cassation appeal is the last ordinary appeal remedy, it should have due regard to the interests of the party. The requirement of the mandatory operation through a lawyer introduced by Polish legislation does not restrict the right of access to the court, since it is possible to apply for the costs of legal representation to be covered. The Committee has not contested the solution adopted by Polish law and in accordance with settled jurisprudence could not act differently other than to declare that the communication was inadmissible under Article 2 of the Protocol.[28]

M.G.

M.G. claimed in his communication to the Committee that Poland had violated his rights under Articles 7, 9(5) and 10(1) of the Covenant.

28 HCR, *Lionel Bochaton v. France*, no. 1084/2002, Date of decision on admissibility: 1 April 2004.

From 28 February to 8 October 2007 the author of the application served a prison sentence at one of the prisons located in Warsaw, after he had been found guilty of fraud by the Regional Court in Warsaw.

In his communication M.G. claimed to have been the victim of inhuman and humiliating treatment while serving his prison sentence, relating to the social and living conditions. The applicant shared a cell with five other inmates. The surface of the cell was only 1.9 m^2 square meters per inmate, while the [standard] under domestic law was 3 m^2 per person.

As there was only one window in the cell, it was not ventilated properly and the light from two bulbs was insufficient for reading or writing. The lack of a dedicated space for meals meant that the prisoners had to eat on their beds and therefore the bed linen was constantly dirty. Separating the toilet only by a curtain prevented any privacy.

In the prison, no criteria for the separation of the prisoners according to the type of offence committed had been applied and, accordingly, they were located together randomly. The other prisoners were convicted of much more serious crimes, such as murder or robbery. Some of the other inmates were addicted to drugs or alcohol and their behaviour, upbringing and culture amounted to torture for M.G.

The applicant claimed that he sent numerous complaints to the prison's administration, but he received no written reply. His "tutor" officer explained that similar conditions prevailed throughout the prison.

On 3 July 2007, M.G. complained to the District Court in Warsaw about the conditions in the cell and requested compensation amounting to PLN 450 000.[29] The District Court in Warsaw agreed that the rights of M.G had been violated, first of all due to the excessive cell-occupation density, which according to the judgment by the Constitutional Court of 2008, could constitute inhuman treatment and the cumulative case elements could amount to torture.

The District Court in Warsaw, in a judgment of 29 October 2008, ordered that the Director of the Detention Centre where the applicant served imprisonment should address a written statement to him, acknowledging that there had been a violation of his human rights and making a commitment that similar violations would not happen in the future. Having assessed the duration of detention and the conditions of serving it, as well as the health condition of the applicant and his rights, the District Court in Warsaw held that the statement had constituted sufficient compensation and rejected his financial claims.

On 24 November 2008, M.G. appealed to the Regional Court in Warsaw. On 16 April 2010, the Appeal Court also found that the statement ordered by the judgment of the first instance court was a sufficient form of remedy in the case of M.G.

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29 Approximately 120,000 Euros as at 3 July 2007. Source: National Bank of Poland, www.nbp.pl.

On 3 February 2011, the Director of the Detention Centre, following the judgment issued by the District Court in Warsaw, addressed a statement to the applicant in accordance with the content of that Court's ruling.

M.G. raised in the communication that due to difficulties related to lodging a cassation appeal to the Supreme Court (compulsory preparation and submission by a qualified lawyer), he had resigned from that option and claimed that he had exhausted all the available domestic remedies.

By a note of 15 December 2014, Poland notified the Committee that on 24 May 2010 the applicant had filed an application to the EHCR concerning the conditions of his detention in Warsaw between 28 February and 8 October 2007. That fact was communicated to the Polish State on 6 October 2014.

On 16 February 2015, the applicant sent to the Committee his letter to the EHCR, dated the same day, in which he asked the EHCR to remove his application from the list of applications. M.G. asked the Committee to consider his case.

On 27 February 2015, the Registry of the EHCR confirmed that the case of M.G. was still pending.

Therefore, similarly to the case of B.W., the admissibility of the communication by M.G should have been assessed under Article 5 § 2(a) of the Protocol. In this case, the Committee had no doubts that, contrary to the assurances of the applicant, his matter was being already examined under another procedure of international investigation or settlement. Consequently, the communication by M.G. was found inadmissible.

The interpretation of the principle resulting from Article 5 § 2(a) of the Protocol in cases similar to that of M.G. poses no particular difficulties.[30] It is well-established in the jurisprudence of the Committee and is applied almost automatically.[31] Possible doubts can result from the initial evaluation by the parties, and often by the Committee itself, of the actual facts of the case. In such situations, in order to avoid any error in judgment, the Committee, under the rules of procedure, may always ask the parties to supplement information or issue a request in that respect to an authority which allegedly was, or currently is, examining the case. For example, in one case, the State argued that the proceedings before the Asian Development Bank met the criterion under Article 5 § 2(a) of the Protocol. Although it was not related to the rights derived from the Covenant, the Committee considered the communication in this regard admissible.[32] The exchange of letters between the Committee and the parties to the proceedings and the EHCR was enough also in the case of M.G. to decide as to its admissibility.

30 HCR, *D.F. v. Sweden*, no. 183/1984, Date of decision on admissibility: 26 March 1985.

31 HCR, *Dagmar Urbanetz Linderholm v. Croatia*, no. 744/1997, Date of decision on admissibility: 23 July 1993.

32 HCR, *Susila Malani Dahanayake and 41 other Sri Lankan Citizens v. Sri Lanka*, no. 1331/2004, Date of decision on admissibility: 25 July 2006.

The views

Wiesław Kall

The author of the communication served in the Civic Militia in various positions. In the years from 1982 to 1990, he served as a senior inspector at the political and educational section as a cadre officer. The author emphasized that the Civic Militia was not identical with the Security Police. On 2 July 1990, he was retroactively reclassified as a Security Police officer and on 31 July 1990 dismissed under the 1990 Protection of State Office Act, which dissolved the Security Police and established a new department.

Wiesław Kall (W.K.) appealed the decision of the Provincial Qualifying Committee in Częstochowa to the Central Qualifying Committee in Warsaw, which repealed it on 21 September 1990, finding that the author could apply for employment at the Ministry of Internal Affairs.

The author's application for employment at the Police in Częstochowa was rejected on 24 October 1990. W.K. wrote a letter to the Minister of Internal Affairs on 11 March 1991. The Minister, acting under Regulation no. 53 of 2 July 1990 noted that the officers who had performed services at the Political and Educational Board were considered to be members of the Security Police. Therefore, the applicant was dismissed lawfully, following the reorganisation of the Ministry of Internal Affairs' structures.

On 16 December 1991, the applicant applied to the HAC alleging unjustified dismissal and an error in the verification procedure. That Court noted that it was not competent to examine the opinions of the qualifying committees.

In the communication to the Committee, W.K. argued that he had been dismissed without justification. The verification procedure prevented him from access to employment in the public service only because of his political opinions and the fact he was a member of the Polish United Workers' Party. In the opinion of the applicant, this situation constituted discrimination within the meaning of Article 25(c) of the Covenant.

On 5 July 1995, the Committee declared the communication admissible. The State Party tried to challenge that decision unsuccessfully. The Committee accepted neither the arguments concerning the failure to exhaust domestic remedies nor the lack of *ratione temporis* competence in the case. The only clearly indicated substantiation for the position of the Committee was taking into account the reasons of the applicant relating to the exhaustion of the domestic remedies, namely that his insufficient legal awareness had caused him to appeal to the HAC against the opinion by the Central Qualifying Commission in Warsaw, instead of appealing the decision on the refusal of employment. In fact, the applicant had never, before any authority, challenged that decision. The letter to the Minister of Internal Affairs and the complaint to the HAC were not remedies in this case.

The applicant should have brought a complaint to the Chief Commander of the Police, and then, if it was necessary, to the HAC. The author of the communication had 14 days to appeal to a higher court concerning the refusal of his employment. In the light of his failure to do so, the decision of 24 October 1990 became final. At that time, Poland was not yet bound by the Protocol. In accordance with established jurisprudence in such situations, the Committee declares the inadmissibility of the communication *ratione temporis*.[33] However, the Committee acknowlegded the possibility to hear the case of W.K. despite the fact that it had to treat the issues raised as a continuing violation, i.e. affirmation by an act or clear implication of the previous violations of the State Party.[34] It should be assumed that the Committee identified the negative assessment of the applicant with his not being employed in the Police. The failure to separate those two events enabled them to be treated as subsequent sequences of one and the same case continued after Protocol entered into force for Poland. Otherwise, the Committee would have to declare the communication inadmissible *ratione temporis*.[35]

The above reasoning imposes on the Committee the obligation to assess the merits of the case, namely the examination of whether the verification procedure and then the refusal of employment in the Police violated the applicant's rights laid down in Article 25(c) of the Covenant.

The Committee noted that the termination of the applicant's employment had resulted from the dissolution of the Security Police under the Protection of State Office Act. As a result of the Security Police's dissolution, the posts of all members thereof were also abolished, without any differentiation.

The Committee, when considering the complaints relating to the verification procedure, noted that on appeal the applicant had been found eligible for a post in the Police. Therefore, the facts of the case demonstrate that the applicant had not been precluded from access to public service.

The Committee also referred to the problem of whether the refusal of employment in the Police constituted sufficient evidence to conclude that it was because of the political opinions of the communication's author, or whether it was a consequence of the limited number of posts available, as was argued by the State Party. Article 25(c) of the Covenant does not guarantee employment in public service to each citizen, but rather access to such employment on the general terms of equality. In the Committee's opinion, information provided in the case did not imply that this right was violated.

It should be noted that W.K. was dismissed from the police service *ex lege*. The Security Police was dissolved following a resolution of Parliament and subsequently those

33 HCR, *Samuel Lichtensztejn v. Uruguay*, no. 77/1980, Date of adoption of views: 15 July 1999.

34 HCR, *E. and A.K. v. Hungary*, no. 520/1992, Date of decision on admissibility: 7 April 1994.

35 HCR, *R.A.V.N. et al. v. Argentina*, no. 343, 344 and 345/1988, Date of decision on admissibility: 26 March 1990.

employed there lost their jobs. The effects of the reorganization of the Ministry of Internal Affairs in this regard concerned all the members of the services under liquidation, not just the applicant. The regulation by the Minister of Internal Affairs, questioned in the course of the proceedings before the Committee, had been issued on the basis of the statutory delegation and only provided details to its provisions, pointing out what posts were classified as belonging to the Security Police. It is therefore difficult to accept that the applicant was retroactively reclassified, as was claimed by him and the Committee.

The applicant was able to challenge and did challenge the decision on ineligibility to serve in the Police, and the Committee agreed to that. However, the positive opinion of the appeal verification committee did not amount to an obligation to employ the applicant in the Police. The employment of any person in any industry is determined by a number of factors: first and foremost the current needs of an employer, and then the qualifications required from the applicant for a job.

Article 25(c) of the Covenant is to protect the organizational structure of the State against its appropriation by one or more groups which enjoy a special status.[36] Consequently, the State must, as the Polish Government rightly raised, be able to establish criteria for the employment of citizens in public service. The work of a police officer does not exclusively require features that should be held by each employee. This is service to the State and the inhabitants thereof, which implies having specific moral values. The Security Police has been dissolved due to its total degradation, also in the ethical and political terms.

Notwithstanding the favourable opinion by the Central Qualifying Commission, the Chief Commander of the Police in Częstochowa was in a position to not consider the applicant as deserving employment in the new services or, due to the limited number of vacancies, he could prefer to give priority in employment to persons without his professional origins. However, it was not possible to assess the situation since W.K. had not tried to challenge that decision. Article 25(c) of the Covenant, in any event, does not guarantee employment in the Police. However, the provision of that Article requires States to establish the transparent guarantess, in particular of a procedural nature, of equal access to the public service, including the Police. They had been established in Polish law and it was up to the applicant whether they should be used or not.

Bożena Fijałkowska

The applicant had been suffering from schizophrenia since 1986. On 12 February 1998, Bożena Fijałkowska (B.F.) was committed to compulsory treatment at the Provincial Psychiatric Therapeutic Centre in Toruń. She was committed to this psychiatric institu-

36 HCR, CCPR General Comment no. 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service, 12 July 1996, §§ 23–24.

tion under the decision of the District Court in Toruń of 5 February 1998, under Article 29 of the Law on Psychiatric Health Protection.

On 29 April 1998, the applicant was able to leave the psychiatric institution and continue the treatment as an outpatient. This was completed on 22 July 1998.

On 1 June 1998, B.F. went to the Toruń District Court registry office to familiarise herself with her case files and obtain a copy of the transcript of the court hearing and the decision of 5 February 1998. The applicant received a copy of the judicial decision on 18 June 1998. On 24 June 1998, she appealed the decision of 5 February 1998 issued by the Toruń District Court. On 26 June 1998, the Regional Court in Toruń dismissed her appeal since she had missed the statutory deadline for submitting it.

On 1 July 1998, B.F. requested that the Regional Court in Toruń establish a new time limit for lodging an appeal. On 16 September 1998, the Regional Court in Toruń refused the request submitted by the applicant. B.F. tried to challenge that decision, unsuccessfully.

On 20 October 1998, the applicant was assigned legal assistance in order to prepare her cassation appeal to the Supreme Court. On 21 April 1999, the Supreme Court rejected the cassation appeal.

On 1 September 1999, the Supreme Court rejected, due to lack of competence, the applicant's request for a review of the constitutionality of the Law on Psychiatric Health Protection.

In the opinion of the B.F., her committal to a psychiatric institution, without her consent, violated Article 7 of the Covenant. She also claimed that treating her at the psychiatric institution amounted to cruel, inhuman or degrading treatment.

In the case of B.F. the issue of admissibility decision seems particularly interesting. The Polish Government argued that the communication was inadmissible due to her failure to exhaust domestic remedies. In its opinion, the applicant should have filed a constitutional complaint pursuant to Article 79 of the Constitution of 2 April 1997. The claim by the applicant, that the compulsory psychiatric treatment had been cruel, inhuman and degrading treatment, could be examined in the context of a violation of her rights provided for in Articles 39, 40 and 41 of the Constitution. Such a complaint would have verified the constitutionality of Article 29 of the Law on Psychiatric Health Protection.

Not only did the Committee not take into consideration the position of Poland in relation to the failure to exhaust the remedies available, but it did not refer to this at all. However, the Committee noted that the applicant provided no evidence for her claims that Article 7 of the Covenant had been violated, and only developed and reiterated the original version thereof in further documents. In the Committee's opinion, those claims were inadmissible under Article 2 of the Protocol since they had not been duly substantiated. In all probability, the direction of the communication's admissibility assessment,

under Article 7 of the Covenant, selected by the Committee, was less complicated in comparison with the examination of whether the constitutional complaint should have been issued before submitting the communication. However, it is interesting that the equivalence of the legal basis of inadmissibility and that raised by the defendant party was maintained.

Although the Committee decided that the original claims had been inadmissible, it found such issues in the case which, in its opinion, should require the continuation of the proceedings. In the opinion of the Committee the circumstances, under which the decision of the applicant's committal to compulsory treatment [at a psychiatric institution] had been made, and in particular the fact that there was no legal representation and that she did not receive a copy of the decision on committal until 18 June 1998, more than four months after it had been issued, and after the expiry of the deadline to lodge an appeal, may raise problems under Article 9 and Article 14 of the Covenant.

On 9 March 2004, the Committee held that the communication was admissible under Articles 9 and 14 of the Covenant. The State Party was asked to submit comments as to whether the applicant's detention had been made in accordance with the procedure established by the law in the meaning of Article 9 of the Covenant, and whether failure to provide legal representation and to provide the author with a copy of the decision on committal in due time amounted to arbitrary detention, contrary to that Article. The Committee also requested that the State Party comment on any possible violation of Article 14 of the Covenant in the applicant's case.

As provided for in Article 5 § 1 of the Protocol, the Committee examined the case of the applicant after obtaining information from all the parties to the dispute.

Committing an individual to a psychiatric institution against the patient's will, as in the case of the applicant, amounts to deprivation of liberty in the meaning of Article 9[37], which was not questioned by the Polish authorities. Poland indicated particular provisions of the Law on Psychiatric Health Protection of 1994, under which the court had issued a decision on the compulsory committal of the applicant to the psychiatric institution[38]. Therefore, the Committee assumed that the applicant had been committed compulsorily to the Mental Health Centre in Toruń under the rules and procedures, and in accordance with the law.

In relation to the possibly arbitrary nature of the applicant's compulsory psychiatric treatment, the Committee did not agree with the opinion of the Polish Government that the deterioration of mental health and inability to meet her basic needs had not affected her legal capability. As to the State Party's argument that "mental illness cannot be equated to a lack of legal capacity," the Committee considered that confinement of an individual to a psychiatric institution amounted to an acknowledgement of the

37 HCR, *A. v. New Zealand*, no. 754/1997, Date of adoption of views: 15 July 1999.
38 Articles 22 and 29.

individual's diminished capacity, legal or otherwise. The State has a particular obligation to protect the people vulnerable to their rights' infringement, including the mentally impaired. The applicant's diminished capacity to act could have affected her ability to participate in the proceedings in her case, and thus the court should have been able to ensure that she was duly represented. The Committee noted that the applicant could not be represented by her sister, as was suggested by the State Party, since she had requested for the committal decision to be issued. The Committee admitted that it might happen that an individual's mental health was so impaired that in order to avoid harm to the individual herself or other people, a committal decision, without providing due representation, might be unavoidable. In the applicant's case there were no such circumstances. Consequently, the Committee found that her compulsory committal to a psychiatric institution had been arbitrary in the meaning of Article 9 § 1 of the Covenant.

Further, the Committee noted that although a committal decision might be appealed to the court, the applicant who had not received the copy thereof and had never been represented by anyone during the proceedings, had to wait until she was released from the psychiatric institution and became aware of relevant information and, applying that information, submitted an appeal. The appeal was dismissed for formal reasons. In the view of the Committee, the applicant's right to challenge the decision on her detention was not provided effectively and constituted a violation of Article 9 § 4 of the Covenant.

Due to the finding of a violation of Article 9 §s 1 and 4 of the Covenant, the Committee did not need to consider whether there had also been a violation of Article 14 of the Covenant.

Pursuant to the provisions of Article 2 § 3(a) of the Covenant, the State Party was obliged to provide F.B. an effective remedy, including compensation, and to make such legislative changes which were necessary to avoid similar violations in the future.

It is not possible to disagree with the opinion of the Committee that a mental illness affects an individual's ability to act. However, it is a fact that neither Polish law, nor probably any other legal system, equates mental illness with the loss of legal capacity. Thus, due to the protection of the basic interests of an individual suffering from this type of illness, Polish law provides for a number of substantive and procedural security measures that do not allow, without an in-depth examination of the case, for declaring incapacitation, even partial,. An effect in the case of B.F. and others may be such that a person suffering from schizophrenia is considered, in the context of the ongoing legal proceedings, fully able to assess her situation. Probably the basis for the verification of the facts in such cases should be the opinion of an expert psychiatrist. Some elements of the case indicated that the applicant's behaviour was indeed conscious. However, it could equally result from afear of being placed in a psychiatric institution. In this sense, the applicant could properly assess the reality and resist the actions by the relevant services with the measures known to her. It is hard to blame the public authorities in the case of B.F. as

they took effective and efficient action aimed at providing her with assistance by the compulsory treatment due to the deteriorating condition of her mental health. The court hearing her case had a duty of care relating to her rights. The assertion of the Committee, in the light of the circumstances of the case, that the applicant was not immediately provided with a copy of the committal decision in order for her to appeal it constitutes a violation of Article 9 §§ 1 and 4, and seems to be an excessively broad interpretation of the Covenant. Even if it was assumed that the court was competent to appoint the defence counsel for the applicant without her consent, it is doubtful whether she could understand the arguments and what was happening in the case at the moment when the decision on the compulsory treatment was made, and the consequences thereof, if the opinion of the Committee on her capacity for discernment had been accepted.

Tatyana Rastorgueva

The author of the communication is a citizen of Belarus. Tatyana Rastorgueva (T.R.) submitted the complaint on behalf of her nephew, Maxim Rastorguev (M.R.), also a citizen of Belarus, was serving a prison sentence in Poland.

On 18 March 2000, M.R. was detained by the Polish Border Guards at the border between Poland and Belarus, since he was wanted by the Polish Police. On 24 March 2000, M.R. was transported to Chełm, where he appeared before the court. He was informed that he was a suspect in an armed robbery and murder, and temporary detention was applied. On the same day, M.R. was interrogated by a prosecutor in the absence of a lawyer, but in the presence of an interpreter, as he did not speak Polish. During the preliminary investigation he was questioned several times without the presence of a defence counsel.

M.R. allegedly met the court appointed lawyer on 13 December 2000. The applicant claims that M.R. was not able to prepare his defence because there was no interpreter. M.R. claimed that the defence counsel met him two more times before the court proceedings started, on 8 February 2001 and 23 April 2001, also without an interpreter and only for a short period of time.

On 4 July 2001, the Regional Court in Lublin convicted M.R. of armed robbery and murder and sentenced him to 25 years' imprisonment. The defence counsel appealed without consulting M.R. On 20 December 2001, the Appeal Court in Lublin upheld the sentence of the first instance court. The lawyer of M.R. did not file a cassation appeal, arguing that the conditions required had not been met. Therefore, M.R. missed the deadline to file a cassation appeal. The cassation appeal was lodged by another lawyer. On 1 October 2002, the Supreme Court upheld the judgments of the lower instance courts.

The applicant claimed that M.R. had not been able to appeal against the violations of the Covenant, since appeals in Poland must be submitted by lawyers. The author claimed that the defence counsels acting in the case of M.R. had not raised the violations of the Covenant. Consequently, M.R. had not had access to effective remedies.

In 2003 M.R. submitted an application to the EHCR. The author of the communication claimed that his case had been discontinued as the Registry of the Court could not contact M.R.

The author of the communication claimed that, as a result of detaining M.R. for six days without informing him of the charges, Poland had violated Article 9 § 2 of the Covenant. She claimed that for the same reason Article 7 of the Covenant had been violated. Since M.R. appeared before the court only after six days, she added that Article 9 § 3 of the Covenant had been violated with respect to him.

Since M.R. had been questioned without the presence of a lawyer and his rare meetings with his lawyer had been short and without the presence of an interpreter, there was a violation of Article 14 § 3(b) of the Covenant in his case.

The applicant contended that the Polish courts had discriminated against M.R., on the grounds of nationality and, therefore, their decisions were wrong, which constituted a violation of Article 14 § 1 and 26 of the Covenant.

The Committee declared the claims relating to violations of Articles 7, 14 § 1 and 26 of the Covenant inadmissible, because they were not sufficiently substantiated under Article 2 of the Covenant. The Committee declared the communication under Article 9 §§ 1, 2 and 3, as well as Article 14 § 3(b) of the Covenant to be admissible.

On the basis of the documents submitted to the Committee, it could not be concluded that the lawyers of M.R. had not been able to represent him adequately, or that they had shown lack of professionalism in conducting his case. What is more, nothing indicated that the courts should have noted that the conduct of the defence counsels was contrary to the interests of the judiciary.

As to the claim of inability to prepare defence in the absence of an interpreter, the Committee referred to the comments by the State Party stating that an interpreter had been provided during the interrogations and court hearings. However, if M.R., as noted by the Committee, had perceived the facts differently during the hearings, he could have informed the courts examining his case on those defects to the proceedings. However, that did not happen even once.

The applicant argued that M.R. could not, due to the absence of an interpreter and the relevant legal assistance, raise claims against the violation of his rights under the Covenant. However, as it is apparent from the files of the case that M.R. twice sent letters to the prosecutor inviting him to come and visit him in prison. These letters were translated from Russian to Polish, so that they could be responded to. M.R. himself requested that the Supreme Court appoint a defence counsel in order to prepare a cassation appeal. Therefore, the argument that M.R. could not submit complaints, appeal or produce other applications relating to the proceedings in his case or violations of his rights under the Covenant, due to the language reasons, was considered unconvincing.

The Committee concluded that the communication did not reveal a violation of the rights of M.R. as laid down by Article 9 §§ 1, 2 and 3 and Article 14 § 3(b) of the Covenant, and held them manifestly illfounded within the meaning of Article 5 § 4 of the Protocol.

It should be emphasized that although it is incumbent on the State party to provide effective legal aid representation in such situations as that of M.R, it is not for the Committee to determine how this should have been ensured, unless it is apparent that there was a miscarriage of justice.[39]

What is more, despite the applicant's allegations, the Committee did not find any irregularities in the behaviour of the defence counsel acting *ex officio,* on behalf of M.R., in both instances.[40]

Finally, it should be emphasized that the cassation appeal was submitted by the lawyer appointed by M.R. himself. The cassation appeal was rejected as there were no reasons to lodge it, a fact which M.R. had been notified of by his *ex officio* defence counsel. In accordance with the jurisprudence of the Committee, the State Party is not responsible for the actions of the defence counsel hired by the person concerned.[41]

Conclusions

Taking into consideration the duration of Poland's functioning in the system of the Covenant, the number of individual communications brought against Poland is small. In most cases, decisions on inadmissibility have been made. Where the Committee ruled on the merits of the case, it usually did not find a violation. Finally, if a violation was found, it covered a scope different from that which had been specified by the allegations included in the communication. Therefore, does the Polish State implement the provisions of the Covenant to a satisfactory extent, so that the individuals do not initiate proceedings before the Committee?

Only the ideal State of Plato could act impeccably towards individuals. However, this thesis could also be considered not fully accurate, if it is taken into account that he did not know the concept of human rights in the meaning of the Covenant.

Poland, as any other State, struggles with difficulties in the implementation of human rights, although in different areas, not only under the Covenant. Some of them are reflected in the communications lodged with the Committee under the Protocol. Certainly, there are those which relate to the issue of the proper administering of justice. However, it should be emphasized that not in all the cases did the requests of the applications deserve consideration.

39 HCR, *Hensley Ricketts v. Jamaica*, no. 667/1995, Date of adoption of views: 4 April 2002.
40 HCR, *Campbell v. Jamaica*, no. 618/1995, Date of adoption of views: 20 October 1998.
41 HCR, *Griffin v. Spain*, no. 493/1992, Date of adoption of views: 4 April 1995.

It seems appropriate to treat even inadmissible communications as a signal to explore, from a broader perspective than the circumstances of one case, the problems raised in the content of these cases, in particular when it is repeated. Some of the applicants, prior to submitting communications to the Committee, had tried to assert their views before the EHCR. Doing so may be evidence of lack of relevant knowledge, but italso suggests the severity of certain phenomena which should not be neglected.

After all, individuals who are subject to the jurisdiction of the Polish State essentially make applications that apply the provisions of the Convention. This is for several reasons, the most important of which are as follows. The Convention is the most recognizable system of human rights protection, not only in the region. The treaty was drawn up according to the standards and aspirations of European societies and not the whole world. The Convention is constantly evolving and is developing at a pace that is unacceptable to the United Nations States. The applications are filed under the Convention with an authority that issues binding decisions, and not with an authority that makes decisions in the form of an opinion, as the Committee does. Important differences apply also to the manner of adjudicating on fair compensation and, possibly, damages.

Taking the above into consideration, it seems that Poland has no particular interest in remaining in the system of the Covenant due to the possibility of individuals submitting applications. In this context, even the essential similarities of the Convention and the Covenant in both the substantive and procedural terms argue in favour of this view. In none of these aspects does any group of people gain any outstanding protection under the Covenant.

Literature

Human Rights Committee, CCPR General Comment no. 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service, 12 July 1996.

Report of the Human Rights Committee, vol. I, Seventy-ninth session (20 October–7 November 2003), Eightieth session (15 March–2 April 2004), Eighty-first session (5–30 July 2004), United Nations, New York 2004.

Report of the Human Rights Committee, vol. I, Eighty-eight session (16 October–3 November 2006), Eighty-ninth session (12–30 March 2007), Ninetieth session (9–27 July 2007), United Nations, New York 2007.

*A. v. New Zealand, n*o. 754/1997, Date of adoption of views: 15 July 1999.

Adimayo M. Aduayom, Sofianou T. Diasso and Yawo S. Dobou v. Togo, no. 422/1990, 423/1990 and 424/1990, Date of adoption of views: 12 July 1996.

Bator v. Poland, no. 1037/2001, Date of decision on admissibility: 22 July 2005.

Campbell v. Jamaica, no. 618/1995, Date of adoption of views: 20 October 1998.
Casanovas v. France, no. 440/1991, Date of decision on admissibility: 7 July 1993.
Dagmar Urbanetz Linderholm v. Croatia, no. 744/1997, Date of decision on admissibility: 23 July 1993.
D.F. v. Sweden, no. 183/1984, Date of decision on admissibility: 26 March 1985.
E. and A.K. v. Hungary, no. 520/1992, Date of decision on admissibility: 7 April 1994.
Fijałkowska v. Poland, no. 1061/2002, Date of adoption of views: 26 July 2005.
Griffin v. Spain, no. 493/1992, Date of adoption of views: 4 April 1995.
Hensley Ricketts v. Jamaica, no. 667/1995, Date of adoption of views: 4 April 2002.
J.M. v. Jamaica, no. 165/1984, Date of decision on admissibility: 26 March 1986.
Joseph Frank Adam v. the Czech Republic, no. 586/1994, Date of adoption of views: 23 July 1996.
Kall v. Poland, no. 552/1993, Date of adoption of views: 14 July 1997.
Katy Solórzano de Peña and Luis Alberto Solórzano v. Venezuela, no. 156/1983, Date of adoption of views: 28 March 1996.
Kétényuéré Ackla v. Togo, no. 505/1992, Date of adoption of views: 25 March 1996.
Kolanowski v. Poland, no. 837/1998, Date of decision on admissibility: 6 August 2003.
Kurkowski v. Poland, no. 872/1999, Date of decision on admissibility: 18 March 2003.
Larry James Pinkney v. Canada, no. 27/1978, Date of adoption of views: 29 October 1981.
Lionel Bochaton v. France, no. 1084/2002, Date of decision on admissibility: 1 April 2004.
Luis Bertelli Gálvez v. Spain, no. 1389/2005, Date of decision on admissibility: 25 July 2005.
M.G. v. Poland, no. 2183/2012, Date of decision on admissibility: 23 July 2015.
R.A.V.N. et al. v. Argentina, no. 343, 344 and 345/1988, Date of decision on admissibility: 26 March 1990.
Rastorgueva v. Poland, no. 1517/2006, Date of adoption of views: 28 March 2011.
Samuel Lichtensztejn v. Uruguay, no. 77/1980, Date of adoption of views: 15 July 1999.
Susila Malani Dahanayake and 41 other Sri Lankan Citizens v. Sri Lanka, no. 1331/2004, Date of decision on admissibility: 25 July 2006.
Wdowiak v. Poland, no. 1446/2006, Date of decision on admissibility: 31 October 2006.

SUMMARY

Individual Communications Against Poland Before the Human Rights Committee: a Review and Tentative Conclusions

Poland has been a party to the International Covenant on Civil and Political Rights of 16 December 1966 for forty years, and has been recognizing the right of individuals to submit applications to the Human Rights Committee for 25 years. The total number of

communications amounts to 11, and the results of the examination thereof encourage consideration of denouncing the Optional Protocol to the International Covenant on Civil and Political Rights of 16 December 1966.

Keywords: Human Rights Committee, the International Covenant on Civil and Political Rights, public international law

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The Binding Force of International Legal Standards in the Face of the Recurrent Practice of Soft Law

Introduction

The intention of states and international organizations which make use of the instruments of soft law, upon recognition of such conduct being in compliance with international standards, is to influence their mutual conduct in a normative, permissive or prohibitive manner. The practice of adopting acts that fall within the domain of soft law can help to revive international initiatives of a normative nature, allowing the extension of their use to instances of a higher or lower level. But acts of this kind can very well be used as acts of sabotage. It seems that one of the basic functions of such instruments is to create grounds for further work aimed at developing and formulating tools and solutions belonging to the realm of the hard law, i.e they may constitute acts preparatory to subsequent decisions, at the same time, however, they do not constitute a legal basis of derivatives.[1]

Such instruments may also replace hard law in some cases (the role of substitution). In this case, the practice of soft law contributes to preparing the ground for the intended legislative process. Acts belonging to the sphere of soft law do not in themselves generate legal consequences, except that they must be more clearly defined at a later stage in the form of acts issued by the relevant institutions.[2]

1 T. Olawale Elias, *Modern Sources of International Law*, in *Transnational Law in a Changing Society – Essays in Honor of Philip C. Jessup*, New York – London 1972, p. 49; K. Skubiszewski, *The elaboration of general multilateral conventions and of non-contractual instruments having a normative function or objective*, "Annuaire de l'Institut de droit international" 1985, vol. 61(1), p. 101; M. Lachs, *Some Reflections on Substance and Form in International Law*, in *Transnational Law...*, *op. cit.*, p. 109; B.S. Diallo, *The role and place of soft law in the international legal system*, in *Wybrane problemy prawa materialnego i procesowego. Teoria i praktyka*, ed. K. Konopka, J. Mucha, vol. IV, Poznań 2016, pp. 68-76.

2 For exemple the Vienna Convention on the Law of Treaties defines a treaty as an agreement that is, among other things, "governed by international law" [Vienna Convention on the Law

The doctrine and the development of soft law

Soft law is a doctrinal concept derived from public international law.[3] Originally conceived as a set of sentences with an attenuated or non-existent binding force, soft law is now conceived as an encompassing concept capable of bringing together all phenomena far from an idea of law as a system of norms sanctioned by the State. Soft law recommends a model of behavior to its recipients, a particular technique for formulating statements embodied in informal acts. In this sense, it differs considerably from the legal norm.[4] Nevertheless, the recommended technique re-establishes links with the legal norm in the light of the functions it ensures; soft law is understood as an accessory and subsidiary technique to hard law. Can this continuation of hard law by other means not be totally integrated with the legal order? The legal order makes soft law a graduated reception, which oscillates between the absence of consideration and the punctual acceptance of its effects. Soft law is generally excluded from the litigation of excess power because of its non-prescriptive nature, but when envisaged as a source of responsibility of the State in the context of unlimited litigation, subject to judicial review, soft law reflects the ambivalence of the international legal order. Soft law is a set of rules whose "jurisdiction" is discussed. They are non-binding rules of law, which is a priori contrary to the essence of the law. The concept of soft law finds application in particular in international law, environmental law, constitutional law and in contemporary laws.[5]

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of Treaties, Art. 2.1(1)(a), May 23, 1969, 1155 U.N.T.S. 331]. This raises the question of what constitutes international law. The statute of the International Court of Justice is probably the most accepted source for a definition of what constitutes international law, and it lists several sources including "international conventions [...] establishing rules expressly recognized by [...] states" [Statute of the International Court of Justice Art. 38(1)(a); hereinafter ICJ Statute]. Thus an agreement is a treaty if it is governed by international law, and international Law is defined as including treaties. It is generally accepted that an agreement is a treaty and therefore is binding under international law if the states involved intend it tobe so. Although one can certainly imagine ambiguities in this pragmatic definition and disputes among states about the legal status of an agreement, it is generally the case that the parties to an agreement have a shared perspective on whether it is binding on them.

3 R.R. Baxter, *International Law in "Her Infinite Variety"*, "The International and Comparative Law Quarterly" 1980, vol. 29, no. 4, p. 549; J. Klabbers, *The Undesirability of Soft Law*, "Nordic Journal of International Law" 1998, vol. 67, p. 385; A. Pellet, *Le "bon droit" et l'ivraie – plaidoyer pour l'ivraie (Remarques sur quelques problèmes de méthode en droit international du développement)*, in *Le droit des peuples à disposer d'eux-mêmes: méthodes d'analyse du droit international. Mélanges offerts à Charles Chaumont*, Paris 1984, pp. 465-493.

4 M. Virally, *La distinction entre textes internationaux ayant une portée juridique entre leurs acteurs et textes qui en sont dépourvus*, "Annuaire de l'Institut de droit international" 1983, vol. 60-I, II, pp. 166-257, 328-357.

5 P.M. Dupuy, *Soft Law and the International Law of the Environment*, "Michigan Journal of International Law" 1991, vol. 12, p. 420; S. Atapattu, *International Environmental Law and Soft*

A text creates soft law when it merely advises without a legally required obligation. Two categories of texts are used in the relations between the subjects of international law; on one hand, instruments creating legal obligations (treaties, conventions, agreements) and on the other hand, legally non-binding texts primarily expressing a political will.[6] The second category includes declarations, resolutions and other acts of international institutions or conferences. This expression of the will of the subjects of international law, principally the States, which is not legally binding, is generally called soft law. Indeed, soft law rules can be found in treaties, which in their entirety are compulsory. Moreover, the increasingly frequent creation of soft law rules, embodied in formally non-binding instruments or in international conventions is one of the main features of current law. This is the case, in particular, for measures to protect the environment, for several reasons. In the first place, unlike many other branches of international law, the environment concerns all areas of life within States, including economic activities, without necessarily affecting or even prioritizing international relations. Secondly, the protection of the environment implies the adoption of medium and long-term measures regulating matters that normally fall within the exclusive competence of States, such as the conservation of biological diversity.[7] In most cases, these provisions require not only the adaptation of national legislation and institutions, but also the development of the capacities of local authorities to implement them and the allocation of the necessary funds for this purpose. As not only the resources but also the capacity to fulfill these obligations may vary from one State to another, the acceptance of „hard" obligations would be unrealistic, so that the adoption of soft law rules is „preferable." Soft law appeared at a time when positivist theories were compelled to confront the regulation of new legal issues that formerly belonged to the *domaine reserve*. Since then, the academy has revisited the sources of international law in considering soft law as a source that questions the canonical basis of international law, thus breaking the ideal of hard legalization and introducing different degrees of normative intensity.[8] Soft law has triggered doctrinal debates on the

Law: A New Direction or A Contradiction?, in *Non-State Actors, Soft Law and Protective Regimes from the Margins*, ed. C.M. Bailliet, Cambridge 2012, pp. 200-226.

6 A.E. Boyle, *Some Reflections on the Relationship of Treaties and Soft Law*, "The International and Comparative Law Quarterly" 1999, vol. 48, p. 901. "The traditional sources of international law are frequently attacked as being too narrow, backward looking, and at any rate, incapable of coping with the modern problems of international relations". V. E. Riedel, *Standards and Sources. Farewell to the Exclusivity of the Sources Triad in International Law?*, "European Journal of International Law" 1991, vol. 2, p. 58.

7 R. Andorno, *The Invaluable Role of Soft Law in the Development of Universal Norms in Bioethics*, Paper at a Workshop jointly organized by the German Ministry of Foreign Affairs and the German UNESCO Commission, Berlin 2007, www.unesco.de/.

8 M. Virally, *Sur la notion d'accord*, in *Festschrift fur Rudolf Bindschedler (Mélanges)*, ed. E. Diaz, Bern 1980, pp. 159-172; F. Roessler, *Law, de facto agreements and declarations of principle in international economic relations*, "German Yearbook of International Law" 1978, pp. 27-73;

difference between soft law and hard law, rooted in positions adopted on the basis of the foundations or sources of international law or the process of lawmaking.[9] Some authors rely on a binary distinction between legal and non-legal rules, while others choose the idea of graduated normativity, or a continuum, or the existence of a penumbra in which soft law has its being. Soft law instruments can even be adopted by new actors involved in the processes of informal international lawmaking, with different degrees of authority, as the new unacknowledged legislators of the world. Soft law also has different functions, covering the inception of law and the interpretation and adaptation of hard law, and it is found in the delegation of functions conferred on international organs charged with developing international law. Soft law has even found its way into legal institutions and international organizations, endowing them with soft responsibility and soft instruments of monitoring and enforcement. In light of these comments and despite its critics, soft law is here to stay.[10]

Soft law as a privileged instrument in the actions of international actors

Soft law can contribute to the development of hard law or partially replace it, without exposing its sources, but at the same time, it compromises its integrity and rigor. Acts in the field of soft law are undoubtedly unusual, soft law may, however, serve as a kind of code of conduct in particularly complex cases, allowing the sphere concerning the application of legal provisions to be evaded, and thus to overcome the impasse. In order to better understand the substitution function of soft law, let us consider a resolution. In the absence of a sufficient amount of time needed to prepare the legal text or even the final shape of the agreement on all the proposed provisions, the parties concerned

M. Bothe, *Legal and non-legal norms. A meaningful distinction in international relations*, "Netherlands Yearbook of International Law" 1980, pp. 65-95.

9 On the erosion of the sources enumerated in Article 38 of the ICJ Statute, v. R.-J. Dupuy, observateur de la première heure du phénomène de la soft law, constate: "Si les âges classiques sont ceux des distinctions nettes entre catégories précises, l'effritement des colonnes du temple de la loi érigé par l'article 38 du Statut de la Cour exprime assez bien un des aspects des mutations de la société internationale du temps présent." R.-J. Dupuy, *Droit déclaratoire et droit programmatoire – de la coutume sauvage à la "soft law"*, in *Communication. Colloque de Toulouse de la Société française pour le droit international, 16-18 mai 1974*, p. 1. Cf. *Declaratory Law and Programmatory Law: From Revolutionary Custom to "Soft Law"*, in *Declarations on Principles, a Quest for World Peace (Liber Röling)*, ed. R.J. Akkerman, P.J. Van Krieken, Ch.O. Pannenborg, Leyden 1977, pp. 247-257. Cf. I.D. Seiderman, *Hierarchy in International Law: The Human Rights Dimension*, Antwerp 2001, p. 13.

10 F. Chatzistavrou, *L'usage du soft law dans le système juridique international et ses implications sémantiques et pratiques sur la notion de règle de droit*, "Le Portique" 2005, vol. 15, http://leportique.revues.org/591.

may, in accordance, decide to adopt the resolution. This element may contribute to the adoption of a temporary solution, which will later on be confirmed on the basis of hard law and replace the temporary soft law solution, which had a controversial form in any case. Finally, in addition to the two aforementioned features, a solution adopted on the basis of soft law can function as a companion act to institutionalization when the matters concerned overlap, but they cannot be dealt with using the same legal tools (we then talk about the additional role played by soft law). All three features described above place emphasis on the two main features of soft law, namely its imperative procedural aspect (requirements in terms of the need for this type of solution are not strict) and its "influential" nature. Both of these features may at first glance seem incompatible because of their coexistence with all its specifics.[11] With regard to the first instruments characterized as „light," it can be said that the fact there is a decision to choose one of these subsidiary legal instruments is also evidence of a reluctance to submit to the legal restrictions of hard law, due to the introduction of short and simplified decision-making procedures. The results achieved by referring to this kind of soft procedure would possibly be difficult to obtain under the procedures of hard law. Soft law, through its more or less programmatic nature, also creates a framework for future discussions and negotiations between states.

In this context it is possible to focus on the purely „symbolic" use of available possibilities, in order to avoid having to take decisions of a binding nature, which are thus likely to entail serious legal consequences. This solution makes it possible to establish a framework covering the individual, intermediate stages to reach a consensus and make a decision based on obtaining clean consent. This makes it quite obvious that it is easier for states to express their consent to the act, which has consequences in the form of legal obligations on a small scale. Consent also reflects the political interests of the parties that want in this way to demonstrate their support for specific fields of policy, and at the same time can do so without being involved at a purely legal level and without making any pretense or imposing on each other's specific rights and responsibilities.[12]

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11 C.M. Chinkin, *The Challenge of Soft Law : Development and Change in International Law*, "The International and Comparative Law Quarterly" 1989, vol. 38, p. 860. Cf. M. Fitzmaurice, *The Identification and Character of Treaties and Treaty Obligations between States in International Law*, "British Yearbook of International Law" 2002, vol. 73, p. 180.

12 For exemple the Rio principle 7 "States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit to sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command." See, e.g., Convention on Long-Range Transboundary Air Pollution (Geneva, 13 Nov. 1979), 1302 U.N.T.S. 217, art. 1. V. also: Vienna Convention for the Protection of the Ozone Layer (Vienna, 22 Mar. 1985), UNEP Doc. IG.53/5, art. 1(2); Montreal Protocol on Substances

Thus, as we have seen, when an act situates itself in the sphere of soft law, it sometimes leads to the adoption of subsequent acts of a compulsory nature, which constitutes a first step towards developing a political consensus. Because the obligation arising under the agreement or contract concluded on the basis of soft law is a mainly a political or moral obligation, the resulting penalties and legal consequences are negligible. The fact there is no compulsory jurisdiction on certain rules of conduct allows states to make interpretations of their own, the fact being that it may sometimes be very convenient to removes some acts from the jurisdiction of the judiciary. For example, many of the provisions contained in the various codes of conduct defining international rules entail legal sanctions due to insufficient clearly formulated content or the same type of conduct under regulation. In this context, there arises not only the danger resulting from differences of interpretation, but, more importantly, the danger of possibly violating the law, against which there would be no possibility of appeal. An international agreement, generating political, moral and legal consequences, must be approved by parliament. While the act of holding a political and moral obligation often includes relevant legal and characterizes at the same time, a certain degree of precision and specialization, is not subject de facto to this procedure. However, it is the responsibility of each country to make a final assessment by reference to the constitutional law applicable on its territory, because the extent to which it can dispense with the procedure depends on parliamentary ratification. Thus, for example, a specific agreement in one country might require the consent of parliament if it is to enter into force, another may well be included under the sole responsibility of the government. Acts governed by the rules of soft law contain a type of conditional or absolute clause ratification. Placing a conditional clause is evidence of some kind of flexibility. Nevertheless, even in the case of a clause, absolute application of the procedure for the implementation of the act is simpler than the procedure that usually takes place in the case of agreements and international law, which does not provide for the exchange of instruments of ratification. Mitigated, the nature of the procedure goes hand in hand with the "influential" nature of soft law. This seemingly paradoxical state of affairs testifies to the rank the soft law enjoys in international com-

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that Deplete the Ozone Layer (Montreal, 16, Sept. 1987), 26 I.L.M. 1550 1987), Pmbl, § 3; Convention on the Transboundary Effects of Industrial Accidents (Helsinki, 17 Mar. 1992), 31 I.L.M.1330, art. 1(c); United Nations Framework Convention on Climate Change (Rio de Janeiro, 9 May 1992), 31 I.L.M. 849, art. 1(1); Convention on the Protection of the Marine Environment of the Baltic Sea Area (Helsinki, 22 Mar. 1974), 13 I.L.M. 546, art. 2(1); Convention for the Prevention of Marine Pollution from Land-Based Sources (Paris, 4 June 1974), 13 I.L.M. 352, art. 1; Convention for the Protection of the Mediterranean Sea against Pollution (Barcelona, 16 Feb. 1976), 15 I.L.M. 290, art. 2(a) and all subsequent regional seas agreements; Convention on the Non-Navigational Uses of International Water courses (New York, 31 May 1997), 36 I.L.M. 700, art. 21(2).

munication or exchange, in spite of its only slightly binding nature. It is worth noting that in describing soft law as "influential," we refer to an act regulating the principles of soft law outside its legal value in the strict sense of the word. An act is characterized by low binding power from a legal point of view, it may be quite binding politically and exert a strong influence on the international arena as a means of political pressure. For example, the opposition of a Member State to a particular act may force the State to remain on the defensive, entailing the need to clarify the position they occupy. But the act which regulated the principles of soft law may also be part of initiating the operation of a particular norms; a situation of this kind took place even in the case of the Universal Declaration of Human Rights. Finally, the act of belonging to the sphere of soft law may establish guidelines in previously pristine areas – guidelines which are designed to prevent such practices from occurring in a state based on selfish sovereignty. Both of the aforementioned features which characterize soft law, i.e either its mild or lighter nature and its "influential" character, reflect differences between the flexibility offered by the procedure and opacity in the impact of strength. Internationally, the dominant area of use and the application of soft law is the area of executive power. In this context, there is a paradoxical contrast between, on the one hand, the high levels of state authorities entitled to sign or approve arrangements made based on the criteria of soft law (heads of state and prime ministers, foreign ministers or other ministers, diplomats, or, in the case of when it is allowed, other officials), involving reciprocal obligations and justified represented in this way, and, on the other hand, the non-binding nature of these obligations of the states. Regardless of any legal dilemmas that inspire the practice of soft law from the point of view of procedural and conceptual practice, it is constantly growing and evolving, becoming an essential instrument for the exercise of political power.

In light of the above, the paradox resulting from the frequent use of soft law can thus be summarized as follows: As soft law is turned to more and more often, an has farther-reaching application, the strengthening of its legal and political status allows national governments to use an even wider range of its features in newer areas of activity in the international arena. By expanding the area of the application of soft law, which results primarily from legal tolerance, government actions are freed from coercion, parliamentary oversight and jurisdiction, and can thereby shape political decisions at various international forums. In other words, despite the fact that acts concluded on the basis of the principle of soft law contain provisions about their specified range, legal acts are carried out without being subject to the requirements of the law in the case of international mechanisms – such as judicial review and mandatory approval by parliament – which essentially would be required by the rule of international law. The fact that these acts are carried out in isolation from the limitations of the existing international mechanisms gives governments considerable leeway to help them make joint decisions. Thus, the

increasing use of soft law instruments creates legal incentives for the creation and operation of a new type of rights.[13]

On the one hand, the use of soft law may be seen as a manifestation of the fact that the decision-making structures operating at the international level do not have transnational decision-making power, yet on the other hand it can also be understood as a kind of loophole in the area of cooperation between countries, which could provide a practical solution for the need to strengthen international legal order, where it shows a certain weakness or turns out to be simply ineffective.[14] Soft law is a kind of gentlemen's agreement binding the parties, which increases the flexibility of their activities with regard to the political governance of their behavior or gives direction to their future actions. It is particularly appropriate in situations of insufficient competence and when there is difficulty in reaching a consensus. However, the risk of abuse of power in relation to the restrictions laid down by treaties, essentially for political reasons, might frustrate both the course implicitly recommended and the current decision-making procedure.[15]

The permissive nature of the international legal system in the face of the development of soft law

The blurred distinction between the nature of this international legal and political instrument raises the issue of border demarcation, which separates the doctrinal point of view of the field of public international law and international relations. Some legal experts point out that the use of soft law in some way carries the risk of the "juridification" of international political relations. The development of specific standards at the international level is associated with a number of problems of a legal, political and technical nature. Paradoxically, the use of soft law is developing in a dynamic way, although this is not due to lack of precise provisions in the treaties relating to the policy area. In the doctrine, the introduction of the concept of soft law was considered as an attempt to discourage countries from benefitting from hard law. "Infra-juridical" practices,

13 J. Klabbers, *The Redundancy of Soft Law*, "Nordic Journal of International Law" 1996, vol. 65, p. 167. Cf. N. Luhmann, *La confiance: un mécanisme de réduction de la complexité sociale*, transl. S. Bouchard, L.K. Sosoe, Paris 2006; S. Beci, *Environmental Protection in the Framework of International Law: Development and Perspectives*, "European Scientific Journal" 2014, vol. 22, pp. 31-42; C.M. Chinkin, *op. cit.*, pp. 850-866.

14 K.W. Abbott, R.O. Keohane, A. Moravcsik, A.-M. Slaughter, D. Snidal, *The Concept of legalization*, "International Organization" 2000, vol. 54, no. 3, pp. 401-419; K.W. Abbott, D. Snidal, *Hard and soft law in international governance*, "International Organization" 2000, vol. 54, no. 3, p. 453.

15 T. Olawale Elias, *op. cit.*, p. 49; H. Thierry, *Les résolutions des organes internationaux dans la jurisprudence de la Cour internationale de Justice*, "Recueil des Cours de l'Académie de Droit International" 1980-II, vol. 167, p. 442.

characterized by permissiveness in the application of the general principles of international law, raise the concern that acts governed by the rule of soft law will replace the legal forms in their strict sense, which alone can guarantee the adoption of provisions which are supposed to be legally binding.[16] Thus, there is a fear that acts of soft law will supplant the legal forms which alone can adopt legally binding provisions. When it comes to counteracting the propensity of actors (both public and private) to go it alone and, for the most powerful, to turn rules to their advantage, or even to seek to define them according to their own interests, international law may prove to be ineffective by favoring the use of non-binding acts. However, not forgetting the above risk of "juridification" in international political relations through these "infra-juridical" practices, the law can possibly evolve or even change in the customary manner. Normative diversification, which carries a soft law raises the problem of qualification and classification standards derived from these "infra-juridical" practices. Is soft law a normative category situated between the law and lawlessness? The prioritization of normative sources leads to imposing a formal order of priorities, so that conformity with the former constitutes the criterion of legality of the latter. A relatively orderly and rational rearrangement of the various acts practiced within the international legal system, without being tied to the definition of a prior hierarchy between them, would allow a distinction to be made based on their function and on the authority from which they derive. However, the variety of international "legalization" with which we are dealing shows that there is a missing hierarchy of norms and a source directory explicitly incorporated into texts; this is the consequence of the choices made by the international legal order. The pyramidal concept of the hierarchy of norms (in terms of consistency and uniformity of the law by H. Kelsen) has been replaced by fuzzy standards, which lack clearly marked boundaries (the so-called «distributed» concept of law).

Conclusion

Acts are defined through the prism of their structures and effects, but in the global hierarchy occupied by each of them on the basis of the mutual relationship existing between them, their legal status is no longer clear. The use of one or other types of act is not associated with an existing possible difference between them in terms of legal status, but with the function and objectives, which is to be achieved with their help. Going beyond the concept assumes that the law implies the existence of a hierarchical

16 D. Trubek, L. Trubek, *The Coexistence of New Governance and Legal Regulation: Complementarity or Rivalry?*, Paper presented at the Annual Meeting of the Research Committee on the Sociology of Law, Paris 2005, www.reds.msh-paris.fr/communication/docs/trubek.pdf [access: 31.07.2015]; A. Peters, *Soft law as a new mode of governance*, in *The Dynamics of Change in EU Governance*, ed. U. Diedrichs, W. Reiners, W. Wessels, Northampton 2011, p. 35.

system of normative functioning at the international level, meaning that the law can be defined not only as a system of a compulsory nature, but also as a system of a contractual nature. In the case of soft law, perhaps, one should speak not so much about legal rules, or what rules of conduct are agreed on by the parties in accordance with their wishes. Given the fact that these rules are not considered a source of legal obligations, they are rather a factor than a source of law. They activate the function of a political party, which is the exercise of authority in the field of "justifying and convincing." Given H. Kelsen's normativist view which holds that it is sufficient for a rule of law to prescribe that its violation should be punished for it to be considered a legal provision, this transfer to a right devoid of coercion or of a contractual nature, which results from soft law being used with increasing frequency, proves that it is necessary to separate the notion of the legal system from the notion of a legal penalty. In fact, the application of sanctions is a prerequisite for the effectiveness of the law, not its existence. In other words, the concept of coercion and consequently, the notion of sanctions is not a constitutive element, but a functional element of the international legal system. In the international context the question of international responsibility of the public subjects is of even more fundamental importance than ever before.

Literature

Abbott K.W., Keohane R.O., Moravcsik A., Slaughter A.-M., Snidal D., *The Concept of legalization*, "International Organization" 2000, vol. 54, no. 3.

Abbott K.W., Snidal D., *Hard and soft law in international governance*, "International Organization" 2000, vol. 54, no. 3.

Andorno R., *The Invaluable Role of Soft Law in the Development of Universal Norms in Bioethics*, Paper at a Workshop jointly organized by the German Ministry of Foreign Affairs and the German UNESCO Commission, Berlin 2007, www.unesco.de/.

Atapattu S., *International Environmental Law and Soft Law: A New Direction or A Contradiction?*, in *Non-State Actors, Soft Law and Protective Regimes from the Margins*, ed. C.M. Bailliet, Cambridge 2012.

Baxter R.R., *International Law in "Her Infinite Variety"*, "The International and Comparative Law Quarterly" 1980, vol. 29, no. 4.

Beci S., *Environmental Protection in the Framework of International Law: Development and Perspectives*, "European Scientific Journal" 2014, vol. 22.

Bothe M., *Legal and non-legal norms. A meaningful distinction in international relations*, "Netherlands Yearbook of International Law" 1980.

Boyle A.E., *Some Reflections on the Relationship of Treaties and Soft Law*, "The International and Comparative Law Quarterly" 1999, vol. 48.

Chatzistavrou F., *L'usage du soft law dans le système juridique international et ses implications sémantiques et pratiques sur la notion de règle de droit*, "Le Portique" 2005, vol. 15, http://leportique.revues.org/591.

Chinkin C.M., *The Challenge of Soft Law : Development and Change in International Law*, "The International and Comparative Law Quarterly" 1989, vol. 38.

Declaratory Law and Programmatory Law: From Revolutionary Custom to "Soft Law", in *Declarations on Principles, a Quest for World Peace (Liber Röling)*, ed. R.J. Akkerman, P.J. Van Krieken, Ch.O. Pannenborg, Leyden 1977.

Diallo B.S., *The role and place of soft law in the international legal system*, in *Wybrane problemy prawa materialnego i procesowego. Teoria i praktyka*, ed. K. Konopka, J. Mucha, vol. IV, Poznań 2016.

Dupuy P.M., *Soft Law and the International Law of the Environment*, "Michigan Journal of International Law" 1991, vol. 12.

Dupuy R.-J., *Droit déclaratoire et droit programmatoire – de la coutume sauvage à la "soft law"*, in *Communication. Colloque de Toulouse de la Société française pour le droit international, 16-18 mai 1974*.

Dupuy R.-J., *La technique de l'accord mixte utilisée par les Communautés européennes*, "Annuaire de l'Institut de droit international" 1973.

Fitzmaurice M., *The Identification and Character of Treaties and Treaty Obligations between States in International Law*, "British Yearbook of International Law" 2002, vol. 73.

Klabbers J., *The Redundancy of Soft Law*, "Nordic Journal of International Law" 1996, vol. 65.

Klabbers J., *The Undesirability of Soft Law*, "Nordic Journal of International Law" 1998, vol. 67.

Lachs M., *Some Reflections on Substance and Form in International Law*, in *Transnational Law in a Changing Society – Essays in Honor of Philip C. Jessup*, New York – London 1972.

Luhmann N., *La confiance: un mécanisme de réduction de la complexité sociale*, transl. S. Bouchard, L.K. Sosoe, Paris 2006.

Olawale Elias T., *Modern Sources of International Law*, in *Transnational Law in a Changing Society – Essays in Honor of Philip C. Jessup*, New York – London 1972.

Pellet A., *Le "bon droit" et l'ivraie - Plaidoyer pour l'ivraie (Remarques sur quelques problèmes de méthode en droit international du développement)*, in *Le droit des peuples à disposer d'eux-mêmes. Méthodes d'analyse du droit international. Mélanges offerts à Charles Chaumont*, Paris 1984.

Peters A., *Soft law as a new mode of governance*, in *The Dynamics of Change in EU Governance*, ed. U. Diedrichs, W. Reiners, W. Wessels, Northampton 2011.

Riedel E., *Standards and Sources. Farewell to the Exclusivity of the Sources Triad in International Law?*, "European Journal of International Law" 1991, vol. 2.

Roessler F., *Law, de facto agreements and declarations of principle in international economic relations*, "German Yearbook of International Law" 1978.

Seiderman I.D., *Hierarchy in International Law: The Human Rights Dimension*, Antwerp 2001.

Skubiszewski K., *The elaboration of general multilateral conventions and of non-contractual instruments having a normative function or objective*, "Annuaire de l'Institut de droit international" 1985, vol. 61(1).

Thierry H., *Les résolutions des organes internationaux dans la jurisprudence de la Cour internationale de Justice*, "Recueil des Cours de l'Académie de Droit International" 1980-II, vol. 167.

Trubek D., Trubek L., *The Coexistence of New Governance and Legal Regulation: Complementarity or Rivalry?*, Paper presented at the Annual Meeting of the Research Committee on the Sociology of Law, Paris 2005, www.reds.msh-paris.fr/communication/docs/trubek.pdf [access: 31.07.2015].

Virally M., *La distinction entre textes internationaux ayant une portée juridique entre leurs acteurs et textes qui en sont dépourvus*, "Annuaire de l'Institut de droit international" 1983, vol. 60-I, II.

Virally M., *Sur la notion d'accord*, in *Festschrift für Rudolf Bindschedler (Mélanges)*, ed. E. Diaz, Bern 1980.

Wellens K.C., Borchardt G.M., *Soft law in European Community law*, "European Law Review" 1989, vol. 14, no. 1.

SUMMARY

The Binding Force of International Legal Standards in the Face of the Recurrent Practice of Soft Law

Soft law facilitates cooperation between international actors. Already, the elaboration of international law is a matter of shared competence between States, traditionally recognized as the only subjects of international law, international organizations and the typical actors. International organizations have initiated a movement towards the adoption of flexible forms of regulation of international relations. They will profoundly change the way in which international law will be created and presented to the recipients of the rule of law. From the very beginning of their activities, organizations preferred a method other than hierarchical command to encourage international cooperation. They will develop a consistent legal technique, aimed at persuading and not compelling their Member States to adopt conduct consistent with the legally binding standard. This article proposes a reflection on soft law and the results of its increasing use in international practices.

Keywords: soft law, binding, international, legal standards, actors, cooperation

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Soft Law in International Governance

Introduction

The increased role of a wide variety of instruments of different natures and functions, such as resolutions, recommendations, codes of conduct and standards, in the context of the global challenges that require measures of a supranational character to be taken, is accompanied by theoretical reflection on the concept of soft law and its place in the system of the sources of public international law. Soft law, as a generic term developed to cover a wide range of new international instruments established after World War II, was announced in the legal discourse in the middle seventies, and it was based on the distinction between formal and paralegal sources of law. Although resolutions, recommendations, codes of conduct and standards play a special role in influencing international and domestic legal systems, the term 'soft law' is perceived to be unclear. On the other hand, despite this criticism, it is commonly used in publications devoted to all the instruments that are difficult to subsume under a single formula. Taking into consideration all the assumptions presented above, the scope of this article is to draw up the concepts of soft law most commonly used in legal discourse – positivist, rational and constructivist – and to apply them to contemporary practice in the field of genetic data, within international and domestic legal systems.

The Positivist Concept of Soft Law

In the literature, the most widely accepted definition of the group of international instruments that fall under the concept of 'soft law', which assumes their non-binding character, is based on the adoption of a binary criterion that enables a distinction to be made between two types of international public law norm. The norms established in international agreements and those expressed in international custom are treated as legally binding, while resolutions, opinions and recommendations are not assigned this status.

The binary criterion separating these two types of regulation is referred to by, *inter alia*, Wolfgang Reinicke and Jan Martin Witte[1] in *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, and Francis Snyder[2] in *Soft Law and International Practice in the European Community*. In the former book, Reinicke and Witte adopted the binary criterion for distinguishing between international regulations in order to analyze the role of soft law in the human rights system, environmental law, arms control, and in the spheres of commerce and finance, thereby revealing the role of soft law in ensuring that states comply with legal regulations. This analysis is accompanied by argumentation in the style of legal-dogmatics, in which Reinicke and Witte formulate the definition of soft law as non-binding legal agreements.[3] While these authors have focused on international agreements, Snyder proposes a broader approach, defining soft law as rules of conduct that in principle do not possess legally binding force, but which do have practical outcomes.[4]

The Rational Concept of Soft Law

Theoretical concepts that can be subsumed under the paradigm of institutional rationalism frame the distinctions between legal instruments in terms of the choices made by the international community. The approach takes into account the preferences of social actors, and is at the same time informed by a neo-utilitarian view of the world[5]. This entails evaluating the process through which legal instruments are created, focusing on the strategies which constitute an expression of these preferences.[6] This approach places the focus on states, exploring how the institutions of international law fulfil the interests of states by resolving the challenges that require collective action. As David Trubek, Patrick Cottrell and Mark Nance observe, the norms established in this way are intended to stabilize the expectations of social actors.[7] These authors, while analyzing the proposals for the interpretation of soft law expressed from the perspective of institutional rationalism, focus on the catalogue of causes found in the literature on the subject that can deter-

1 W. Reinicke, J. M. Witte, *Interdependence, Globalization, and Sovereignty: The Role of Non-binding International Legal Accords*, in *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, ed. D. Shelton, Oxford 2003, p. 75.

2 F. Snyder, *Soft Law and International Practice in the European Community*, in *The Construction of Europe: Essays in Honour of Emile Noël*, ed. S. Martin, Dordrecht 1994, pp. 197, 198.

3 W. Reinicke, J. M. Witte, *Interdependence, Globalization, and Sovereignty*…, *op. cit.*, p. 75.

4 F. Snyder, *Soft Law and International Practice*…, *op. cit.*, pp. 197, 198.

5 D. Trubek, P. Cottrell, M. Nance, *Soft Law, Hard Law and European Integration: Toward a Theory of Hybridity*, "University of Wisconsin Legal Studies Research Paper" 2005, no. 1002, p. 71.

6 B Kingsbury, *The Concept of Compliance as a Function of Competing Conceptions of International Law*, "Michigan Journal of International Law" 1998, vol. 19, p. 345.

7 D. Trubek, P. Cottrell, M. Nance, *Soft Law, Hard Law and European Integration*…, *op. cit.*, p. 71.

mine the choice of a particular legal regime.[8] In their opinion, some of the advantages of adopting soft law as a form of regulation are as follows:

- lower negotiation costs,
- less sacrifice on the part of states in terms of their sovereignty,
- greater freedom to implement international standards in domestic law systems,
- the possibility to renegotiate provisions due to changing circumstances,
- simplicity and speed of proceeding,
- work on creating new regulations is open to other participants in international relations,
- the possibility of establishing a basis for binding legal regulations that will be formulated in the future.

As institutional rationalists point out, these reasons provide a basis for selecting soft law as the form to regulate a chosen issue, with the choice conditioned by the context. This paradigm sits well with the theory of rational choice, whose author, Andrew Guzman, suggests that "soft law represents a choice by the parties to enter into a weaker form of commitment,[9]" while drawing up a model interpretation of institutional rationalism.

The concept of legalization is a development of the rationalist paradigm, as presented in *The Concept of Legalization*.[10] The authors – Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter and Duncan Snidal – define legalization in international relations as varying across three dimensions:

- the precision of rules,
- obligation,
- delegation to a third party decision-maker.

The aforementioned criteria make it possible to define soft law by demonstrating that a given type of regulation is weaker in one of these three aspects. In this context, hard law "refers to legally binding obligations that are precise or can be made precise through adjudication or the issuance of detailed regulations and that delegate authority for interpreting and implementing the law."[11] Whereas, in contrast "the realm of soft law begins once legal arrangements are weakened along one or more of the dimensions of obligation, precision, and delegation."[12]

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8 Cf. C. Lipson, *Why Are Some International Agreements Informal?*, "International Organization" 1991, p. 45; H. Hillgenberg, *A Fresh Look at Soft Law*, "European Journal of International Law" 1999, no. 3, pp. 499-515.

9 A. Guzman, *The Design of International Agreements*, "The European Journal of International Law" 2005, vol. 16 no. 4, p. 611.

10 K.W. Abbott, R.O. Keohane, A. Moravcsik, A.M. Slaughter, D. Snidal, *The Concept of Legalization*, "International Organization" 2000, vol. 54, issue 3, pp. 401-419.

11 Ibidem, p. 421.

12 Ibidem, p. 422.

The Constructivist Concept of Soft Law

"Unlike positivism and materialism, which take the world as it is, constructivism sees the world as a project under construction, as becoming rather than being"[13] - writes Emanuel Adler, when defining the constructivist paradigm. Representatives of constructivism focus on the process of creating and implementing the standards of international law. Stressing the role of this process as the focus of interest, they attempt to fill the gap between the law described in books and the law in action, which leads them to concentrate on the aforementioned process, regardless of the emphasis in other conceptions of the distinction between soft law and hard law. They adopt this assumption when demonstrating the varied impact of legal norms on the conduct of their addressees, not only in the system of international law, but also in national systems, which are perceived as a system of binding norms in the positivist and rationalist doctrines. Legal constructivism draws inspiration from sociological theories, which view the social world as an intersubjective structure. As John Ruggie writes:

> At bottom, constructivism concerns the issue of human consciousness: the role it plays in international relations, and the implications for the logic and methods of social inquiry of taking it seriously. Constructivists hold the view that the building blocks of international reality are ideational as well as material; that ideational factors have normative as well as instrumental dimensions; that they express not only individual but also collective intentionality; and that the meaning and significance of ideational factors are not independent of time and place.[14]

By adopting this assumption, constructivists focus on the role of law in the process of socialization, viewing the process of creating law as an opportunity to strengthen the shared system of norms.

International Declaration on Human Genetic Data

The development of the human rights system from a bioethical perspective is tied up with the policies of international organizations that focus on the new risks arising from the practical use of advances in the biological and medical sciences. The local consequences of global challenges such as genetic discrimination, attempts to enhance human beings and tamper with their integrity, or patent the human genome, required a transnational response. These actions were initiated by the United Nations, which laid the

13 E. Adler, *Constructivism and International Relations Theory*, in *Handbook of International Relations*, eds. W. Carlsnaes, T. Risse, B. Simmons, London 2002, p. 113.

14 J. Ruggie, *What Makes The World Hang Together*, "International Organization" 1998, no. 3, p. 52.

foundations, in a declarative manner, for the direction in which national systems would develop. According to Janusz Symonides, questions concerning the impact of scientific progress and its technological applications on the human rights system became a subject of debate for the first time at the Human Rights Conference held in Tehran in 1968. Further international initiatives resulted in a series of papers that gave rise to declarations on the use of scientific and technological progress in the interests of peace and the benefit of mankind, which were adopted in 1975 by the United Nations General Assembly. The next step in the process of establishing international legislation that responded to the social consequences of genetic engineering was to confirm the right to use the applications of scientific progress, while at the same time addressing the risks involved. As Symonides points out, during the World Conference on Human Rights, held in Vienna in 1993, the international community clearly stated that these threats could have negative effects on dignity, integrity and human rights. Efforts to establish international regulations were intensified with the first scientific papers on genetic discrimination published by the team working under Paul Billings, and by the Human Genome Project, which aimed to determine the sequence of all the complementary pairs that make up the human genome. At that time, global problems emerged, requiring international initiatives, which were undertaken by the United Nations and the Council of Europe, and which gave rise to work on the extension of the international human rights system to the bioethical domain. One of these acts is the International Declaration on Human Genetic Data of 16 October, 2003, which is of key interest to this paper.

The International Declaration on Human Genetic Data, adopted by the General Conference of UNESCO on 16 October, 2003,[15] formulates the principles that bind "in the collection, processing, use and storage of human genetic data, human proteomic data and of the biological samples from which they are derived [...] in keeping with the requirements of equality, justice and solidarity, while giving due consideration to freedom of thought and expression, including freedom of research."[16]

This act gives special status to human genetic data, which it describes by distinguishing their attributes. These attributes are: the ability to define individuals' genetic predispositions, the ability to influence human offspring, the cultural dimension and the status of human genetic data as an information medium, the significance of which may be identified following genetic testing. This act calls for ensuring the appropriate level of

15 V. J. Symonides, *Międzynarodowe instrumenty prawne w dziedzinie bioetyki i biotechnologii*, in *Prawa człowieka wobec rozwoju biotechnologii*, Warszawa 2013, p. 22; A. den Exter et al., *International health law and ethics*, Apeldoorn – Antwerp – Portland 2009 pp. 477-487; J. A. Bovenberg, *Property rights in Blood, Genes and Data. Naturally yours?*, Leiden – Boston 2006, p. 12; G.I. Serour, A. R. A. Ragab, *Ethics of genetic counselling*, in *The SAGE Handbook of Health Care Ethics*, eds. R. Chadwick, H. ten Have, E. M. Meslin, London 2011, p. 153.

16 Art. 1 of the International Declaration on Human Genetic Data adopted on 16 October 2003 by the 32 session of the General Conference of UNESCO.

protection both for the data and for the biological samples from which the said data may be obtained. It defines the purposes and procedures in the collection, processing, use and storage of the data. In particular, this covers diagnostics, health care, scientific research and forensic medicine, as well as criminal and other legal proceedings. The Declaration also admits the collection, processing, use and storage of data for purposes other than those numerically listed, establishing as a condition that they are consistent with its provisions and international human rights law. Those procedures related to using human genetic data and proteomic data must meet ethical norms, while policy itself in this area should take into account the opinions expressed by society. Ethics committees play an important role in this policy. These institutions – functioning at national, regional, local and institutional levels – have been ascribed the role of consultants, expressing an opinion in the process of establishing regulations to normalise measures taken in regard to human genetic data, proteomic data, and biological samples, as well as their usage in specific projects.

A condition that has to be met for steps to be taken in respect to human genetic data is that the person concerned gives their consent. This person's will must be expressed in an informed, voluntary and direct manner, after having received information concerning the purpose of the collection, processing, use and storage of the data, regarding the consequences connected to the said data, and about being able to withdraw consent at any stage of the proceedings. Following the example of the Universal Declaration on the Human Genome and Human Rights, the International Declaration on Human Genetic Data also allows for an exception to this rule, linked to reasons of great importance for the state of health of the person concerned, in the event of the said person being unable to express their conscious consent. The Declaration establishes that such intervention is defined by domestic legislation, and must proceed in keeping with the international system for the protection of human rights, while simultaneously taking into account the overriding character of the individual's interest. The Declaration also attaches authorisations to this interest regarding counselling and the results of examinations. These are: the right to decide whether or not to be informed of the results of examinations, and the right to take advantage of expert counselling when considering the option of agreeing to undergo genetic testing. Thus not allowing individuals to have access to their own data is in principle forbidden. However, this does not apply in the case of this data being irretrievably unlinked to that person as the identifiable source, or where such access is limited due to a threat to public health or order, or to national security.

The Declaration obliges states to take measures aimed at protecting the privacy of genetic data through the establishing of domestic legislation consistent with international human rights law. In this context it formulates a set of directives embracing the following:

- a prohibition on the disclosure or rendering accessible of human genetic data, proteomic data or biological samples linked to an identifiable person to third parties,[17]
- a requirement not to link human genetic data, proteomic data or biological samples collected for scientific research purposes to an identifiable person, with the exception of cases where this is essential for the nature of the research, while simultaneously ensuring protection of the privacy of these data and restricting their period of storage to the essential minimum,[18]
- a requirement for persons and organizational units responsible for the processing of both data and biological samples to ensure their accuracy, credibility, security and quality.[19]

The principles of international collaboration in regard to the circulation of data and samples are defined by three directives:

- a requirement for states to regulate the circulation of human genetic data, proteomic data and biological samples in accordance with national and international legislation, and in a manner ensuring fair access to these data,[20]
- a requirement for states to make every effort in regard to fostering the international dissemination of scientific knowledge related to human genetic data and proteomic data,[21]
- a requirement for scientists to make every effort towards establishing collaboration in regard to human genetic data and proteomic data, subject to the restrictions expressed in this Declaration.[22]

This collaboration involves the requirement to share the results of scientific research using human genetic data, proteomic data or biological samples, both with society and the international community, subject to the restrictions contained in domestic legislation and international agreements. The following are example ways of achieving this goal:

- establishing forms of special assistance provided to individual persons and groups participating in the research,
- guaranteeing access to medical care,
- using the research results to ensure new diagnostic methods, means of treatment, and drugs,
- providing support for the health service,
- providing research assistance for developing countries,

17 Art. 14 letter b.
18 Art. 14 letters c, d.
19 Art. 15.
20 Art. 18 letter a.
21 Art. 14 letter b.
22 Art. 14 letter c.

– other forms of action in keeping with the principles of this Declaration.

The principles of access, protection of privacy, and the demands placed before institutions involved in the processing of human genetic data, proteomic data and biological samples, also define the purpose of their use. In order for there to be a change in the purpose of using genetic data, proteomic data and biological samples, there must be sufficient grounds for public interest. As such, the Declaration allows for an exception to the prohibition on changing the purpose of their use. The samples may be used for data generation based on previously-obtained consent expressed in an informed, voluntary and direct manner by the person concerned.

Human Genetic Data. From International Soft Law to Domestic Legal System

The programmatic goals of soft law are pursued in a variety of ways by different countries in the international community. Among the examples of initiatives undertaken in this regard, it is worth mentioning the American, German and French approaches to some of the problems associated with the protection of genetic information. Both the United States and Germany have undertaken similar measures in line with international law on the protection of genetic information. The US Genetic Information Nondiscrimination Act of 21 May, 2008[23] deals with unequal treatment – in the fields of health insurance and employment – that is based on genetic information, defined as information gleaned from diagnostic tests and the history of family illness. Title I of this three-part act includes provisions that cover the issue of allowances, the payment of costs and the guarantee that compensation will be made in the event of damage in the insurance sector. Title II prohibits the use of genetic information by employers in making decisions on employment, promotion, working conditions and contractual arrangements, as well as employee privileges. Similarly to US law, the German Genetic Diagnostics Act of 31 April, 2009[24] also contains provisions on the use of genetic information in the context of social security and employment. This law not only prohibits genetic discrimination, as the US law does, but also makes it mandatory for the healthcare system to inform individuals who are interested in undergoing diagnosis about the possible social risks related to genetic testing, and to offer counselling in this regard.

In contrast to the German and American models, in the French system legal issues related to genetic testing are covered in Book I, Title I, Chapter III of the French Civil Code and in the Public Health Code. The French Civil Code limits the use of genetic tests to medical and scientific purposes, and in these cases the written consent of the

23 Genetic Information Nondiscrimination Act 21 May 2008, 122 Stat. 881, Public Law 110-233, May 21, 2008.

24 Gesetz über Genetische Untersuchungen bei Menschen, 31 April 2009.

person undergoing the test is a mandatory requirement. The detailed provisions on genetic testing, developed and elaborated in the French Civil Code, are set out in the Public Health Code. Chapter I of the Public Health Code stipulates the scope of the information that must be provided prior to the test and outlines the rules for reporting the results of such tests. The only person authorized to convey the result of a genetic test is the doctor who issued the referral for it. French law respects the right – expressed in the soft law provisions of international public law – to refuse to provide information on the results. Derogation from this principle is permitted, and crucial, in the case of serious genetic abnormalities, where the doctor is required to provide such information to the person concerned, or to his or her statutory representative. The French legislator has stipulated a detailed procedure for providing information to the family, involving both the doctor and the Biomedicine Agency. Such derogation from medical confidentiality results from the need to explain genetic implications to the tested person's family. Chapter II of the Public Health Code covers the profession of genetic counsellor, a role which can only be performed in authorized health centres, both private and public. The provisions of Chapter II also impose penalties for engaging in this work without the necessary permission.

Conclusion

This outline highlights the significance of the role of international soft law instruments in tackling global challenges that require supranational initiatives. Assessing the impact of soft law instruments on the legislative practice of selected countries in the international community, and thus assessing the way the provisions resulting from international programmatic norms are implemented, was preceded by an attempt to define the meaning of soft international law from a theoretical perspective. The brief introduction presented three ways of conceptualizing the notion of soft law in the legal sciences – positivist, rationalistic and constructivist. The first defines soft law by adopting a binary criterion that distinguishes two regimes of public international law, and defines soft law as non-binding. The second defines soft law in terms of the choice made by the international community, highlighting the benefits of adopting this legal regime. With the third way, the focus is on the process of creating and implementing the standards of international law, by addressing the issue of law in the context of socialization as means of strengthening the shared system of norms. Through adopting the perspective of institutional rationalism extended to the paradigm of legalism, the study considers the implementation of international standards in the field of genetic data protection in selected legal systems. These initiatives, undertaken by Germany, the United States of America and France, highlight the role of the choices made by the states of the international community when it comes to addressing the local effects of global, civilizational challenges.

Literature

Abbott K.W., Keohane R.O., Moravcsik A., Slaughter A.M., Snidal D., *The Concept of Legalization*, "International Organization" 2000, vol. 54, issue 3.

Adler E., *Constructivism and International Relations Theory*, in *Handbook of International Relations*, eds. W. Carlsnaes, T. Risse, B. Simmons, London 2002.

Bovenberg J.A., *Property rights in Blood, Genes and Data. Naturally yours?*, Leiden – Boston 2006.

Exter A. den et al., *International health law and ethics*, Apeldoorn – Antwerp – Portland 2009.

Guzman A., *The Design of International Agreements*, "The European Journal of International Law" 2005, vol. 16, no. 4.

Hillgenberg H., *A Fresh Look at Soft Law*, "European Journal of International Law" 1999, no. 3.

Lipson C., *Why Are Some International Agreements Informal?*, "International Organization" 1991.

Kingsbury B., *The Concept of Compliance as a Function of Competing Conceptions of International Law*, "Michigan Journal of International Law" 1998, vol. 19.

Reinicke W., Witte J.M., *Interdependence,Globalization, and Sovereignty: The Role of Non-binding International Legal Accords*, in *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, ed. D. Shelton, Oxford 2003.

Ruggie J., *What Makes The World Hang Together*, "International Organization" 1998, no. 3.

Snyder F., *Soft Law and International Practice in the European Community*, in *The Construction of Europe: Essays in Honour of Emile Noël*, ed. S. Martin, Dordrecht 1994.

Trubek D., Cottrell P., Nance M., *Soft Law, Hard Law and European Integration: Toward a Theory of Hybridity*, "University of Wisconsin Legal Studies Research Paper" 2005, no. 1002.

Serour G.I., Ragab A.R.A., *Ethics of genetic counselling*, in *The SAGE Handbook of Health Care Ethics*, eds. R. Chadwick, H. ten Have, E.M. Meslin, London 2011.

Symonides J., *Międzynarodowe instrumenty prawne w dziedzinie bioetyki i biotechnologii*, in *Prawa człowieka wobec rozwoju biotechnologii*, Warszawa 2013.

Genetic Information Nondiscrimination Act 21 May 2008, 122 stat. 881, Public Law 110-233, May 21, 2008.

Gesetz über Genetische Untersuchungen bei Menschen, 31 April 2009.

International Declaration on Human Genetic Data adopted on 16 October 2003 by the 32 Session of the General Conference of UNESCO.

SUMMARY

Soft Law in International Governance

The purpose of the article is to assess how the provisions resulting from international programmatic norms in the field of human genetic data are implemented. The presented study, adopting the perspective of institutional rationalism extended to the paradigm of legalism, considers examples of the implementation of these standards in selected legal systems – Germany, the United States of America and France. The selection of the research paradigm is preceded by a theoretical introduction, which presents three ways of conceptualizing the notion of soft law in the legal sciences. Following an outline of this legal regime in positivism, and the theories of rationalization and constructivism, the author focuses on the provisions of the International Declaration on Human Genetic Data of 16 October, 2003, which are compared with the legislative initiatives of Germany, the United States of America and France, to show the influence that the choices of states has on selection of the implemented standards and how they are implemented.

Keywords: public international law, soft law, human genetic data

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Linguistic Human Rights in Education*

Introduction

Although there is general agreement among scholars of different disciplines (linguistics, law, anthropology, to name but a few) that language constitutes a crucial element in the process of one's identity formation, linguistic human rights are being neglected in terms of legal protection. Language gets much less coverage in human rights law than other important human attributes, such as race, gender or nationality.[1] The economic and political empowerment of linguistic minorities and their participation in policy-making, put this issue on the international agenda in the 1990s (e.g., the European Charter for Regional or Minority Languages adopted in 1992, or the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities). This study claims that linguistic human rights complement the existing human rights framework and there are solid reasons why states should protect them.

Linguistic human rights are a concept that encompasses the language-related elements of other human rights, e.g. right to fair trial (i.e. right to language assistance in criminal proceedings), cultural rights or the right to identity. Arguably, one of the most linguistically sensitive spheres is education – the empowerment of individuals and, in consequence, communities they belong to, ensures the survival and continued development of linguistic minorities. This study will focus on the linguistic elements of the right to education and aims to investigate their coverage in the UN human rights system – both in the texts of the treaties and in the practice of treaty-based bodies. As the right to education is a complex normative concept, which encompass a group of educational

* This article is based on research conducted within the project "International Covenant on Economic, Social and Cultural Rights – Commentary" financed by National Science Centre (no. 2012/05/B/HS5/00544).

1 T. Skutnabb-Kangas, *Linguistic genocide in education or worldwide diversity and human rights?*, New Delhi 2008, p. 482.

rights and freedoms (i.e. the right of everyone to receive education, the freedom of parents to choose schools for their children or the freedom of individuals and bodies to establish and direct educational institutions), those components related to language will be referred to as "linguistic human rights in education" (LHREs).

Linguistic human rights in education in the UN treaties and the practice of treaty-based bodies

UN treaty-based bodies (hereafter Committees) constitute an important element of the international human rights system – their interpretation provided in general comments along with concluding observations under the monitoring mechanisms, although legally non-binding, serve as an important point of reference in clarifying particular human rights, as well as the nature and extent of states' obligations. However, LHREs can be reconstructed solely on the basis of the International Covenant on Economic, Social and Cultural Rights of 1966[2] (hereafter ICESCR), while the work of the CESCR Committee, other UN treaties and monitoring bodies provide more detailed and precise normative input for interpretation. Moreover, different treaty-based bodies address various LHREs under the monitoring mechanism. In order to extract a "big picture," this study is based mainly on the interpretation of the ICESCR, International Convention on the Rights of the Child of 1989[3] (hereafter CRC), International Convention on the Elimination of All Forms of Racial Discrimination of 1965[4] (hereafter CERD), UNESCO Convention against Discrimination in Education of 1960[5] (hereafter CADE) and ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries of 1989[6] (hereafter ILO Convention no. 169). The analysis is further complemented by references to the General Comments and concluding observations of the treaty-based bodies.

Interestingly, although the role of language in the construction of one's identity has been fairly well studied, one may claim that its importance was not reflected enough in the abovementioned documents. While the CRC and the CADE contain specific provisions addressing language-related rights or freedoms in education, the ICESCR only

2 UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

3 UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.

4 UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195.

5 UN Educational, Scientific and Cultural Organisation (UNESCO), Convention Against Discrimination in Education, 14 December 1960.

6 International Labour Organization (ILO), Indigenous and Tribal Peoples Convention, C169, 27 June 1989, C169.

mentions language in the non-discrimination clause, while the CERD merely makes a reference in the preamble. Among dozens of General Comments and recommendations issued by the treaty-based bodies, merely two elaborate in detail on the importance of language in education. Those are CERD General recommendation no. 23 on the rights of indigenous peoples (1997)[7] and CRC General Comment no. 11 on indigenous children and their rights under the Convention (2009).[8] The most complex regulation was included in ILO Convention no. 169, but the document refers only to indigenous peoples and remains outside the UN-established human rights machinery.

This lack of references to the language-related rights of communities other than indigenous peoples might be a consequence of controversies regarding minorities' status under international law. This state of affairs, however, is being challenged by the treaty-based bodies under the monitoring mechanism. The CRC and CESCR Committees, but most of all the CERD Committee, are devoting more and more attention to the LHREs of communities other than indigenous peoples. Moreover, the LHREs assigned to the latter group, as enshrined for instance in ILO Convention no. 169, are being interpreted directly from the ICESCR, CRC, CADE and CERD when addressing other communities. Committees mention LHREs in the context of "indigenous peoples," "linguistic minorities," "national minorities" or simply refer to them as to "minorities." Last but not least, there are an increasing number of concluding observations regarding migrants and children as particularly vulnerable groups. Hereafter, the terms "minority" and "linguistic minority" will be used alternatively in reference to all the communities whose language is not an official language of the state they live in.

The most complex regulation on education in the UN treaties was included in Article 13 of the ICESCR. Nevertheless, there is neither direct reference to minority education rights nor to LHREs. Klaus D. Beiter, however, notes that "once it is accepted that minority education rights are part of the right to education, it must also be held that their protection is embedded in article 13."[9] It seems that the interpretation of Article 13 in the context of the anti-discrimination clause contained in Article 2(2) gives a legal justification to the idea of the LHREs of linguistic minorities. Moreover, in General Comment no. 13 on the right to education, the CESCR Committee provided the most detailed interpretation of the right to education among all the treaty-based bodies. Last but not least, the CESCR Committee indicated the CRC, the CADE, the CERD and ILO Convention no. 169 as important points of reference when interpreting the normative

7 CERD Committee, General recommendation no. 23 on the rights of indigenous peoples (1997), A/52/18, annex V.

8 CRC Committee, General Comment no. 11: Indigenous children and their rights under the Convention (2009), CRC/C/GC/11.

9 K. D. Beiter, *The Protection of the Right to Education by International Law. Including a Systematic Analysis of Article 13 of the International Covenant on Economic, Social and Cultural Right*s, Leiden 2006, p. 430.

content of Article 13. Thus, Article 13 and the related General Comment provide a clear and delineated framework for further considerations.[10]

The right to receive education in the mother tongue

The CESCR Committee identified the development of the human personality as being perhaps the most fundamental objective of education.[11] Although this term may seem vague, the historical context will help to shed light on its meaning. The catalogue of objectives included in Article 13(1) of the ICESCR was drafted at a time when the emotional wounds of the Second World War were still fresh and education was seen as an instrument that could prevent totalitarianism in the future. Thus, the educational system was supposed to serve to liberate the individual and to develop their abilities to the highest extent, rather than to subordinate people's desires to the good of the state.[12] Adding the centrality of human dignity invoked in Article 13(1) – the concept which affirms Kant's theory of individual autonomy and the right of everyone to choose his/her destiny[13] – there is little doubt concerning the basic meaning of the "full development of human personality". Such a clarification, however, does not exhaust either the semantic or normative content, and thus encourages broader interpretation.

Associating one's personality and dignity with individual autonomy, the right of everyone to receive education in his/her mother tongue, is justified and rational, at least from the moral point of view. One may claim that the guarantee regarding language should be formulated as a freedom, not a right and thus imposing on a state merely an obligation of non-interference, rather than an obligation to provide education in a specific language. Nevertheless, analysis of the ICESCR's *travaux préparatoires* indicates the negotiators' awareness in operating with the concepts of 'right' and 'freedom' when drafting Article 13. Moreover, the anti-discrimination clause included in Article 2(2) guarantees that all the rights established in the ICESCR – including the right to education – will be exercised without discrimination of any kind as to, *inter alia*, language. Lastly, the interpretation of Article 13(1) in conjunction with Article 13(2) allows one to conclude that members of linguistic minorities have the right to receive education aimed at the full development of their personality and sense of dignity. One may ask if language

10 CESCR Committee, General Comment no. 13 on the right to education (Article 13), E/C. 12/1999/10, 2 December 1999, § 31.

11 *Ibidem*, § 4.

12 K.D. Beiter, *op. cit.*, pp. 463–464.

13 Ch. McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, "The European Journal of International Law" 2008, vol. 19, no. 4 pp. 659–660.

affects the process of intellectual and social development, and if so, how? Answering this requires a sociolinguistic perspective to be taken.[14]

As numerous studies have shown, the length of time that the mother tongue is used[15] as a medium in education is the most important factor in predicting the educational success of bilingual students.[16] Language appears to be a far more influential factor than the parents' education or economic status. Moreover, education provided to linguistic minority students only in the dominant language is "widely attested as the least effective educationally."[17] Research conducted in former colonies in Africa, where numerous populations were forced to make an early transition from their mother tongue into English has shown their poor literacy in both the mother tongue and the dominant language, poor mathematics and science knowledge, and high drop-out rates.[18] As T. Skutnabb-Kangas claims, "it takes 6–8 years to learn enough of a second language to be able to learn through it."[19] Regardless of the precise timeframe, the importance of language in achieving the full development of intellectual skills is widely recognized and well proven. Thus, everyone's right to receive education in his or her mother tongue is justified in the context of Article 13(1) of the ICESCR. This right, however, shall be interpreted in accordance with the principle of the progressive realization of the ESC rights (as enshrined in Article 2(1) of the ICESCR), which oblige states to take steps to the maximum of their available resources.

The importance of the mother tongue in education was reflected in other international documents. The UN Declaration on the Rights of Indigenous Peoples,[20] although not legally binding, stresses that the states shall take effective measures in order to ensure indigenous peoples' (particularly children's) access to, when possible, an education in their own culture and provided in their own language [Article 14(3)]. Similarly, Article 4(3) of the UN Declaration on the Rights of Persons belonging to National or Ethnic,

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14 T. Skutnabb-Kangas, *Language Rights*, [in] W. E. Wright, S. Boun, O. García, *The Handbook of Bilingual and Multilingual Education*, Malden – Oxford – Chichester 2015, p. 199.

15 T. Skutnabb-Kangas indicates that the "mother tongue" can be defined as follows: 1) the language one learned first; 2) the language one identifies with (external dimension); 3) the language one is identified as a native speaker by others (external dimension); 4) the language one knows best' the language one uses most. T. Skutnabb-Kangas, *Bilingualism or Not – The Education of Minorities*, Clevedon 1984, p. 18.

16 UN Permanent Forum on Indigenous Issues, Indigenous Children's Education and Indigenous Languages – Expert Paper (2005), E/C.19/2005/7, § 9.

17 S. May, R. Hill, *Bilingual/immersion education: Indicators of good practice. (Milestone Report 2)*, Hamilton 2003, p. 14

18 K. Heugh, *Into the cauldron: Interplay of indigenous and globalised notions of literacy and language education in Ethiopia and South African*, "Language Matters" 2010, vol. 40, no. 2, pp. 166–189.

19 T. Skutnabb-Kangas, *Language Rights*, *op. cit.*, p. 199

20 UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples, adopted on 2 October 2007, A/RES/61/295.

Religious and Linguistic Minorities[21] indicates that the states "should take appropriate measures so that, wherever possible, persons belonging to minorities may have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue." The most complex binding regulation is provided by ILO Convention no. 169, which refers, however, only to indigenous peoples. Its Article 28(1) establishes a "principle of mother tongue preference" in education by indicating *expressis verbis* that children belonging to indigenous peoples shall, wherever practicable, be taught to read and write in their own indigenous language or in the language most commonly used by the group to which they belong.

The right to education in the mother tongue, along with other LHREs, can be exercised either individually or collectively. The latter dimension was emphasized by the CRC and CERD[22] Committees under the reporting mechanism. For instance, the CERD Committee pointed out that the lack of recognition of minority languages impedes such groups from preserving and expressing their cultural and linguistic identity.[23] The CRC Committee, in turn, called for strengthening efforts to protect and promote the identity and rights of children belonging to minorities, including by allocating adequate human and financial resources for teaching the mother tongue in schools.[24]

Language definitely goes beyond its communicative function and remains a vehicle for ethnic[25] and/or national identity. Nevertheless, language is the source of *linguistic identity*, not necessarily entailing other social identities (e.g. ethnic, national), many studies show that it remains the main source for sustaining collective identity.[26] The relationship between language and ethnic identity is particularly evident with indigenous peoples. For instance, in Australia the main feature of tribal adherence is language and in the great majority of cases the tribal name is the language name.[27] The loss of indigenous languages signifies not only the loss of cultural diversity (including linguistic), but

21 UN General Assembly, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 3 February 1992, A/RES/47/135.

22 CERD Committee, General Recommendation no. 23.

23 CERD Committee, Concluding Observations: Libyan Arab Jamahiriya (2004), CERD/C/64/CO/4, § 15.

24 CRC Committee, Concluding Observations: Algeria (2005), CRC/C/15/Add.269, § 84.

25 Ethnicity refers to belonging to a social and cultural group, based on common regional origins and cultural traditions. For definition v. R. Hampton, M. Toombs, *Indigenous Australians and Health*, Oxford 2013, p. 5.

26 C. Lapresta, A. Huguet, *A model of relationship between collective identity and language in pluricultural and plurilingual settings: Influence on intercultural relations*, "International Journal of Intercultural Relations" 2008, no. 32, pp. 260–281.

27 Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), Federation of Aboriginal and Torres Strait Islander Languages and Culture (FATSILC)*National Indigenous Languages Survey*, 2005, pp. 20–21.

also the loss of traditional knowledge which is usually passed down from generation to generation only (or mainly) orally.

The state's obligation to fulfil[28] the collective dimension of the LHREs requires authorities to take steps aimed at empowering linguistic minorities to participate in designing educational policy. Article 27(2) of ILO Convention No. 169 states that "the competent authority shall ensure the training of members of these peoples and their involvement in the formulation and implementation of education programmes, with a view to the progressive transfer of responsibility for the conduct of these programmes to these peoples as appropriate." Moreover, Article 27(3) stipulates *expressis verbis* that "appropriate resources shall be provided for this purpose" which may be interpreted either as organizational or financial resources. Bearing in mind that ILO Convention no. 169 only refers to indigenous people, it seems that in the light of the objectives set in Article 13(1) of the ICESCR, as well as Article 30 of the CRC,[29] the scope of the LHREs shall be extended to other linguistic minorities. Taking into account the concluding observations of the CESCR Committee, this is all the more justified. The Committee, on various occasions, recommended that the state party shall "ensure, to the extent possible, adequate opportunities for minority children to receive instruction in their native languages by effectively monitoring the quality of minority language instruction, providing textbooks and increasing the number of teachers instructing in minority languages."[30]

The right to learn the dominant language

Another element of great importance is the right to know the dominant language and, therefore, to receive a proper second language education. On the one hand, lack of or limited knowledge of the dominant (official) language can lead to discrimination or the exclusion of minorities from political life, and from access to justice or access to various educational institutions.[31] On the other hand, in bilingual communities in which one language is very dominant, acquisition of the minority language can be hampered under

28 CESCR Committee, in order to clarify the meaning of states' obligations under the Convention, has developed a doctrine of the triad of obligations: to respect (refrain from interfering with the enjoyment of the right), to protect (prevent others from interfering with the enjoyment of the right), to fulfil (adopt appropriate measures towards the full realization of the right). Cf. O. de Schutter, *International Human Rights Law: Cases, Materials, Commentary*, Cambridge 2014, pp. 281–291.

29 Article 30 of the CRC reads as follows: "In those States in which [...] linguistic minorities [...] exist, a child belonging to such a minority [...] shall not be denied the right, in community with other members of his or her group, to enjoy [...] to use his or her own language."

30 CESCR Committee, Concluding Observations: The former Yugoslav Republic of Macedonia (2008) E/C.12/MKD/CO/1, § 48.

31 UN Development Programme, *United Nation's 2004 Human Development Report*, New York 2004.

conditions of reduced input.[32] For instance, in Welsh-speaking communities in England, children's acquisition of Welsh is correlated with the degree of input in Welsh which the speakers receive in their homes and at schools.[33] Therefore, an appropriate language policy which balances the acquisition of first and the second languages is crucial for ensuring children's full development, as well as for enabling an individual to participate effectively in a free society. The requirement of "effectiveness," enshrined in Article 13(1) of the ICESCR, can be fulfilled only when the knowledge of the dominant language is good enough to actively participate in the political life of the dominant population, e.g. exercising the right to vote and stand for elections, and the right to access public information.[34] The right to know the dominant language has recently been placed high on the international agenda, as it refers, *inter alia*, to migrants. The CERD Committee has called for organizing intensive language classes to support the learning of the dominant language by migrant children and their parents, as well as to provide adequate training of teachers.[35] Moreover, the Committee has drawn attention to the fact that "children of immigrants are overrepresented in special schools for under-achievers" mainly on account of their lack of adequate dominant language skills.[36]

Adequate measures aiming at the linguistic integration of language minorities shall be preceded by consultations with these minorities and applied with great caution. The CERD Committee pointed out the need to "facilitate the participation of ethnic minorities in the elaboration of cultural and educational policies that will enable persons belonging to minorities to learn or to have instruction in their mother tongue, as well as in the official language."[37] The States' authorities should bear in mind, however, that linguistic integration does not equal linguistic assimilation. The latter is built upon the idea of rearranging the linguistic identity of the particular ethnic communities into a new identity, an embedded feature of which is proficiency in the dominant (official) language. In many cases, an assimilation policy implies the loss of a particular language and, as a result, the extinction of that culture. Out of the world's 6,700 languages, over 50% of them are endangered nowadays and will potentially be lost within one to four genera-

32 V.C. Mueller Gathercole, E.M. Thomas, *Bilingual First-language development: Dominant language takeover, threatened minority language take-up*, "Bilingualism: Language and Cognition" 2009, no. 12, pp. 213–237.

33 *Ibidem*.

34 Human Rights Council, Report of the independent expert on minority issues, Gay McDougall (2011), A/HRC/16/45/Add.2 § 87.

35 CERD Committee, Concluding Observations: Liechtenstein (2007), CERD/C/LIE/CO/3, § 21.

36 CERD Committee, Concluding Observations: Germany (2008), CERD/C/DEU/CO/18, § 23.

37 CERD Committee, Concluding Observations: Mongolia (2006), CERD/C/MNG/CO/18, § 21.

tions.[38] However, not all of them were lost due to government policies, the disappearance rate has grown significantly since the 15th century and correlates strongly with government policies which treated language as a consolidating factor for multicultural and/or multi-ethnic societies. Some authors refer to this phenomenon as *linguistic genocide* or *linguicide*. Interestingly, some claim the "assimilationist character of the jurisprudence" worldwide which put the *raison d'être* (national unity, more precisely) above the minorities being able to exercise LHREs.[39] On the other hand, the CRC and CESCR Committees have emphasized the importance of programmes promoting bilingual education within indigenous peoples[40] and have called for the establishment of programmes to revitalize indigenous languages.[41] Moreover, the CERD Committee clearly stated that bilingual education initiatives should be an opportunity to consolidate the use of two languages rather than lose the native language in favour of the dominant one.[42]

One of the most aggressive linguistic assimilation policies has been implemented in China's autonomous region of Xinjiang, which is inhabited by a relatively large population of Uyghurs. Since 1984, Uyghur-language instruction has been gradually reduced at all levels. Until the mid-1990s, Chinese had been only taught as a second language in minority-language schools, but after the mid-1990s Chinese became the language of instruction from the third grade of primary school.[43] In the 2000s Chinese became the language of instruction from the first grade, and since then it is Uyghur that has been taught as if it were a second language. Moreover, since September 2002, Xinjiang University has not offered any courses led only in the Uyghur language and even Uyghur poetry is now taught entirely in Chinese.[44] The CERD Committee expressed its concern that "in practice Mandarin is the sole language of instruction in many schools in the autonomous minority provinces, especially at secondary and higher levels of education. [...] [The Committee] reiterates its concern about remaining disparities for ethnic minority children in accessing education which is often linked to the availability of teaching in Mandarin only."[45]

38 T. Skutnabb-Kangas, *Linguistic genocide in education...*, *op. cit.*

39 M. Paz, *The Tower of Babel: Human Rights and the Paradox of Language*, "European Journal of International Law" 2014, vol. 25, no. 2, pp. 467–496.

40 CESCR Committee, Concluding Observations: Costa Rica (2008), E/C.12/CRI/CO/4, § 7.

41 CERD Committee, Concluding Observations: El Salvador (2010), § 21.

42 CERD Committee, Concluding Observations: Peru (2009), CERD/C/PER/CO/14-17, § 13.

43 A.M. Dwyer, *The Xinjiang Conflict: Uyghur Identity, Language Policy, and Political Discourse*, Washington DC 2005, pp. 34–35.

44 K. Große, *Kein Studium in Muttersprache: Peking schaltet Uigurisch ab*, "Frankfurter Rundschau" 2002, vol. 4, no. 2.

45 CERD Committee, Concluding Observations: China (2009), CERD/C/CHN/CO/10-13, § 22.

Freedom from involuntary language shift

Katarina Tomasevski, former Special Rapporteur of the Commission on Human Rights on the Right to Education, elaborated on the freedom to use one's language, when describing the criterion of *acceptability* embedded into the right to education: "the State is obliged to ensure [...] that education is acceptable both to parents and to children." Moreover, she made a direct reference to language by pointing out that "the language of instruction can preclude children from attending school."[46] Therefore, the criterion of the *acceptability* of the right to education in relation to linguistic minorities encompasses three elements: 1) the freedom of parents to choose schools for their children other than those established by the public authorities (e.g. non-public schools offering education of/in the minority language), 2) the freedom of individuals and bodies to offer education in the language of their choice in the educational institutions established by them, and 3) the freedom of the individual to use their language in public and in private (including public and non-public schools). While the first element is guaranteed *expressis verbis* in Article 13(3) of the ICESCR as well as Article 2(b) and Article 5(1)c of the CADE, the remaining two require further justification.

The freedom of individuals and bodies to establish and direct educational institutions is guaranteed under Article 13(4) of the ICESCR. It is, however, not unlimited – institutions are subject to the observance of the principles set forth in Article 13(1) and to conforming with the minimum standards laid down by the state. Both requirements are intrinsically related to language, as the role of the states' authorities is to foster, on the one hand, the full development of one's personality (associated with the usage of the mother tongue) and, on the other, the skills necessary to effectively participate in society (dependent on the knowledge of the dominant language). Thus, the minimum standards should include, *inter alia*, linguistic requirements such as the minimum proficiency level of the dominant language of graduates. Similarly, Article 5(1)c of the CADE recognizes *expressis verbis* that education in minority-led schools shall not prevent the members of minorities from understanding the culture and language of the community as a whole. *Ipso facto*, unless this requirement is fulfilled, educational institutions may adopt any linguistic approach, also regarding the language of instruction. The role of the state is, in turn, to ensure the equal treatment of minority-led educational institutions and equal opportunities for their graduates. It requires public authorities not to interfere with the freedom but to take legislative measures to ensure actual non-discrimination (e.g. ensuring official recognition of the non-public education).[47]

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46 K. Tomasevski, *Economic, Preliminary Report submitted by the Special Rapporteur of the Commission on Human Rights on the Right to Education*, UN Doc. E/CN.4/1999/49, §§ 62–69

47 Human Rights Committee, *Concluding Observations: Japan (2008)*, CCPR/C/JPN/CO/5, § 31.

The freedom of the individual to use his or her language in public and in private goes far beyond the scope of LHREs and encompasses all spheres of life. Nevertheless, as children spend a significant amount of time at school, ensuring they can use the language of their choice is particularly important for achieving full development of their personality with respect for the right to identity (individual dimension) and for sustaining the survival of the linguistic minority (collective dimension). The analysis of the Genocide Convention's *travaux préparatoires* indicates that the importance of language in education was widely discussed while drafting the definition of *cultural genocide*. Professor Raphael Lemkin pointed out that the prohibition on teaching the language of the group concerned or restrictions regarding the use of that language were aimed at the "rapid and complete disappearance of the cultural, moral and religious life of a group of human beings."[48] Some scholars today find Article 2(b) of the Convention highly relevant in the context of linguistic human rights (including LHREs). Nevertheless, language is not mentioned *expressis verbis* in the document.[49] Other scholars have noticed that language, besides being a means of communication in social intercourse, remains a means of governmental control of one's development, beliefs and prejudices.[50] In other words, language restrictions lead not only to the disappearance of certain groups, but result in increasing social tensions by fuelling hatred and a sense of inferiority which undermines the very foundations of human rights.

Conclusions

The analysis confirms that LHREs are grounded in several major UN treaties and are indeed applied by the treaty-based bodies. Nevertheless, taking into account the state of the art in various fields (including sociolinguistics, anthropology and human rights law), LHREs remain underestimated or – one may claim – intentionally underrepresented, as they settle controversies over the legal status of various communities, including national minorities and indigenous people. By taking a soft but consistent approach, CESCR, CRC and CERD Committees, in fact act to strengthen the legal grounds for the protection of LHREs.

Although there are numerous categorizations and definitions of LHREs, the two elements – namely the right to receive education in the mother tongue and the right to learn the dominant language – are fairly well grounded in the literature and they are reflected in the Committees' concluding observations. One of the aims of this paper was

48 H. Abtahi, P. Webb, *The Genocide Convention. The Travaux Préparatoires*, vol. 1, Leiden – Boston 2008, p. 235.

49 T. Skutnabb-Kangas, *Language Rights*, *op. cit*., p. 191.

50 A.H. Leibowitz, *Language as a Means of Social Control: The United States Experience*, Annual Meeting of the World Congress of Sociology, August 1974.

to emphasize the necessity of distinguishing another dimension – the freedom from the involuntary language shift which is conceptually rooted in the Genocide Convention of 1948, however, due to controversies over the definition of "cultural genocide," it was abandoned by the negotiators of the final text.

Literature

Abtahi H., Webb P., *The Genocide Convention. The Travaux Préparatoires*, vol. 1, Leiden – Boston 2008.

Beiter K.D., *The Protection of the Right to Education by International Law. Including a Systematic Analysis of Article 13 of the International Covenant on Economic, Social and Cultural Rights*, Leiden 2006.

Dwyer A.M., *The Xinjiang Conflict: Uyghur Identity, Language Policy, and Political Discourse*, Washington DC 2005.

Große K., *Kein Studium in Muttersprache: Peking schaltet Uigurisch ab*, "Frankfurter Rundschau" 2002, vol. 4, no. 2.

Hampton R., Toombs M., *Indigenous Australians and Health*, Oxford 2013.

Heugh K., *Into the cauldron: Interplay of indigenous and globalised notions of literacy and language education in Ethiopia and South African*, "Language Matters" 2010, vol. 40, no. 2.

Lapresta C., Huguet A., *A model of relationship between collective identity and language in pluricultural and plurilingual settings: Influence on intercultural relations*, "International Journal of Intercultural Relations" 2008, no. 32.

Leibowitz A.H., *Language as a Means of Social Control: The United States Experience*, Annual Meeting of the World Congress of Sociology, August 1974.

May S., Hill R., *Bilingual/immersion education: Indicators of good practice (Milestone Report 2)*, Hamilton 2003.

McCrudden Ch., *Human Dignity and Judicial Interpretation of Human Rights*, "The European Journal of International Law" 2008, vol. 19, no. 4.

Mueller Gathercole V.C., Thomas E.M., *Bilingual First-language development: Dominant language takeover, threatened minority language take-up*, "Bilingualism: Language and Cognition" 2009, no. 12.

Paz M., *The Tower of Babel: Human Rights and the Paradox of Language*, "European Journal of International Law" 2014, vol. 25, no. 2.

Schutter O. de, *International Human Rights Law: Cases, Materials, Commentary*, Cambridge 2014.

Skutnabb-Kangas T., *Bilingualism or Not – The Education of Minorities*, Clevedon 1984.

Skutnabb-Kangas T., *Language Rights*, in *The Handbook of Bilingual and Multilingual Education*, ed. W.E. Wright, S. Boun, O. García, Malden – Oxford – Chichester 2015.

Skutnabb-Kangas T., *Linguistic genocide in education, or worldwide diversity and human rights?*, New Delhi 2008.

Tomasevski K., *Economic, Preliminary Report submitted by the Special Rapporteur of the Commission on Human Rights on the Right to Education*, UN Doc. E/CN.4/1999/49.

CERD Committee, Concluding Observations: China (2009), CERD/C/CHN/CO/10-13.

CERD Committee, Concluding Observations: El Salvador (2010).

CERD Committee, Concluding Observations: Germany (2008), CERD/C/DEU/CO/18.

CERD Committee, Concluding Observations: Libyan Arab Jamahiriya (2004), CERD/C/64/CO/4.

CERD Committee, Concluding Observations: Liechtenstein (2007), CERD/C/LIE/CO/3.

CERD Committee, Concluding Observations: Mongolia (2006), CERD/C/MNG/CO/18.

CERD Committee, Concluding Observations: Peru (2009), CERD/C/PER/CO/14-17.

CERD Committee, General Recommendation no. 23 on the rights of indigenous peoples (1997), A/52/18, annex V.

CESCR Committee, Concluding Observations: Costa Rica (2008), E/C.12/CRI/CO/4.

CESCR Committee, Concluding Observations: The former Yugoslav Republic of Macedonia (2008) E/C.12/MKD/CO/1.

CESCR Committee, General Comment no. 13 on the right to education (Article 13), E/C. 12/1999/10, 2 December 1999.

CRC Committee, Concluding Observations: Algeria (2005), CRC/C/15/Add.269.

CRC Committee, General Comment no. 11: Indigenous children and their rights under the Convention (2009), CRC/C/GC/11.

Human Rights Committee, Concluding Observations: Japan (2008), CCPR/C/JPN/CO/5.

Human Rights Council, *Report of the independent expert on minority issues*, Gay McDougall (2011), A/HRC/16/45/Add.2.

International Labour Organization (ILO), Indigenous and Tribal Peoples Convention, C169, 27 June 1989, C169.

UN Development Programme, *United Nation's 2004 Human Development Report*, New York 2004.

UN Educational, Scientific and Cultural Organisation (UNESCO), Convention Against Discrimination in Education, 14 December 1960.

UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577.

UN General Assembly, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 3 February 1992, A/RES/47/135.
UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993.
UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations, Treaty Series, vol. 660.
UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples, adopted on 2 October 2007, A/RES/61/295.
UN Permanent Forum on Indigenous Issues, Indigenous Children's Education and Indigenous Languages – Expert Paper (2005), E/C.19/2005/7.

SUMMARY

Linguistic Human Rights in Education

Linguistic human rights are a concept remaining on the crossroads of several scientific disciplines, e.g. linguistics, anthropology, psychology and, last but not least, human rights law. Taking the latter as a lens, this study seeks to clarify the concept of linguistic human rights in education – presumably, the most linguistically sensitive sphere in the life of individuals and communities. The paper demonstrates that despite little mention of language in the UN treaties (ICESCR, CRC, CERD, CADE), its importance is reflected in the practice of the relevant treaty-based bodies. Moreover, increasing interest from scholars across a range of disciplines is contributing to the development of a linguistic human rights doctrine and is penetrating the UN human rights framework.

Keywords: human rights, linguistic human rights, language, education

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Cultural Rights and Cultural Identity in the Case-Law of the Human Rights Committee

Introduction

For decades cultural rights have been a neglected category of human rights.[1] Although some of the international human rights treaties provide for their protection, none of them formulates a comprehensive definition or enumeration. That underdevelopment should be attributed, at least in part, to the vagueness of the term 'culture'.[2] International legal discourse defines culture in three different contexts. The first one, connected with international trade, sees it as a type of commercial product, the second as an effect of human practice in the fields of art, music or literature. According to the third one, influenced mostly by anthropologists and sociologists, culture constitutes a specific way of life of a given group of people.[3] In this article I refer to the last understanding of culture – as the totality of ideas, customs, traditions, distinctive beliefs and practices of specific groups. This understanding is in accordance with the definition developed in the UNESCO Universal Declaration on Cultural Diversity, which states: "culture should be regarded as the set of distinctive spiritual, material, intellectual and emotional features of society or a social group [...] it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs."[4]

1 J. Symonides, *Cultural rights: a neglected category of human rights*, "International Social Science Journal" 1998, vol. 50, no. 158, pp. 559–572.

2 *Ibidem*, p. 560.

3 M. al Attar, N. Aylwin, R. J. Coombe, *Indigenous Cultural Heritage Rights in International Human Rights Law,* in *Protection of First Nations Cultural Heritage: Laws, Policy, and Reform*, ed. C. Bell, R. K. Paterson, Vancouver – Toronto 2009, pp. 330–331. See also the three understandings of the term culture formulated in R. Williams, *Keywords. A vocabulary of culture and society*, New York 1985, pp. 87–93.

4 UNESCO Universal Declaration on Cultural Diversity, 2 November 2001, Resolution of the 31st General Conference of UNESCO. A similar definition had been already formulated by a Mexico City Declaration on Cultural policies, according to which culture is "the whole complex of distinctive spiritual, material, intellectual and emotional features that characterize

It should be no surprise that the majority of claims concerning cultural rights come from vulnerable groups, i.e. minorities and indigenous people. That tendency shows that they are the most threatened by infringements in that field. The first significant examples of the imposition of a 'cultural hegemony' date back to colonial times. It was then that indigenous communities became outnumbered by the influx of colonists. One of the undesirable results of the interaction between the indigenous peoples and the descendants of the settlers was the dominance of a hegemonic culture over traditional cultures. It proceeded in conformity with the ideology of supremacy over the conquered communities. As Edward Said rightly pointed out, "almost all colonial schemes begin with an assumption of native backwardness and general inadequacy to be independent, 'equal' and fit."[5] Steps taken in order to seize the lands and resources, involving atrocities and policies of discrimination against indigenous people, have been justified, *inter alia*, through references to Darwin's theory of evolution, according to which the stronger will always extirpate the weaker.[6] The author himself observed that "wherever the European has trod, death seems to pursue the aboriginal."[7] Many years later that fact was acknowledged by the United Nations Declaration on the Rights of Indigenous Peoples, which states: "indigenous peoples have suffered from historic injustices as a result of, *inter alia*, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests."[8]

Colonial times are over, but the prejudice against differences persists. To date, the cultures of minorities are at risk mostly due to the States' interference in their ways of life. Above all, that refers to indigenous peoples, who are the most underprivileged group of that category. Originally considered as backward, today perceived as a threat to progress – indigenous peoples are often urged to abandon their lands. This does not necessarily occur through direct dispossession, but rather through the State's undesirable interference in landscapes, which may jeopardise the cultural customs of tribal communities.

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a society or social group. It includes not only the arts and letters, but also modes of life, the fundamental rights of the human being, value systems, traditions and beliefs". V. Mexico City Declaration on Cultural Policies, 6 August 1982, adopted during second World Conference on Cultural Policies.

5 E.W. Said, *Culture and Imperialism*, New York 1993, p. 80.

6 S. Lindqvist, *Terra Nullius. Podróż przez ziemię niczyją*, Warszawa 2010, pp. 39–41.

7 The same observation was shared by the ethnologist James Prichard, who noted: "Wherever Europeans have settled, their arrival has been the harbinger of extermination to the native tribes." V. A.D. Moses, *Genocide and Settler Society*, in *Australian History in Genocide and Settler Society: Frontier Violence and Stolen Indigenous Children in Australian History*, ed. A.D. Moses, New York – Oxford 2004, p. 5.

8 United Nations Declaration on the Rights of Indigenous Peoples, 13 September 2007, A/RES/61/295.

Consequently, the States' efforts have led to a rise in the ethnic consciousness of minorities.[9] Over time, endeavours to secure the rights of these minorities have acquired a more organised character, such that their voices could be heard in international forums. However, the process leading to a final acknowledgement of minority rights took long a long time. After the Second World War, the international community awoke to the dangers of racial and religious discrimination, but ironically did not recognize the issue of minority protection as a distinctive problem. Thanks to the UN Charter, the rights of minorities were confined to the human rights framework and for a long time realized in line with the principle of non-discrimination.[10] Undoubtedly, the problem of minority protection was marginalized due to post-war struggles for political stability and the territorial integrity of States. 'Positive protection' of minorities was finally possible thanks to the International Covenant on Civil and Political Rights[11] (henceforth referred to as 'the Covenant' or ICCPR) – the first internationally binding document that includes a provision specifically referring to minority rights. Article 27 of the Covenant reads as follows, "In those States in which ethnic, religious or linguistic minorities exist persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language".

In other words, minorities are granted the right to live as they choose – in accordance with their own traditions, customs and beliefs. All these rights fall under the notion of the so-called 'right to cultural identity' – a term commonly used in soft law instruments, and international legal discourse, but overlooked by legally binding instruments under international law. The notion *cultural identity*, appears in General Comment no. 23 on The Rights of Minorities, although without further elaboration. Interpreting the provisions of Article 27, the Human Rights Committee has found that "[...] the protection of these rights is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole."[12] To better understand the concept of cultural identity, it seems reasonable to refer to General Comment no. 21 on the Right of Everyone to Take Part in Cultural Life, which provides a more detailed elaboration. The document reads

9 R.G. Buendia, *Ethnic Identity, Self-Determination and Human Rights: A Re-Examination of Majoritarian Democracy*, "Kasarinlan. Philippine Journal of Third World Studies" 1993, vol. 8, no. 4: *The NDF at 20: A Front United?*, p. 83.

10 A.F. Vrdoljak, *Minorities, Cultural Rights and the Protection of Intangible Cultural Heritage, paper presented at the ESIL (European Society for International Law) Research Forum on International Law*, Conference on Contemporary Issues, 26–29 May 2005.

11 International Covenant on Civil and Political Rights, 19 December 1966, A/RES/21/2200.

12 Human Rights Committee, General Comment no. 23: The Rights of Minorities (Article 27), 8 April 1994, Doc. CCPR/C/21/Rev.1/Add.5.

as follows: "[...] minorities have the right to their cultural diversity, traditions, customs, religion, forms of education, languages, communication media (press, radio, television, Internet) and other manifestations of their cultural identity and membership."[13] Therefore, the statement that culture "encompasses all manifestations of human existence"[14] appears justified. Further detailing of the cultural rights of minorities can be attributed to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities,[15] which was inspired by the provisions of Article 27 of the ICCPR. Article 1(1) of the document reads, "States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity".

Interestingly, scientific discourse provides various justifications for the need to secure cultural identity. Some people recognize a close link between culture and sovereignty, and argue that cultural identity constitutes the essential element.[16] There are also those putting forward even more daring opinions – that genocide occurs through the destruction of cultural identity.[17] According to the most common view, the individual's personality is realized through his/her culture, hence, to respect a person, it is vital to give due consideration to all manifestations of his/her cultural identity, including ways of life, religion and language.

After the ICCPR came into force, the struggle for cultural identity may be reflected in recourse to procedures available under the auspices of the United Nations. Through the complaint procedure of the Human Rights Committee, individuals may bring cases against States that have ratified the aforementioned International Covenant on Civil and Political Rights and its Optional Protocol.[18] In light of the collective char-

13 Committee on Economic, Social and Cultural Rights, General Comment no. 21: Right of Everyone to Take Part in Cultural Life (Article 15, § 1 (a)), 21 December 2009, Doc. E/C.12/GC/21, § 32.

14 *Ibidem*, § 11.

15 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 18 December 1992, A/RES/47/135.

16 According to V.J. Deloria indigenous sovereignty "consists more of a continued cultural integrity than of political powers and to that degree that a nation loses its sense of cultural identity, to that degree it suffers a loss of sovereignty." Cited from: S. Wiessner, *The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges*, "The European Journal of International Law" 2011, no. 22, p. 129.

17 K. Anderson, *Colonialism and Cold Genocide: The Case of West Papua*, "Genocide Studies and Prevention: An International Journal" 2015, no. 9: *Time, Movement, and Space: Genocide Studies and Indigenous Peoples*, p. 16. "Yet, where cultural genocide is linked inextricably to physical genocide, acts that may be characterised as cultural genocide should in fact be plainly considered genocide."

18 The Human Rights Committee exercises control over the implementation of the International Covenant on Civil and Political Rights by its state parties by means of different types of procedures. The first one – periodic reporting – involves State's obligation to submit reports on how

acter of the rights falling under the notion of the right to cultural identity, they act as the "representatives" and peculiar "guards" of values pertaining to the community they belong to.[19]

So far, Article 27 of the Covenant has been invoked forty times in the aforementioned procedure before the Human Rights Committee. The complaints were based on various grounds: ranging from interference with ancestral lands (as invoked by the Sami people against Finland, Norway and Sweden; the Aymara people against Peru; or the indigenous community of Maori against New Zealand), restrictions on the right to profess and practise one's own religion, to infringements of the right to use a minority language (brought most commonly by Bretons against France). The Committee has, so far, adopted views relating to twenty-seven individual communications, deciding on the inadmissibility of the others. Nearly half of these cases have been brought before the Committee by indigenous communities claiming to be victims of the violation of the right of individuals to enjoy their own culture together with the other members of the group. The examples presented below demonstrate that steps taken by the State in the name of economic development might have an undesirable impact on territories, and may hamper the execution of cultural rights pertaining to those distinct communities. That issue is addressed at the beginning of this article, with specific regard given to the concept of land in indigenous peoples' cultures. Then, I focus on the subject of respect for the right to profess and practice a minority religion. Despite the scarcity of the Committee's jurisprudential elaboration in that field, it can be undeniably stated that respect for this right is vital for the full realisation of the right to cultural identity. So is, of course, the right to use a minority language, which is addressed in the subsequent part of the article. Last but not least, the study aims to present the phenomenon of ethnocide, and tries to answer whether this still poses a danger for minority cultures.

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the rights are being implemented. Possible concerns and recommendations of the Committee are voiced in so-called 'concluding observations.' Thanks to the publication of Committee's findings public attention focuses on a country under review. The complaints procedure, on the other hand, enables individuals to bring cases against States that have ratified the Covenant and its Optional Protocol.

19 F. Lanzerini, *Indigenous Peoples' Cultural Rights and the Controversy over Commercial Use of their Traditional Knowledge,* in *Cultural Human Rights*, ed. F. Francioni, M. Scheinin, Leiden – Boston 2008, pp. 125–126. A. Jakubowski refers to minorities and indigenous peoples as specific categories of collective cultural rights holders, A. Jakubowski, *Introduction*, in *Cultural Rights as Collective Rights: An International Law Perspective*, ed. A. Jakubowski, Leiden 2016, p. 7. For an elaboration on cultural rights as a collective entitlement also: K. Hossain, *Protection of Community Culture as Part of Human Rights in International Law*, in *Cultural Rights*..., *op. cit.*, pp. 113–132.

The right to enjoy one's own culture in the case-law of Human Rights Committee

Land as the Foundation of Indigenous Cultures

One of the characteristics that best describes those culturally distinct identities is their strong relationship with the land and dependence on natural resources as the means of livelihood. Their modes of production, and consequently ways of life, are being adjusted to environmental conditions. They are even called , "ecosystem people" by some authors since they constitute an intrinsic part of the ecosystem.[20] That distinctive feature of the indigenous peoples was also recognized in the UNESCO Declaration of San Jose, adopted on the wave of protests against the loss of cultural identity among the Indian populations of Latin America:

"For the Indian peoples, the land is not only an object of possession and production. It forms the basis of their existence, both physical and spiritual, as an independent entity. Territorial space is the foundation and source of their relationship with the universe and the mainstay of their view of the world."[21]

A spiritual attitude towards land and natural resources characterizes many culturally distinct entities. For instance, the Quichua[22] believe that spirits living within mountains, hills and rivers exercise control over plants and animals.[23] The Massai people perceive land as God-given and therefore belonging to the entire community. They worship Mother Earth as a source of spirituality for human lives.[24] In the Samburu's culture, land and the environment are even subjects of songs, which praise their importance for all generations.[25] For tribal Filipinos, the land, as a source of life, is owned by God, however, people as 'secondary owners', have the right to exploit it. They emphasise that there is an inseparable bond between land ownership and a people's identity.[26] Being completely

20 P.L. Bennagan, *Tribal Filipinos*, in *Indigenous Views of Land and the Environment*, ed. S.H. Davis, World Bank Discussion Paper no. 188, Washington DC 1993, p. 67.

21 UNESCO Declaration of San Jose, 11 December 1981, UNESCO Doc. FS 82/WF.32 (1982).

22 The largest Indian group of indigenous peoples in the Ecuadorian Amazon.

23 S.H. Davis, *Introduction*, in *Indigenous Views...*, *op. cit.*, p. 14.

24 K. Matampash, *The Massai of Kenya*, in *Indigenous Views...*, *op. cit.*, pp. 32, 35–36.

25 G. Lochgan, *The Samburu of Kenya*, in *Indigenous Views...*, *op. cit.*, pp. 46–47. One of the Samburu dwellings goes: "Your father will be telling you when you look after cows, 'this day go through here, now take this route' and you will slowly learn why he is telling you that. When you become a moran you will be allowed to attend elders meetings when they discuss and decide; 'all families would move to this or the other side,' 'all cows should be driven to some place for this period because we want this land to recover here.'" *Ibidem*, pp. 46–47.

26 P.L. Bennagan, *op. cit.*, pp. 68–70. Part of the summary of responses obtained during the consultation conducted in Mindanao (1985) by the Episcopal Commission on Tribal Filipinos of the Roman Catholic Church reads: "land is also seen as a symbol of identity. It symbolizes their historical identity because they see it as an ancestral heritage that is to be defended and preserved for all future generations. It symbolizes their local identity because they believe that

dependent on the environment, indigenous peoples developed specific systems to protect it. Interestingly, many of the land management practices involve various religious rites, exercised in order to placate spirits responsible for the natural world.[27] Since some of them constitute a tradition handed down from parents to children, they have remained essentially unchanged to this day. The concept of land ownership has also remained constant. Since the land belongs to God, people are only trustees. Undoubtedly, the strong bond between indigenous peoples and their ancestral lands constitutes an essential part of their identity. Therefore, external influences that have an undesirable impact on their landscapes may hamper the execution of basic rights pertaining to them. Consequently, some of the State's measures that were undertaken in order to promote economic development and which involved a significant interference with the environment have been have been deemed to be in violation of Article 27 of the International Covenant on Civil and Political Rights.[28] Judicial elaboration of the Committee helps to answer the question on how to define the culture of a minority group and what roles economic activities play in that culture.

Indigenous cultural rights before the Human Rights Committee

According to the Committee, the right to enjoy one's own culture is very closely related to the right to engage in economic and social activities that are part of the culture of a distinct community. Analysis of the Human Rights Committee's jurisprudence shows that there is a wide range of such activities.[29]

For instance, in the most recent case, *Ángela Poma Poma v. Peru*,[30] the Committee dealt with a complaint brought by a member of an ethnic minority called the Aymara. The activity that took center stage in the Committee's examinations was the raising of

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wherever they are born, there too shall they die and be buried, and their own graves are proof of their rightful ownership of the land. It symbolizes their tribal identity because it stands for their unity, and if the land is lost, the tribe, too, shall be lost." *Ibidem*, p. 69.

27 *Ibidem*, p. 75.

28 The significant influence of modernization on the cultural identities of distinct communities was very appropriately recognized by R. G. Buendia, who stated: "while it is commonly argued that for economic growth and development to take place, certain cultural identities have to be compromised and undermined for the interest of the majority, these culturally homogenizing, socially fragmenting, and atomizing processes of modernization bring in conditions of social and economic vulnerability and insecurity to ethnic groups." V. R. G. Buendia, *op. cit*., p. 83.

29 In order to establish what kinds of economic and social activities constitute a part of minorities' culture the Committee carries out a peculiar 'cultural test.' V. J. Gilbert, *Nomadic Peoples and Human Rights*, London – New York 2014, pp. 177–178.

30 Human Rights Committee, *Ángela Poma Poma v. Peru*, Communication no. 1457/2006, UN Doc. CCPR/C/95/D/1457/2006.

livestock, principally alpacas and llamas, which form the basis of the Aymara's economy and culture. Until the Government of Peru significantly interfered in the landscape, it was the only means of survival for the author and her family. The State's actions were aimed at the diversion of water from the Andes to the Pacific coast in order to provide water for the city of Tacna. The community did not manage to forestall the implementation of the project and, as a consequence of the diversion of the river and well-drilling carried on over many years, animals were deprived of water, which lead to the death of a great deal of livestock.

The author of the complaint alleged that the State's actions constituted a violation of Article 1 § 2[31] of the International Covenant on Civil and Political Rights, by depriving her of her livelihood, and of Article 17[32], by interference in her family's life and activities, since, as she rightly stipulated "[...] private and family life consists of their customs, social relations, the Aymara language and methods of grazing and caring for animals. This has all been affected by the diversion of water." Having examined the presented facts, the Committee found that they rather raised issues related to Article 27 of the Covenant, and declared the communication admissible in respect of the complaints under its provisions.[33]

The Committee observed that the steps taken by the State in order to promote economic development should comply with the proportionality principle.[34] It also found that prior participation of a specific community in the decision-making process may legitimatize the State's measures.[35] Since, in this case no consultations were held with the community, no studies were carried out in order to assess the possible impact of the undertaken measures on the traditional activities of the Aymara people, nor were any actions applied in order to minimize the negative consequences, the Committee found that the State's activities violated the author's right to enjoy her own culture together with the other members of her group, in accordance with Article 27 of the Covenant. The finding

31 "2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence."

32 "1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation."

33 *Ángela Poma Poma v. Peru*, § 6.5.

34 "Economic development may not undermine the rights protected by Article 27. Thus the leeway the State has in this area should be commensurate with the obligations it must assume under Article 27." *Ibidem*, § 7.4.

35 "In the Committee's view, the admissibility of measures which substantially compromise or interfere with the culturally significant economic activities of a minority or indigenous community depends on whether the members of the community in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy." *Ibidem*, § 7.6.

confirmed – as had already been stated in the aforementioned General Comment No. 23 on The Rights of Minorities, which clarifies the provisions of Article 27 ICCPR – that the right to enjoy one's culture may be manifested in a particular way of life.[36]

It also followed some previous verdicts concerning the measures of States which pose a threat to the cultures of minorities. Many of them involved the complaints of the Sami people brought against Finland, Norway, and Sweden. For instance in *Ivan Kitok v. Sweden,*[37] the author of the complaint claimed that, as a result of government's legislation (Reindeer Husbandry Act of 1971),[38] he was denied his "inherited 'civil right' to reindeer breeding" and argued that it was equal to preventing the exercise of the right to enjoy the culture of the Sami. The Committee acknowledged the importance of reindeer husbandry for the Sami community and found that "the regulation of an economic activity is normally a matter for the State alone. However, where that activity is an essential element in the culture of an ethnic community, its application to an individual may fall under Article 27 of the Covenant."[39]

In *Länsman et al. v. Finland*[40] reindeer breeding activity also took center stage in the Committee's examinations. This case dealt with a complaint concerning the process of stone quarrying, which had an impact on reindeer herding in traditional Sami lands. Although the Committee did not find a breach of Article 27 (the State met the requirement of the consultation voiced in Comment no. 23), it conceded that reindeer

36 "With regard to the exercise of the cultural rights protected under Article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law." V. Human Rights Committee, *General Comment no. 23: The Rights of Minorities (Article 27)*, § 7.

37 The Human Rights Committee, *Ivan Kitok v. Sweden*, Communication no. 197/1985, UN Doc. CCPR/C/33/D/197/1985.

38 According to the State, the *ratio legis* of the Reindeer Husbandry Act was to secure the well-being of the Sami, who occupy in reindeer husbandry. In practice, however, it restricted the number of reindeer breeders and provided for rearrangements in existing Sami villages – under new legislation they were reorganized into larger units. Substantial changes in that field have resulted in huge interference in the social structures of the Sami community, since "the Sami villages have their origin in the old siida, which originally formed the base of the Sami society consisting of a community of families which migrated seasonally from one hunting, fishing and trapping area to another, and which later on came to work with and follow a particular self-contained herd of reindeer from one seasonal grazing area to another." *Ibidem*, § 4.2. What is more, Swedish legislation granted the Sami population the power to decide on issues of membership in Sami villages, causing the division of the Sami community into reindeer-herding (full Sami) and non-reindeer herding (half-Sami). It resulted in difficulties in maintaining the Sami identity for the latter group.

39 *Ibidem*, § 9.2.

40 Human Rights Committee, *Länsman et al. v. Finland*, Communication no. 511/1992, UN Doc. CCPR/C/52D/511/1992.

husbandry constitutes a traditional activity which deserves protection. In the second *Länsman* case brought before it, the Committee assessed the impact of logging and the construction of roads on such traditional economic practices.[41]

In *Lubicon Lake Band v. Canada*[42], on the other hand, the Committee ruled that Canada had violated minority rights under Article 27, by allowing the provincial government of Alberta to expropriate the land of Lubicon Lake Band for private corporate interests (such as leases for oil and gas exploration) notwithstanding prior arrangements granting the original inhabitants of that area the right to continue their traditional way of life.

Similarly, in *Apirana Mahuika et al. v. New Zealand*[43] the Committee examined the complaint submitted by individuals belonging to the Maori people of New Zealand. Due to a dramatic growth in the fishing industry, the government decided to implement a mechanism for the conservation of New Zealand's fisheries resources and to regulate commercial fishing. The adoption of new measures provided in the Treaty of Waitangi (Fisheries Claims) Settlement Act had an unintended negative impact on Maori fishers. Since fishing constitutes an essential element of traditional Maori culture, they maintained that the State's actions threatened both their ways of life and culture. What is more, the authors claimed that they were denied the right to determine their political status, as the right to self-determination can be exercised only with full access to, and control over, resources.[44] In this case, the Committee did not find the State party in violation of Article 27, mostly because of its engagement in the consultation process, during which the cultural and religious significance of fishing for the Maori was acknowledged.[45] However, it emphasised that any steps that may affect the economic activities of the Maori must be taken in a way that ensures the authors' right to enjoy their culture, and profess and practice their religion in a community with other members of their group.[46]

Judicial elaboration confirms an undoubted and strong bond between indigenous peoples' cultures and land rights. Economic activities which constitute an essential element of the culture of a community may fall within the ambit of the right to enjoy one's own culture. Therefore, the right to preserve their distinct identity involves, above all, the possibility to continue their inherited ways of life. Dispossessing a community of

41 Human Rights Committee, *Länsman et al. v. Finland*, Communication no. 671/1995, UN Doc. CCPR/C/58/D/671/1995.

42 Human Rights Committee, *Lubicon Lake Band v. Canada*, Communication no. 167/1984, UN Doc. CCPR/C/38/D/167/1984

43 Human Rights Committee, *Apirana Mahuika et al. v. New Zealand*, Communication no. 547/1993, UN Doc. CCPR/C/70/D/547/1993.

44 *Ibidem*, § 6.1.

45 *Ibidem*, §§ 9.5, 9.6, 9.8.

46 *Ibidem*, § 9.9.

its economic livelihood may, under certain circumstances, be equal to robbing it of its cultural identity.[47] It, therefore, has an impact going far beyond financial consequences.

Indigenous peoples' rights of ownership and possession over the land and its natural resources are commonly recognized by international law.[48] Unfortunately, however, such cases of resistance to state-proposed projects involving interference with ancestral lands and unceasing struggles for a respect for indigenous customs and ways of life prove the continuing relevance of the problem. A statement made in 1989 by Morinage Parkipuny remains true to date. Before the United Nations Working Group on Indigenous Populations he said: "the process of alienation of our land and its resources was launched by European colonial authorities at the beginning of this century and has been carried on, to date, after the attainment of national independence."[49]

The right to profess and practise a minority religion

The Committee has twice dealt with complaints invoking an infringement of Article 27 in the context of a minority's right to profess and practice their own religion. In neither of them, however, was a violation found. For instance, in the case *Prince v. South Africa*[50] the author of the complaint, who was a Rastafarian, i.e. a member of a religious minority group in South Africa, claimed that the State had infringed his rights by prohibiting the possession and use of cannabis.[51] Gareth Anver Prince was a law graduate and wanted to become an attorney. Having fulfilled all the academic requirements, he had to perform a period of community service before being allowed to practice. He filed an application to the relevant body (the Law Society of Cape of Good Hope) to register his contract of community service but was refused due to his prior convictions for possessing cannabis.

47 "Culture or way of life cannot survive if the bearers of that culture have to change their ways of making a living." V. D. Maybury-Lewis, *Indigenous Peoples, Ethnic Groups, and the State*, Boston – London – Toronto – Sydney – Tokyo – Singapore 1997, p. 37.

48 V. Articles 13–16 of International Labour Organization Convention (no. 169) concerning Indigenous and Tribal Peoples in Independent Countries, 27 June 1989, adopted during 76th ILC session and Articles 25–26 of United Nations Declaration on the Rights of Indigenous Peoples.

49 M. Parkipuny, *The Human Rights Situation of Indigenous Peoples in Africa*, Statement before the Sixth Session of the United Nations Working Group on Indigenous Populations in Genéve, Switzerland on August 3, 1989, "Fourth World Journal" 1989, vol. II, no. 2, http://cwis.org/FWJ/classic/?issue=117# [access: 15.01.2017].

50 Human Rights Committee, *Prince v. South Africa*, Communication no. 1474/2006, UN Doc. CCPR/C/91/D/1474/2006.

51 The Rastafari religion originated in Jamaica. It's roots lie in the black consciousness movement that sought to overthrow colonialism, oppression and domination. The use of cannabis constitutes an inherent element of that religion. Regarded as a "holy herb" it is used at religious gatherings, as well as in private homes. At religious ceremonies, it is smoked through a chalice (water-pipe) as part of Holy Communion, and burnt as incense. However, it is used not only for spiritual, but also for medical and even culinary purposes. *Ibidem*, § 2.1.

In other words, the Law Society's assessment was that he was not a "fit and proper" candidate. Before the Committee, he claimed that Rastafarians use and possess cannabis for religious purposes and postulated that they should be granted an exemption from the general prohibition of possession and use of that drug. The Committee acknowledged the fact that the use of cannabis is inherent to the manifestation of the Rastafari religion, but at the same time concluded that the freedom of religion and the right of minorities to profess and practice it freely, as guaranteed in Articles 18 and 27, are not absolute and can be limited in order to protect public safety, order, health, morals, or the fundamental rights and freedoms of others.

In *Waldman v. Canada*[52], on the other hand, the Committee had to find whether in light of Ontario's exclusive funding of Roman Catholic schools,[53] the lack of funding to other religious schools constituted a violation of Articles 26[54] and 27 of the International Covenant on Civil and Political Rights. The author of the complaint, a member of the Jewish faith, pointed out that non-secular schools "form an essential link in preserving community identity and the survival of minority religious groups and that positive action may be required to ensure that the rights of religious minorities are protected."[55] The Committee acknowledged differential treatment between the Roman Catholic faith and the author's religious denomination in the field of educational funding, and found the State party in breach of Article 26.[56] Unfortunately, however, it did not address the issue of the infringement of Article 27.[57]

52 Human Rights Committee, *Waldman v. Canada*, Communication no. 694/1996, UN Doc. CCPR/C/67/D/694/1996.

53 The Canadian Constitution Act (1867) provides for exclusive jurisdiction of each province in Canada to enact acts regarding education. In Ontario that power is exercised through the Education Act, under which only Roman Catholic schools are entitled to public funding on equal terms with public secular schools. *Ibidem*, § 2.3.

54 "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

55 *Waldman v. Canada*, § 3.5.

56 "The Covenant does not oblige States parties to fund schools which are established on a religious basis. However, if a State party chooses to provide public funding to religious schools, it should make this funding available without discrimination. This means that providing funding for the schools of one religious group and not for another must be based on reasonable and objective criteria. In the instant case, the Committee concludes that the material before it does not show that the differential treatment between the Roman Catholic faith and the author's religious denomination is based on such criteria. Consequently, there has been a violation of the author's rights under article 26 of the Covenant to equal and effective protection against discrimination". *Ibidem*, § 10.6.

57 Although a member, Martin Scheinin concurred with the finding, in his individual opinion, he pointed out that "the existence of public Roman Catholic schools in Ontario is related to

The right to use a minority language

Last, but not least, the Committee deals with complaints of minorities claiming to be deprived of their right to use their own language. Interestingly, almost a half of these cases were filed by French citizens born in Bretagne who claimed the right to use Breton, which is their mother tongue.[58] In none of them, however, was the infringement of Article 27 stated. The violation of this Article in the context of language rights was noted in the case of *Rakhim Mavlonov and Shansiy Sa'di v. Uzbekistan*.[59] The complaint concerned a denial of re-registration of a newspaper published in a minority language by the State party's authorities. The authors of the communication (both Uzbek citizens of Tajik origin) claimed that they had fallen victims to violations of Article 19[60] and Article 27, read together with Article 2, of the International Covenant on Civil and Political Rights. The articles of "Oina" were published almost exclusively in the Tajik language and concerned education or cultural matters.[61] Therefore, the newspaper constituted a unique messenger

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a historical arrangement for minority protection and hence needs to be addressed not only under article 26 of the Covenant but also under articles 27 and 18." He found, *inter alia*, that "article 27 imposes positive obligations for States to promote religious instruction in minority religions." *Ibidem*, individual opinion by member Martin Scheinin, §§ 4 and 5.

58 See Human Rights Committee, *Yves Cadoret, Hervé Le Bihan v. France*, Communication no. 323/1988, U.N. Doc. CCPR/C/41/D/323/1988; *Hervé Barzhig v. France*, Communication no. 327/1988, UN Doc. CCPR/C/41/D/327/1988; *Dominique Guesdon v. France*, Communication no. 219/1986, UN Doc. CCPR/C/39/D/219/1986. Actually, none of these cases were examined on the merits with regard to Article 27. The French government filed a "declaration" concerning Article 27 of the Covenant, claiming it was not applicable, since the French Constitution guarantees the equality of all citizens before the law. The Committee treated the declaration as a reservation to Article 27, and as a consequence it lacks jurisdiction over cases concerning the Breton language. Unfortunately, such a declaration amounts to a denial of the existence of minority groups in the country.

59 Human Rights Committee, *Rakhim Mavlanov and Shansiy Sa'di v. Uzbekistan*, Communication no. 1334/2004, UN Doc. CCPR/C/95/D/1334/2004.

60 "1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals."

61 The Committee adhered to the author's claim that 'Oina' published articles containing educational and other materials for Tajik students and young persons on events and matters of cultural interest to this readership, as well as reported on the particular difficulties facing the continued provision of education to Tajik youth in their own language, including shortages in Tajik-language textbooks, low wages for teachers and the forced opening of Uzbek-language classes in some Tajik schools. See *Rakhim Mavlanov and Shansiy Sa'di v. Uzbekistan*, § 8.7

of Tajik's culture to its readers. Problems appeared when, as a consequence of one of the founders' opt-out, the newspaper had to apply for re-registration. The authorities refused to re-register the newspaper due to an alleged violation of the Law "On Mass Media."[62]

Most importantly, in light of the issues addressed in this article, the Committee's verdict proved that culture manifests itself in many forms and the right to enjoy it freely may also involve access to minority language press. In the analysed case, the Committee found that: "[...] the use of a minority language press as means of airing issues of significance and importance to the Tajik minority community in Uzbekistan, by both editors and readers, is an essential element of the Tajik minority's culture."[63] In other words, the Committee acknowledged the important role of language in defining cultural identity, since it constitutes one of the representatives of the distinct characteristics of a community. Consequently, it fosters the sense of belonging to a certain group. A further detailing of the minorities' language rights can be attributed to the Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities, which in Article 4(3) reads: "States should take appropriate measures so that, wherever possible, persons belonging to minorities may have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue." A strong relationship between language and culture was also stressed by the famous linguist, Ken Hale, who lamented: "When you lose a language, you lose a culture, intellectual wealth, a work of art. It's like dropping a bomb on a museum, the Louvre."[64]

Ethnocide in international legal discourse

The very term *ethnocide* appeared for the first time in Lemkin's "Axis Rule in Occupied Europe." When elaborating on the new term and conception for the destruction of nations, Lemkin pointed out that instead of *genocide*, by which we mean the destruction of a nation or of an ethnic group, the term *ethnocide* can be used to express the same idea.[65] Interestingly, in his research Lemkin focused on the cultural elements of the crime: "genocide has two phases: one, destruction of the national pattern of the oppressed group; the other, the imposition of the national pattern of the oppressor."[66] It

62 According to the commission, the newspaper's work was not performed in accordance with mass media activity towards "enlightment and national ideology building". It accused "Oina" of, *inter alia*, publishing articles that were inciting inter-ethnic hostility and violating laws prohibiting calls for territorial integrity changes. *Ibidem*, § 2.6.

63 *Ibidem*, § 8.7.

64 Cited from: K. D. Harrison, *When Languages Die: The Extinction of the World's Languages and the Erosion of Human Knowledge*, New York 2007, p. 7.

65 R. Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, New Jersey 2005, p. 79.

66 *Ibidem*.

appears that according to Lemkin, cultural patterns are as important as the biological structure of a distinct group. Indeed, his objective was to include cultural aspects in the legal definition of genocide.[67] In his view, the cultural facet of the crime involved a ban on the use of the native language, and upbringing in the spirit of imposed ideology in order to suppress independent national thinking.[68] However, his postulates were not fully taken into account, and the only cultural aspect included in the final legal definition of the crime of genocide is laid down in Article 2 (e) of the Convention on the Prevention and Punishment of Genocide, and concerns the act of forcibly transferring children of the group to another group.[69]

In the following years, the term ethnocide evolved, and is now more often considered strictly as the policy of destroying other cultures.[70] Consequently, such practices as exterminating a culture have been called a *cultural* or *passive* genocide, although they do not necessarily involve the physical destruction of a group.[71]

In 1981, UNESCO created an international definition of this phenomenon. According to the aforementioned Declaration of San Jose: "ethnocide means that an ethnic group is denied the right to enjoy, develop and transmit its own culture and its own language, whether collectively or individually. This involves an extreme form of massive violation of human rights and, in particular, the right of ethnic groups to respect for their cultural identity [...] ethnocide, that is, cultural genocide, is a violation of international law equivalent to genocide, which was condemned by the United Nations Convention on the Prevention and Punishment of the Crime of Genocide of 1948."

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67 For detailed research on the evolution of the term genocide see H. Schreiber, *Cultural genocide – ludobójstwo kulturowe – kulturobójstwo: niedokończony czy odrzucony projekt prawa międzynarodowego?*, in *Kultura w stosunkach międzynarodowych*, t. I: *Zwrot kulturowy*, ed. H. Schreiber, G. Michałowska, Warszawa 2013, pp. 252–274; E. Novic, *From 'Genocide' to 'Persecution': 'Cultural Genocide' and Contemporary International Criminal Law*, in *Cultural Rights*..., *op. cit.*, pp. 313–335.

68 R. Lemkin, *op. cit.*, pp. 84–85. In fact, Lemkin distinguished eight different types of genocide (or as he called it: "techniques of genocide in various fields") – political, social, cultural, economic, biological, physical, religious and moral. *Ibidem*, pp. 82–90.

69 Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, A/RES/3/260.

70 W.A. Schabas, *Genocide in International Law: The Crime of Crimes*, Cambridge 2000, p. 189; M. Shaw, *What is genocide?*, Cambridge 2007, pp. 65–67; B. Clavero, *Genocide or Ethnocide, 1933-2007. How to make, unmake, and remake law with words*, Milan 2008, pp. 99–101.

71 Undoubtedly, however, cultural suppression may precede and herald the crime of genocide and prove the perpetrator's genocidal intent (*mens rea*). What is more, in the jurisprudence of international criminal tribunals and courts, the link between cultural suppression and persecution, which constitutes one of the acts defining the crime against humanity, was found. Acts directed against cultural heritage are generally perceived as an instrument of repression and an element of the strategy of dehumanisation. For detailed research see S. Stryjkowska, *Problematyka ochrony dziedzictwa kulturowego w działalności międzynarodowych trybunałów karnych*, "Adam Mickiewicz University Law Review" 2016, vol. 6, pp. 222–225.

In light of the above, it is worth considering whether the problem of ethnocide still threatens native cultures. It is an undisputed fact that minorities throughout the world are being coerced to give up their cultural customs, languages and religious traditions. The foregoing considerations prove that minority cultures at risk mostly due to States' interference in their ways of life, restrictions on the use of their native language, or infringements of the right to practice one's own religion. The cases referred to in this article show that the steps taken by States with regard to minorities may constitute a form of indirect domination, and as a consequence impair the cultural identities of minority communities.

Despite the fact that acts of ethnocide are still being carried out, this subject has not been sufficiently addressed in international law. Admittedly, the prohibition of cultural suppression is enshrined – although not explicitly under the specific name *ethnocide* – in Article 8(1) of the United Nations Declaration on the Rights of Indigenous Peoples, which states: "indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture." The aforementioned declaration is an important instrument aimed at eliminating human rights violations against indigenous peoples, but it does not constitute a legally binding document. Therefore, it is in accordance with the general trend of demonstrating the international community's interest in matters connected with cultural rights through the implementation of the instruments of soft law. Undoubtedly, however, this subject merits more attention, since the observance of cultural rights ensures the perpetuation of distinct groups.[72]

Concluding remarks

Judicial elaboration proves that a lot has to be done in order to secure desirable, harmonious and cooperative relations between States and minorities. The reservations of States towards minorities can be attributed to the fact that issues of cultural rights pertaining to them, especially the territorial rights of indigenous communities and their entitlement to ancestral lands, are inextricably linked to the concept of self-determination. As culturally distinct entities, they are often considered as a threat to the State's territorial integrity because of their potential wish for secession. In order to avoid this, governments undertake attempts to integrate and assimilate them, frequently violating their basic rights. However, the problem of securing the cultural rights pertaining to them should be treated as a matter of recognition within already existing States.[73]

72 A. F. Vrdoljak, *Self-Determination and Cultural Rights*, in *Cultural Human Rights*, *op. cit.*, p. 41.

73 D. Maybury-Lewis, *op. cit.*, p. 56. It has also been stated explicitly in the Human Rights Committee's General Comment no. 23: "the enjoyment of the rights to which article 27 relates does not prejudice the sovereignty and territorial integrity of a State party." V. General Comment no. 23: The Rights of Minorities (Article 27), § 3.2. In the same document the Committee

It is a truism to say that most existing nations are not culturally homogenous entities. That is why it is so important to create conditions for the amicable coexistence of different cultural traditions. The relevance of cultural diversity is being emphasized by UNESCO, which has advocated for that concept from the very beginning of its existence, since pluralism plays an important role in the organisation's discourse.[74] According to UNESCO's Universal Declaration on Cultural Diversity "culture takes diverse forms across time and space. This diversity is embodied in the uniqueness and plurality of the identities of the groups and societies making up humankind. As a source of exchange, innovation and creativity, cultural diversity is as necessary for humankind as biodiversity is for nature. In this sense, it is the common heritage of humanity and should be recognized and affirmed for the benefit of present and future generations."

In order to complete the present study, it is worth recalling the view of Anthony Giddens, who argues that racist attitudes in modern societies take the form of 'cultural racism' based on the criteria of cultural differences.[75] He stipulates that 'new racism' has already replaced the concept of 'biological racism', since it is more often exercised on cultural rather than biological grounds.[76] Giddens observes that the values of the majority culture set standards for creating the hierarchy and any reluctance to assimilate with the majority may result in marginalisation.[77]

Literature

Al Attar M., Aylwin N., Coombe R.J., *Indigenous Cultural Heritage Rights in International Human Rights Law*, in *Protection of First Nations Cultural Heritage: Laws, Policy, and Reform*, ed. C. Bell, R. K. Paterson, Vancouver – Toronto 2009.

Anderson K., *Colonialism and Cold Genocide: The Case of West Papua*, "Genocide Studies and Prevention: An International Journal" 2015, vol. 9.

adopted an interpretation of Article 1 of the Covenant meant to forestall potential claims of autonomy brought before it by minority groups. It stated that an individual cannot claim to be a victim of violation of the right to self-determination enshrined in Article 1 of the Covenant, since it deals with rights conferred upon peoples. "The Covenant draws a distinction between the right to self-determination and the rights protected under article 27. The former is expressed to be a right belonging to peoples and is dealt with in a separate part (Part I) of the Covenant. Self-determination is not a right cognizable under the Optional Protocol. Article 27, on the other hand, relates to rights conferred on individuals as such and is included, like the articles relating to other personal rights conferred on individuals, in Part III of the Covenant and is cognizable under the Optional Protocol." *Ibidem*, § 3.1.

74 J. Tomlinson, *Cultural imperialism – A Critical Introduction*, London 1991, pp. 70–75.

75 A. Giddens, *Sociology*, Cambridge – Malden 2006, p. 495.

76 *Ibidem*.

77 *Ibidem*.

Bennagan P.L., *Tribal Filipinos*, in *Indigenous Views of Land and the Environment*, ed. S.H. Davis, World Bank Discussion Paper no. 188, Washington DC 1993.

Buendia R.G., *Ethnic Identity, Self-Determination and Human Rights: A Re-Examination of Majoritarian Democracy*, "Kasarinlan. Philippine Journal of Third World Studies" 1993, vol. 8, no. 4.

Clavero B., *Genocide or Ethnocide, 1933–2007. How to make, unmake, and remake law with words*, Milan 2008.

Davis S.H., *Introduction*, in *Indigenous Views of Land and the Environment*, ed. S.H. Davis, World Bank Discussion Paper no. 188, Washington DC 1993.

Giddens A., *Sociology*, Cambridge – Malden 2006.

Gilbert J., *Nomadic Peoples and Human Rights*, London – New York 2014.

Harrison K.D., *When Languages Die: The Extinction of the World's Languages and the Erosion of Human Knowledge*, New York 2007.

Hossain K., *Protection of Community Culture as Part of Human Rights in International Law*, in *Cultural Rights as Collective Rights: An International Law Perspective*, ed. A. Jakubowski, Leiden 2016.

Jakubowski A., *Introduction*, in *Cultural Rights as Collective Rights: An International Law Perspective*, ed. A. Jakubowski, Leiden 2016.

Lanzerini F., *Indigenous Peoples' Cultural Rights and the Controversy over Commercial Use of their Traditional Knowledge*, in *Cultural Human Rights*, ed. F. Francioni, M. Scheinin, Leiden – Boston 2008.

Lemkin R., *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, New Jersey 2005.

Lindqvist S., *Terra Nullius. Podróż przez ziemię niczyją*, Warszawa 2010.

Lochgan G., *The Samburu of Kenya*, in *Indigenous Views of Land and the Environment*, ed. S.H. Davis, World Bank Discussion Paper no. 188, Washington DC 1993.

Matampash K., *The Massai of Kenya* in *Indigenous Views of Land and the Environment*, ed. S.H. Davis, World Bank Discussion Paper no. 188, Washington DC 1993.

Maybury-Lewis D., *Indigenous Peoples, Ethnic Groups, and the State*, Boston – London – Toronto – Sydney – Tokyo – Singapore 1997.

Moses A.D., *Genocide and Settler Society in Australian History*, in *Genocide and Settler Society: Frontier Violence and Stolen Indigenous Children in Australian History*, ed. A.D. Moses, New York – Oxford 2004.

Novic E., *From 'Genocide' to 'Persecution': 'Cultural Genocide' and Contemporary International Criminal Law*, in *Cultural Rights as Collective Rights: An International Law Perspective*, ed. A. Jakubowski, Leiden 2016.

Parkipuny M., *The Human Rights Situation of Indigenous Peoples in Africa*, Statement before the Sixth Session of the United Nations Working Group on Indigenous Popula-

tions in Genéve, Switzerland on August 3, 1989, "Fourth World Journal" 1989, vol. II, no. 2, http://cwis.org/FWJ/classic/?issue=117# [access: 15.01.2017].

Said E. W., *Culture and Imperialism*, New York 1993.

Schabas W. A., *Genocide in International Law: The Crime of Crimes*, Cambridge 2000.

Schreiber H., *Cultural genocide – ludobójstwo kulturowe – kulturobójstwo: niedokończony czy odrzucony projekt prawa międzynarodowego?*, in *Kultura w stosunkach międzynarodowych*, t. I: *Zwrot kulturowy*, ed. H. Schreiber, G. Michałowska, Warszawa 2013.

Shaw M., *What is genocide?*, Cambridge 2007.

Stryjkowska S., *Problematyka ochrony dziedzictwa kulturowego w działalności międzynarodowych trybunałów karnych*, "Adam Mickiewicz University Law Review" 2016, vol. 6.

Symonides J., *Cultural rights: a neglected category of human rights*, "International Social Science Journal" 1998, vol. 50, no. 158.

Tomlinson J., *Cultural imperialism – A Critical Introduction*, London 1991.

Vrdoljak A. F., *Minorities, Cultural Rights and the Protection of Intangible Cultural Heritage*, paper presented at the *ESIL (European Society for International Law) Research Forum on International Law, Conference on Contemporary Issues*, 26–29 May 2005.

Vrdoljak A. F., *Self-Determination and Cultural Rights*, in *Cultural Human Rights*, ed. F. Francioni, M. Scheinin, Leiden – Boston 2008.

Wiessner S., *The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges*, "The European Journal of International Law" 2011, no. 22.

Williams R., *Keywords. A vocabulary of culture and society*, New York 1985.

Committee on Economic, Social and Cultural Rights, General Comment no. 21: Right of Everyone to Take Part in Cultural Life (Article 15 § 1 (a)), 21 December 2009, Doc. E/C.12/GC/21.

Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, A/RES/3/260.

Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 18 December 1992, A/RES/47/135.

Human Rights Committee, General Comment no. 23: The Rights of Minorities (Article 27), 8 April 1994, Doc. CCPR/C/21/Rev.1/Add.5.

Human Rights Committee, *Lubicon Lake Band v. Canada,* Communication No 167/1984, UN Doc. CCPR/C/38/D/167/1984.

Human Rights Committee, *Ivan Kitok v. Sweden*, Communication No. 197/1985, UN Doc. CCPR/C/33/D/197/1985.

Human Rights Committee, *Dominique Guesdon v. France*, Communication No. 219/1986, UN Doc. CCPR/C/39/D/219/1986.

Human Rights Committee, *Hervé Barzhig v. France*, Communication No. 327/1988, UN Doc. CCPR/C/41/D/327/1988.

Human Rights Committee, *Yves Cadoret, Hervé Le Bihan v. France*, Communication No. 323/1988, U.N. Doc. CCPR/C/41/D/323/1988.

Human Rights Committee, *Länsman et al. v. Finland*, Communication No. 511/1992, UN Doc. CCPR/C/52D/511/1992.

Human Rights Committee, *Apirana Mahuika et al. v. New Zealand*, Communication No. 547/1993, UN Doc. CCPR/C/70/D/547/1993.

Human Rights Committee, *Länsman et al. v. Finland*, Communication No. 671/1995, UN Doc. CCPR/C/58/D/671/1995.

Human Rights Committee, *Waldman v. Canada*, Communication No. 694/1996, UN Doc. CCPR/C/67/D/694/1996.

Human Rights Committee, *Rakhim Mavlanov and Shansiy Sa'di v. Uzbekistan*, Communication No. 1334/2004, UN Doc. CCPR/C/95/D/1334/2004.

Human Rights Committee, *Ángela Poma Poma v. Peru*, Communication No. 1457/2006, UN Doc. CCPR/C/95/D/1457/2006.

Human Rights Committee, *Prince v. South Africa*, Communication No. 1474/2006, UN Doc. CCPR/C/91/D/1474/2006.

International Covenant on Civil and Political Rights, 19 December 1966, A/RES/21/2200.

International Labour Organization Convention (no. 169) concerning Indigenous and Tribal Peoples in Independent Countries, 27 June 1989, adopted during 76th ILC session.

Mexico City Declaration on Cultural Policies, 6 August 1982, adopted during second World Conference on Cultural Policies.

UNESCO Declaration of San Jose, 11 December 1981, UNESCO Doc. FS 82/WF.32 (1982).

UNESCO Universal Declaration on Cultural Diversity, 2 November 2001, Resolution of the 31st General Conference of UNESCO.

United Nations Declaration on the Rights of Indigenous Peoples, 13 September 2007, A/RES/61/295.

SUMMARY

Cultural Identity in the Case-Law of the Human Rights Committee

The aim of the article is to present the jurisprudence of the Human Rights Committee on Article 27 of the International Covenant on Civil and Political Rights concerning the rights of persons belonging to ethnic, religious and linguistic minorities. Therefore, the study examines the underprivileged position of minorities within States and focuses on their will to survive as a distinct culture. Examination of the aforementioned case-law provides an insight into the Committee's understanding of the concept of cultural identity.

Keywords: cultural identity, cultural rights, rights of minorities, Human Rights Committee

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Migrant Domestic Workers in Europe: the Need for Better Protection*

Introduction

According to ILO, migrant domestic workers are estimated at approximately 11.5 million persons worldwide, and "women comprise the majority of domestic workers, accounting for 80 per cent of all workers in the sector globally."[1] Moreover, gender is fundamental in relation to migration. European women are being replaced in their cleaning, caring and cooking tasks by immigrant women from Africa, Asia and Eastern Europe.[2]

Migrant domestic workers are vulnerable not only to different kinds of abuse, but also harassment and violence. Sexual, psychological and physical abuse, including food deprivation and confinement, are the most serious violations. The physical proximity of domestic workers to household members, and the intimacy and isolation of the workplace cause the risk to rise. Live-in domestic workers are in a worse situation, because they are present in the household all the time.[3] The home is a place that typically escapes any control on the part of labour inspections and is not treated like a formal workplace.[4]

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1 ILO, *Social protection for domestic workers: Key policy trends and statistics*, paper no. 16, Geneva 2016, pp. IX–X.

2 A. Triandafyllidou, *Irregular Migration and Domestic Work in Europe: Who Cares?*, in *Irregular Migrant Domestic Workers in Europe: Who Cares?*, ed. A. Trianafyllidou, Farnham 2013, p. 6.

3 ILO, *Effective protection for domestic workers: a guide to designing labour laws*, Geneva 2012, pp. 3, 41.

4 A. Triandafyllidou, *op. cit.*, p. 2.

It is a place where women's unpaid work is invisible and not economically valued.[5] Domestic work is extremely susceptible to illegal work, because state strategies to control compliance would require interference in private homes, and that is likely to meet with the resistance of citizens.[6] For that reason, migrant domestic workers, whose legal status of residence is very often unregulated, are the most disadvantaged. Female migrant domestic workers, characterised by the lack of support, the lack of awareness of their rights and gender discrimination, may be even more vulnerable.[7]

Firstly, my intention in this article is to list the most important international legal instruments relating to the protection of migrants. This will make it easier to answer the question whether human labour rights are available to all migrants – both legal and illegal – and will provide a starting point for examining whether the international legal guarantees are not an illusion in the face of reality. Secondly, in this article I will look at the effectiveness of the human labour rights of the migrant domestic workers residing in Europe, taking as a starting point the typology presented by K. Drzewicki. As this author points out, international standards concerning labour as a matter of human rights are divided into four groups: rights relating to employment (e.g. the prohibition of slavery and forced labour); rights deriving from employment (e.g. the right to social security, the right to just and favourable conditions of work); rights concerning equal treatment and non-discrimination; and instrumental rights (e.g. the right to organise, the right to strike).[8] Instrumental rights are beyond the scope of this study.

Legal basis

Within the United Nations' instruments, we should firstly mention the Universal Declaration of Human Rights, according to which: "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control." Everyone also has the

5 J. Fudge, K. Strauss, *Migrants, Unfree Labour, and the Legal Construction of Domestic Servitude: Migrant Domestic Workers in the UK*, in*Migrants at Work. Immigration and Vulnerability in Labour Law*, ed. C. Costello, M. Freedland, Oxford 2014, p. 164.

6 D. Vogel, *The challenge of irregular migration*, in *Routledge Handbook of Immigration and Refugee Studies*, ed. A. Triandafyllidou, London – New York 2016, p. 338.

7 ILO, *Effective..., op. cit.*, pp. 3, 41.

8 K. Drzewicki, *Prawo do pracy jako normatywny agregat międzynarodowej ochrony praw człowieka*, in *Wolność i sprawiedliwość w zatrudnieniu. Księga pamiątkowa poświęcona Prezydentowi Rzeczypospolitej Polskiej Profesorowi Lechowi Kaczyńskiemu*, ed. M. Seweryński, J. Stelina, Gdańsk 2012, pp. 75–77.

right to social security, the right to freedom of peaceful assembly and association, the right to work, to free choice of employment, to just and favourable conditions of work, and to protection against unemployment. The Universal Declaration of Human Rights sets forth the principle of equality and equal protection against any discrimination. The document ensures these and other rights to "everyone," without restrictions in the case of migrant status. However, the Universal Declaration of Human Rights is not legally binding. Similarly, the 1985 UN Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live has no binding force. Moreover, the document limits the application of labour and social rights to "aliens lawfully residing in the territory of a State."[9]

The International Covenant on Economic, Social and Cultural Rights adopted in 1966 guarantees everyone the right to work, the right of everyone to the enjoyment of just and favourable conditions of work and the right of everyone to form trade unions and join the trade union of his or her choice. The International Covenant on Civil and Political Rights states that no one shall be required to perform forced or compulsory labour, and that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. It also points out that everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his or her interests.

In 1990, the UN document – The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families – was adopted, and since then "has become a cornerstone of the human rights–based approach to regulating labor immigration"[10]. The Convention entered into force on 1 June 2003 and encompasses the human rights of all migrants, those illegal and members of their families as well[11]. The difference is visible between the third (Articles 8–35) and the fourth part (Articles 36–56) of the Convention. The third part refers to all migrant workers, and the fourth only to legal migrants and their families. In the light of Article 25, migrant workers shall enjoy treatment not less favourable than that which applies to nationals of the State of employment in respect of remuneration and other working conditions. The Convention

9 M. Olivier, O. Dupper, A. Govindjee, *Enhancing the Protection of Transnational Migrant Workers: a Critical Evaluation of Regulatory Techniques*, in *The Transnational Dimension of Labour Relations. A New Order in the Making?*, ed. E. Ales, I. Senatori, Turin 2013, p. 294.

10 M. Ruhs, *The Price of Rights: Regulating International Labor Migration*, Oxford 2013, p. 1.

11 J.N. Fish, *Rights across borders: policies, protections and practices for migrant domestic workers in South Africa*, in *Exploited, Undervalued – and Essential: Domestic Workers and the Realisation of their Rights*, ed. D. du Toit, Pretoria 2013, p. 231; D. Estrada-Tanck, *Human Security and Universal Human Rights of Undocumented Migrants: Transnational Vulnerabilities and Regional Traditions*, in *Select Proceedings of the European Society of International Law*, ed. M.J. Aznar, M.E. Footer, Oxford – Portland – Oregon 2015, p. 190.

is overseen by the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families.[12]

A General Recommendation from the UN Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW) – General Recommendation No. 26 on Women Migrant Workers, and a General Comment from the UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families – General Comment No. 1 on Migrant Domestic Workers, have attempted to address the problems of workplace exploitation, the exclusion from the protections of employment law, social security, and precarious migration status.[13]

Turning now to the ILO's instruments, we should mention the Migration for Employment Convention (Revised), 1949, no. 97, and the Migration for Employment Recommendation (Revised), 1949, no. 86, which concentrate on the standards applicable to the recruitment of migrants for employment and their conditions of work. Two further documents, the Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers no. 143, 1975 and the Migrant Workers Recommendation no. 151, 1975, were an attempt to cope with undocumented migrants and traffickers. According to Convention No. 143, each member for which the Convention is in force undertakes to respect the basic human rights of all migrant workers, and reaffirms its commitments to respect the equality of opportunity and treatment. However, it should be highlighted that Convention no. 97 states that each member for which this Convention is in force undertakes to apply, to immigrants lawfully within its territory, treatment no less favourable than that which it applies to its own nationals in respect of the matters specified therein. A similar limitation in the use of the effective equality of opportunity and treatment is introduced in Recommendation no. 151.[14] Moreover, the ILO's Convention concerning decent work for domestic workers (Domestic Workers Convention, no. 189, 2011, entry into force: 5 September 2013), and Recommendation no. 201, 2011, ensure that domestic workers, particularly migrant domestic workers, live-in domestic workers and young domestic workers, should enjoy labour and social protection in the indicated domains.[15] For example, according to Article 8(1) of the Convention no. 189, "National laws and regulations shall require that

12 L. Swepston, *The Development in International Law of Articles 23 and 24 of the Universal Declaration of Human Rights: The Labor Rights Articles*, Leiden – Boston 2014, p. 18; L. F. Vosko, *Out of the Shadows? The Non-Binding Multilateral Framework on Migration (2006) and Prospects for Using International Labour Regulation to Forge Global Labour Market Membership*, in *The Idea of Labour Law*, ed. G. Davidov, B. Langille, Oxford 2011, p. 374.

13 S. Mullally, *Migration, Gender, and the Limits of Rights*, in *Human Rights and Immigration*, ed. R. Rubio-Marín, Oxford 2014, p. 169.

14 M. Olivier, O. Dupper, A. Govindjee, *op. cit.*, pp. 300–302.

15 ILO, *Effective...*, *op. cit.*, p. 6.

migrant domestic workers who are recruited in one country for domestic work in another receive a written job offer, or contract of employment that is enforceable in the country in which the work is to be performed, addressing the terms and conditions of employment referred to in Article 7, prior to crossing national borders for the purpose of taking up the domestic work to which the offer or contract applies."

In the framework of the Council of Europe system, the European Social Charter and its revised version, provide for the right of migrant workers and their families to protection and assistance. The document encompasses "foreigners only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned." The interpretation according to which migrants working, but residing unlawfully, are protected by the scope of the European Social Charter, cannot be excluded.[16] Generally this protection does not cover migrants who are not nationals of the contracting parties. Refugees lawfully staying in the territory of the contracting parties, who should be given "treatment as favourable as possible," are among the exceptions.

The European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 provides that state parties have to secure for everyone within their jurisdiction the rights and freedoms defined in section I of the Convention. Theoretically, such a formulation includes illegal immigrants who can effectively enforce their rights before the European Court of Human Rights (e.g. Siliadin v France, App no 73316/01, ECHR 26 July 2005). It is nevertheless important to remember that there is no guarantee in the Convention which would protect the irregular immigrant from the consequences of irregularity.[17] The Convention does not generally protect labour rights, but provides, *inter alia*, the prohibition of slavery and forced labour, freedom of thought, conscience and religion, freedom of assembly and association, including the right to form and to join trade unions, the right to an effective remedy and the right to equality. The prohibition of discrimination is regulated in Article 14, but it only secures the enjoyment of the rights and freedoms set forth in the Convention. However, Protocol no. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature in Rome on 4 November 2000, entails further consequences. It introduces a general prohibition of discrimination. The practical significance of the autonomous nature of this Protocol is based on the full opening of the European Court of Human Rights forum for complaints of discrimination, e.g. on employment or issues related to social and living conditions. "It will be in the full sense the judicially conducted

16 V. Mantouvalou, *Organizing against Abuse and Exclusion: The Associational Rights of Undocumented Workers*, in *Migrants at Work...*, *op. cit.*, *passim*.

17 E. Dewhurst, *The Right of Irregular Immigrants to Back Pay: The Spectrum of Protection in International, Regional, and National Legal Systems*, in *Migrants at Work...*, *op. cit.*, p. 226.

complaint procedure."[18] Protocol no. 12 has been signed so far by 19 countries and ratified by 19 more. Poland does not belong to either of these groups.

Within the system of the Council of Europe, we should also mention the European Convention on the Legal Status of Migrant Workers 1977, which entered into force on 1 May 1983, but has only been ratified by eleven states.[19] The Convention sets forth, *inter alia*, that in the matter of conditions of work, migrant workers authorised to take up employment shall enjoy treatment not less favourable than that which applies to national workers. Equality of treatment should be also ensured in the matter of social security. Some rights are limited to migrant workers and the members of their families lawfully present in (or officially admitted to) the territory of a contracting party, e.g. social and medical assistance, general education, vocation training, retraining and access to higher education. Moreover, as stated by Cholewinski, the Convention constitutes a framework instrument, which does not regulate all the elements of the legal status of migrant workers, but refers instead to national legislation, and other multilateral and bilateral instruments. Besides, in spite of the Convention's emphasis on migrant workers` equal treatment with the nationals of contracting parties, a major part of its provisions are worded in terms of inter-state obligations rather than in terms of the rights of migrant workers.[20]

Answering the question of whether all migrants are eligible for human labour rights, it should be stated that some differences in treatment are tolerable for illegal migrants.

Rights relating to employment

The existence of slavery in Europe, especially among migrant domestic workers has been reported in the literature. There is evidence (e.g. provided by recent high-profile UK court cases) of migrants being kept "like slaves" in their employers' homes. This constitutes proof of the existence and "possible prevalence of forced labour experiences among migrants in the UK."[21] According to the report of the non-governmental organisation Kalayaan from London, which helps migrant domestic workers, in 2010, 60% of migrant domestic workers registered with Kalayaan were not allowed out unaccompanied, 65% had their passport withheld, 54% suffered from psychological abuse, 18% physical abuse/assault, 3% sexual abuse/harassment, 26% did not receive regular/sufficient food, 49% did

18 B. Gronowska, *Europejska Konwencja Praw Człowieka a prawa drugiej generacji – kilka refleksji o zacieraniu granic*, "Europejski Przegląd Sądowy" 2013, no. 9, p. 8.

19 V. Mantouvalou, *Organizing...*, *op. cit.*, p. 389.

20 R. Cholewinski, *The Legal Status of Migrants Admitted for Employment. Committee of Experts on the Legal Status and Rights of Immigrants: A Comparative Study of Law and Practice in Selected European States*, Strasburg 2004, p. 14.

21 H. Lewis, P. Dwyer, S. Hodkinson, L. Waite, *Hyper-precarious lives: Migrants, work and forced labour in the Global North*, "Progress in Human Geography" 2015, vol. 39, no. 5, p. 589.

not have their own room, 67% worked seven days a week with no time off, 48% worked at least 16 hours a day, 58% had to be available "on call" 24 hours, 56% received a salary of 50 GBP or less per week.[22] Such abusive working conditions have been qualified as "modern slavery," not only in the literature and the documents of governmental and non-governmental organisations, but also in case law.[23]

In the literature, much attention has been paid to the sexual servitude of women. Other forms of forced labour, such as domestic service, should nevertheless be given equal attention. The ILO Forced Labour Convention no. 29, 1930 defines forced or compulsory labour as: "All work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily."[24] In the UN Trafficking Protocol, 2000, domestic work was also considered as one of the occupations that are vulnerable not only to domestic slavery and forced labour, but also to trafficking. As we know from the International Organisation for Migration (IOM) data, there are up to 800,000 people trafficked annually. According to an estimate made by the ILO in 2005, up to 12.3 million people were victims of forced labour. 20 per cent of them were also victims of trafficking (2.45 million people).[25] Migrant domestic workers, especially those in an irregular situation, are particularly vulnerable to such risks.[26]

In 2001, the Council of Europe adopted Recommendation 1523 on "domestic slavery" and, in 2004, the Parliamentary Assembly in the Council of Europe adopted Recommendation 1663, "Domestic slavery: servitude, au pairs and mail-order brides." Domestic work is perceived in these documents as forced labour and trafficking in human beings, and female migrants working in the houses of diplomats is seen "as the prototype of the enslaved migrant domestic worker."[27] In fact, many studies deliver information about migrants who have been compelled, coerced and confined into exploitative work.[28] For example, according to the Centre for Equal Opportunities and the Fight against Racism on Human Trafficking's report (2011), in Brussels the number of cases of economic exploitation of domestic "live-in" workers is rising. There are two principal profiles within

22 M. Lalani, *Ending the Abuse. Policies that work to protect migrant domestic workers*, Kalayaan. Justice for migrant domestic workers, London 2011, pp. 12, 35.

23 V. Mantouvalou, *Are Labour Rights Human Rights?*, "European Labour Law Journal" 2012, vol. 3, no. 2, p. 165.

24 L. Lean Lim, K. Landuyt, M. Ebisui, M. Kawar, S. Ameratunga, *An Information Guide: Preventing Discrimination, Exploitation and Abuse of Women Migrant Workers*, Geneva 2003, p. 10.

25 A. Ricard-Guay, *Trafficking in human beings. 15 years after the Palermo Protocol*, in *Routledge Handbook...*, *op. cit.*, p. 354.

26 S. Mullally, *op. cit.*, p. 168.

27 M. Kontos, G. Tibe Bonifacio, *Introduction: Domestic and Care Work of Migrant Women and the Right to Family Life*, in *Migrant Domestic Workers and Family Life: International Perspectives*, ed. M. Kontos, G. Tibe Bonifacio, London 2015, pp. 1–2.

28 H. Lewis, P. Dwyer, S. Hodkinson, L. Waite, *op. cit.*, p. 589.

the victims: namely, females working as domestic workers for a diplomat, and females working in a private home, often looking after the children.[29]

The above-mentioned landmark case of Siliadin v. France sparked hopes for an improvement to the situation of migrant domestic workers. The case involved a migrant domestic worker from Togo who was forced to endure horrific living conditions in France. Taking into consideration Article 4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Court described the situation as "servitude, forced and compulsory labour." However, the Court did not qualify the situation as "slavery" because the employers did not exercise the right of legal ownership over the victim. With respect to France, the Court ruled that the lack of legislation criminalising such extremely difficult working conditions constitutes a breach of Article 4.[30]

Rights deriving from employment

A lack of effectiveness of the rights deriving from employment, in the case of migrant workers, has been very well documented in the literature. For this group of people, the term "precarity" has been used. It has been described as a phenomenon related to workers "hirable on demand, available on call, exploitable at will, and firable at whim."[31] However, the situation of many migrant workers (especially domestic migrant workers) could be described by the term "hyper-precarity," which "refers to the multidimensional insecurities in migrants' work relations and other aspects of their migration journey or project. Migrants' precarious statuses can restrict and impede their access to, in law and in practice, a range of employment and social protections in the host state that citizens and permanent residents generally enjoy."[32] Hyper-precarious undocumented immigrants are in a situation of extreme deprivation of any rights, and of the greatest exploitation.[33] For instance, in France illegal migrant domestic workers who work undeclared are in principle not covered by the usual employment-related social security, e.g.

29 M. Godin, *Domestic Work in Belgium: Crossing Boundaries between Informality and Formality*, in *Irregular...*, *op. cit.*, p. 34.

30 B. Ryan, V. Mantouvalou, *The Labour and Social Rights of Migrants in International Law*, in *Human Rights and Immigration*, *op. cit.*, p. 206.

31 A. Foti, *Mayday Mayday: Euro flex workers time to get a move on*, 2005, http://eipcp.net/transversal/0704/foti/en [access: 28.01.2017].

32 M. Zou, *Hyper-Dependence and Hyper-Precarity in Migrant Work Relations*, in *Labour And Social Rights. An Evolving Scenario. Proceedings of the Twelfth International Conference in Commemoration of Marco Biagi*, ed. T. Addabbo, W. Bromwich, T.M. Fabbri, I. Senatori, Turin 2015, p. 256.

33 B. Likić-Brborić, C.-U. Schierup, *Labour Rights as Human Rights? Trajectories in the Global Governance of Migration*, in *Migration, Precarity and Global Governance: Challenges and Opportunities for Labour*, ed. C.-U. Schierup, R. Munck, B. Likić-Brborić, A. Neergaard, Oxford 2015, p. 231.

paid sick leave, maternity leave, unemployment benefits or pensions for occupational disabilities or retirement. Since 1999, a specific scheme for irregular migrants entitled the "State Medical Aid" has existed for health care coverage. However, it provides access only to basic health care treatment and services for irregular migrants who have stayed for at least three months in France and have few resources.[34]

Entering the foreign labour market, migrant workers accept "by definition" to undertake "3D" jobs: "dirty," "dangerous" and "demeaning" (or "degrading"). These are jobs that native workers are no longer interested in.[35]

In the literature, migrant domestic work has been described by the term "decent work deficit". It implies not only low wages and unpredictable working hours, but also limited access to social security, and an ambiguous employment status.[36] Moreover, there are many situations in which an agreement made verbally between parties is changed by the employer during the fulfilment of work. Employers increase employees' tasks without simultaneously increasing their remuneration. They usually do this "naturally" "as live-in domestic workers develop pseudo-family relations with their clients."[37]

The acceptance of abusive working conditions and the renunciation from claiming entitlements by migrant domestic workers are symptomatic of their situation. It is caused by the necessity to keep their job, maintain their income of subsistence, and to keep sending remittances to their children and families.[38] Besides, by losing her job, a live-in migrant domestic worker at the same time loses her home.[39]

The negative influence of abusive working and living conditions on migrant workers' health is another important determinant that affects their situation. Chronic illness or work incapacity may occur when working for longer time-frames under appalling working conditions and psychological pressure.[40] Women migrant workers are exposed to many specific health risks, e.g. physical, they are prone to sexual and verbal abuse. The ILO reported that Indonesian or Filipino women domestic migrant workers are particularly vulnerable to gender predicated violence and to HIV that is a constant threat throughout the employment period.[41] Another important issue is the obligation to work

34 K. Sohler, F. Lévy, *Migration Careers and Professional Trajectories of Irregular Domestic Workers in France*, in *Irregular...*, *op. cit.*, p. 60.

35 M. Maroufof, "*With All the Cares in the World": Irregular Migrant Domestic Workers in Greece*, in *Irregular...*, *op. cit.*, p. 96; F. A. Latif Alnasir, *Health of Migrant Workers; A Matter Of Concern*, "Middle East Journal of Family Medicine" 2015, vol. 13, no. 2, p. 43; L. Lean Lim, K. Landuyt, M. Ebisui, M. Kawar, S. Ameratunga, *op. cit*., p. 25.

36 S. Mullally, *op. cit*., p. 168.

37 M. Maroufof, *op. cit.*, pp. 101–102.

38 K. Sohler, F. Lévy, *op. cit.*, p. 54.

39 M. Maroufof, *op. cit.*, p. 104.

40 K. Sohler, F. Lévy, *op. cit.*, p. 61.

41 F. A. Latif Alnasir, *op. cit.*, pp. 43–44. See the cited literature.

when they are ill,[42] and psychological stress that causes depression, for example.[43] As pointed out by Bonizzoni, many live-in workers reported that they were not fed enough by their employers; some of them were always controlled in regards to what and how much they ate.[44]

Rights concerning equal treatment and non-discrimination

Female migrant domestic workers very often suffer discrimination and exploitation.[45] According to J. Wrench,[46] there are four main variants of discrimination against immigrants that are important from the perspective of the field of employment: racist, statistical, societal and structural discrimination.

Racist discrimination is direct and intentional. It takes place when the hallmarks of racial or ethnic identity are used as grounds for differentiation, and no other justification exists. Racist discrimination includes actions by racist or prejudiced people who hold and act on negative stereotypes about people, e.g. denying them jobs. Moreover, this type of discrimination covers not only verbal, psychological and physical abuse, but also harassment at the workplace.

Statistical discrimination includes actions based on perceptions of a minority group as having certain features that will generate negative consequences for the employer. This type of discrimination does not cover actions based on personal racism or prejudices.

Societal discrimination means that people who may not be motivated by prejudice or ethnic hostility themselves take into consideration other people's negative approaches to members of a social group. For instance, if employment agency employees know that an employer is reluctant to employ immigrants, they can refrain from sending immigrants for a job interview.

Structural discrimination, which is also called systemic discrimination, "concerns group-based patterns of disadvantage and inequality that are not the consequences of a particular individual's bias against the group or a wilful act of social exclusion, but are the result of more subtle, structural and institutional forces." The disadvantage appears

42 H. Lewis, P. Dwyer, S. Hodkinson, L. Waite, *op. cit.*, p. 589.

43 P. Bonizzoni, *Undocumented Domestic Workers in Italy: Surviving and Regularizing Strategies,* in *Irregular...*, *op. cit.*, p. 153.

44 *Ibidem*, p. 151.

45 N. Cyrus, *Being Illegal in Europe: Strategies and Policies for Fairer Treatment of Migrant Domestic Workers*, in*Migration and Domestic Work: A European Perspective on a Global Theme*, ed. H. Lutz, London – New York 2008, p. 177.

46 J. Wrench, *Discrimination against immigrants in the labour market. An overview and a typology*, in *Routledge Handbook...*, *op. cit.*, pp. 121–123; idem, *Diversity Management and Discrimination: Immigrants and Ethnic Minorities in the EU*, London – New York 2016, pp. 116–119. V. the cited literature.

here because the existing system of opportunities and constraints favours the success of one group and disadvantages another group, through the operation of policies and practices contributing to such a situation.

Legal discrimination is a sub-type of structural discrimination. It is connected with the restrictions in some countries that impede the access of migrant workers e.g. to major sections of labour market opportunities.

For example, in the UK the majority of migrant worker visa programmes limit the possibilities to decide on how workers should be employed, where they can live (it is often the employer's household), if and how they can obtain permanent residence or citizenship, and if they can be joined by their families. Sometimes they have their passports confiscated on arrival. Moreover, many programmes establish conditions concerning the termination of the employment of domestic migrant workers which differ from those created for other types of workers and which result in deportation, e.g. if they leave their employer, or if they become pregnant.[47] In fact, if a migrant domestic worker gets pregnant or has to support underage children it is common for her to lose her job. As we can see, it is gender that plays a crucial role in the course of the life of migrant domestic workers.[48]

It is worth looking at other examples in order to highlight how the state disadvantages one group and favours others. In Spain, legally resident domestic workers start to receive sick pay only after 29 days of illness. In comparison, other workers receive sick pay on the fourth day of illness.[49] Moreover, if irregular immigrants seek legal redress in this country, they have to reckon with the fact that they can be deported.[50] In Ireland, the discrimination experienced by women working without documentation in an unregulated area of work is intensified by immigration policies which limit the organising opportunities among workers.[51] In the UK, au pairs (often female migrants) are excluded from benefiting from the national minimum wage. In Eastern Europe, 45% of domestic employees are not protected under labour laws. Discrimination risk differs significantly depending on such contextual variables. "The risks for a highly skilled male migrant executive are unlikely to be the same as a low skilled female migrant au pair. Female migrants are therefore sometimes at risk of double or triple discrimination (age, gender and/or ethnicity)."[52]

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47 J. Fudge, K. Strauss, *op. cit.*, pp. 163–164.

48 A. Triandafyllidou, T. Maroukis, *Irregular Migrant Domestic Workers in Europe: Major Socioeconomic Challenges*, in *Irregular...*, *op. cit.*, p. 220.

49 *Ibidem*, p. 215.

50 *Ibidem*, p. 213.

51 S. Daly, *The Home as a Site of Work*, in *Irregular...*, *op. cit.*, p. 132.

52 J. Mallender, M. Gutheil, A. Heetman, D. Griffiths, M. Carlberg, R. Marangozov, *Discrimination of migrant workers at the workplace*, European Parliament, May 2014, p. 43.

With regard to remuneration, migrant women working as domestic and care workers earn, as a rule, less than the native care workers.[53] For example, according to 2004 estimates, in Western Europe the wages of migrant domestic workers were 24% lower than those of national domestic workers.[54] Besides, salary levels are differentiated according to the nationality of the worker. Longer established ethnic niches of care workers, e.g. Filipinos, earn more than the more recently arrived Ukrainians, Albanians or Russians. An evident connection between the stereotypes connected with the workers' ethnicity and their wages is also observable. For instance, comparing domestic workers from Albania and the Philippines during the 1990s, it was concluded that the inequality of their earnings resulted from the stereotypes attached to them: "the good Catholic girls," i.e. Filipinos, earned more than "the enemy at the doorstep", i.e. Albanians.[55] As regards race discrimination, e.g. in the Netherlands, there is a stronger demand for domestic workers from the Philippines (who get paid better) than for those from Ghana (who get paid worse). As has been mentioned above, it is also gender which keeps determining a migrant domestic worker's position on the Dutch market. Employers in the Netherlands generally see domestic work as women's work and tend to prefer women.[56]

Conclusions

International instruments provide broad protection of the human labour rights of migrants. However, reflecting on their effectiveness, we come to the conclusion that some of them only exist in writing. Selected rights from the first three groups, according to the K. Drzewicki's typology, have been presented in this article. It turns out that the tools introducing safeguards for the protection of the rights relating to employment, rights deriving from employment and rights concerning equal treatment and non-discrimination lack effectiveness.

In the face of such an unfavorable balance, action should be taken to encourage countries to take responsibility for modern slavery, hyper-precarity and discrimination. In particular, we should look at their approach to the ratification of international instruments. For example, the lack of ratification or even signing (by any of the EU countries) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, certainly does not provide the answer to the challenges of migration processes. In addition, the demands contained in the ILO's Fair Migration Agenda should be considered, e.g. with regard to increasing the effectiveness of laws on

53 H. Lutz, E. Palenga-Möllenbeck, *Global care chains*, in *Routledge Handbook...*, *op. cit.*, p. 141.

54 ILO, *Social...*, *op. cit.*, p. 16. V. the cited literature.

55 M. Maroufof, *op. cit.*, p. 104. V. the cited literature.

56 S. van Walsum, *Regulating Migrant Domestic Work in the Netherlands: Opportunities and Pitfalls*, in *Irregular...*, *op. cit.*, pp. 170–171.

equal treatment and non-discrimination.[57] It should also be emphasised that host countries should improve the domestic law and migration policies, ensuring decent working conditions and freedom from exploitation. Particular attention should be paid to helping migrants employed in households.

As highlighted by the ILO, the law should be drafted in an accessible way and should be accompanied by instruments and strategies for its communication and dissemination. Workers will benefit equally from such measures, as in many cases they will be unfamiliar with applicable laws and protective provisions. The tools and methodologies available to ensure compliance with the applicable law should be adapted to the specific circumstances of domestic work. The protection of victims, prevention of transgression, accessible assistance, and complaints procedures are important from the point of view of all domestic workers, especially live-in migrant domestic workers.[58] Legal protective provisions should perform the following tasks: define what constitutes abuse, harassment and violence; prohibit such transgressions; establish dissuasive sanctions; assign responsibility for prevention and protection; provide for preventative measures, and assign responsibility for monitoring and enforcement.[59]

The situation of migrant domestic workers could be also improved by implementing programs analogous to the Irish pilot scheme of labour inspections of private homes.[60] The aim should be to establish monitoring and inspection systems to cover unregulated work in the informal economy, especially domestic work.[61] Additionally, the requirement of a written contract for domestic workers may constitute an important step in transferring domestic work from the informal economy to the formal one.[62] It is also important to reduce the number of illegal migrants, as most people from this group are exposed to violations of their rights.

As regards equal treatment and discrimination, further steps should also be taken. Countries should apply the principle of equal treatment, according to which migrant domestic workers are afforded the same labour rights as native workers, e.g. the right to social security. The ILO's study found that 86% of countries providing legal coverage for national domestic workers also do so for migrant domestic workers. However, challenges remain in terms of the vertical dimension of coverage with regard to the number of social security branches included in the coverage of migrant workers.[63]

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57 ILO, *Fair migration: Setting an ILO agenda. Report of the ILO Director General to the International Labour Conference*, Geneva 2014, p. 7.

58 ILO, *Effective..., op. cit.*, p. 4.

59 *Ibidem*, p. 42.

60 C. Murphy, *The Enduring Vulnerability of Migrant Domestic Workers in Europe*. "International & Comparative Law Quarterly" 2013, vol. 62, no. 3, pp. 611–613; S. Daly, *op. cit.*, pp. 119–120.

61 L. Lean Lim, K. Landuyt, M. Ebisui, M. Kawar, S. Ameratunga, *op. cit.*, p. 44.

62 ILO, *Effective..., op. cit.*, p. 16.

63 ILO, *Social..., op. cit.*, p. 38.

Literature

Bonizzoni P., *Undocumented Domestic Workers in Italy: Surviving and Regularizing Strategies,* in *Irregular Migrant Domestic Workers in Europe: Who Cares?*, ed. A. Triandafyllidou, Farnham 2013.

Cholewinski R., *The Legal Status of Migrants Admitted for Employment. Committee of Experts on the Legal Status and Rights of Immigrants: A Comparative Study of Law and Practice in Selected European States*, Strasburg 2004.

Cyrus N., *Being Illegal in Europe: Strategies and Policies for Fairer Treatment of Migrant Domestic Workers*, in *Migration and Domestic Work: A European Perspective on a Global Theme*, ed. H. Lutz, London – New York 2008.

Daly S., *The Home as a Site of Work*, in *Irregular Migrant Domestic Workers in Europe: Who Cares?*, ed. A. Triandafyllidou, Farnham 2013.

Dewhurst E., *The Right of Irregular Immigrants to Back Pay: The Spectrum of Protection in International, Regional, and National Legal Systems*, in *Migrants at Work. Immigration and Vulnerability in Labour Law*, ed. C. Costello, M. Freedland, Oxford 2014.

Drzewicki K., *Prawo do pracy jako normatywny agregat międzynarodowej ochrony praw człowieka*, in *Wolność i sprawiedliwość w zatrudnieniu. Księga pamiątkowa poświęcona Prezydentowi Rzeczypospolitej Polskiej Profesorowi Lechowi Kaczyńskiemu*, ed. M. Seweryński, J. Stelina, Gdańsk 2012.

Estrada-Tanck D., *Human Security and Universal Human Rights of Undocumented Migrants: Transnational Vulnerabilities and Regional Traditions*, in *Select Proceedings of the European Society of International Law*, ed. M. J. Aznar, M. E. Footer, Oxford – Portland – Oregon 2015.

Fish J. N., *Rights across borders: policies, protections and practices for migrant domestic workers in South Africa*, in *Exploited, Undervalued – and Essential: Domestic Workers and the Realisation of their Rights*, ed. D. du Toit, Pretoria 2013.

Foti A., *Mayday Mayday: Euro flex workers time to get a move on*, 2005, http://eipcp.net/transversal/0704/foti/en [access: 28.01.2017].

Fudge J., Strauss K., *Migrants, Unfree Labour, and the Legal Construction of Domestic Servitude: Migrant Domestic Workers in the UK*, in *Migrants at Work. Immigration and Vulnerability in Labour Law*, ed. C. Costello, M. Freedland, Oxford 2014.

Godin M., *Domestic Work in Belgium: Crossing Boundaries between Informality and Formality*, in*Irregular Migrant Domestic Workers in Europe: Who Cares?*, ed. A. Triandafyllidou, Farnham 2013.

Gronowska B., *Europejska Konwencja Praw Człowieka a prawa drugiej generacji – kilka refleksji o zacieraniu granic*, "Europejski Przegląd Sądowy" 2013, no. 9.

ILO, *Effective protection for domestic workers: a guide to designing labour laws*, Geneva 2012.

ILO, *Fair migration: Setting an ILO agenda. Report of the ILO Director General to the International Labour Conference*, Geneva 2014.

ILO, *Social protection for domestic workers: Key policy trends and statistics*, paper no. 16, Geneva 2016.

Kontos M., Tibe Bonifacio G., *Introduction: Domestic and Care Work of Migrant Women and the Right to Family Life*, in *Migrant Domestic Workers and Family Life: International Perspectives*, ed. M. Kontos, G. Tibe Bonifacio, London 2015.

Lalani M., *Ending the Abuse. Policies that work to protect migrant domestic workers*, Kalayaan. Justice for migrant domestic workers, London 2011.

Latif Alnasir F.A., *Health of Migrant Workers; A Matter Of Concern*, "Middle East Journal of Family Medicine" 2015, vol. 13, no. 2.

Lean Lim L., Landuyt K., Ebisui M., Kawar M., Ameratunga S., *An Information Guide: Preventing Discrimination, Exploitation and Abuse of Women Migrant Workers*, Geneva 2003.

Lewis H., Dwyer P., Hodkinson S., Waite L., *Hyper-precarious lives: Migrants, work and forced labour in the Global North*, "Progress in Human Geography" 2015, vol. 39, no. 5.

Likić-Brborić B., Schierup C.-U., *Labour Rights as Human Rights? Trajectories in the Global Governance of Migration*, in *Migration, Precarity and Global Governance: Challenges and Opportunities for Labour*, ed. C.-U. Schierup, R. Munck, B. Likić-Brborić, A. Neergaard, Oxford 2015.

Lutz H., Palenga-Möllenbeck E., *Global care chains*, in *Routledge Handbook of Immigration and Refugee Studies*, ed. A. Triandafyllidou, London – New York 2016.

Mallender J., Gutheil M., Heetman A., Griffiths D., Carlberg M., Marangozov R., *Discrimination of migrant workers at the workplace*, European Parliament, May 2014.

Mantouvalou V., *Are Labour Rights Human Rights?*, "European Labour Law Journal" 2012, vol. 3, no. 2.

Mantouvalou V., *Organizing against Abuse and Exclusion: The Associational Rights of Undocumented Workers*, in *Migrants at Work. Immigration and Vulnerability in Labour Law*, ed. C. Costello, M. Freedland, Oxford 2014.

Maroufof M., *"With All the Cares in the World": Irregular Migrant Domestic Workers in Greece*, in *Irregular Migrant Domestic Workers in Europe: Who Cares?*, ed. A. Triandafyllidou, Farnham 2013.

Mullally S., *Migration, Gender, and the Limits of Rights*, in *Human Rights and Immigration*, ed. R. Rubio-Marín, Oxford 2014.

Murphy C., *The Enduring Vulnerability of Migrant Domestic Workers in Europe*. "International & Comparative Law Quarterly" 2013, vol. 62, no. 3.

Olivier M., Dupper O., Govindjee A., *Enhancing the Protection of Transnational Migrant Workers: a Critical Evaluation of Regulatory Techniques*, in *The Transnational Dimension of Labour Relations. A New Order in the Making?*, ed. E. Ales, I. Senatori, Turin 2013.

Ricard-Guay A., *Trafficking in human beings. 15 years after the Palermo Protocol*, in *Routledge Handbook of Immigration and Refugee Studies*, ed. A. Triandafyllidou, London – New York 2016.

Ruhs M., *The Price of Rights: Regulating International Labor Migration*, Oxford 2013.

Ryan B., Mantouvalou V., *The Labour and Social Rights of Migrants in International Law*, in*Human Rights and Immigration*, ed. R. Rubio-Marín, Oxford 2014.

Sohler K., Lévy F., *Migration Careers and Professional Trajectories of Irregular Domestic Workers in France*, in *Irregular Migrant Domestic Workers in Europe: Who Cares?*, ed. A. Triandafyllidou, Farnham 2013.

Swepston L., *The Development in International Law of Articles 23 and 24 of the Universal Declaration of Human Rights: The Labor Rights Articles*, Leiden – Boston 2014.

Triandafyllidou A., *Irregular Migration and Domestic Work in Europe: Who Cares?*, in*Irregular Migrant Domestic Workers in Europe: Who Cares?*, ed. A. Triandafyllidou, Farnham 2013.

Triandafyllidou A., Maroukis T., *Irregular Migrant Domestic Workers in Europe: Major Socioeconomic Challenges*, in *Irregular Migrant Domestic Workers in Europe: Who Cares?*, *ed.* A. Triandafyllidou, Farnham 2013.

Vogel D., *The challenge of irregular migration*, in *Routledge Handbook of Immigration and Refugee Studies*, ed. A. Triandafyllidou, London – New York 2016.

Vosko L. F., *Out of the Shadows? The Non-Binding Multilateral Framework on Migration (2006) and Prospects for Using International Labour Regulation to Forge Global Labour Market Membership* in*The Idea of Labour Law*, ed. G. Davidov, B. Langille, Oxford 2011.

Walsum S. van, *Regulating Migrant Domestic Work in the Netherlands: Opportunities and Pitfalls*, in *Irregular Migrant Domestic Workers in Europe: Who Cares?*, *ed.* A. Triandafyllidou, Farnham 2013.

Wrench J., *Discrimination against immigrants in the labour market. An overview and a typology*, in *Routledge Handbook of Immigration and Refugee Studies*, ed. A. Triandafyllidou, London – New York 2016.

Wrench J., *Diversity Management and Discrimination: Immigrants and Ethnic Minorities in the EU*, London – New York 2016.

Zou M., *Hyper-Dependence and Hyper-Precarity in Migrant Work Relations*, in *Labour And Social Rights. An Evolving Scenario. Proceedings of the Twelfth International Conference in Commemoration of Marco Biagi*, ed. T. Addabbo, W. Bromwich, T. M. Fabbri, I. Senatori, Turin 2015.

SUMMARY

Migrant Domestic Workers in Europe: the Need for a Better Protection

Migrant domestic workers are estimated at approximately 11.5 million persons worldwide. European women are being replaced in their household chores by immigrant women, e.g. from Africa, Asia and Eastern Europe. The paper focuses on human labour rights of domestic migrant workers, especially from the point of view of the typology which divides international standards concerning labour as a matter of human rights into four groups: rights relating to employment (eg. the prohibition of slavery and forced labour); rights deriving from employment (eg. the right to social security, the right to just and favourable conditions of work); rights concerning equal treatment and non-discrimination, and instrumental rights (eg. the right to organise, the right to strike). The aim of this paper is to reveal insufficient effectiveness of human labour rights according to the above-mentioned typology. Thus, the author will concentrate on the issues of modern slavery, hyper-precarity and discrimination.

Keywords: migrant domestic workers, modern slavery, hyper-precarity, discrimination

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Social Guarantees in the Case of Employees' Dismissal in Russia: Comparative Legal Aspects of Russian and Foreign Labor Law

Introduction

Recently, increasing attention has been paid to the exterritorial application of a labor rights, which is substantially connected with the activities of the multinational companies, and with the forming of transnational employment relationships.

The inclusion of Russia in the process of globalization caused the necessity of assessing and analyzing modern directions in the development of international and foreign labor rights. It is necessary to recognize that the experience in the legal regulation of wage labor that the world community has gained has a supranational value.

In this regard it is necessary to conduct complex research into: the problems of interaction between international and national labor rights; the international and national legal sources of labor rights; the problems arising in the process of implementing international labor standards in domestic labor law; and the results of their implementation in practice.

The practical significance of comparing Russian and international labor law is that this provides an opportunity to learn and make maximum use of the rich global experience in the field of labor regulation, in order to improve domestic legislation. For this purpose, it is necessary to compare Russian legislation with international labor standards and to emphasize those aspects of other countries' experience that can and should be taken into account in the process of lawmaking and law enforcement in the Russian Federation.

Social guarantees to workers in the case their employment contract being terminated

Recently in Russian labor law theory there has been much active discussion concerning issues related to the expansion of the scope of the contractual method of regulating

labor relations. Therefore, the question of liberalization, including the dismissal of employees in compliance with certain guarantees from the employer, has gained particular relevance in Russia today. In this regard, labor law theorists are increasingly turning to international labor standards and the experience of other countries in regulating labor relations.

Fundamental documents of the ILO on the termination of an employment relationship

One of the main sources for the international legal regulation of hired labor and the provision of the certain guarantees to employees upon the termination of employment relations are the acts adopted by the International Labor Organization (ILO).

In fact, international efforts have created a set of model instruments to be applied to labor relations, the creative development of which is a necessary condition for the development and improvement of the Russian system of labor law, which seeks to conform to recognized civilized standards. These instruments – hich are the object of careful study and are designed for practical use as a civilized world standard – act as a kind of international code of labor.[1]

The first fundamental document governing the termination of labor relations and establishing specific guarantees to workers is a recommendation adopted by the ILO on 26 July 1963 – No. 119 "On the termination of employment at the initiative of the entrepreneur."[2] For the first time at the international level, the act contained provisions regarding the dismissal of workers or the reduction of the number or staff of workers of the organization: "dismissal may be permitted only if it is justified by a valid reason connected with the abilities or behaviour of the employee or due to operational requirements of the enterprises, institutions or services." In addition, ILO Recommendation no. 119 introduced the concept of "reduction of the workforce" and established the rules for carrying out such a reduction, to balance the interests of employees and employers. ILO Recommendation no. 119 states that there must be a mandatory consultation with workers' representatives and that the competent authorities must be informed about the upcoming large-scale downsizing. It was also necessary to develop criteria for the selection of employees to be affected by the reduction of the workforce, and these criteria included the need to ensure the efficiency of the enterprise, and the ability, experience, skill, seniority, age, marital status, etc. of the employees. In our opinion, of particular interest is the provision permitting the re-engagement of workers who have been previ-

1 I. Kiselev, A. Lushnikov, *Labor law of Russia and foreign countries (international labor standards). Tutorial*, ed. M. Lushnikova, Moscow 2008, p. 480.

2 *The Convention and recommendations adopted by the International Labor conference*, vol. 2, Geneva 1991, p. 1381.

ously terminated on the basis of the aforementioned criteria (a similar provision is not reflected in national legislation).

It should be recognized that ILO Recommendation no. 119 was the basis for the subsequent adoption of the two basic acts regulating the termination of labor relations on an employer's initiative: the ILO Convention of 22 July 1982 no. 158 "On the termination of labor relations on the initiative of the entrepreneur",[3] and the Recommendations of 22 July 1982 no. 166[4] of the same name. The Convention contains a number of provisions that are guarantees for employees and defines the reasons for their dismissal which cannot be attributed to legitimate reasons. In ILO Recommendation no. 166 additional regulations established guarantees. This Recommendation complements the Convention and specifies its main principles. Currently, ILO Convention 158 is not ratified by Russia. However, the fact that Russia is a member of the ILO requires it to respect and implement the principles concerning fundamental rights which are the subject of non-ratified conventions. This is stated in § 2 of the ILO Declaration dated 18 June 1998 – "On fundamental principles and rights at work."[5] Meanwhile, the issue of the ratification of ILO Convention no. 158 has been raised many times and still remains open.[6]

Analysis of the current labor legislation of the Russian Federation shows that there are sufficient grounds for implementing the provisions of this Convention, making possible its ratification in the near future.

Thus, ILO Convention No. 158 fixed the basic provisions of the Recommendation of ILO No. 119 and gave them the status of an international treaty. It established a basic warranty according to which "The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service". As we can see, the term "performance standards" is replaced with the term "operational requirements," which is logical due to the fact that the latter is more objective. ILO Convention no. 158 retained the basic guarantees relating to the termination of employment for economic, technological, structural or similar reasons, by still requiring the employer to have mandatory consultations with workers' representatives (employees), and communicate with the competent authority concerning the possible dismissal of workers.

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3 ILO Convention no. 158 "On termination of labor relations", 1982; *The Convention and recommendations adopted by the International Labor conference in 2 vols*, vol. 2: *1957–1990*, Geneva 1991, pp. 1983–1989.

4 ILO Recommendation no. 166 "On termination of employment at the initiative of the entrepreneur", 1982; International Labor Organization, *Conventions and recommendations 1919–1956*, vol. 2, Geneva 1991.

5 I. Protopopova, *Implementation of the international traditions of the Russian law on the issue of dismissal of the employee by the employer*, "Taxes" 2011, no. 13, p. 26.

6 N. Lutov, *The prospects of ratification of ILO conventions by Russia*, "Labor Law" 2010, no. 2, p. 94.

ILO Recommendation no. 166, the successor to ILO Recommendation no. 119 and a complement to ILO Convention no. 158, provides special safeguards to workers, in the form of additional measures to prevent the termination of employment relations or reducing the workforce. The recommendation suggests that the reduction in the number of employees must be gradual and this must take place over a certain (long) period of time. This contributes to natural redundancies, the transfer of employees within the enterprise, training and retraining, voluntary retirement before reaching pension age with the relevant provision of income, the restriction of overtime and the reduction of normal hours of work. Moreover, ILO Recommendation no. 166 provides a number of measures aimed at mitigating the consequences of employment termination, e.g. helping the workers affected find suitable alternative employment as soon as possible with vocational training or retraining, and providing some compensation for incurred expenditure in the search of a new job.

The analysis of these regulatory acts leads to the conclusion that, in the Conventions and Recommendations of the ILO, the dismissal of employees for economic, technological, structural or similar reasons are regarded as atypical situations in the enterprise, which are caused by objective reasons and problems of an essentially economic nature. Since dismissal is not connected with the misconduct of employees, it inevitably infringes on the rights of the employee, therefore international legal regulation is aimed firstly at avoiding such situations and secondly at minimizing the adverse effects of such dismissals and the establishment of certain guarantees for dismissed employees.

It should also be noted that the legal regulation of individual dismissals is almost entirely absent in the Russian Federation. Meanwhile, in some other countries this procedure is regulated in detail in their legislation, which contains a number of provisions that primarily take into account the interests of the employees being dismissed. In these cases, the development of the national legislation of these countries is based on the procedural norms contained in ILO Recommendation no. 166 (Articles 7 to 13).

Prevention term

In many other countries, employees may only be dismissed with a warning of dismissal, and they get a salary for the entire period of notice. The exception to this rule is dismissal for gross misconduct committed by the employee. A warning of dismissal from the employer is a guarantee that the dismissal does not catch employees by surprise and give them an opportunity to find new job employment.

Normally the minimum period of notice the employer has to give is set by law, but it can be increased in collective bargaining or in an employment contract. In several countries specified in the act, the notice period applies only if there is no agreement between the parties, as the parties may agree on any duration of the period.

As a rule, the duration of the notice period in other countries depends on the seniority, the retirement age, and the schedule of wage payment. In some cases it is set by the agreement of the parties within the established minimum and maximum. Typically, such a period of notice for workers ranges from 1 week to 3 months, and for officials from 2 weeks to 6 months. For managers it can sometimes be up to 12 months or more.[7] The employer gives the employee a warning about the dismissal, and must pay employees not just wages for the period of notice, but must also reimburse them for certain losses (damages) incurred in connection with their dismissal.

In current Russian legislation (with rare exceptions) there is no requirement to warn employees about their dismissal by the employer. It should be recognized that the absence of such guarantees are not only at odds with international practice, but also violates international labor standards, for example, Article 11 of ILO Convention no. 158 and clause 4, Article 4 of the European social Charter.[8]

Release from work

In other countries there is a norm which guarantees workers who are to be made redundant a mandatory exemption from work for a certain time within the notice period in order that they may seek other work. This time when employees are absent from work for the purpose of seeking a new job must be paid for by the employer. This guarantee is reflected in such international instruments as ILO Recommendation no. 166.

It should be noted that in ILO Recommendation no. 166 it is recommended that the employer give priority to rehiring workers whose employment was terminated for reasons of economic, technological, structural or similar nature if the enterprise is again hiring suitably qualified staff.

Previously, section 2 of Article 34 of the Labor code of the Russian Federation[9] stated that comparable qualifications and labor productivity established preferential rights for employees with long experience of continuous work at the enterprise, institution or organization to remain at work during staff reductions. It seems that long experience of continuous work for a given employer has an impact on quality and productivity. It would therefore be desirable to supplement part 2 of Article 179 of the labor Code of Russian Federation with the condition that provides that right for such workers to be given priority when selecting staff who will remain in employment during reduction.

In several European countries, when some employees are subject to dismissal there is an agreement concerning assistance in finding new employment. The parties to the

7 I. Kiselev, *Labor law of Russia and foreign countries*, Moscow 2005, p. 357.

8 European social Charter (revised), ETS no. 164. Was adopted on 3 may 1996, Strasbourg.

9 The code of laws on labor of the Russian Federation of 9 December 1971 (repealed)

agreement are the employee, the employer and a private employment agency. The employer undertakes (guarantees) to pay the agency to find work for the employee, while the employee consents to the agency searching on their behalf, and undertakes not to refuse a suitable job. The agency also undertakes to find a job that will be suitable. Such an agreement remains in force for a certain period of time. After the agreement expires, however, employees may be dismissed by the employer, regardless of whether they found employment through the agency or the search for employment was not successful.

In some countries it is possible to avoid mass layoffs by implementing 'temporary layoffs.' In these situations workers are sent on a partially paid leave of absence for an indefinite period (which is paid for by the employer and national insurance funds). The employer uses such temporary layoffs to restructure production and to prevent a sudden increase in unemployment, and at the same time never actually terminating the employment relationship with employees.

The laws of Luxembourg also seek to reduce the effects of being made redundant. During the notice period for dismissal, employees have the right to request that the employer give them time off work to search for a new job. However, the duration of such leave may not exceed 6 working days.

In France, the employer pays (usually for a period of one year) a certain amount towards state unemployment benefits to persons dismissed due to staff reduction.

Unfortunately, Russian legislation does not provide employees with a guarantee of free days or even hours for the purpose of finding a new job within two months of the notice period. Therefore, if an employee unilaterally does not come to work on any of the days of the notice period and explains their absence as being due to the search for work, the jurisprudence views this as absence without leave.

However, individual organizations that recognize a local normative act or a collective agreement may allow their employees the right to free (paid or unpaid) days during the notice period for the purpose of searching for a new job and subsequent employment.

Dismissal wage

ILO Convention no. 158 provides that the amount of severance benefits paid by an employer to an employee should depend on the level of wages for that employer, and, in certain cases, on the age of the employee.

Recently, severance benefits, which are considered as a form of "deferred" wages, have become increasingly common in some countries. The amount of the severance benefit depends primarily on the length of service, and is awarded not only to employees dismissed by the employer but also to employees terminating the employment relationship on their own initiative

The usual allowance in these countries is equal to a monthly salary for each year of service with that employer. However, the payment of such benefits does not deprive workers of the right to claim unemployment benefits.

Russian legislation guarantees that payment of severance pay will be paid to employees upon termination in certain cases. Article 178 of the Labor Code lists the conditions requiring payment of a dismissal allowance when an employment contract is terminated due to liquidation or termination (see also clause 1 and 2 of Article 81, § 7 to 9 of Article 77, clause 1, 2 and 5 of Article 83 of the LC RF), and this article also determines the indemnity (from two-week's earnings to the average monthly salary, depending on the reason for dismissal).

The employer's obligation to pay severance pay of the amount not lower than three of the employee's average monthly salaries is also provided by Article 181 of the Labor Code if the employment contracts of the head of the organization, his deputies and the chief accountant are cancelled, due to a change in the ownership of the organization (clause 4 of Article 81 of the LC RF).

Part 4 of Article 178 of the labor code stipulates that an employment or collective agreement may stipulate other cases of indemnity other than money (except for Article 178 of the LC RF). Thus, the legislation allows the contractual method to establish the obligation of the employer to pay the employee severance pay.

The peremptory norms of Article 178 of the LC RF stipulate the right to a dismissal wage following the termination of an employment contract. Therefore, no other circumstances can deprive the employee of the right to receive the statutory severance pay or limit it.

Following the dismissal of an employee, the amount of severance pay is determined based on the average earnings of the employee for a certain period. The labor code establishes a single procedure for calculating the size of the average wage (Article 139 LC RF).

With certain categories of employees, severance pay is not provided by the Labor Code of Russian Federation or other federal laws (the law regulating the relations in the sphere of public service can be included among such laws).

It should be recognized that in Russia employers make very small severance payments on their own initiative to employees after their dismissal. For an example and comparison we can look at the size of severance payments following dismissal in other countries.

For example, in Hungary the amount of severance pay is equal to from 1 to 6 monthly salaries, depending on seniority. While in Austria it is from 1 to 12 monthly wages, depending on seniority. In Spain the severance pay is 45 days of monthly earnings for each year of service in the enterprise, up to a maximum of 18-months salary.[10] This practice of paying severance pay to workers depending on their years of experience is established

10 I. Kiselev, *Comparative and international labor law*, Moscow 1999, p. 160.

in many countries and meets the requirements of international standards. Consequently, ILO Convention no. 158 provides that the amount of severance payments should depend on seniority, which is perfectly logical. However, this regulation still has not been implemented in the Russian legislation.

It appears that it is desirable to expand the situations in which Russian employers are required to provide severance pay to workers, and most importantly to increase the amount. The amount of the severance pay must be differentiated depending on the employee's length of service for their employer and the employee's age, as well as on the causes and circumstances of dismissal.

However, such differentiation (the length of service and age) should not be considered as violating the principle of equality and justice. It needs to be considered from the point of view of the worker being able to compete on the job market, since age can be an obstacle to subsequent employment with another employer.

Suspension of employment contract

In accordance with no. 1, Article 83 of the Labor Code of Russia, an employer terminates the employment contract if an employee is called for military service or the employee is required to perform alternative civic duties. However, such a rule is contrary to Article 5 (n. "B") of the ILO Recommendation no. 166, which provides that absence from work due to compulsory military service or the requirement to perform other civic duties cannot be a valid ground for dismissal. It should be noted that in many countries, compulsory military service or alternative civilian service does not constitute the end of an employment contract, but merely its suspension.[11] In order to perform various public functions (including military service) employees may also be granted leave without pay. The suspension of labor contracts is provided for in the labor law in many countries, and it involves the release of an employee from the obligation to perform work functions, while simultaneously maintaining the employment relationship.

Laws or collective agreements provide for the possibility of suspending employment at a specific time, on a variety of grounds. Such reasons may include: the mutual agreement of the parties of the labor contract; the fault of an employer (for example, downtime which is no fault of the employee); extraordinary events (force majeure), employee illness or disability, an accident at work, military service; vacation time, study, maternity leave and so on; temporary dismissal on various grounds (for example, production cuts), the removal of an employee from work for misconduct; election of the employee as

11 It should be noted that in the Russian legislation and national labor law theory does not pay much attention to such important legal construction like the suspension of the employment contract. It seems that for the development of this issue Russian legislator may use a wealth of international experience.

a member of parliament or for another elective office; the involvement of a worker in trade union in the enterprise; a strike in the enterprise; finally, an employee being in custody as a result of a criminal case (before sentencing) and others.

In each case, the law or other normative legal act defines the preservation of (full or partial) wages, or the termination of payment, in the period during which the employment contract is suspended. If the payment of wages is terminated, the employee usually receives benefits from social insurance funds.

In most countries, the employer pays fully for downtime caused through fault of their own and, as a rule, the employees' leave during this period. In the case of suspension from work as a result of extraordinary events, wages are not paid at all or are only paid for a short time. For military service and other similar obligations, employees are usually granted leave without pay.

In Japan, the suspension of employment contracts is governed by collective agreements and internal labor regulations. These usually indicate a period during which the employment contract is suspended - the employment contract remains in force, but the employee is not obliged to work and the employer is fully or partially exempt from the obligation to pay the employee wages. Typically, an employment contract is suspended in the following cases:

- as a form of punishment of the employee;
- if the employee is accused of a felony, and the court has not yet chosen the punishment. In such cases, the payment of wages to the employee is reduced depending on the situation.

> An employment contract is also suspended if the employee is on leave due to illness, if an employee becomes a full-time union official, or attends to full-time training. The amount of wages to be paid in these cases is determined by the employer, but cannot be less than the amount prescribed by law. If the employment contract is suspended for reasons that depend only on the employer, the employees' wages cannot be lower than 60% of the average size of their salary.[12]

Russian legislation also allows employment to be suspended, but only for specific categories of workers. So, for example, in situations where the employer is unable to ensure the participation of an athlete in sport competitions, it is permitted by agreement that the athlete can, with written consent, be temporarily transferred to another employer for a period not exceeding one year (Article 348.4 of Labor Code of Russia). For the period of the temporary transfer, the original signed employment contract is suspended,

12 http://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158904/lang--en/index.htm [access: 20.09.2016].

in other words the parties suspend the implementation of the rights and obligations established by labor legislation and other regulatory legal acts. At the same time, the terms of the original employment contract are not interrupted.

For the period of the temporary transfer to the new employer, the new employer concludes a fixed-term employment contract with the athlete containing the conditions and safeguards established by labor legislation. In fact, such a transfer cannot change the working conditions of the athlete: only the employer changes. At the same time, improvement in the athlete's conditions compared with the original labor contract is allowed.

In practice, the conclusion of a temporary employment contract usually requires only the written consent of the athlete and his employers at the main place of work and the place of temporary work. At the same time, the employer at the main place of work sometimes does not even need to prove that he cannot provide "participation in sports" for their employee (athlete). However, it should be noted that the absence of such circumstances as a reason for the temporary transfer of the athlete is contrary to the order of the transfer (Article 348.4 of Labor Code of Russia).

The employer at the place of temporary work has no right to transfer the temporarily transferred athlete to another employer, even with the consent of all parties concerned.

A temporary employment contract may be terminated for any reason specified in the labor legislation. In the event of the early termination of a temporary contract, the original labor contract becomes effective again in full on the next working day after the calendar date, and from this day the temporary employment contract will be terminated.

If a temporary contract period has expired, and none of the parties has demanded its termination, the original labor contracts cease to have effect. The employment contract concluded for a period of temporary transfer is extended for a period determined by agreement between the parties, and in the absence of such an agreement - for an indefinite period (n. 7, Article 348.4 of Labor Code of Russia).

However, the legislation does not indicate on what grounds the employment contract with the athlete should be discontinued. As is known, the termination of an employment contract is possible only on the grounds specified the Labor Code or other federal laws. In our opinion, in this case the termination of previously concluded employment contract with the athlete is only possible with the agreement of the parties, and on the initiative of the athlete in the manner prescribed by law.

Reduction of normal working hours

I would like to draw attention to one of the guarantees established in Article 22 ILO Recommendation no. 166, which allows the possibility of a temporary reduction of working hours, if this would prevent mass layoffs. This recommendation draws attention

to the need for partial reimbursement by the employer of the lost wages incurred by the employee for hours not worked compared to the normal workweek.

It must be admitted that Russian legislation covers this in n. 5, Article 74 of the Labor Code of Russia implemented Article 22 ILO Recommendation no. 166, but only in terms of the possibility of a temporary (six months) reduction of normal working hours. This opportunity is available to the employer when the issues related to organizational and technological changes in working conditions can lead to the mass dismissal of employees. However, the need for partial compensation of losses to the employee for hours not worked was ignored by the Russian legislator.

Financial compensation

Attention should also be paid to international experience in addressing labor disputes. Compared to Russia, the courts of other countries make fewer decisions to reinstate workers in their previous posts, tending more often to award workers whose rights have been violated with compensation. Compensation for wrongful dismissal in other countries has increased substantially, and the amounts are large in cases which concern long seniority, elderly workers[13] or dismissal based on discrimination. Thus, in Sweden the amount of compensation to the employee for wrongful dismissal (depending on the length of service and age) is from 6 to 48-months salary.[14]

Sometimes employees appeal to the court, on the basis that their personal relationship with the employer is hopelessly corrupt, and the latter is still looking for a reason to get rid of them.[15] In such cases, monetary compensation would be more in line with protecting the interests of the employee (depending on the severity of the violation of the worker's rights).

In fairness, it should be noted that the first step in this direction is the norm of Article 394 of the Labor Code of Russia. According to this article, the body considering the individual labor dispute at the request of the employee cannot restore the employee to their previous work if the dismissal was illegal, and the body has to restrict itself to awarding compensation to the employee.

Replacing the employer in an employment contract

Changes in an employment contract may relate to the employer. The labor law prohibits the replacement of the employee in the employment contract because labor relations

13 The chance of a real possibility to get a new job, for example, for people after 45–50 years, especially for a permanent job, in many foreign countries is close to zero.

14 I. Kiselev, *Comparative labor law*, *op. cit.*, p. 144.

15 B. Korabelnikov, *Labor relations in joint-stock companies*, Moscow 2001, p. 95.

are strictly personal in nature. However, in accordance with Art. 75 of the Labor Code of Russia it is permissible under certain circumstances to replace the employee in an employment contract.

It should also be noted that the Russian legislature has provided in the Labor Code of Russia, in some cases, a specific opportunity for an employer to terminate the employment contract with an employee unilaterally, without giving any reasons for dismissal, for example the head of the organization or individual employees, in the event of a change of ownership of the property of the organization.

It should be recognized that with today's dynamic economy, enterprise restructuring, changes of ownership, and various changes in the legal status of employers – this is quite a common phenomenon. Therefore, these kinds of changes affect a large number of workers.[16]

I would like to note that, at the present time, in the labor law of the European Union problems connected with the protection of the rights of employees during the transfer of the ownership of a business occupy and important position. With regard to this issue, the European Union adopted Directive number 2001/23/EC "On the transfer of businesses."[17] The main purpose of the Directive - the preservation of the prior rights and responsibilities of employees during the transfer of ownership of a business or its parts to a new purchaser (employer). The directive focuses on regulating the rights arising from labor relations in accordance with collective agreements. In the event of a change in ownership, the working conditions agreed in any previous collective agreement continue to apply. They cannot be changed until the adoption of a new collective agreement in the prescribed manner. Termination of the employment contract in connection with the transfer of ownership of a business from one owner to another is considered invalid.

The period during which employees can contest their rights violated by the employer may not exceed one year.

If the transfer of the ownership of a business from one owner to another leads to a substantial change in working conditions, the employer is considered responsible for terminating the contract and the employee shall be paid monetary compensation or the employee receives the right to purchase insurance against unemployment.

Extensive jurisprudence of the European Court of Justice[18] is devoted to the issues concerning the application of this Directive in European countries.

On the basis of the Directive "On the transfer of a business" European countries have adopted legislation implementing the provisions of this Directive at the national level.

16 The Russian Federation owns a large number of federal state unitary enterprises. Nowadays, there is also active process of privatization of these objects. Because of that we can only guess how many Russian workers may face various problems in the process of privatization.

17 ABI, 2001, L82/16.

18 Also known as the Court of Justice of the European Communities (established in 1958).

What are the basic guarantees provided to employees if a business changes ownership under Russian law (Article 75 of the Labor Code of Russia)?

Legislation concerning the transfer of ownership of a business focuses on, in particular:

- During the privatization of state or municipal property. The alienation of property owned by the Russian Federation, its constituent entities, municipalities, property of individuals or legal entities;
- When accessing the property owned by the organization, in public ownership;
- The transfer of public enterprises to the municipal property and vice versa;
- The transfer of a federal state enterprise to the ownership of the subject of the Russian Federation and *vice versa*.[19]

Thus, the content of Article 75 of the Labor Code of Russia applies to a fairly narrow range of circumstances which enables us to describe there being a real transfer of the ownership a business. In order to talk about a transfer of the ownership of a business, it is necessary to identify the specific organizational and legal form of the legal entity and the constitution of its property.[20]

It should be borne in mind that a joint stock company established through the transformation of a state unitary enterprise, in accordance with the legislation on privatization, after its state registration in the Unified State Register of Legal Entities, becomes an owner as a successor of the owner of the property included in the privatization plan, or transfer Act.[21]

With regard to the employees of the organization, they cannot be dismissed due to a transfer of ownership. This is expressly provided for in n. 2 Article 75 of the Labor Code of Russia, which found that the transfer of the ownership of a business is not grounds for terminating employment contracts. Exceptions to this rule are only the heads of the organization, their deputies and the chief accountant. Labor relations with other workers continue under the new owner. The previous employment contract is not terminated under these circumstances, a new labor agreement is not concluded, and all the conditions set out by the previous contract are to be performed. Thus no additional employment paperwork is required.

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19 V. p. 32 Resolution of the Plenum of the Supreme Court N.2 from 17.03.2004 "On application by the courts of the Labor Code of the Russian Federation" (Bulletin of the Supreme Court of the Russian Federation) 2004, no. 6.

20 V. G. Soifer, O.B. Zheltov, *Problems termination of employment with the change of ownership of the organization*, "Employment Law" 2003, no. 11, p. 24.

21 V. p. 11 Resolution of the Plenum of the Supreme Court of the Russian Federation no. 10, Resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation no. 22 from 29 April 2010 "On some issues arising in judicial practice in the resolution of disputes relating to the protection of property rights and other proprietary rights", "Bulletin of the Supreme Court of the Russian Federation" July 2010, no. 7.

Terminating the employment contracts with the heads of organizations, their deputies and chief accountants can be carried out by new owners within three months of their becoming owners. If during this period these workers have not been dismissed on this ground, then the new owner (employer) may terminate the employment contracts with them only in general terms.

Conclusions

It can be noted that Russian labor law has at its disposal a rather large array of international legal instruments containing the fundamental principles and norms intended to provide the legal regulation of labor and associated relations in Russia. These rules and principles in accordance with Article 15 of the Constitution and Article 10 of the Labor Code of Russia have legal supremacy over the Russian legal system and should be applied directly.

However, it should be recognized that current Russian legislation (with some exceptions) does not provide for the obligatory warning of employee dismissal. It is not only at odds with international practice, but also violates international labor standards, such as Article 11 ILO Convention no. 158 and n. 4 of Article 4 of the European Social Charter.[22]

The role given to severance pay in Russian legislation is insignificant, and the amounts are small. It seems that analysis of international experience and practice should encourage the Russian legislature to reform this area, as such a guarantee for the worker as financial compensation in the case of dismissal is important, and most importantly will increase its size and importance.

It is necessary to expand the number applications for employee severance pay and tie the amount to the length of service. It appears that the size of the severance pay must also be differentiated, depending on the cause and circumstances of the dismissal.

ILO Recommendation no. 166, admits the possibility of a temporary reduction of employee's working hours if that will prevent mass layoffs. At the same time, ILO Recommendation no. 166 (v. 22) draws attention to the need for partial reimbursement for the lost wages incurred by the employee due to reduced working hours compared to the normal workweek. It seems that such compensation should be established under Russian labor law for Russian employees too.

It is worth noting that n. 6 Article 74 of the Labor Code of Russia is in conflict with Article 19 ILO Recommendation no. 18223, which provides that an employee's refusal

22 European Social Charter (revised). It was adopted on 3 May 1996 in Strasbourg, "Bulletin of International Agreements" 2010, no. 4.

23 ILO Recommendation no. 182 from 24 June 1994, "On the work part-time."

to work normally (i.e. for the complete duration of the working week), after switching to part-time work cannot serve as the basis for subsequent dismissal.

Literature

Kiselev I., *Comparative and international labor law*, Moscow 1999.

Kiselev I., *Labor law in Russia and foreign countries*, Moscow 2005.

Kiselev I., Lushnikov A., *Labor law in Russia and foreign countries (international labor standards),* ed. M. Lushnikova, Moscow 2008.

Korabelnikov B., *Labor relations in joint-stock companies*, Moscow 2001.

Lutov N., *Prospects Russia's ratification of ILO conventions*, "Employment Law" 2010, no. 2.

Protopopova I., *Implementation of international traditions in the Russian labor legislation on dismissal of an employee by the employer*, "Taxes" 2011, no. 13.

Soifer V., Zheltov O., *Problems termination of employment with the change of ownership of the organization*, "Labor Law" 2003, no. 11.

SUMMARY

Social Guarantees in the Case of Employees' Dismissal in Russia Comparative Legal Aspects of Russian and Foreign Labor Law

The main purpose of the article is to identify the contradictions and problems arising when both international labor standards and Russian labor law are applied and separate guarantees to workers are provided in the case of their dismissal. The object of the research is the employment relationship which arises between the employer and the employee when social guarantees are given to the workers when the employment relations are terminated. This article considers the regulations of Russian and foreign labor law which provide workers with certain guarantees if the employment contract is terminated at the initiative of the employer. For the first time, these guarantees are considered from a comparative legal perspective. Specific recommendations about improvement of the Russian labor law and its enforcement.

Keywords: guarantees, privileges, benefits, denunciation of the labor contract, dismissal pays, severance pays

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The Development of the Russian Legal System after the "Accession" of the Republic of Crimea to the Russian Federation

Introduction

On 18 March 2014, the Agreement between the Russian Federation and the Republic of Crimea on the Accession of the Republic of Crimea to the Russian Federation and on Forming New Constituent Entities within the Russian Federation was signed.[1] Almost all other countries and international organizations described this step as illegal annexation.[2] Regardless of how this situation is treated by international law, we are faced with a *fait accompli* and the word "accession" will be used in this article. The Republic of Crimea became a federal subject of the Russian Federation and Russian law will govern all its legal relations.

Therefore, the Ukrainian legal system that governed in Crimea had to be replaced by the Russian one. So, after the "accession" Ukrainian law ceased to apply. The main transition period was set by the Russian Federation, with the end on 1 January 2015. Until that date, the normative legal acts adopted by the Autonomous Republic of Crimea and by Sevastopol, a city with special status, were binding in the Republic of Crimea, unless they were contrary to the Constitution of the Russian Federation. Russian laws and normative legal acts were also applicable in that period.

The main aim of this article is to analyse how legal regulations worked during the transition period. Changes in the law directly influenced the residents of the territory of the Republic of Crimea, who found themselves to be in a situation that can be described as a 'legal vacuum.' The Ukrainian and Russian legal systems grew out of Soviet legisla-

1 Dogovor mezhdu Rossiiskoi Federatsiei i Respublikoi Krym o prinyatii w Rossiiskuyu Federatsiyu Respubliki Krym i obrazovanii v sostave Rossiiskoi Federatsii novykh sub'ektov (podpisan v g. Moskve 18.03.2014), http://www.garant.ru/hotlaw/federal/531718/ [access: 16.02.2017].

2 P. Grzebyk, *Aneksja Krymu przez Rosję w świetle prawa międzynarodowego*, "Sprawy Międzynarodowe" 2014, no. 1, pp. 19–37; J. Kranz, *Kilka uwag na tle aneksji Krymu przez Rosję*, "Państwo i Prawo" 2014, no. 8, pp. 23–40.

tion. Nevertheless, during the independent development of the two countries, both legal systems accumulated some differences in the approaches to various legal institutions. Residents of Crimea nowadays have to conclude legal transactions that under a legal system which is unfamiliar to them. In addition, the transition period was characterised by the fact that the law was created on a day-to-day basis, which means that legal certainty became merely imaginary, while legal certainty in the contemporary world has become one of the basic requirements for the whole of society and the individuals' quality of life.[3]

The article starts with an analysis of the legal background to the accession of Crimea to the Russian Federation, then examines whether the accession documents are in accordance with Russian law. The Russian legal system includes laws which define the procedures for the admission of other states to the Russian Federation. Analysis of the accession documents and Russian laws indicates that during the Crimean accession events were artificially created in an attempt to ensure their compliance with Russian legislation. The next part of the article describes changes in Russian civil law, criminal law, commercial law and tax law. The main transition period was set to end on 1 January 2015 by the Russian legislator. During its implementation, however, it became clear that this was not sufficient, and in some fields it was prolonged. In some fields the new legislation turned out to be more favorable, while in some regulations were more stringent for Crimean residents than the Ukrainian ones. The third part of the article will provide an analysis of changes in the Judiciary within the transition period. This was the most problematic issue for the Crimean residents. The lack of qualified lawyers was the biggest challenge. The last part of the article provides a summary and offers conclusions

The accession of the Republic of Crimea to the Russian Federation

The legal background to the accession

On 17 March 2014, the Republic of the Crimea proclaimed itself an independent and sovereign state, with Sevastopol as a city with special status.[4] That decision was taken on the basis of the results of the Crimean referendum and the Declaration of Independence of Crimea. On 6 March 2014, the Presidium of the Supreme Council of Crimea adopted Resolution nr 1702-6/14 "On holding the Crimean referendum."[5] According to this document, the referendum would be held on 16 March 2014. There were two choices offered:

3 Cf. M. Wojciechowski, *Pewność prawa*, Gdańsk 2014.

4 Postanovlenie Verkhovnoi Rady Respubliki Krym 'O nezavisimosti Kryma,' "Sbornik normativno-pravovykh aktov Respubliki Krym" 2014, no. 3, part 1, pp. 64–65.

5 Postanovlenie Verkhovnoi Rady ARK 'O provedenii obshchekrymskogo referenduma,' *ibidem*, pp. 11–12.

1. Do you support the reunification of Crimea with Russia with all the rights of the federal subject of the Russian Federation?
2. Do you support the restoration of the Constitution of the Republic of Crimea in 1992 and the status of Crimea as part of Ukraine?

On 17 March the official results of the referendum were published. 1,274,096 people who were entitled to vote in the referendum took part (83.10%). 1,233,002 people answered the first question positively (96.77%), while 31,997 answered the second question affirmatively (2.51%).

Just before the referendum, on 11 March, the Supreme Council of Crimea and the Sevastopol City Council adopted the "Declaration on the independence of the Autonomous Republic of Crimea and the city of Sevastopol."[6] In accordance with the provisions of this document, if a decision to become part of Russia was made in the Referendum of 16 March 2014, Crimea, including the Autonomous Republic of Crimea and the city of Sevastopol, would be proclaimed an independent and sovereign state with a republican order. After the referendum results were announced, the Supreme Council of Crimea adopted the resolution 'On the independence of Crimea.' In that document Crimea was proclaimed an independent sovereign state as the Republic of Crimea, and the city of Sevastopol was given a special status within it. At the same time, the Supreme Council of the Autonomous Republic of Crimea on behalf of the Republic of Crimea requested that the Russian Federation accept the Republic of Crimea as a new constituent entity of the Russian Federation with the status of a republic.

On the same day, 17 March, the President of the Russian Federation signed the executive order on the recognition of the Republic of Crimea as a sovereign and independent state.[7] The next day, President Putin notified the Federation Council of the Federal Assembly, the State Duma of the Federal Assembly and the Government, of proposals by the State Council of the Republic of Crimea – the Parliament of the Republic of Crimea and the Legislative Assembly of the city of Sevastopol regarding the accession of the Republic of Crimea, including the city of Sevastopol, to the Russian Federation and the formation of new constituent territories within the Russian Federation. Such action was taken pursuant to Article 6 of the Federal Constitutional Law "On the Procedure of Admission to the Russian Federation and the Formation Within It of New Constituent Territories."[8] Additonally, on 18 March 2014 the Agreement between the Russian Federation and the Republic of Crimea on the Accession of the Republic of

6 Deklaratsiya nezavisimosti Avtonomnoi Respubliki Krym i goroda Sevastopolya, *ibidem*, pp. 185–186.

7 Ukaz Prezidenta Rossiiskoi Federatsii ot 17 marta 2014 g. N 147 'O priznanii Respubliki Krym,' http://base.garant.ru/70613384/ [access: 16.02.2017].

8 Federalnyi konstitutsionnyi zakon Rossiiskoi Federatsii ot 17.12.2001, no. 6-FKZ 'O poryadke prinyatiya v Rossiiskuyu Federatsiyu i obrazovaniya v ee sostave novogo sub'ekta Rossiiskoi Federatsii,' http://base.garant.ru/184002/ [access: 16.02.2017].

Crimea to the Russian Federation and on Forming New Constituent Entities within the Russian Federation (Agreement) was signed by the President of the Russian Federation, the Chairman of the State Council of the Republic of Crimea, the Prime Minister of the Republic of Crimea and the Chairman of the Coordinating Council for the establishment of the Sevastopol municipal administration. According to the Agreement, the Republic of Crimea is considered to have acceded to the Russian Federation from the date of the Agreement's signing. Beginning on the day that the Republic of Crimea acceded to the Russian Federation, two new constituent entities were formed within the Russian Federation: the Republic of Crimea and the Federal City of Sevastopol. This document included provisions concerning the "accession" of the Republic of Crimea to the Russian Federation and the formation of new constituent entities within the Russian Federation, including provisions regarding the territories of the new Russian constituent entities, their residents' citizenship, and the constituent entities' government bodies. The Agreement was applied provisionally from the date of signature and had to enter into force on the date of ratification.

The State Duma and the Federation Council ratified the Agreement on 20 and 21 March, respectively. The Federal Constitutional Law "On Accession to the Russian Federation the Republic of Crimea and Establishing within the Russian Federation new constituent entities of the Republic of Crimea and the City of Federal Importance Sevastopol" (FCL) was also adopted.[9] President Putin immediately signed both documents: FCL and the Federal Law "On Ratifying the Agreement between the Russian Federation and the Republic of Crimea on the Accession of the Republic of Crimea in the Russian Federation and on Forming New Constituent Entities within the Russian Federation."[10] According to Article 3 of the FCL, Crimea's admission to the Russian Federation was considered retroactive, as of 18 March.

The unprecedented speed of the adoption and implementation of the decisions concerning this issue must be noted. On 6 March 2014 the decision was taken by the Crimean authorities regarding the referendum that would be held on 16 March 2014, and on 21 March the Russian parliament concluded the process of Crimea's accession to the Russian Federation. No one doubted the outcome of the Crimean referendum, which was also swiftly announced the very next day – 17 March. But the rapid pace of the accession of Crimea and Sevastopol to the Russian Federation was even more

9 Federalnyi konstitutsionnyi zakon ot 21.03.2014, no. 6-FKZ 'O prinyatii v Rossiiskuyu Federatsiyu Respubliki Krym i obrazovanii v sostave Rossiiskoi Federatsii novykh sub'ektov – Respubliki Krym i goroda federalnogo znacheniya Sevastopolya,' http://base.garant.ru/184002/ [access: 16.02.2017].

10 Federalnyi zakon ot 21.03.2014, no. 36-FZ 'O ratifikatsii Dogovora mezhdu Rossiiskoj Federatsiei i Respublikoi Krym i obrazovanii v sostave Rossiiskoi Federatsii novykh sub'ektov,' http://base.garant.ru/70618344/ [access: 16.02.2017].

amazing: the State Duma and the Federation Council both took their decisions within 2 days. This was truly breakneck speed for such a significant act, one which changed the borders of two countries. It seems that members of the Russian parliament simply followed the motto "why we should discuss, if we agree with everything." The whole situation was summed up by senator Lyskov at the meeting of the Federation Council which was dedicated to President Putin's request to use military force in Ukraine: "[...] we are wasting the president's time."[11]

Accession and Russian law

Russian legislation provides clauses for the incorporation of a foreign state or part of one into the Russian Federation. Such a possibility is foreseen under Art. 65 of the Constitution of the Russian Federation and the federal law enacted pursuant to the Constitution "On the Procedure of Admission to the Russian Federation and the Formation Within It of New Constituent Territories". Although that law had been in existence for a long time (from 2001), it had never been used previously.[12]

According to Article 4.2 of the law, "The admission to the Russian Federation as a new entity of a foreign country or its part is carried out by mutual agreement of the Russian Federation and of the foreign state in accordance with international agreement on the admission to the Russian Federation as a new entity of a foreign country or its part [...], signed by the Russian Federation with the foreign country."

The law also provides the following procedure for the admission of the new entity to the Russian Federation: the foreign state takes the initiative for accession to the Russian Federation of the foreign state or its part; the President of the Russian Federation notifies the State Duma and the Federation Council about this initiative; the Russian Federation and a foreign country sign an international agreement; following the signing of such an agreement the President of the Russian Federation appeals to the Constitutional Court with a request to verify the compliance of the agreement with the Constitution of the Russian Federation; and if the Constitutional Court confirms the compliance, the agreement in question is submitted to the Federal Assembly for ratification, together with a draft federal constitutional law on the admission to the Russian Federation of the new entity.

Following the above description, the actions taken by the Russian authorities were, at least formally, compliant with the federal legislation in question. After the agreement was signed, the President of the Russian Federation sent the requisite request to the Constitutional Court. The Court issued its decision on 19 March, in which it recognised

11 *Stenograma trista sorok sed'mogo (vneocherednogo) zasedaniya Soveta Federatsii 1 marta 2014 goda*, Federalnoe Sobranie Rossiiskoi Federatsii, Iskh. St-347 ot 0103.2014, Moskva, p. 26.

12 P. Romashov, *Poryadok prinyatiya v sostav Rossiiskoi Federatsii novogo sub'ekta RF*, "Probely v rossiiskom zakonodatelstve" 2014, no. 2, p. 26.

the Agreement between the Russian Federation and the Republic of Crimea as compliant with the Constitution of the Russian Federation. The Court stated that it only decided on questions of law and did not assess the political advisability of an international treaty of the Russian Federation. So from the legal and formal point of view of the Russian Federation, the accession of Crimea to the Russian Federation was in accordance with Russian law.

However, several questions arise that cannot be overlooked here. First, the Russian President signed the executive order on the recognition of the Republic of Crimea as a sovereign and independent state, referring to the outcome of the referendum. But according to the results of this referendum, Crimea should be part of Russia, which is incompatible with the status of a "sovereign and independent state." The issue of state independence was not even put to a vote during the Crimean referendum. Second, the Constitutional Court's decision was taken immediately, without public debate and hearing other views. Such proceedings were even criticised by Russian lawyers. According to a former employee of the Constitutional Court, professor Kryazhkov, "consideration of the case took place in a procedure unknown to the Law on Constitutional Court of the Russian Federation."[13]

Furthermore, as was mentioned above, according to Russian law a foreign state takes the initiative for accession to the Russian Federation and this particular foreign state has to sign an accession agreement. Therefore, in order to comply with this order, and with Crimea being an integral part of the state of Ukraine, an initiative of this foreign state, i.e. an initiative by Ukraine, would be required. However, the Russian Federation sticks to the position that after the referendum outcome the Republic of Crimea became an independent state, and as such it was recognised by Russia, so an international agreement was signed with the state known as the Republic of Crimea. This is a disputable position since, as was mentioned, the questions raised in the referendum did not refer to the issue of independence, but only of joining Russia.

It thus appears that during the Crimean accession process the sequence of events, and the events themselves, were artificially created in an attempt to ensure their compliance with the Russian legislation.

Changes in the Russian law after the "accession" of the Republic of Crimea to the Russian Federation

The "accession" of one state to another state has implications both in international law and in domestic law. In international law it is connected with concept of 'succession.' It

13 V. Kryazhkov, *Krymskii pretsedent: konstitutsionno-pravovoe osmyslenie*, "Sravnitel'noe konstitutsionnoe obozrenie" 2014, no. 5, p. 87.

is "the replacement of one State by another in the responsibility for the international relations of territory."[14] In other words, it involves the transfer of the territory of one state to another state. The issue of succession is well known and is beyond the scope of this article.[15] In domestic law, a change of the state's sovereignty over the territory leads to a change in the law in a given territory. In history such cases have occurred repeatedly. A recent example is provided by the unification of the Federal Republic of Germany and the German Democratic Republic. The legal framework for this unification was established in "The Unification Treaty between the FRG and the GDR."[16] In the field of the harmonization of law, the general rule was to extend federal law to the 'accessed' territory with simultaneous continuous of validity of the GDR law as long as it was compatible with federal law.

In turn, according to Art. 6 of the Agreement, "from the day that the Republic of Crimea accedes to the Russian Federation and new constituent entities are formed and until January 1, 2015, a transition period is in effect for setting issues of integrating the new federal constituent entities into the Russian's Federation economic, financial, credit and legal systems, Russia's system of government agencies, and implementation issues of military duty and military service in the territories of the Republic of Crimea and the Federal City of Sevastopol." Article 6 ("Transition period") of the FCL contains a similar provision.

The transition period was characterised by the adoption of a great number of regulations to govern the relations in Crimea, especially by the Russian Federation. The changes affected all aspects of Crimean society. Unfortunately, presentation of all these changes is not possible within the scope of this publication and only certain changes made by the Russian legislator to the previously existing legislation – aimed at integration of Crimea to the Russian legal system – will be presented further.

Civil law

The most important changes to the Civil Code of the Russian Federation caused by the accession of the Republic of Crimea were introduced by the Federal Law "On Amendments to the Federal Law 'On implementation of the Part One of the Civil Code of the

14 Vienna Convention on the Succession of States in Respect of Treaties from 23 August 1978, United Nations, "Treaty Series" 1978, vol. 1946, p. 3.

15 Cf. D. P. O'Conell, *State Succession in Municipal and International Law*, London 1967; M. Mrak, *Succession of States*, The Hague 1999; R. Szafarz, *Sukcesja państw w odniesieniu do traktatów we współczesnym prawie międzynarodowym*, Wrocław 1982.

16 The Unification Treaty between the FRG and the GDR from 31 August 1990, German Unification and Its Discontents. Documents from the Peaceful Revolution; *United States of America*, ed. R. T. Gray, S. Wilke, Minneapolis 1996, pp. 258–265.

Russian Federation' and to Article 1202 of Part Three of the Civil Code of the Russian Federation."[17]

This law implemented the mechanism of re-registration for legal entities of the Republic of Crimea, which had been registered according to Ukrainian legislation. Thus, according to this law, a legal entity that wanted to acquire the right to re-register to the legal entity of the Russian Federation needed to provide its founding documents by January 1, 2015, in compliance with the legislation of the Russian Federation and to apply for their data entry into the Unified State Register of Legal Entities.

A necessary condition for obtaining this right to re-register is the permanent executive body or, in the absence of a permanent executive body, a body or person authorised to act on behalf of the legal entity without a power of attorney being located in the territory of the Republic of Crimea or the federal city of Sevastopol on the date of the accession of Crimea to Russia.

According to the amendments to art. 1202 of the Civil Code of Russia, the personal law of a legal entity shall be deemed the law of the country where the legal entity has been founded, unless otherwise provided by the Federal Law "On Amendments to the Federal Law 'On implementation of the Part One of the Civil Code of the Russian Federation' and to art. 1202 of Part Three of the Civil Code of the Russian Federation." This implies that with the acquisition of the status of being a legal entity of the Russian Federation, legal entities registered under Ukrainian law in the territory of the Autonomous Republic of Crimea would automatically be considered as legal entities of the Republic of Crimea and therefore as subjects of the Russian Federation. Legal entities, which did not bring their founding documents by 1 January 2015, in compliance with the legislation of the Russian Federation, and did not apply for their data entry into the Unified State Register of Legal Entities, are obliged to acquire the status of a branch of a foreign entity. We should mention that the process of re-registration of legal entities was free of charge till 2015.

At the end of the year, on 31 December 2014, the Federal Law "On Amendments to the Article 19 of the Federal Law 'On implementation of the Part One of the Civil Code of the Russian Federation'" was adopted, which extended the transition period for changing the status of a Ukrainian legal entity to a Russian legal entity.[18] According to this law, Crimean legal entities had time to re-register until 1 March 2015, as well as legal entities that decided to acquire the status of a branch of a foreign entity. Legal entities

17 Federalny zakon ot 5.05.2014, no. 124-FZ "O vnesenii izmenenii v federalnyi zakon 'O vvedenie v deistvie chasti pervoi Grazhdanskogo kodeksa Rossiiskoi Federatsii' i stat'yu 1202 chasti tret'ei Grazhdanskogo kodeksa Rossiiskoi Federatsii,'" http://base.garant.ru/70648870/ [access: 16.02.2017].

18 Federalny zakon ot 31.12.2014, no. 506-FZ "O vnesenie izmenenii v stat'yu 19 Federalnogo zakona 'O vvedenie v deistvie chasti pervoi Grazhdanskogo kodeksa Rossiiskoi Federatsii,'" http://www.consultant.ru/document/cons_doc_LAW_173197/ [access: 16.02.2017].

that did not bring their founding documents in compliance with the legislation of the Russian Federation, did not apply for their data entry into the Unified State Register of Legal Entities, and did not acquire the status of a branch of a foreign entiry within the specified time, had no right to operate on the territory of the Russian Federation and were subject to liquidation. Agricultural farms had time to re-register to 1 July 2015.

The extension of the transition period for re-registering was granted due to the fact that a small number of existing organizations re-registered by the required deadline of 1 January 2015. According to the Federal Tax Service, as of 12 September 2014 1,166 entities had already re-registered in conformity with the legislation of the Russian Federation.[19] As of 6 February 2015 there were 13,944 entities re-registered.[20] However, there were about 29,000 legal entities registered in Crimea before 18 March 2014.[21] So, approximately half of the enterprises located in the territory of the Republic of Crimea had been re-registered by February 2015.

In the opinion of the deputies of the City Council of Crimea, re-registration was not been completed in time due to delays in the registration authorities' processing times. In connection with this, entrepreneurs did not have enough time to obtain new registration documents.[22] But this is just one of the reasons. In addition, the legislation of Ukraine establishes the specific legal forms of legal entities that do not exist in Russian legislation. In Russia there are no such forms as, for example, private enterprises and associations of co-owners of apartment buildings. According to Art. 113 of the Economic Code of Ukraine, private enterprise is deemed an enterprise that acts on the basis of private ownership of one or more citizens of Ukraine, foreigners, stateless persons and his/her/their labor or with the use of employed labor. An enterprise is also deemed private if it acts on the basis of private ownership of a business entity – a legal entity. It is most similar to the Russian limited liability company (LLC). The main feature of an LLC is the procedure of the charter capital formation. In contrast to an LLC, an enterprise

19 Svedeniya o yuridicheskikh litsakh, sozdannykh na territoriyakh Respubliki Krym i g. Sevastopolya do 18 marta 2014 g., svedeniya o kotorokh vneseny v EGRYUL v svyazi s privedeniem imi svoikh uchreditelnykh dokumentov v sootvetstvie s zakonodatelstvom Rossiiskoi Federatsii, 12 September 2014, http://regforum.ru/files/677_pereregistrirovannye_organizacii_kryma_i_sevastopolya/get/ [access: 16.02.2017].

20 Svedeniya o yuridicheskikh litsakh, sozdannykh na territoriyakh Respubliki Krym i g. Sevastopolya do 18 marta 2014 g., svedeniya o kotorokh vneseny v EGRYUL v svyazi s privedeniem imi svoikh uchreditelnykh dokumentov v sootvetstvie s zakonodatelstvom Rossiiskoi Federatsii, 6 February 2015, http://www.nalog.ru/rn77/taxation/krim_sev/reg_krim/ [access: 16.02.2017].

21 Kil'kist' aktivnikh pidpriemstv za regionami Ukraini ta vidami ekonomichnoi diyal'nosti, 15 November 2013, http://www.ukrstat.gov.ua/operativ/operativ2014/kap/kap_u/kap_u13.htm [access: 16.02.2017].

22 V. Nikoforov, *Krymskii biznes ne uspevaet pereiti v Rossiyu. Gossovet Kryma predlozhil prodlit' pereregistratsiyu yuridicheskikh lits*, 23 November 2014, http://www.kommersant.ru/doc/2595496 [access: 16.02.2017].

is created on the basis of indivisible authorised capital and unlimited liability for the obligations of the company with all the founders' property. This implies that the form of an LLC is more advantageous in terms of capital protection for the founders. However, private enterprises could conduct business without a stamp and without opening a bank account, which was very convenient for many entrepreneurs. In turn, the association of the co-owners of apartment buildings is an organizational and legal form wherein the owners possess and use the property of apartment buildings, as well as manage them. In Russia, similar forms are the house-building cooperatives and houseowners' associations stipulated by Art. 110 of the Housing Code of the Russian Federation, to which it was necessary to re-register the specified entities. While the first form (private enterprise) was widespread in Ukraine, but associations of co-owners of apartment buildings were not very popular. In Crimea the number of such associations as of 31 December 2014 amounted to 1345 houses, when the multi-family housing stock of the Republic of Crimea consisted of 15069 apartment buildings.[23] There were lots of difficulties with the re-registrations of joint stock companies. In Ukraine, there are two forms of joint stock companies (JSC): public and private. They needed to be re-registered into similar Russian entities. To register a JSC in Russia, the company had to conduct a general meeting of shareholders, who had to approve the transfer of the company to be under Russian jurisdiction. If some shareholders blocked the re-registration, the company would have to buy out their shares, which could be a financial burden for the enterprise. Agricultural farms also have had problems with re-registrations. Under the Russian law, they are not legal entities. But according to Ukrainian law, agricultural farms are legal entities and they keep property and land on the balance sheet. At this moment there are difficulties for them with the transition to the Russian legal field.

In turn, the Minister of Economic Development of the Republic of Crimea, Nicholas Koryazhkin, explained the small amount of re-registered entities in the following way: "issues of taxation in Ukraine are more favorable and more attractive with respect to the transition to the Tax Code of the Russian Federation."[24]

Finally, at the end of the transition period for changing the status of a Ukrainian legal entity to a Russian legal entity, on 1 July 2015, 16,123 entities were re-registered in conformity with the legislation of the Russian Federation.[25]

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23 Doklad Glavy Respubliki Krym, Predsedatelya Soveta ministrov Respubliki Krym Aksenova Sergeya Valer'evicha o fakticheski dostignutykh znacheniyakh pokazatelej dlya otsenki effektivnosti deyatelsnosti organov ispolnitelnoj vlasti Respubliki Krym za 2014 god i ich planiruemykh znacheniyakh na 3-letnij period (2015), http://rk.gov.ru/rus/opendata [access: 16.02.2017].

24 *V Krymu po zakonodatelstvu Rossii zaregistrirovalos' 22% SKHD*, 12 November 2014, http://investigator.org.ua/news/141573/ [access: 16.02.2017].

25 Svedeniya o yuridicheskikh litsakh, sozdannykh na territoriyakh Respubliki Krym i g. Sevastopolya do 18 marta 2014 g., svedeniya o kotorokh vneseny v EGRYUL v svyazi s privedeniem

Tax law

According to Art. 15 of the FCL, the legislation of the Russian Federation on taxes and duties apply in the territory of the Republic of Crimea and City of Federal Importance Sevastopol from 1 January 2015.

Tax issues had to be regulated in that territory according to the legal order that was valid on 17 March 2014. But on 11 April 2014, the State Council of the Republic of Crimea adopted the resolution "Instruction On Specifics of Application of Tax Legislation and Taxes in the Republic of Crimea During the Transition Period" that amended VAT regulations.[26] According to this document, the basic VAT rate was 20% until 1 May 2014, and on 1 May 2014 the Russian rate of 18% replaced it. It was also provided that Russian tax legislation – except for the provisions governing relations for the establishment, administration and collection of land tax and state tax collection – would be applicable to legal entities and individual entrepreneurs which had been re-registered in the Russian State Register.

It is worth noting that that the tax rate established by that Resolution was further modified by the Resolution of the State Council of the Republic of Crimea on 30 April 2014.[27] Thus, the VAT rate was reduced from 1 May 2014 in the Republic of Crimea from 18% to 10%. Such a low VAT rate is characteristic only for offshore areas; but in this case it was necessary first of all to attract Russian businesses and investment to Crimea, since a reduction in VAT is the most important benefit for business development and attracting investors.

Besides that, on 29 November 2014 the Federal Law "On the development of the Crimean Federal District and the free economic zone on the territory of the Republic of Crimea and the federal city of Sevastopol"[28] was adopted, which was a further step taken to attract investors to Crimea. Analysis of this law indicates that of all the free economic zones of the Russian Federation, the most favorable conditions are provided

imi svoikh uchreditelnykh dokumentov v sootvetstvie s zakonodatelstvom Rossiiskoi Federatsii, 10 February 2017, https://www.nalog.ru/rn77/taxation/reg_krim/ [access: 16.02.2017].

26 Postanovlenie Gosudarstvennogo Soveta Respubliki Krym ot 11.04.2014, no. 2010-6/14 'Polozhenie ob osobennostyakh primeneniya zakonodatelstva o nalogakh i sborakh na territorii Respubliki Krym v perekhodnyi period,' "Sbornik normativno-pravovykh aktov Respubliki Krym" 2014, no. 4, part 2, pp. 128–132.

27 Postanovlenie Gosudarstvennogo Soveta Respubliki Krym ot 30.04.2014, no. 2093-6/14 'O vnesenie izmenenii' v Postanovlenie Gosudarstvennogo Soveta Respubliki Krym ot 11.04.2014, no. 2010-6/14 'Ob utverzhdenii Polozheniya ob osobennostyakh primeneniya zakonodatelstva o nalogakh i sborakh na territorii Respubliki Krym w perekhodnyi period,' *ibidem*, no. 4, part 3, pp. 204–210.

28 Federalnyi zakon ot 29.11.2014, no. 377-FZ 'O razvitii Krymskogo federalnogo okruga i svobodnoi ekonomicheskoi zony na territoriyakh Respubliki Krym i goroda federalnogo znacheniya Sevastopolya,' http://ivo.garant.ru/#/document/70807520/paragraph/1:1 [access: 16.02.2017].

in Crimea.[29] In order to become a member of the Crimean zone, the investment threshold of 3.000.000 RUB is set for small and medium-sized businesses, while for large businesses it is 30.000.000 RUB. This threshold is exceptionally low for the Russian Federation. For comparison, in the special economic zone in the Kalinigrad region the minimum size of capital investments is set at 150.000.000 RUB.[30] A legal entity has to be registered in Crimea to become the member of the free economic zone. Three types of benefits are provided for investors - tax, customs and administrative.

Tax benefits include a reduced rate on corporate profit tax (part of which is paid to the federal budget – 0%, to the budgets of the Republic of Crimea and Sevastopol – not more than 13.5%), exemption from payment of property tax by members of the free economic zone (for 10 years after the registration of the property acquired for the purpose of conducting relevant activities) and land tax (for 3 years) and a reduced rate of insurance payments: Pension Fund – 6%, Social Insurance Fund – 1.5%, Compulsory Medical Insurance Fund – 0.1%. In comparison, the general tax rates in Russia are the following: the Pension Fund payment is 22%, payment to the Social Insurance Fund – 2.9%, medical insurance – 5.1%[31]; corporate profit tax - the part paid to the federal budget – 2%, to budgets of the federal subjects – 18%.[32] Customs benefits, including duty-free import to Crimea of goods, components and equipment required for the implementation of investment projects, are provided by the regime of the free customs zone.

In theory, preferential treatment should attract Russian investments to Crimea. On the other hand, it is possible that many investors will take a wait-and-see approach to the new law, because reality does not always meet business expectations. We should not forget that the economic situation in Crimea is difficult: international land routes are limited, there is no developed banking sector and there are problems with the power and water supply. It is more likely that at the beginning of its existence the free economic zone will be attractive mostly for Crimean domestic producers.

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29 Informatsiya o l'gotakh, deistvuyushchikh na territotii osobykh ekonomicheskikh zon v Rossiiskoi Federatsii, http://economy.gov.ru/minec/activity/sections/sez/becomeinvestor/news/201505194# [access: 16.02.2017].

30 Federalnyi zakon ot 10.01.2006, no. 16-FZ 'Ob osoboj ekonomicheskoi zone v Kaliningradskoi oblasti i o vnesenii izmenenii v nekotorye zakonodatelnye akty Rossiiskoi Federatsii,' http://www.consultant.ru/document/cons_doc_LAW_57687/ [access: 16.02.2017].

31 Federalnyi zakon ot 24.07.2009, no. 212-FZ 'O strakhovykh vznosakh v Pensionnyi fond Rossiiskoi Federatsii, Fond sotsialnogo strakhovaniya Rossiiskoi Federatsii, Federalnyi fond obyazatelnogo meditsinskogo strakhovaniya i territorialnye fondy obyazatelnogo meditsinskogo strakhovaniya,' http://www.consultant.ru/document/cons_doc_LAW_89925/ [access: 16.02.2017].

32 Nalogovyi kodeks Rossiiskoi Federatsii. Chast vtoraya, http://base.garant.ru/10900200/ [access: 16.02.2017].

Licensed activities

The regulation of licensed activities by Russian legislation is a very important issue for those entrepreneurs and legal entities in Crimea dealing with licensed products or services. Generally, in Russia it is much more difficult to obtain licenses for licensed activities than in Ukraine.

Article 12 of FCL guaranteed that during the transition period business permits (licenses, except licenses to conduct banking operations and licenses (permits) for the activities of non-credit financial institutions) in the Republic of Crimea and Sevastopol, issued by the state and other authorities of Ukraine, the government and other official bodies of the Autonomous Republic of Crimea, the state and other authorities of the city of Sevastopol, will be valid without limitation of their validity period and any confirmation by the public authorities of the Russian Federation, the Republic of Crimea and the federal city of Sevastopol.

Originally it was planned that Crimean companies would start working with the Russian licenses from 1 January 2015. Most of the difficulties were caused by the Russian norms concerning issuance of licenses for the sale of alcohol. According to the Federal law 'On the state regulation of production and turnover of ethyl alcohol, alcohol and alcohol products and limitation of consumption (drinking) of alcohol production,' only legal entities can sell alcohol.[33] Private entrepreneurs can only sell alcohol products such as beer and cider. In addition, in order to obtain a license, one needs to provide a rental agreement for at least a year or an ownership document for stationary commercial property of a certain square footage. Besides a rental agreement or a property ownership document, a certificate from the Unified State Register of Rights to Real Estate is also needed.

Taking into account the fact that not all legal entities have been re-registered and there have been problems with obtaining a certificate from the Unified State Register of Rights to Real Estate, a decision was made to significantly simplify the licensing procedure for the sale of alcohol by Crimean companies. On 31 December 2014 a Federal Law was adopted: "On Amendments to the Federal law 'On state regulation of production and turnover of ethyl alcohol, alcohol and alcohol products and limitation of consumption (drinking) of alcohol production.'"[34] This law made it easier for sellers of alcoholic beverages established prior to 2015 to obtain licenses, as they were not required to

33 Federalnyi zakon ot 22.11.1995, no. 171-FZ 'O gosudarstvennom regulirovanii proizvodstva i oborota etilovogo spirta, alkogolnoi i spirtosoderzhashchei produktsii i ob ogranichenii potrebleniya (raspitiya) alkogolnoi produktsii,' http://base.garant.ru/10105489/ [access: 16.02.2017].

34 Federalnyi zakon ot 31.12.2014, no. 491-FZ "O vnesenii izmenenii v Federalnyi zakon 'O gosudarstvennom regulirovanii proizvodstva i oborota etilovogo spirta, alkogolnoi i spirtosoderzhashchei produktsii i ob ogranichenii potrebleniya (raspitiya) alkogolnoi produktsii,'" http://www.consultant.ru/document/cons_doc_LAW_173117/ [access: 16.02.2017].

possess a commercial property of a certain square footage. The requirement for the lease of commercial property, which had to exceed one year was also abolished, which made it possible to not register a rental agreement in the Unified State Register of Rights to Real Estate. Individual entrepreneurs engaged in the retail sale of beer in Crimea are relieved from the requirement to have stationary retail facilities.[35] Those amendments should have a positive impact on the preservation of economic stability on the peninsula and help to prevent the growth of counterfeiting and illegal trade of alcoholic beverages.

It should be noted that, in accordance with current legislation, the Ukrainian licenses that had not expired were still valid. So, legal entities which did not re-register, were entitled to sell alcoholic beverages until 1 March 2015. As was mentioned, the process of re-registering was extended to this date.

It was also decided to extend the time for obtaining the Russian licenses. Consequently, on December 29 2014 the Federal Constitutional Law was adopted: "On Amendments to the Article 4 and the Article 12 of the Federal Constitutional Law 'On Accession to the Russian Federation the Republic of Crimea and Establishing within the Russian Federation the new constituent entities of the Republic of Crimea and the City of Federal Importance Sevastopol.'"[36] Article 12 was changed, and according to this, the deadline for obtaining the Russian licenses was set for 1 June 2015. Until that date, all business activities were divided into two categories - under a compulsory license under Russian law, and without obtaining a license – by using the notification procedure. The notification procedure is supposed to be used for the delivery of medical services, the decontamination and disposal of waste, the conservation of cultural inheritance and development, and the production, testing and repair of aircrafts. This procedure will apply until 1 January 2018. Also until 1 January 2018 there is a moratorium on planned inspections of companies operating in less risky areas for the community and state - where the planned inspections are carried out once every three years.

Criminal law

Criminal law is the subject of Article 9.20 of the FCL. It is provided that the investigation of criminal cases which were pending before the bodies of preliminary investigation operating in the Republic of Crimea on the day of 18 March 2014 should be carried out

35 According to the Federal Law "On the basis state regulation of commercial activities in the Russian Federation," stationary retail facilities are commercial properties, which are a building or part of a building, the foundation of which is firmly connected with land and connected toa network of engineering and technical support.

36 Federalnyi konstitutsionnyi zakon ot 29.12.2014, no. 19-FKZ "O vnesenii izmenenii v stat'i 4 i 12 Federalnogo konstitutsionnogo zakona 'O prinyatii v Rossiiskuyu Federatsiyu Respubliki Krym i obrazovaniya v sostave Rossiiskoi Federatsii novykh sub'ektov – Respubliki Krym i goroda federalnogo znacheniya Sevastopolya,'" http://base.garant.ru/70830620/ [access: 16.02.2017].

according to the criminal procedural legislation of the Russian Federation. Criminal cases were submitted for examination to courts on condition that the accusation was supported by the Prosecutor of the territorial authority of the Prosecutor's Office of the Russian Federation on behalf of the Russian Federation.

On 5 May 2014, the Federal Law "On the Application of Provisions of the Criminal code of the Russian Federation and the Code of Penal Procedure of the Russian Federation in the territories of the Republic of Crimea and the Federal City of Sevastopol" was adopted.[37] It was approved that Russian criminal law applies to criminal cases in Crimea and Sevastopol that date back to the period before 18 March 2014. Application of more stringent penalties for crimes committed prior to 18 March 2014 is not allowed. This means that a more severe penalty than the one that had to be applied at the time of the crime can not be imposed, i.e. when the Criminal Code of the Russian Federation stipulates a tougher penalty or considers an action as a crime, while the Criminal Code of Ukraine does not - this law cannot be applicable to suspects and defendants.

The law defines the mode of action with evidence in support of pre-trial proceedings that was not completed by 18 March 2014.[38] The prosecutor has the main role in that process. The prosecutor determines the type of prosecution and investigative jurisdiction in accordance with the Criminal Procedure Code of the Russian Federation. The prosecutor should decide if acts containing elements of crime are crimes under Russian law or not.

The above-mentioned law also stipulates how cases examined before 18 March 2014 will be treated. Judgments of the Ukrainian courts on the territory of the Republic of Crimea and Sevastopol before March 18 have the same legal force as judgments of the Russian courts. There is a possibility to appeal against judgments issued before 18 March 2014. However, this has to be done in compliance with Russian law.

None of these documents stipulated that the legislation of the Republic of Ukraine in Crimea continued to apply during the transition period. This raises the question about the possibility of local law enforcement officers applying the criminal and criminal procedural law of the Russian Federation in Crimea. Criminal cases that were investigated under the Criminal Procedure Code of Ukraine were formed on the basis of other legislation, which is qualitatively different from the Russian Criminal Procedure Code.[39]

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37 Federalnyi zakon ot 5.05.2014, no. 91-FZ..., *op. cit.*

38 E. Kremyanskaya, *A short note of the development of the Criminal Justice System after the Accession of Crimea and Sevastopol to the Russian Federation*, "New Journal of European Criminal Law" 2014, vol. 5, no. 2, pp. 258–259.

39 Cf. E. Alontseva, *Sledstvennye deistviya po ugolovo-protsessual'nomu zakonodatel'stvu RF i Ukrainy (sravnitelno-pravovoe issledovanie)*, "Mezhdunarodnoe ugolovnoe pravo i mezhdunarodnaya yustitsiya" 2010, no. 2, pp. 17–19; N. Kovtun, *Sudebnye stadii i proizvodstva UPK Ukrainy: sistema i vektory realizovannykh normativnykh reform*, "Ugolovnoe sudoproizvodstvo" 2013, no. 2, pp. 23–30; I. Makeeva, *Ponyatie dosudebnogo proizvodstva po ugolovno-protsessual'nomu*

Despite this, the investigation should continue in accordance with the criminal procedure legislation of the Russian Federation. At the same time, law enforcement employees have not studied criminal law and criminal procedure legislation of the Russian Federation before. The current legal situation can trigger unpredictable consequences. A criminal case for organizing and participating in mass riots on 26 February 2014 could be a good example of such case. In January – February 2015 three Crimean Tatars were arrested in the course of a criminal investigation into the organization and participation in mass riots on 26 February 2014 (Article 212.1 and 2 of the Criminal Code of the Russian Federation). At that time the arrested suspects were citizens of Ukraine and Crimea was Ukrainian territory. According to Article 12. 3 of the Criminal Code of the Russian Federation, criminal proceedings against foreign nationals who have committed crime on the territory of another State is possible only for a crime against the interests of the Russian Federation or a citizen of the Russian Federation. The question is what this investigation is trying to prove: that in February 2014 Ukrainian citizens in Crimea committed acts against the interests of Russia or its citizens?

The judiciary in the transition period in the Republic of Crimea and Sevastopol

According to Article 9 of the FCL, during the transition period in the Republic of Crimea and Sevastopol courts of the Russian Federation (the federal courts) were created in accordance with the legislation of the Russian Federation on the judicial system.

Civil, administrative and commercial cases, as well as criminal cases, admitted to the proceedings of courts of first instance, operating in the territory of the Republic of Crimea and Sevastopol, prior to 18 March 2014 and which had not been decided by that time continue to be considered in accordance with the relevant legislation of the Russian Federation. Criminal cases will be considered on condition that the accusation will be supported by the prosecutor of the relevant territorial authority of the Russian Federation Prosecutor's Office on behalf of the Russian Federation.

Immediately after this law came into force, the Crimean courts temporarily ceased to adjudicate, although claims that were based on the norms of Russian legislation were accepted. However, in practice, the judicial system in Crimea has remained almost wholly inactive. The reason for this collapse was the collision of the legal systems of two different states. Such dualism in the legal regulation of various aspects of social relations has created severe difficulties in resolving a number of issues. Despite the genetic relatedness of the procedural legislation of the Russian Federation and Ukraine, there are

zakonodatel'stvu Rossiiskoi Federatsii i Ukrainy, "Mezhdunarodnoe ugolovnoe pravo i mezhdunarodnaya yustitsiya" 2013, no. 5, pp. 9–13.

nevertheless a number of differences, from the procedure for determining the amount of the state's court costs, the procedure for notifying participants in the process and collecting evidence, through to the issuance of the writ of execution.[40] For example, in accordance with the Law of Ukraine "On the judicial assembly," the court fee is charged as a rate of the minimum monthly wage established by law as of January 1 of the calendar year, in which the relevant application or complaint is filed to court – in relation to the amount of the claim and as a fixed amount. The amount of the court fees for filing a court claim of a property nature depends on the type of court. In a court of general jurisdiction the amount of the court fee is 1 percent of the amount of the claim but not more than 3 times the minimum wage, in the commercial court – 2% of the amount of the claim but not exceeding 60 minimum wages, in the administrative court – 2% of the amount of the claim but not more than 4 minimum wages.[41] In Russia, the amount and payment procedure of state fees (including court costs) is established by the Tax Code of the Russian Federation. In a court of general jurisdiction the amount of the court fee is dependent on the amount of the claim. The minimal amount of the court fee is 4% of the amount of the claim but not less than 400 RUB. The maximum amount of the court fee is charged when the amount of the claim of more than 1.000.000 RUB and is 13,200 RUB + 0,5% of the amount exceeding 1.000.000 RUB, but not more than 60 000 RUB. Obviously, from the claimant's point of view, the method set out in the Ukrainian legislation was more favorable.

Furthermore, according to Article 9.5 of the FCL, "persons holding positions of judges in courts (in Crimea on the day of its accession to the Russian Federation), shall continue to administer justice to the creation and launching of the courts of the Russian Federation in these territories if they have Russian citizenship." During the first months after Crimea's accession to the Russian Federation not so many people obtained Russian citizenship. Hence, there were situations whereby citizens of Ukraine had to make judicial decisions on behalf of Russia. The judges working in Crimean courts generally do not have an appropriate knowledge of Russian law. Thus the peculiar situation arose whereby a person who was a citizen of one country and had not lost or given up their citizenship and was appointed by the previous governing state to a specific position and given the required oath, suddenly – without being released from these positions either an his own request or for other reasons – began to serve the interests of another State that had not even nominated him or her to that position. Realizing the inconsistency of this situation, which was not governed by relevant legislation, and given the absence of

40 N. Marysheva, *Regulirovanie mezhdunarodnogo grazhdanskogo protsessa v stranakh SNG*, in *Mezhdunarodnoe chastnoe pravo*, ed. N. Marysheva, Moskva 2011, pp. 836–844.

41 Zakon Ukrainy N 3674-VI ot 8.07.2011 'O Sudebnom Sbore,' http://kodeksy.com.ua/ka/o_sudebnom_sbore.htm [access: 16.02.2017].

their own knowledge and skills, the judges tried not to make any decisions and simply delayed trials. As was pointed in an interview of the Chairman of the Economic Court of the Republic of Crimea Sergey Lazarev, the consideration of cases that had started in accordance with Ukrainian legislation were suspended, because the judges who stayed to work in Crimea had no right to consider cases before a decision on their obtaining Russian citizenship.[42]

In order to resolve this situation, on June 23, 2014 the President of the Russian Federation signed a number of federal laws aimed at the formation of the judicial system of the Republic of Crimea and Sevastopol:

- The Federal Law "On the Creation of Courts of the Russian Federation in the Republic of Crimea and the City of Federal Importance Sevastopol and on Amending to Some Legislative Acts of Russian Federation,"[43]
- The Federal Law "On the Bodies of the Judicial Community of the Republic of Crimea and the City of Federal Importance Sevastopol,"[44]
- The Federal Law "On the procedure of selection of candidates for the initial composition of the federal courts, established in the territory of the Republic of Crimea and the City of Federal Importance Sevastopol,"[45]
- The Federal Constitutional Law "On creation of the Twenty First Arbitration Appeal Court, and on Amending the Federal Constitutional Law 'On arbitration courts in the Russian Federation.'"[46]

The Federal Law "On the Creation of Courts of the Russian Federation in the Republic of Crimea and the Federal City of Sevastopol" provides for the establishment of the Supreme Court of the Republic of Crimea, the Arbitration Court of the Republic of Crimea, twenty four district and city courts of the Republic of Crimea; and the Arbitra-

42 M. Bludshaya, Okkuporovannoe pravosudie v Krymu i "litsa, zamschayuschie dolzhnosti sudei," 28 March 2014, http://racurs.ua/496-okkupirovannoe-pravosudie-v-krymu-i-lica-zameschauschie-doljnosti-sudey [access: 16.02.2017].

43 Federal'nyi zakon ot 23.06.2014, no. 154-FZ 'O sozdanii sudov Rossiiskoi Federatsii na territoriyakh Respubliki Krym i goroda federalnogo znacheniya Sevastopolya i o wnesenii izmenenii v otdel'nye zakonodatel'nye akty Rossiiskoi Federatsii,' http://ivo.garant.ru/#/document/70681114/paragraph/1:1 [access: 16.02.2017].

44 Federal'nyi zakon ot 23.06.2014, no. 155-FZ 'Ob organakh sudeiskogo soobscchestva Respubliki Krym i goroda federal'nogo znacheniya Sevastopolya,' http://www.consultant.ru/document/cons_doc_LAW_164497/ [access: 16.02.2017].

45 Federal'nyi zakon ot 23.06.2014, no. 156-FZ 'O poryadke otbora kandidatov v pervonachal'nye sostavy federal'nykh sudov, sozdavaemykh na territiriyakh Respubliki Krym i goroda federal'nogo znacheniya Sevastopolya,' http://www.consultant.ru/document/cons_doc_LAW_164494/ [access: 16.02.2017].

46 Federal'nyi Konsitutsionnyi zakon ot 23.06.2014, no. 10-FKZ "O sozdanii dvadtsat' pervogo arbitrazhnogo apellyatsionnogo suda i o vnesenii izmenenii v federal'nyi konstitutsionnyi zakon 'b arbitrazhnykh sudakh v Rossiiskoi Federatsi,'" http://www.consultant.ru/document/cons_doc_LAW_164495/ [access: 16.02.2017].

tion Court of Sevastopol, the Sevastopol City Court, four district courts of Sevastopol, the Crimean Military Court and the Sevastopol Military Court. The law also establishes rules for considering cases and submitting for examination to the general, commercial, appellate commercial, administrative, appellate administrative courts operating in the territory of the Republic of Crimea and Sevastopol, and those not resolved on 18 March 2014. The law confirms the provisions of Article 20.4 of the FCL – the resolution about the day in which the activities of the courts were to start in Crimea had to be made at the Plenum of the Supreme Court of the Russian Federation. The courts of the Russian Federation officially only started their activities on 26 December 2014 in accordance with the resolution of the Plenum of the Supreme Court, which was only adopted on 23 December 2014.[47]

The Federal Law "On the procedure of selection of candidates for the initial composition of the federal courts, established in the territory of the Republic of Crimea and Sevastopol city of federal significance" establishes the procedure for selecting judges. This selection is made on a competitive basis, taking into consideration the legal education, professional experience and the results of the admittance examination. This law established a preferential right for individuals holding the position of judge in courts operating in the territory of the Republic of Crimea and Sevastopol on 18 March 2014 to fill the positions of judge of the federal courts of general jurisdiction and arbitration courts, if they acquired Russian citizenship and complied with the requirements for candidates for the post of judge in accordance with Russian federal law. For such individuals, the law establishes an exception. In such a case, a basic document confirming the existence of a foreign nationality (passport), together with a disclaimer of it, must be transferred to the Judicial Department of the Supreme Court of the Russian Federation. In accordance with the legislation of Ukraine, the date of renunciation of citizenship is the date of publication of a relevant decree of the President of Ukraine. Thus in practice it was possible that active judges of Russian Federation would officially be citizens of Ukraine as well. Accordingly, the transfer of their Ukrainian passport together with a letter of resignation of their Ukrainian citizenship was supposed to serve, according to the Russian legislators, as a certain guarantee of the intention of such persons to resolve the situation with their citizenship.

Completion of the formation of the judiciary of the Republic of Crimea and Sevastopol occurred before 1 July 2015. After that date, the further formation and operation of the judiciary has been carried out in the usual manner, in accordance with the procedure adopted in Russia.

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47 Postanovlenie Plenuma Verkhovnogo Suda RF 'O dne nachala deyatel'nosti federal'nykh sudov na territoriyakh Respubliki Krym i goroda federal'nogo znacheniya Sevastopolya,' http://supcourt.ru/search.php?searchf=%EA%F0%FB%EC [access: 16.02.2017].

Conclusion

The accession of Crimea to the Russian Federation is a complicated process of extending the Russian legal system to the territory of the Republic of Crimea. The Russian and Ukrainian legal systems have many differences, in all fields. Residents of Crimea were not familiar with Russian law, which additionally was changing during the transition period. At the same time, residents of the new Russian federal entity are not always sufficiently aware and prepared for the fact that Russian and the Ukrainian laws are quite different. Furthermore, professionals whose task is to apply the law – judges and the employees of judicial authorities – faced the same problem. Residents of Crimea had to re-register companies initially registered according to the Ukrainian legislation. That time was extended. During that time more than half of the existing companies registered before 18 March 2014 were re-registered. The remaining companies ceased their activity. Currently the main challenge for Crimean entrepreneurs is to conduct business according to Russian legislation. The decision to impose a moratorium on the planned state audits of certain types of company should surely be welcomed. However, it would be advisable to introduce a temporary moratorium on the application of penalties in relation to Crimean entrepreneurs for violations identified during the first state audit. Many questions are arising in connection with criminal law; lack of legal competence within the employees of the judicial authorities remains the biggest problem. The transition period was characterised by discrepancies, difficulties and lack of clarity in the judiciary. From 1 July 2015 the judiciary has carried out its duties in accordance with the procedure followed in Russia. Unfortunately, there is evidence that violations of the Federal law of the Russian Federation in the Republic of Crimea are frequently committed by courts of the first instance.[48] One of the ways to improve the quality of the judiciary may be sending Russian judges to work in Crimea. This solution was adopted during the harmonisation of the judiciary after the unification of RFN and GDR.

It was necessary to ensure that the residents of the Republic of Crimea had legal certainty, which has become one of the basic criteria for the whole of society and the individuals' quality of life in the contemporary world. As was mentioned, the principle of legal certainty is one of the most important of the European democratic achievements. It makes the actions of both state authorities and citizens more predictable. Unfortunately, during the transition period Russian legislature has failed to set conditions for the legal certainty of Crimean residents in all fields of life. However, the legal integration of Crimea to the Russian Federation has started and seems irrevocable. For the successful continuation of this integration, it is necessary to improve the qualifications of the

48 V. Kululaev, *Zakonodatelstvo Rossii ne rabotaet v Krymu*, 19 August 2015, http://7x7-journal.ru/post/66107 [access: 16.02.2017].

employees of the judicial authorities, as well as the legal awareness and legal culture of Crimean society.

Literature

Alontseva E., *Sledstvennye deistviya po ugolovo-protsessual'nomu zakonodatel'stvu RF i Ukrainy (sravnitelno-pravovoe issledovanie)*, "Mezhdunarodnoe ugolovnoe pravo i mezhdunarodnaya yustitsiya" 2010, no. 2.

Bludshaya M., *Okkuporovannoe pravosudie v Krymu i "litsa, zamschayuschie dolzhnosti sudei,"* 28 March 2014, http://racurs.ua/496-okkupirovannoe-pravosudie-v-krymu-i-lica-zameschauschie-doljnosti-sudey [access: 16.02.2017].

German Unification and Its Discontents. Documents from the Peaceful Revolution, ed. R. T. Gray, S. Wilke, Washington 1996.

Grzebyk P., *Aneksja Krymu przez Rosję w świetle prawa międzynarodowego*, "Sprawy Międzynarodowe" 2014, no. 1.

Kovtun N., *Sudebnye stadii i proizvodstva UPK Ukrainy: sistema i vektory realizovannykh normativnykh reform*, "Ugolovnoe sudoproizvodstvo" 2013, no. 2.

Kranz J., *Kilka uwag na tle aneksji Krymu przez Rosję*, "Państwo i Prawo" 2014, no. 8.

Kremyanskaya E., *A short note of the development of the Criminal Justice System after the Accession of Crimea and Sevastopol to the Russian Federation*, "New Journal of European Criminal Law" 2014, vol. 5, no. 2.

Kryazhkov V., *Krymskii pretsedent: konstitutsionno-pravovoe osmyslenie*, "Sravnitel'noe konstitutsionnoe obozrenie" 2014, no. 5.

Kululaev K., *Zakonodatelstvo Rossii ne rabotaet v Krymu*, 19 August 2015, http://7x7-journal.ru/post/66107 [access: 16.02.2017].

Makeeva I., *Ponyatie dosudebnogo proizvodstva po ugolovno-protsessual'nomu zakonodatel'stvu Rossiiskoi Federatsii i Ukrainy*, "Mezhdunarodnoe ugolovnoe pravo i mezhdunarodnaya yustitsiya" 2013, no. 5.

Markin V., *V Krymu zaderzhan odni iz liderov obschestvennoi organizatsii "Medzhlis krymsko-tatarskogo naroda" po podozreniyu v organizatsii i uchastii v massovykh bespriadkach*, 29 January 2015, http://sledcom.ru/news/item/889047/ [access: 16.02.2017].

Marysheva N., *Regulirovanie mezhdunarodnogo grazhdanskogo protsessa v stranakh SNG*, in *Mezhdunarodnoe chastnoe pravo*, ed. N. Marysheva, Moskva 2011.

Mrak M., *Succession of States*, The Hague 1999.

Nikoforov V., *Krymskii biznes ne uspevaet pereiti v Rossiyu. Gossovet Kryma predlozhil prodlit' pereregistratsiyu yuridicheskikh lits*, 23 November 2014, http://www.kommersant.ru/doc/2595496 [access: 16.02.2017].

O'Conell D. P., *State Succession in Municpal and International Law*, London 1967.

Romashov P., *Poryadok prinyatiya v sostav Rossiiskoi Federatsii novogo sub'ekta RF*, "Probely v rossiiskom zakonodatelstve" 2014, no. 2.

Szafarz R., *Sukcesja państw w odniesieniu do traktatów we współczesnym prawie międzynarodowym*, Wrocław 1982.

V Krymu po zakonodatelstvu Rossii zaregistrirovalos' 22% SKHD, 12 November 2014, http://investigator.org.ua/news/141573/ [access: 16.02.2017].

Vienna Convention on the Succession of States in Respect of Treaties, 1978.

Wojciechowski M., *Pewność prawa,* Gdańsk 2014.

Deklaratsiya nezavisimosti Avtonomnoi Respubliki Krym i goroda Sevastopolya, "Sbornik normativno-pravovykh aktov Respubliki Krym" 2014, no. 3, part 1.

Postanovlenie Gosudarstvennogo Soveta Respubliki Krym ot 11.04.2014, no. 2010-6/14 'Polozhenie ob osobennostyakh primeneniya zakonodatelstva o nalogakh i sborakh na territorii Respubliki Krym v perekhodnyi period,' "Sbornik normativno-pravovykh aktov Respubliki Krym" 2014, no. 4, part 2.

Postanovlenie Gosudarstvennogo Soveta Respubliki Krym ot 30.04.2014, no. 2093-6/14 'O vnesenie izmenenii' v Postanovlenie Gosudarstvennogo Soveta Respubliki Krym ot 11.04.2014, no. 2010-6/14 'Ob utverzhdenii Polozheniya ob osobennostyakh primeneniya zakonodatelstva o nalogakh i sborakh na territorii Respubliki Krym w perekhodnyi period,' *ibidem*, no. 4, part 3.

Postanovlenie Verkhovnoi Rady ARK 'O provedenii obshchekrymskogo referenduma,' "Sbornik normativno-pravovykh aktov Respubliki Krym" 2014, no. 3, part 1.

Postanovlenie Plenuma Verkhovnogo Suda RF 'O dne nachala deyatel'nosti federal'nykh sudov na territoriyakh Respubliki Krym i goroda federal'nogo znacheniya Sevastopolya,' http://supcourt.ru/search.php?searchf=%EA%F0%FB%EC [access: 16.02.2017].

Postanovlenie Verkhovnoi Rady Respubliki Krym 'O nezavisimosti Kryma,' "Sbornik normativno-pravovykh aktov Respubliki Krym" 2014, no. 3, part 1.

Stenograma trista sorok sed'mogo (vneocherednogo) zasedaniya Soveta Federatsii 1 marta 2014 goda, Federalnoe Sobranie Rossiiskoi Federatsii, Iskh. St-347 ot 0103.2014, Moskva.

Ukaz Prezidenta Rossiiskoi Federatsii ot 17 marta 2014 g. N 147 'O priznanii Respubliki Krym,' http://base.garant.ru/70613384/ [access: 16.02.2017].

Zakon Ukrainy N 3674-VI ot 8.07.2011 'O Sudebnom Sbore,' http://kodeksy.com.ua/ka/o_sudebnom_sbore.htm [access: 16.02.2017].

SUMMARY

The Development of the Russian Legal System after the "Accession" of the Republic of Crimea to the Russian Federation

On March 18 2014, the Republic of Crimea became a federal subject of the Russian Federation and the Ukrainian legal system was changed to the Russian system. The transition period was set to end on January 1 2015. This transition period was characterized by the fact that the law was created on a day-to-day basis, and as the residents of Crimea were unfamiliar with Russian law they found themselves in a legal vacuum. Laws were adopted in an urgent manner to ensure that the unification was as smooth as possible. In practice it became apparent that the allocated time was not sufficient, and the transition period was extended in some areas. The Article presents a review of the accession procedure and the legal regulations established in the Republic of Crimea during the transition period, and identifies some issues which have arisen.

Keywords: Russian legal system, Republic of Crimea, "accession"

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Tomasz Nieborak

The Tax Avoidance Clause: Do We Want it, Do We Need it?

Introduction

As of 25 July 2016, a tax avoidance clause[1] has been implemented once again in the Polish legal system, with the aim of helping the tax authorities to prevent tax evasion, which leads to reduced tax revenues. By referring to this clause, the tax authorities will have a chance to question and challenge such optimising activities and other activities which, although legal, allow certain taxpayers to avoid paying taxes. This instrument is certainly a strong tool owing to which the tax administration authorities may have recourse to the past activities of taxpayers. This may also be the reason why the clause provokes so much controversy. The first attempt to incorporate the clause in the Polish tax system was made over ten years ago and it failed then, as it was challenged by the Constitutional Court. Since then a number of other optimising structures have developed and their growth has been accompanied by increasing financial needs of the State. Hence discussion concerning the possibility of actually implementing tax avoidance clause structures has recently returned, and is currently taking place among legal theoreticians and practitioners. The many questions asked include: (i) Is it really necessary to adopt a tax avoidance clause?; (ii) Are there any legal grounds which would justify its adoption?; and, if the answer to the latter is in the affirmative, (iii) Should the solutions adopted in it be regarded as the right ones? These three questions, and some others frequently asked, have been the inspiration behind the writing of this paper.

Taxpayer's attitudes as a premise for the adoption of the tax avoidance clause

The general tax avoidance clause has been known under several other names, of which the most commonly used are the general anti-avoidance rule and the general anti-abuse

1 Act of 13 May 2016 on the amendment to the Act on Tax Ordinance and certain other legislative acts (Dz. U. 2016 item 846).

rule. The idea of tax avoidance is not new and the anti-abuse rule is present in the legal orders of many States, while many others are considering its adoption. Examples of the latter are Germany and France in Europe, or India and Australia.[2] The concept's global relevance arises from the fact that in each tax system taxpayers will tend to try to reduce their tax dues. Hence the various actions undertaken by interested parties (taxpayers), which range from those which generate a tax liability to those which amount to tax fraud. Some of these activities lead to aggressive tax planning, which is a negative phenomenon currently under the scrutiny of various authorities, including the European Commission. On 6 December 2010, the Commission published Recommendation 2012/772/UE (OJ L 338/41),[3] in which it expressed support for the initiatives of EU Member States aimed at combatting aggressive tax planning. At the same time, the Commission emphasised that although in principle tax planning is an acceptable practice, the instruments used have evolved in the direction of more refined structures, now extending to a greater number of States and covering different national jurisdictions, which allow taxable income to be moved to States or jurisdictions that are more favourable to entities seeking to optimise taxation. Thus for the purpose of further deliberations presented in this paper, the content of point 1 of the Preamble to the Recommendation is crucial, as it states that a key feature of the tax optimisation practice is a reduction of the tax liability, which is legal but contrary to the intention of the legislator. Here we arrive at the main element that constitues the circumvention of a law clause, and subsequent justification of its application by tax authorities. It is, after all, the tax authority which is vested by law with the task of assessing the intentions of a taxpayer who has resorted to tax optimisation strategies.

In doing so, tax authorities will first and foremost rely on procedures available in law. However, it is also vital to identify the moment at which the optimisation starts securing a taxpayer excessive gains at the cost of the State tax revenue base. In other words, it becomes important to capture the moment when the result of optimisation turns out to be contrary to the legislator's intention and the principle underlying taxation. The Commission refers to such a situation aggressive tax planning when, in order to reduce tax liability, a taxpayer uses the technical aspects of a given tax system or the differences between two or more tax systems, and for instance makes deductions for the purpose of reducing. Such planning may take the form of, say, double tax exemptions or making tax deductions allowable in the case of a loss in two tax systems.

2 Described in detail in the publication authored by A. Olesińska, *Klauzula ogólna przeciwko unikaniu opodatkowania*, Toruń 2013, *passim*.

3 Commission Recommendation of 6 December 2012 on aggressive tax planning (2012/772/EU), OJ L 338/41.

However, it must be repeated once again that not all optimising activities undertaken by taxpayers are negative in character.[4] As pointed out in the literature, each situation requires individual examination before it is classified as a given form of a taxpayer's behaviour, of which he most common ones are:[5]

- tax saving – a legally indifferent behaviour which nevertheless influences the taxpayer's situation, when for example taxpayers limit their professional activity and control income in order to reduce the taxable base.
- tax planning – defined by some as tax optimisation achieved through the exercise of all tax reductions and tax exemptions available by law.
- tax avoidance – the subject of this paper, which may be interpreted in a number of ways, all sharing some common features, such as the active involvement of a taxpayer aimed at reducing the tax liability within allowable limits or (at times) where not regulated by law. The issue of the legality of such an activity has not been unambiguously solved, but the problem may be best illustrated by the fact that tax avoidance is often referred to as an "indirect violation of tax law."
- tax evasion – a phenomenon of the most negative nature. The term is used to describe a situation involving a direct breach of the applicable law and the subsequent punishment administered for an act sometimes referred to as "tax fraud."

These different types of tax behaviours illustrate different taxpayers' attitudes to taxation, which range from those that are completely legal (positive) to the negative ones, which are not accepted by the State (or society). These attitudes result from many interrelating and overlapping factors, and are subsequently analysed in different scientific areas of research, including economics, psychology, sociology, or law, with an aim of identifying and subsequently separating factors that influence the tax decisions made by taxpayers.[6] This behavioural aspect of the research cannot be underestimated and should be used in the process of creating and enforcing law.[7] It is, after all, the behavioural elements shaping taxpayer's attitudes that form behavioural facts. Following Andrzej Gomułowicz, it is tax mentality, tax morality or tax ethics[8] that have a role in the shap-

4 K. Wójtowicz-Janicka, *Optymalizacja podatkowa w doktrynie i orzecznictwie*, in *Optymalizacja podatkowa*, ed. Ł. Mazur, Warszawa 2012, pp. 15-19.

5 P. Karwat, *Obejście prawa podatkowego*, Warszawa 2002, pp. 13-28.

6 R. Sowiński, *Uchylanie się od opodatkowania. Przyczyny, skutki i sposoby zapobiegania zjawisku*, Poznań 2009, p. 21.

7 T. Nieborak, *Creation and enforcement of financial market law in the light of the economisation of law*, Poznań 2016, pp. 158-172.

8 A. Gomułowicz, *Podatki a etyka*, Warszawa 2013, *passim*.

ing of individual taxpayers' attitudes.[9] All this happens in a situation in which, from the point of view of the taxpayer, "tax is seen as a form of the State authorities" intervention in the rights in property of a given payer and is directed against one of the strongest and most protected pursuits i.e. the desire to make and multiply income and increase the wealth."[10] Excessive tax liabilities are therefore perceived as fiscalism and are bound to bring about a defensive reaction on the part of the taxpayer. This tax resistance characterising a taxpayer is believed to be the intrinsic feature of any tax liability.[11] As Aleksandra Wrzesińska-Nowacka noted, "the obligation to share one's own financial success with the State often results in taxpayers getting involved in activities aimed reducing their tax burdens."[12]

A legislator's action (taken by a tax authority) triggers off a reaction which may take different forms: from tax saving to tax evasion. It is right to believe that the tax law relationship constitutes a natural axis of the conflict between the parties, which in this case are the State (the active party) and the taxpayer (the passive party). In this context, tax avoidance is in between the two extreme forms: an autonomous form of activity undertaken by taxpayers. Tax planning (and tax saving) is a legal method of lowering or reducing one's tax liabilities that is accepted by fiscal authorities. It may, for instance, be the running of business in which tax exemptions and reliefs are used to the maximal legally allowed extent. It is worth noting here that the common view presented in the literature is that basically tax planning is very close to the avoidance of tax paying and the border between the two is hard to identify. While they are both always regarded as legal, they are not equally acceptable to tax authorities which, equipped with instruments available in general and specific tax law, undertake measures aimed at combatting tax evasion. This happens in consequence of the largely legitimate activities allowing taxpayers to reduce or eliminate tax dues (tax avoidance behaviour). State tax-based revenues are at stake as a result of unpaid taxes. With the general tax avoidance clause in place, fiscal authorities will have additional grounds upon which they will be able to challenge the reasons given by taxpayers seeking ways to avoid their tax liabilities, of which economic reasons are the most common.[13]

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9 A. Gomułowicz, *Postawy wobec opodatkowania*, in A. Gomułowicz, D. Mączyński, *Podatki i prawo podatkowe*, Warszawa 2016, p. 360-380.

10 *Ibidem*; V. also H. Filipczyk, *Ingerencyjny charakter prawa podatkowego – jedna teza, dwie interpretacje*, in *XXV lat przeobrażeń w prawie finansowym i prawie podatkowym*, ed. Z. Ofiarski, Szczecin 2014, pp. 399-409.

11 A. Olesińska, *op. cit.*, pp. 25-32.

12 A. Wrzesińska-Nowacka, *Granice między unikaniem opodatkowania a uchylaniem się od niego na tle wybranych orzeczeń sądów administracyjnych*, in *Stanowienie i stosowanie prawa podatkowego w Polsce. Optymalizacja podatkowa a obejście prawa podatkowego*, ed. M. Münnich, A. Zdunek, Lublin 2012, p. 173.

13 A. Olesińska, *op. cit.*, p. 17.

The tax avoidance clause in the Polish legal system – assessment

The analysis of Polish legal solutions underlying the introduction of the tax avoidance clause may begin with a statement that taxpayers exercising the ability to avoid paying taxes lies within the range of legal activities available to them. This fact is not without significance when it comes to the potential consequences under penal-fiscal law. More precisely, the enforcement of the clause may render the application of the provisions of this law impossible in a situation when the taxpayer attempts to avoid tax liabilities through illegal actions. The negative character of these activities can also be seen in other terms used to describe such illegal activity, such as "tax is fraud" or "tax crime." Other examples of illegal activity include a failure to disclose all income sources or deducting from the taxable base costs that have not been incurred. Thus the opinion that there is a difference between an instance of tax planning when a taxpayer attempts to avoid a tax liability that may arise, and the situation of attempted tax evasion when a tax liability does arise but the taxpayers is not willing to satisfy the obligation[14] seems to be correct. In the latter case the decision made is covert and *contra legem*, and it clearly differs from tax avoidance, which is an overt activity within the limits of the law, even if in the eyes of the legislator and tax authorities it is to the prejudice of the objective and rationale underlying the tax regime. This potential conflict between the taxpayer and the tax payee requires that in a tax avoidance situation it becomes necessary to determine the boundaries between what is a legal way of reducing or minimising one's tax liability and what constitutes unacceptable actions aimed exclusively at lowering the payable tax liabilities.

The tax avoidance clause is an instrument with which tax authorities have been equipped and which serves to take actions aimed at the above. The characteristic feature of this instrument is its general character, which means that in deciding to resort to this instrument, the legislator indicates that certain activities undertaken by taxpayers in order to reduce the amounts of payable tax are ineffective. In this way, as it is often claimed, the legislator pays more attention to the spirit, not the letter of law.[15] Equipped with such a clause, a tax authority may disregard the beneficial tax consequences enjoyed by a taxpayer and adopt a hypothesis of the *status quo*, which in the opinion of the tax authority will be the most adequate to the economic essence of the events that have occurred.[16]

This general and subjective element of assessment, which is part of the activity of tax authorities, is a source of numerous debates and controversies every time when a tax avoidance clause is adopted in a legal system (of any state). It was no different in Poland

14 T. Dębowska-Romanowska, *Uwarunkowania konstytucyjne dopuszczalności wprowadzania klauzul antyabuzywnych, jako ogólnych instytucji materialnego prawa podatkowego*, in *Nauka prawa finansowego po I dekadzie XXI wieku*, ed. I. Czaja-Hliniak, Kraków 2012, pp. 91-94.

15 A. Olesińska, *op. cit.*, p. 27.

16 *Ibidem*, p. 17.

when, more than 10 years ago, the Tax Ordinance was amended and Articles 24a and 25b were added. However, all this was in vain since the Constitutional Court ruled in its judgment of 11 May 2004 (file K 4/03)[17] that §1 of Article 24b was unconstitutional, being contrary to Article 2 in connection with Article 217 of the Constitution of the Republic of Poland. Without analysing the content of the judgment in any detail, and having regard to the opinions in the doctrine,[18] it still is worth noting that the fundamental problem of the enforceability of the abusive clause included in the provision of the challenged Article, is the possibility it provided for the enforcement of the clause in making *ex post* assessments of a taxpayer's behaviour, which may result in negative consequences for the taxpayer in the event his/her behaviour has been found legal and not in breach of the applicable legal order. Thus, keeping in mind the ruling of the Constitutional Court and its rationale, the Polish legislator was obliged to make necessary amendments in line with the Court's reasoning which read as follows:

> In the Constitutional Court's opinion, there should be no doubt as to the view that one of the elements of the constitutional principle of the rule of law (Article 2 of the Constitution) is a norm that prohibits sanctioning (here: in the meaning of ascribing negative consequences or refusing to respect the positive consequences) such behaviours of the addressees of the provisions, which are in compliance with the law (ordered or at least allowable). Therefore if an addressee performs an act in law which is lawful and the purpose of such an act is not prohibited by the law, it cannot be recognised as right and proper to qualify such an act in law in a manner (suggesting) that the goal achieved (including the taxation goal) is equivalent to and treated as prohibited acts. Therefore it must once again be emphasised that a legal norm is missing in the tax law system, which would prohibit a lower tax rate (of course when achieved by a taxpayer as a result of legal actions performed) [...]. The Constitutional Court thus stressed that threats to such predictability may be found in three factors. Firstly, when the premises for understanding (interpreting) a certain under-defined term are determined by subjective elements. The greater the scope for individualised interpretation of a given notion, the greater the threat of the unpredictability of solutions made on its basis. Secondly, the use of under-defined terms should be accompanied with the necessity of filling them with such contents which will guarantee the uniformity of the legal reasoning (or decisions underlying

17 Ruling of the Constitutional Court of 11 May 2004 (file K 4/03).

18 Including, primarily, an opinion assessing the possibility of applying general clauses, formulated separately to the Court's decision of 14 July 2004 (file SK 16/02) by Justice Teresa Dębowska-Romanowska who stated that "in the light of Polish constitutional regulations, general clauses referring to the enforcement of tax law have a very limited application and their implementation must be accompanied by particularly fair legislation".

> the enforcement of law). Thirdly, it is of essence to ensure that the determination of unclear (blurred) concepts used in a given regulation will not be part of the task of authorities enforcing the said regulation, as this could potentially lead to illicit law-making by these authorities. Referring these reservations to the wording of para 1 of Article 24b of the Tax Ordinance it must be stated that from this point of view the regulation in question arouses fundamental doubts and reservations. Terms such as "it could not have been anticipated," "other benefits of substance," or "benefits arising from the lowering of the level of liability" decidedly disallow a conclusion that "their judicial interpretation will really be uniform and precise" and that "it will not be possible to derive from their wording the law-making capacity of law enforcing authorities." It is also worth noting that the above reservation disallowing a provision with a wording containing under-defined terms to become subject of the law-making activity of law enforcing authorities was formulated by the Constitutional Court particularly with regard to regulations enforced by courts (as in the Constitutional Court's ruling of 17 October 2000, SK 5/99, OTK ZU No. 7/2000, item 254).

These and other critical remarks formulated by the Constitutional Court were subsequently taken into account when a new wording of the general tax avoidance clause was being drafted. Still, however, the clause contains a number of under-defined terms, leaving much freedom and discretion of their interpretation to relevant tax authorities. This, however, again poses a risk of these organs assuming the law-maker's role.

It should be nevertheless expected that this clause will be used reasonably and cautiously, to serve its main function, which is prevention, as indicated in the Preamble to the Act of 13 May 2016 on the amendment to the Act – Tax Ordinance and some other Acts (Dz.U. 2016 item 846). That Act re-introduced a tax avoidance clause to the Polish legal system. Its adoption was recommended by the Codification Committee of the General Tax Law in a document entitled: "Directions of the assumptions underlying the new tax law" of 24 September 2015.[19] The Commission emphasized the fact that although the anti-abuse clause is known worldwide, there is no one normative model of this clause that could be commonly used. The Polish model is a pioneering solution in this respect, but has so far failed to attract wider attention or discussion which would help to define the concepts referred to Section IIIa "Counteracting tax avoidance"[20] added to the Tax Ordinance."[21]

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19 Kierunkowe założenia nowej ordynacji podatkowej, http://www.mf.gov.pl/c/document_library/get_file?uuid=c5583761-7069-4816-8f1f-63fb34b9d86b&groupId=764034, http://www.mf.gov.pl/c/document_library/get_file?uuid=c5583761-7069-4816-8f1f-63fb34b9d86b&groupId=764034 [access: 20.05.2017].

20 Kierunkowe założenia..., *op. cit*., p. 13.

21 Act of 29 August 1997 Tax Ordinance (consolidated text Dz.U. 2017 item 201).

The Section which covers the provisions of Articles 119a-119zf of the Tax Ordinance is extremely extensive and detailed, but not of all them require a thorough analysis.

The first issue requiring explanation is the definition of tax avoidance. As provided in Article 119a §1 of the Tax Ordinance, the goal of an action taken in the case of tax avoidance is a tax advantage, which under given circumstances is contrary to the subject and purpose of the tax law. Tax avoidance will not result in any tax advantage if the manner of the action taken to achieve it was artificial. In such a case, the tax effects resulting from a tax avoidance action are determined on the basis of such a state of affairs which could have possibly occurred, had a correct action been performed. An action shall be deemed correct if the entity could have performed it in given circumstances, had it acted reasonably and followed lawful objectives other than tax advantage, contrary to the subject and objective of the provisions of the tax law. If, in the course of the proceedings, a proper action can be identified, the tax effects will be determined on the basis of the state of affairs which would have occurred had the action been taken. An action is considered artificial if on the basis of the existing circumstances it must be regarded that such an action would not have been performed by an entity acting reasonably, abiding by the existing laws, and for lawful and legal purposes that were other than gaining a tax advantage that is contrary to the subject and l or purpose of the tax law. However, how should the artificiality and contradiction to the subject and purpose of the tax law be understood? The notion of "the subject and objective of tax law" has not been defined in any detail in the Tax Ordinance. To reconstruct its understanding, it may be useful to adopt the common belief that the purpose underlying tax law is fiscal in nature, which materialises when taxes are transferred to the State, local authorities etc. for the purpose of financing their public tasks.[22] However, it is the legislator himself who creates possibilities for taxpayers to resort to and make use of tax reliefs, exemptions or reductions and other beneficial solutions. Thus a situation may be imagined in which although a taxpayer will pursue activities aimed at tax avoidance, in the long run this will improve his/her economic situation and have a positive effect on the State's revenues, thus facilitating the realisation or implementation of various social or structural purposes. Whereas to assess whether the manner of the action performed was nothing but artificial, the following must at least be taken into account: 1. The presence of intermediating entities, despite the lack of economic justification for their involvement; 2. Elements leading to the achievement of the state of affairs identical to or close to the state existing before the action was performed; 3. The economic risk exceeding the expected benefits other than tax advantages, to the extent that it must be assumed that an entity acting reasonably would not have opted for this type of activity or action. An action is regarded as undertaken primarily for the purpose of a tax advantage if the remaining economic activities

22 R. Mastalski, *Prawo podatkowe*, Warszawa 2006, pp. 34-38.

indicated by the taxpayer as undertaken are of minor significance.[23] A tax advantage in the meaning of the relevant provisions of the Tax Ordinance includes, among other things: the non-occurrence of a tax liability, the postponement of the occurrence of a tax liability, a reduction in the amount of a tax liability, the overvaluation of a tax loss, the occurrence of a tax overpayment, the right to a tax refund right, or an increase in the tax overpayment or refund amount.

Thus, to prove that the taxpayer's action was artificial, a tax authority will primarily have to indicate the irrationality of the actions the taxpayer has performed. At the same time, non-artificial actions, being a *contrario* rational, will be these actions which even if seemingly intended to seek tax avoidance, will nevertheless belong to the elements of tax planning, which is economically justified. Despite the risk undertaken, such actions will generate measurable effects for the taxpayer, and thus, indirectly, for the State as well.

As can be seen from the above, determination of whether under actual circumstances we are dealing with actions indicating tax avoidance, requires a number of interpretative activities to be performed. If the tax avoidance clause can be enforced, then pursuant to § 1 Article 119a of the Tax Ordinance the tax authority will be in a position to cancel (recover, or refuse to grant) the tax advantage, and "deconstruct" at the same time the taxpayer's action by its reclassification (pursuant to Article 119a §§ 2-4 of the Tax Ordinance) or its neutralisation (pursuant to § 5 Article 119a).[24]

What is also important is that when introducing the tax avoidance clause, the legislator determined the timescale of its enforcement, basing it on the concept of retrospectivity. Article 7 of the Act of 3 May on the amendments to the Tax Ordinance Act and some other legislative acts (Dz.U. 2016 item 846) provides that Articles 119a-119f apply to tax advantages gained after the coming into force of the said Act. In such a case, retrospectivity, although controversial from the point of view of the compliance of the adopted solution with the Constitution of the Republic of Poland, will mean that the legislator can make normative acts which will apply to circumstances that continue at the date of adoption and after the enforcement of these acts.[25]

An allegation that a taxpayer attempted to avoid paying taxes may be defended. The defence should have a 'cascade' form and provide evidence of the correctness of the ac-

23 More on the delimiting clause referring to the economic optimisation reality and tax avoidance: S. Bogucki, M. Romanowicz, *Niedopuszczalność kwestionowania skutków podatkowych czynności prawnej w ramach instytucji art. 199a § 2 Ordynacji podatkowej w przypadku nadużycia prawa*, in *Międzynarodowe unikanie opodatkowania. Wybrane zagadnienia*, ed. D. Gajewski, Warszawa 2017, p. 3.

24 H. Filipczyk, *Stosowanie klauzuli ogólnej przeciwko unikaniu opodatkowania – zagadnienia wybrane*, "Monitor Podatkowy" 2016, no. 7, p. 13.

25 K. Turzyński, M. Kolibski, *Reguła intertemporalna klauzuli ogólnej przeciwko unikaniu opodatkowania w świetle standardów konstytucyjnych – polemika*, "Przegląd Podatkowy" 2016, no. 12, pp. 21-25. Cf. H. Filipczyk, *Stosowanie klauzuli...*, *op. cit.*, pp. 17-18.

tions performed, proving that they were based on reasonable grounds. This is so because the tax avoidance clause is of a legally fictitious character, allowing enforcement of legal provisions in a manner which in reality leads to imposing tax on a given action performed.[26] This action will, however, be placed in a certain actual state of affairs created on the basis of a model of a reasonable taxpayer's conduct, who in his/her actions aims at goals other than economic. Thus a tax authority will take steps to pursue and determine the legal effects of the actual state of affairs considered correct for a given economic goal. However, this pursuit will be based on a non-existent state of affairs, although from an objective point of view it is the most correct in the given circumstance of the taxpayer.

The consequence of the tax authority's activity may be a tax decision regarding tax avoidance. Thus the question arises whether persons responsible (and in particular, the financial officers in such a company) for a challenged tax avoidance situation in a company which is subject to Corporate Income Tax can be held liable and punishable under the Penal and Fiscal Code [the Code].[27] The amended Tax Ordinance introducing the tax avoidance clause failed to regulate this. Consequently, the provisions of the Code will apply. Their analysis leads to the conclusion that there is no way in which penal fiscal sanctions may be applied in respect of persons – officers of a company, liable for the occurrence of a situation of tax avoidance in nature. This may be justified or explained by constitutional provisions as well as the provisions of the penal fiscal nature. Article 42 clause 1 sentence 1 of the Constitution of the Republic of Poland provides that only a person who has committed an act prohibited by a statute in force at the moment of commission thereof, and which is subject to a penalty, shall be held criminally responsible. A reflection of this principle is the provision of Article 1 § 1 of the Code stating that only a person who has committed a socially harmful act prohibited under the penalty clause of the binding law shall be criminally responsible for a tax crime or a fiscal offence. Neither the Tax Ordinance nor the Code provides that tax avoidance is an act amounting to a penal-fiscal liability and as such is not subject to it.[28] What is more, there is no mention in the Code of such a category of an offence as tax avoidance. Tax evasion (Article 54 of the Code) and tax fraud (Article 56 of the Code) are penalised if their source was illegal actions. The characteristic feature of tax avoidance is, as shown above, the legality of actions performed by a taxpayer, which may, however, under certain circumstances, be questioned by the tax authorities. As a result, it would not be permissible under the rule of law to penalise any person (and what is more, with the use of penal law instruments) for legal and lawful actions performed.

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26 H. Filipczyk, *Stosowanie klauzuli...*, *op. cit*., p. 14.

27 Act of 10 September 1999 Penal and Fiscal Code (Dz.U. 2016 item 2137 j.t.).

28 J. Olesiak, Ł. Pajor, *Komentarz do art. 119c Ordynacji Podatkowej*, in *Ordynacja podatkowa. Komentarz*, ed. H. Dzwonkowski, Warszawa 2016.

Conclusions

To sum up, it must be stated that since the development of the institution of taxation, a certain game has been going on between the State and the taxpayers, in which public and private interests collide. The notion of the common good should guide a State to enforce the opposing parties to seek a compromise. When it comes to taxes, however, a compromise is not easy to reach and often depends of the quality of the legislation and the activity of the tax authorities. The decisions or actions of the latter are generally not welcome. And yet, the tax authorities are vested with the task of protecting the State's finances and are therefore becoming increasingly better equipped with new instruments. This is partly due to the regulatory dialectics i.e. a situation in which the reaction of a tax legislator is triggered by the activity of taxpayers who sometimes take a too liberal approach to the interpretation of tax law provisions and create aggressive forms of tax planning. The answer to such actions will be the tax avoidance clause analysed in this paper. This clause has now returned to the Polish legal system, and is potentially a very powerful, but also – and this needs emphasising – dangerous weapon given to the tax authorities. It may only be expected that in the future the efficiency of the clause will flow from its preventive function rather than its actual application.[29]

Literature

Act of 10 September 1999 Penal and Fiscal Code (Dz.U. 2016 item 2137 j.t.).

Act of 13 May 2016 on the amendment to the Act on Tax Ordinance and certain other legislative acts, Dz.U. item 846.

Act of 29 August 1997 Tax Ordinance (consolidated text Dz.U. 2017 item 201).

Bogucki S., Romanowicz M., *Niedopuszczalność kwestionowania skutków podatkowych czynności prawnej w ramach instytucji art. 199a § 2 Ordynacji podatkowej w przypadku nadużycia prawa*, in *Międzynarodowe unikanie opodatkowania. Wybrane zagadnienia*, ed. D. Gajewski, Warszawa 2017.

Brzeziński B., *Zagadnienie konstytucyjności klauzuli normatywnej zapobiegającej unikaniu opodatkowania*, in *Państwo prawa i prawo karne. Księga Jubileuszowa Profesora Andrzeja Zolla*, vol. I, Warszawa 2012.

Commission Recommendation of 6 December 2012 on aggressive tax planning (2012/772/EU), OJ L 338/41.

29 What is important here is the role of the tax avoidance clause and its application as an element of building citizens' trust in the State and the law created by the State. More on this: B. Brzeziński, *Zagadnienie konstytucyjności klauzuli normatywnej zapobiegającej unikaniu opodatkowania*, in *Państwo prawa i prawo karne. Księga Jubileuszowa Profesora Andrzeja Zolla*, vol. I, Warszawa 2012, pp. 694-695.

Dębowska-Romanowska T., *Uwarunkowania konstytucyjne dopuszczalności wprowadzania klauzul antyabuzywnych, jako ogólnych instytucji materialnego prawa podatkowego*, in *Nauka prawa finansowego po I dekadzie XXI wieku*, ed. I. Czaja-Hliniak, Kraków 2012.

Filipczyk H., *Ingerencyjny charakter prawa podatkowego – jedna teza, dwie interpretacje*, in *XXV lat przeobrażeń w prawie finansowym i prawie podatkowym*, ed. Z. Ofiarski, Szczecin 2014.

Filipczyk H., *Stosowanie klauzuli ogólnej przeciwko unikaniu opodatkowania – zagadnienia wybrane*, "Monitor Podatkowy" 2016, no. 7.

Gomułowicz A., *Podatki a etyka*, Warszawa 2013.

Gomułowicz A., *Postawy wobec opodatkowania*, in A. Gomułowicz, D. Mączyński, *Podatki i prawo podatkowe*, Warszawa 2016.

Karwat P., *Obejście prawa podatkowego*, Warszawa 2002.

Kierunkowe założenia nowej ordynacji podatkowej, http://www.mf.gov.pl/c/document_library/get_file?uuid=c5583761-7069-4816-8f1f-63fb34b9d86b&groupId=764034 http://www.mf.gov.pl/c/document_library/get_file?uuid=c5583761-7069-4816-8f1f-63fb34b9d86b&groupId=764034 [access: 20.05.2017].

Mastalski R., *Prawo podatkowe*, Warszawa 2006.

Nieborak T., *Creation and enforcement of financial market law in the light of the economisation of law*, Poznań 2016.

Olesiak J., Pajor Ł., *Komentarz do art. 119c Ordynacji Podatkowej*, in *Ordynacja podatkowa. Komentarz*, ed. H. Dzwonkowski, Warszawa 2016.

Olesińska A., *Klauzula ogólna przeciwko unikaniu opodatkowania*, Toruń 2013.

Ruling of the Constitutional Court of 11 May 2004 (file K 4/03).

Sowiński R., *Uchylanie się od opodatkowania. Przyczyny, skutki i sposoby zapobiegania zjawisku*, Poznań 2009.

Turzyński K., Kolibski M., *Reguła intertemporalna klauzuli ogólnej przeciwko unikaniu opodatkowania w świetle standardów konstytucyjnych – polemika*, "Przegląd Podatkowy" 2016, no. 12.

Wójtowicz-Janicka K., *Optymalizacja podatkowa w doktrynie i orzecznictwie*, in *Optymalizacja podatkowa*, ed. Ł. Mazur, Warszawa 2012.

Wrzesińska-Nowacka A., *Granice między unikaniem opodatkowania a uchylaniem się od niego na tle wybranych orzeczeń sądów administracyjnych*, in *Stanowienie i stosowanie prawa podatkowego w Polsce. Optymalizacja podatkowa a obejście prawa podatkowego*, ed. M. Münnich, A. Zdunek, Lublin 2012.

SUMMARY

The Tax Avoidance Clause: Do We Want it, Do We Need it?

The aim of this paper is to outline the institution of the tax avoidance clause which has recently been re-introduced to the Polish legal system. The clause is known in many legal systems worldwide, and always arouses numerous controversies, which arise primarily from the subjectivity as well as, partly, the retroactivity of its application, which is based on extremely general principles, leaving a vast interpretative margin to the tax authorities enforcing the clause. Selected problems arising from the implementation of the tax avoidance clause in the Polish legal system have been analysed. These theoretical problems will be real once the clause has been enforced.

Keywords: tax, tax evasion, tax avoidance clause, the Tax Ordinance

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Corporate Consistency and the Regulations of the Corporate Governance System

Introduction

In contemporary organizations the management process is constantly changing. This is due to the fact that new trends are continuously emerging and they have a significant influence on corporate practice. The trends concern the external surroundings in which companies operate, as well as their internal environment. The main external changes are connected with economic and geopolitical conditions, but also with a new model of the consumer based on postmodernist theory, called 'the postmodern consumer.' The internal changes are connected mainly with a new era of workers and with a turn to nonmaterial values in management, but also with the necessity of applying the latest technology.

Management system transformation is a process, which means that it is taking place all the time and, moreover, on each level of management in an organization. As it concerns all the levels, there is a problem of overall planning and coordination, especially from the perspective of the board.[1] The problem starts when we try to analyze and construct consistency within an organization, because no operational models are available. At this point specific questions arise, and answers are required since they are crucial not only for an in-depth understanding of the problem but also for practical application. This is one of the most important issues for researchers of management theory nowadays, because business and public managers require support with regard to consistency within organizations, which may be the key to building a competitive advantage in a modern way.

Trying to respond to the challenges mentioned above, we decided to provide a holistic picture of modern corporate governance from two perspectives. The first considers the internal role of the board as the main body responsible for the efficiency and effectiveness of operations. The second analyzes the relationship between companies and their

1 A. Dignam, M. Galanis, *The Globalization of Corporate Governance*, Burlington 2009.

environment. Both pictures create a synergy effect and provide a general view of modern corporate governance practices and problems.

To accomplish this aim, the author of the first part of the paper tries to operationalize the process of corporate consistency by establishing the concept of corporate consistency. The concept consists of certain consistency platforms which are described in detail below. This is the first time that this concept has been introduced in an international publication. There are also auxiliary aims, such as: to introduce a corporate consistency model, to describe consistency platforms, and to point out the main problems in implementing the consistency process. To make the topic more understandable the author attempts to exemplify the corporate consistency building process by referring to companies with mature process structures. Process structures are introduced more and more often in modern organizations, so connecting consistency with process structures seems to be very important from both a theoretical and practical point of view. At the end of the first part of the paper, the author suggests the directions in which further studies of the topic should be taken.

The second part focuses on corporate governance regulations as an element of a broadly understood system of company management, including the management of a company's relationship with entities from their business environment. This section aims to present and evaluate the corporate governance system, focusing in particular on the EU and Polish regulations introduced following changes to conditions. The main thesis of this part of the article is the assumption that general trends in the development of corporate governance regulations outlined by international organizations, including EU directives and Polish regulations, show the right direction and should be given credit. Drafts of new regulations and recently adopted ones take into account the current trends in the development of enterprises and markets. However, further successful development of the corporate governance system requires the cooperation of many actors involved in the creation of this system. This means that the development of EU and Polish rules concerning the corporate governance system should be based on the cooperation of all the stakeholders involved in the formation of this system. The provisions quoted in the paper were enforced on 31 December 2015.

Corporate consistency in management theory

The topic of management consistency rarely appears in management theory, and when it does it is not analyzed in depth. Moreover, no operational studies have been carried out and no models have been constructed so far. However, some authors deal with the issue and a short overview will be presented below.

R. Coolidge approaches the consistency problem by pointing out that consistency is practicing what you preach, which means that actions should be consistent with

words.[2] This way the author focuses our attention on creating an appropriate corporate culture which is flexible enough to adapt to different periods in a company's life cycle.

Coolidge helps companies evaluate if they are consistent by listing some characteristics of consistent companies. They are:

- low employee turnover, high motivation and morale,
- high customer satisfaction, loyal customers,
- customers can accurately describe your company's culture, and embrace it,
- rapid growth after a period of slow growth or decline,
- growth after a period of decline exceeds previous successes, indicating the incorporation of learning and consistency

According to E. Brackett, consistency relates to a company's brand and to be consistent means deciding on specific visual elements, such as a name, logo, logotype, color and design system to be used throughout the company[3]. This approach, although important, only refers to a narrow meaning of consistency, focusing on brand creation. A similar approach is represented by S. Robshow-Bryan, who stresses the need for brand consistency,[4] and A. Lynch, who gives examples of good (consistent) and bad brands.[5]

A. Pulido, D. Stone and J. Strevel analyze corporate consistency from the customer's point of view.[6] They insist that to increase customer satisfaction, sales rate and revenues, companies should be consistent with regard to: having clear policies, rules, and supporting mechanisms to ensure consistency during each interaction; positive customer emotional experience – reflected in a feeling of trust; ensuring customers recognize the delivery of promises, which requires proactively shaping communications and key messages that consistently highlight delivery as well as themes. In this approach, consistency also relates to a given part of companies' activities regarded as general clues as to what companies should remember about.

A different view on consistency is represented by H. Cronqvist, A. Makhija and S. Yonker, who associate consistency with human resource management and employment policy.[7] They point out that each CEO should be individually matched to the

2 R. Coolidge, *Corporate Consistency, Executive Blueprint*, http://www.executiveblueprints.com/tips/080503_corporateconsistency.htm [access: 6.10.2016].

3 E. Brackett, *Why Consistency is important?*, Visible Logic, http://www.visiblelogic.com/blog/2009/04/why-consistency-is-so-important-to-branding/ [access: 6.10.2016].

4 S. Robshow-Bryan, *The importance of brand consistency*, Surfire 2013.

5 A. Lynch, *A difference between a good brand and a great brand. Consistency, Northstar Marketing*, http://www.northstarmarketing.com/2015/05/07/the-difference-between-a-good-brand-and-a-great-brand-consistency [access: 8.10.2016].

6 A. Pulido, D. Stone, J. Strevel, *The three Cs of customer satisfaction: Consistency, consistency, consistency*, March 2014.

7 H. Cronqvist, A. Makhija, S. Yonker, *Behavioral consistency in corporate finance: CEO personal and corporate leverage*, "Journal of Financial Economics" 2012, vol. 103, no. 1, pp. 20–40.

position in the company according to the exact position description and requirements. Only such detailed requirements make it possible to decide if a candidate is right for the position or not. Importantly, the authors advise using the behavioral consistency theory to match people to their functions.

As we can see, consistency is presented in management theory in a very specific way – there are some attempts to analyze consistency in certain areas of business operations. The most popular area is connected with marketing and the company-customer relationship. However, there has been no attempt to analyze consistency from a general perspective, where the board should plan and implement consistent actions.

The foundation of the consistency concept – general systems theory

Consistency theory is based on Ludwig von Bertallanfy's general systems theory. One of the most important assumptions of this theory is that changes influence not only other elements of the system, but also the effectiveness of the whole system. According to general systems theory, a change in one element of the system influences the other elements and hence the functioning of the whole system changes. Thus, optimization of one element of the system (suboptimization) may have three effects on the whole system: it may improve its effectiveness, deteriorate its effectiveness or have no results at all.

When we look at an organization as a system, the conclusions drawn from general systems theory have a key meaning for organizational harmonization and optimization. When we optimize an organization by implementing constant changes we need to see it and analyze it as one system, and we need to look in different directions, which means searching for possible effects of changes in various areas of the functioning of the organization. Possible effects may also appear in areas located far away from each other.

The assumptions of general systems theory are characterized by a high level of abstraction. The problem becomes apparent when we try to put these assumptions into practice. To do so, we need to identify the main areas where changes are needed and show the interaction between them. Only then will we be able to identify how possible changes in one area influence other areas. This way, the process of harmonization, adjusting and consistency building among different organizational areas will be identified, which will allow us to implement changes. This will lead to an increase in organizational effectiveness. For this reason the author of the first part of this paper introduces platforms for the creation of consistency.

Another important conclusion resulting from general systems theory is an opportunity to see an organization from the perspective of systems, subsystems and suprasystems. It is known that systems consist of subsystems, but at the same time systems are

the elements of suprasystems. Subsystems may join to create systems and systems join to create suprasystems. This mechanism was used by the author to construct the concept of consistency presented below.

Corporate consistency platforms

Before consistency platforms are introduced, a crucial remark needs to be made – although the platforms are universal for any organization, their internal construction must be adjusted to the strategic level of every organization: to its mission, vision, strategy and strategic goals. Since each organization has a different strategic level construction, the internal shape of the consistency platforms in each case will be different, and will need to be adjusted appropriately. Such an approach is necessary and has one big advantage, namely the need to think over strategic issues first, before further decisions on consistency are made. In many organizations the strategic level is neglected or even abandoned[8].

The consistency concept proposed in this part of the paper consists of three consistency platforms. Each of them should create a consistent system and when this condition is met all the elements of each platform are harmonized and consistent. The platforms are presented in Table 1.

Table 1. The platforms of organizational consistency

Platform Number	First element	Second element	Effect of harmonization
Platform 1	Management concepts	Management methods	Consistent system
Platform 2	Organizational structure	Management style and mechanisms	Consistent system
Platform 3	Platforms 1+2	Human resource (profile, practices)	Consistent system

Source: own study.

As we can see from the table above, harmonization takes place on three platforms of consistency. Each platform consists of two elements which should constitute a consistent system.

The first platform refers to two elements which in the theory and practice of management logically complement each other – the concepts and methods of management. Introducing a chosen concept triggers the need to introduce other concepts, so that the first one is supported by complementary concepts. Thus, even in the area of concepts

8 K. Obłój, *Strategia organizacji*, Warszawa 1999, p. 74.

there are some consistent subsystems. Furthermore, introducing certain management concepts triggers the need to implement the specific management methods which result from the choice of those concepts. When we think about methods it is not only important to implement them, but also to adjust and accommodate them according to the concepts and all the methods implemented. So, again here we end up with a consistent subsystem, but this time in the area of methods, which is adjusted to the concepts. As we can see, the proposed consistency platforms allows the harmonization of some subsystems which are internally consistent to be sought, and in moving up to the system level they join a consistent system. This approach is presented in Figure 1.

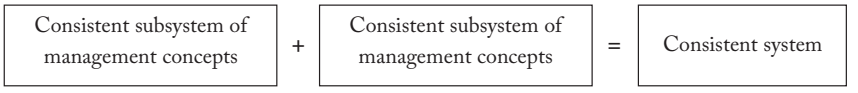

Figure 1. Consistency system in organizational harmonization exemplified by platform 1
Source: own study.

Using the terminology of general systems theory it may be said that if the concepts and methods of management constitute a consistent system, then their internal mini-systems constitute consistent subsystems of the whole system. It also refers to other platforms which may be perceived as consistent subsystems of the whole consistent system. Here we move on different levels of a system analysis.

Platform two, as we can see in Table 1, consists of two key elements. The first one is an organizational structure and the other the appropriate style and mechanisms of management in the organization. In each organization there is an organizational structure that requires a specific management style which managers prefer, as well as mechanisms they use so that the two elements are appropriately adjusted. Generally speaking, organizational structures may be functional structures, process structures (and process-like structures, e.g. virtual), and also hybrid structures are a combination of functional and process structures. Each of the structures mentioned differs with regard to its functioning and requires adjusting the management style and recognizing the mechanisms which are natural for the structure. When the mechanisms are recognized and understood in the organization, they must be used actively by managers on all company levels.

The third platform in Table 1 is the platform which integrates the previously analyzed platforms with human resource management in the organization. This platform shows that the human resources of the company must be adjusted to the consistent systems of the concepts and methods of management, and to the organizational structure and style and the mechanisms of management. The human capital of the organization must have some characteristics which are matched to the requirements resulting from the previous platforms.

Thus, platform three consists of a consistent subsystem made up of two subsubsystems (Platforms 1 and 2) and a subsystem of human resource. The last one requires special adjustment inside human resource management in the organization. These adjustments may be in the area of human resource practices and other activities resulting from the determined human resource profile. Platform 3 also underlines the key role and intersystem character of human resources in the organization, which are the basis of the efficient and effective functioning of all the other systems mentioned on Platform 1 and 2.

Organizational consistency model

According to the analysis presented above, it is possible to construct an organizational consistency model on the strategic level of corporate management. The model summarizes the analysis made on the specific consistency platforms. It is presented in Figure 2.

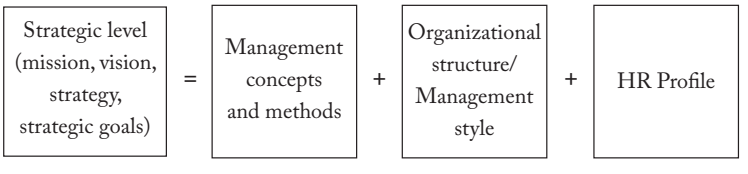

Figure 2. Organizational consistency model
Source: own study.

As we can see in Figure 2, the foundation of organizational consistency and the harmonization of organizational assumptions and activities is always built on the strategic level of an organization, which is its mission, vision, strategy and strategic goals. The strategic level influences the harmonization of all the other subsystems that we can see in the model. Thus, the model shows platforms where necessary analyses resulting from a consistent system have to be carried out. When such a system is achieved, the effectiveness and efficiency of the organization is optimized.

What needs to be underlined is the fact that the subsystems presented above in the model (consistency platforms) are open, which means that analysis platforms may be added to the model if necessary. The platforms presented in the model in Figure 2 are obligatory for the analysis in the company, but there is a possibility to add new analysis subsystems. This way a consistency model may inspire managers, which is a very important value of the model. The inspiring character of the model is presented in Figure 3.

As we can see from the above, the consistency model has an open nature. Importantly, the model is also flexible, which means its subsystems can be reconfigured accordingly to fit to the changes in the internal and external environment of an organization (internal reconfiguration of subsystems). The internal reconfiguration may be temporary or

permanent. Temporary reconfiguration means modifications in the subsystems when compared to the configuration made before. This kind of situation may arise when, for example, in times of crisis in an organization the democratic management style is replaced by an autocratic one, in order to solve problems quickly. Then the workers only follow orders. When the situation of the company improves and the problems are solved then there is a return to the previous model.

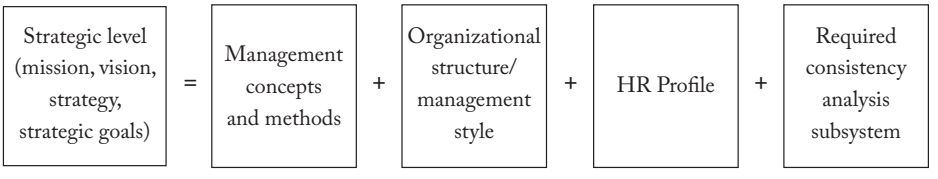

Figure 3. Consistency platforms configuration – open model type
Source: own study.

Permanent reconfiguration means changing the subsystems and their regulations according to permanent environment changes or new experiences gained[9]. What is important here is feedback regarding the effectiveness of the regulations which are part of the subsystems. Such a communication system allows for organizational learning and changing subsystems accordingly.

Temporary and permanent reconfiguration of the model subsystems means that, due to the consistency concept introduced by the author, it is natural that reconfiguration of the subsystems is optimized all the time and changes are introduced when they are required. Consequently, managers must be involved in consistency management almost on a daily basis.

When permanent and profound changes of the regulation model within an organization take place, then the strategic level of the company changes (the mission, vision, strategy, strategic goals), and so does the functioning of the model. Then often a new subsystems configuration is necessary. For example, such a situation may arise when an organization changes its structure from functional to process-oriented, and when process management is introduced. The changes are complex and actually model subsystems are formed from the very beginning. What is important is that the change does not have to concern the elements proposed in the model in Figure 3, but only the regulations inside the consistency subsystems.

9 M.M. Blair, *Reforming Corporate Governance: What History Can Teach US*, Berkeley 2004, pp. 39–40.

Corporate governance – an external approach

Corporate governance can be defined as a system of rules, practices and processes by which a company is directed and controlled. Corporate governance essentially involves balancing the interests of many stakeholders in a company, namely its shareholders, management, customers, suppliers, financiers, government and the community. Since corporate governance also provides a framework for attaining a company's objectives, it encompasses practically every sphere of management, from action plans and internal controls to performance measurement and corporate disclosure.[10]

The main issues regulated by the principles of corporate governance include:

- relationships with shareholders, contractors and employees,
- the disclosure of conflicts of interest,
- the establishment of objectives and identification of factors and mechanisms to monitor the achievement of these objectives,
- the shaping of the organisational structure, segregation of roles and duties,
- the information and communication system,
- risk management,
- the system of internal control,
- external and internal audit.

The notion of corporate governance was first formulated by the Organization for Economic Cooperation and Development in its *Principles of Corporate Governance*[11]. It was meant to serve as a helping tool in the assessment and improvement of the legal framework, relevant institutions and binding regulations existing in the countries where a system of exercising influence on shareholders' supervision is in place. According to the OECD, corporate governance is a system through which economic organizations are managed and supervised. It is expected that good corporate governance will motivate the management to focus on meeting the company's objectives and use the company's resources efficiently. It should also facilitate successful monitoring of the company's business, thus counteracting improper or overtly fraudulent accounting practices and financial fraud.

In the preamble, of the OECD Principles of Corporate Governance we can read that:

> Corporate governance involves a set of relationships between a company's management, its board, its shareholders and other stakeholders. Corporate governance also

10 *Corporate Governance*, Investopedia, http://www.investopedia.com/terms/c/corporategovernance.asp [access: 23.09.2013].

11 *OECD Principles of Corporate Governance*, OECD, 6 October 1999, http://www.oecd-ilibrary.org/governance/oecd-principles-of-corporate-governance_9789264173705-en [access: 23.09.2013].

> provides the structure through which the objectives of the company are set, and the means of attaining those objectives [...] are determined. Good corporate governance should provide proper incentives for the board and management to pursue objectives that are in the interests of the company and its shareholders and should facilitate effective monitoring. The presence of an effective corporate governance system, within an individual company and across an economy as a whole, helps to provide a degree of confidence that is necessary for the proper functioning of a market economy. As a result, the cost of capital is lower and firms are encouraged to use resources more efficiently, thereby underpinning growth.[12]

The five basic areas covered by the OECD Principles of Corporate Governance are:

1. Protection of the rights of shareholders,
2. Equitable treatment of all shareholders, comprising full disclosure of material information as well as the prohibition of abusive self-dealing and insider trading,
3. Equitable treatment of all stakeholders as established by law, and encouragement of cooperation between the company and its stakeholders,
4. Timely and accurate disclosure and transparency with respect to the matters pertinent to company performance, ownership and governance,
5. Strategic guidance of the company and effective monitoring of its management by the board of directors, as well as the board's accountability to the company and its shareholders ensured by the corporate governance framework.

The Principles are non-binding and do not aim at detailed prescriptions for national legislation. They seek to identify objectives and suggest various means for achieving them. Their purpose is to serve as a reference point. According to the intention of the OECD:

> They can be used by policy makers as they examine and develop the legal and regulatory frameworks for corporate governance that reflect their own economic, social, legal and cultural circumstances, and by market participants as they develop their own practices. The Principles are evolutionary in nature and should be reviewed in light of significant changes in circumstances. To remain competitive in a changing world, corporations must innovate and adapt their corporate governance practices so that they can meet new demands and grasp new opportunities.[13]

The OECD Principles are referenced by countries developing their local codes or guidelines. In 2002, on the basis of a consultative process and ISAR's deliberations and

12 *Ibidem*.

13 *OECD Principles of Corporate Governance*, OECD, 29 April 2004, p. 14.

building on the Principles of the OECD, the Intergovernmental Working Group of Experts on International Standards of Accounting and Reporting (ISAR) at UNCTAD prepared a report entitled *Transparency and disclosure requirements for corporate governance.*[14] An updated version entitled *Guidance on Good Practices in Corporate Governance Disclosure* was published in 2006.[15] These guidelines consist of more than fifty distinct disclosure items across five broad categories:

- auditing,
- the board and management structure and process,
- corporate responsibility and compliance in the organisation,
- financial transparency and information disclosure,
- the ownership structure and exercise of control rights.

EU regulations

The EU Member States and the European Union have made a significant contribution to the development of corporate governance standards. The OECD principles of corporate governance have been developed on the basis of the principles of good practice in the UK[16]. In the European Union a range of different corporate governance codes has been developed at the national and international level. The structure of these codes is very similar, but the solutions are not always the same. Corporate governance systems reflect the history, culture, economic development, social values and legal system of each country. All the codes, however, attempt to create some patterns of behaviour that can achieve a real (not just a formal) alignment of the rights and the position occupied by various corporate actors (shareholders, managers, creditors, etc.).

The European Union has achieved a great deal in terms of enhancing corporate governance in the EU. The background to the debate in the European Union on corporate governance began with the report of the High Level Group of Company Law Experts in 2002. This report, entitled "A Modern Regulatory Framework for Company Law in Europe"[17] focused on corporate governance and the modernisation of company law. This report concluded that the EU should not attempt to develop a pan-European code,

14 *Transparency and Disclosure Requirements for Corporate Governance: Report by the Ad Hoc Consultative Group of Experts on Corporate Governance Disclosures*, United Nations Conference on Trade and Development, TD/B/COM.2/ISAR/15 26 July 2002 (1.10.2013).

15 *Guidance on Good Practices in Corporate Governance Disclosure, United Nations Conference on Trade and Development*, New York – Geneva 2006.

16 The principles of good practice are included in the Cadbury's report, Greenbury's and Hampel's reports and Turnbull's report.

17 *A Modern Regulatory Framework for Company Law in Europe*, The High Level Group of Company Law Experts, Brussels, 4 November 2002, http://ec.europa.eu/internal_market/company/docs/ modern/report_en.pdf [access: 14.02.2017].

but rather consider "a certain coordination" of corporate governance codes to encourage further convergence. This convergence should focus on both, reducing barriers to cross-border voting by shareholders, as well as to the information that affects shareholders' ability to evaluate the governance of companies.

In 2007, the Commission published two other reports reviewing Member States' implementation of Member States of the Commission Recommendations on independent directors and directors' remuneration.[18] The findings of the reports show that all Member States have issued corporate governance codes and most codes are applied on a comply-or-explain basis. However, the reports identify certain areas where the recommended principles have not been adequately followed.[19]

In 2014, the European Commission announced a new proposal to improve corporate governance within the European Union – Commission Recommendation of 9 April 2014 on the quality of corporate governance reporting ('comply or explain').[20] The proposal aims to improve corporate governance reported by the listed companies. The purpose of this Recommendation is to provide guidance to the bodies of Members States responsible for national corporate governance codes, companies and other parties concerned. The guidance aims to improve the overall quality of corporate governance statements published by companies in accordance with Article 20 of Directive 2013/34/EU[21] and, specifically, the quality of explanations provided by companies in the case of ignoring the recommendations of the relevant corporate governance code.

The European Commission commented that there were "shortcomings in the way the 'comply or explain' principle is applied" by European listed companies. This refers to the situation when "companies often do not provide appropriate explanations when they depart from corporate governance codes". The Recommendation mainly aims to "provide guidance on how listed companies should explain their departures from the recommendations of the relevant corporate governance codes." It will not be legally binding but it is nevertheless intended to "improve the overall quality of corporate governance statements published by companies." According to the decision of the European Com-

18 *Report on the application by Member States of the EU of the Commission Recommendation on directors' remuneration*, Brussels, 13.07.2007, SEC (2007) 1022.

19 *A Guide to Corporate Governance Practices in the European Union*, International Finance Corporation, World Bank Group, 2015, http://www.ifc.org/wps/wcm/connect/c44d6d0047b7597bb7d9f7299ede9589/CG_Practices_in_EU_Guide.pdf?MOD=AJPERES [access: 22.09.2016], pp. 5–8.

20 Commission Recommendation of 9 April 2014 on the quality of corporate governance reporting ('comply or explain') (2014/208/EU), Official Journal of the European Union L 109/43.

21 Directive 2013/34/EU of The European Parliament and of The Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC, Official Journal of the European Union L 182/19 2013.

mission, the EU Member States should draw this Recommendation to the attention of the bodies responsible for national corporate governance codes, listed companies and other parties concerned.

The unique important step in the subject of corporate governance was the adoption in 2014 of Directive 2014/95/EU,[22] which requires the disclosure of non-financial and diverse information by certain large businesses. In particular, large public interest entities with more than 500 employees will be required to disclose certain nonfinancial information in their management reports. This includes listed companies as well as some unlisted companies, such as banks, insurance companies, and others that are so designated by Member States because of their activities, size, or the number of employees. The scope includes approximately 6,000 large companies and groups across the EU.

According to this Directive, a non-financial report should contain information relating to, as a minimum:

- a brief description of the company's business model,
- a description of the policies pursued by the company in relation to those matters, including due diligence processes implemented,
- the outcome of those policies,
- the principal risks related to those matters linked to the company's operations including, where relevant and proportionate, its business relationships, products or services which are likely to cause adverse impacts in those areas, and how the company manages those risks,
- non-financial key performance indicators relevant to the particular business.

According to the preamble to Directive 2014/95UE the report should disclose:

- environmental matters (e.g. health and safety, use of renewable and/or non-renewable energy, greenhouse gas emissions, water use and air pollution),
- social and employee-related matters (e.g. gender equality, implementation of the fundamental conventions of the International Labour Organization, working conditions, social dialogue, respect for the right of workers to be informed and consulted, respect for trade union rights, health and safety at work and the dialogue with local communities, and/or the actions taken to ensure the protection and the development of those communities),
- human rights matters (e.g. information on the prevention of human rights abuses), anti-corruption and bribery matters (e.g. information on instruments in place to fight corruption and bribery).

22 Directive 2014/95/EU of The European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, Official Journal of the European Union, L 330/1 2014.

Thus, non-financial reports contain a lot of information in the area of corporate governance. The directive leaves significant flexibility for companies to disclose relevant information in the way they consider most useful, or in a separate report. Companies may use the international, European, or national guidelines that they consider appropriate (for example, the UN Global Compact, ISO 26000, or the German Sustainability Code).

The main problem for the European Commission has been to design a single system in the context of widely differing legal traditions and ownership structures. Undoubtedly the European Union has come some way toward convergence because of the wide acceptance of the 'comply or explain' principle, but it can be argued that there is little agreement in many of the detailed corporate governance practices and norms, and in particular the gulf remains wide between markets with dispersed ownership and those with controlling shareholders.[23] Many corporate governance commentators believe that the EU corporate governance initiatives have succeeded in bringing about substantial convergence, harmonization, and unification in corporate governance regimes among its Member States.[24]

There is general agreement that EU directives have created a solid framework for improving corporate governance in its Member States and have triggered many corporate governance improvements. European Commission Directive 2006/46/EC required all listed companies to produce a corporate governance statement in their annual report to shareholders for the first time. This and other EU corporate governance reforms have succeeded in bringing about substantial convergence in corporate governance regimes among the Member States. Some European countries and some international bodies very strongly support corporate governance in diverse ways. They assume that developing corporate governance practices is conducive to increasing competitiveness and sustainable development among European companies.[25]

Polish regulations

Good corporate governance practices are known in Poland under the name of 'good practices.'[26] They combine the generally accepted principles of good governance with the norms that govern a company's investor relations with the environment. Their main

23 *A Guide to Corporate Governance..., op. cit*., pp. 5–8.

24 I. Ivaschenko, P. Brooks, *Corporate governance reforms in the EU: Do they matter and how?,* IMF Working Paper WP/08/91, Washington DC 2008, cit. after: *A Guide to Corporate Governance..., op. cit*.

25 *A Guide to Corporate Governance..., op. cit*., pp. 5–8.

26 1 January 2016 a modified set of corporate governance rules came into force, namely Best Practices of WSE Listed Companies 2016.

objective is to strengthen the transparency of listed companies, improve the quality of their communication with the investor community, as well as to provide better protection of shareholders' rights.

Good governance principles specify the proceedings at annual general meetings, the running of management meetings, and the relations of the above bodies with external people and institutions, including the manner of selecting the auditor and publishing company information. What is noteworthy is that the principles of good governance require companies to publish a confirming statement in their annual reports if these principles have been adopted and implemented. If a company derogates from acting in accordance with corporate governance, that fact must be disclosed to the public and the reasons for such derogation must be stated.

An important step in the development of good governance practices in Poland was the drafting of the Good Governance Code, which was done by the Polish Forum of Corporate Governance[27] (Forum – Corporate Governance, 2005). The recommendations of the Code address the problems that often arise when one dominant shareholder effectively takes control of a company. Another issue regulated by the code is the proper audit mechanisms in situations involving a substantial dispersion of shareholders. The fundamental principle adopted in the Code is that a company must operate in a manner that fosters the common interest of each and every shareholder, regardless of the number of shares held.

The good practices of WSE Listed Companies combine the generally accepted principles of corporate governance standards concerning the relations between listed companies and their business environment. Their aim is to strengthen the transparency of listed companies, improve the quality of their communication with investors, and to strengthen the protection of shareholder rights. Good Practices focus on the areas where their use can have a positive impact on the market valuation of companies, thus reducing the cost of capital. The rules formulated by the Best Practices Committee determine desirable practices concerning the general meeting, the management boards of companies, and the relationship of these bodies with external persons and institutions, including the principle for the selection of an auditor and the ways to share information about companies. It should be emphasized that these policies have been imposed on the company as a commitment to public disclosure in the annual report on corporate governance. In the case of deviations from these, the company should disclose this and provide reasons.

In order to facilitate the implementation of good governance practices by Polish companies, the Stock Exchange at www.corp-gov.gpw.pl has designed a page to provide all

27 *Dobre praktyki w spółkach publicznych 2005*, Komitet Dobrych Praktyk, Forum – Corporate Governance, Warszawa 2005, http://www.corp-gov.gpw.pl/assets/library/polish/dp2005.pdf [access: 5.05.2011].

the necessary information and material that companies may use to adopt and follow the practices, including updated or current information on recent developments in this field. The website aims to promote good governance and create a discussion forum for the exchange of opinions between the Stock Exchange and interested parties, listed companies and others. There are links to documents promoting good governance or facilitating its implementation, other relevant publications, as well as references or links to the websites of institutions engaged in promoting good governance in companies.

The obligation to report on corporate governance for listed companies stems from the provisions of Directive 2013/34/EU (Article 20) and the Accounting Act[28] (Article 49 § 2), which states that this should be done in the annual report. The scope of information on this issue is defined in the Ordinance of the Minister of Finance of 19 February 2009 on current and periodic information disclosed by issuers of securities and the conditions of recognising this information as equivalent to the information required by the laws of non-EU Member States.[29] According to § 91 paragraph 5 point 4 of the Ordinance statement, corporate governance should include a description of the internal control, risk management and financial reporting process.

The question of information on corporate governance is also the subject of the National Accounting Standard No. 9 Report on the activities. In this standard, it is assumed that this information should include a description of the internal control and risk management, the process for the preparation of financial statements, together with an evaluation.

Conclusions

In the contemporary highly competitive and demanding business environment it is necessary for companies to search for new, innovative ways to be effective and efficient. The consistency concept proposed in the first part of the paper presents an internal viewpoint in corporate governance and creates new possibilities in this area. The possibilities concern an ongoing search for consistency by harmonizing various organization management areas which create subsystems for analysis. This permanent consistency search is based on system theory and results from the strategic level of the company.[30] Consistent thinking is one of the main tasks of contemporary managers at all organizational levels:

28 Accounting Act of 29 September 1994 (Dz.U. no. 121 item 591).

29 Ordinance of the Minister of Finance dated 19 February 2009 on current and periodic information disclosed by issuers of securities and the conditions of recognising this information as equivalent to the information required by the laws of non-EU Member States, (Dz.U. no. 3 item 259).

30 C.M. Daily, D.R. Dalton, A.A. Cannella, *Corporate Governance: Decades of Dialogue and Data*, "Academy of Management Review" 2003, vol. 28, no. 3, pp. 375–376.

strategic, tactical and operational. It should be of course initiated and monitored by the board.[31]

The scope of the consistency analysis in the organization is determined by the management level. Here, the zooming process appears. For example, in a process organization the operational level and the consistency analysis may concern only one process, whereas in a functional organization it my concern just one function (e.g. sales, finance). However, zooming must be a part of the consistency concept in each organization. The consistency concept is the basis for the zooming process – the concept is operationalized at lower management levels.

To achieve organizational consistency there must be a sequence of activities within the company. First, the theoretical assumptions of the consistent system are formulated, and then the series of projects which implement the theoretical concept are introduced. When the projects are finished we may say that the organization has achieved maturity in its consistency. This means that it may be possible to construct an organizational consistency maturity model as the steps toward consistency are made. Once the consistency maturity has been achieved there is ongoing consistency management, because the search for consistency never ends – the changing environment makes it one of the basic everyday managerial tasks. In this way consistency is similar to the process management and process maturity of an organization. This analogy should inspire further analysis of how the consistency concept is applied in practice.[32]

When there is no consistency awareness in an organization and the consistency concept is not present, many problems may result from this state of affairs. Then the effectiveness and efficiency of an organization decreases and the value added for the client is lower than it could be. All this makes the competitive position of the organization worse. The main reasons why the consistency concept is neglected are lack of consistency awareness and knowledge on how to build consistency in theory, and then how to operationalize it. There are no alternatives to the consistency model presented in this paper. There are also no experiences which may be used by organizations in a consistency search. Moreover, to become consistent it is necessary to make an organizational effort, which may be discouraging.

These problems create challenges for researchers. Firstly, it is necessary to make the necessary efforts to widen the awareness and knowledge concerning the consistency concept among managers. Secondly it is necessary to search for operational solutions regarding consistency implementation in organizations.

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31 *European Corporate Governance. Cleaning the Augean Tables. Corporate Governance in Continental Europe is Improving Rapidly*, "The Economist" June 2011.

32 M. Flieger, *Zarządzanie procesowe w urzędach gmin. Model adaptacji kryteriów dojrzałości procesowej*, Poznań 2012, p. 120.

The consistency concept and the consistency model proposed in this paper may be a starting point for operational solutions, such as developing: diagnosis questionnaires, consistency maturity models (both descriptive and prescriptive), consistency model modifications, and other solutions that make consistency more understandable and easier to implement. One of the biggest problems nowadays is how to measure the level of consistency within an organization. No complex questionnaires and measures are available, and designing them poses challenges to management theory nowadays. As we can see, there is a lack of knowledge and the tools which can be found in the literature may be used in consistency search only to a limited extent, because they were designed for other purposes. A good example is a diagnostic questionnaire for learning organizations.[33]

Summing up, the consistency concept and the consistency model proposed by the authors suits the most modern trends in management connected with search for effectiveness, efficiency and competitive advantage. Moreover, it fills a knowledge gap existing in the literature and brings new possibilities for managers in organizations. This concept has an implementation value, which makes it attractive for practitioners. It is also universal so it may be used in any kind of an organization. Moreover, the proposed concept may inspire other management specialists and scientists to fill a knowledge gap in the organizational consistency area.

On the other hand, from an external point of view, corporate governance is affected by the relationships among participants in the governance system. Controlling stakeholders can significantly influence corporate behaviour. Institutional investors are increasingly demanding a voice in corporate governance. Individual shareholders usually do not seek to exercise governance rights, but may be very concerned about obtaining fair treatment from controlling shareholders and management. Creditors play an important role in a number of governance systems and can serve as external monitors over the corporate performance. Employees and other stakeholders play an important role in contributing to the long-term success and performance of the corporation, while governments establish the overall institutional and legal framework for corporate governance. The role of each of these participants and their interactions varies widely in different countries, including the EU Member States. These relationships are subject, in part, to law and regulation and, in part, to a voluntary adaptation and, most importantly, to market forces. The degree to which corporations adhere to the basic principles of good corporate governance is an increasingly important factor for investment decisions. Following good corporate governance practices can help to improve the confidence of investors, reduce the cost of capital and thus enhance the functioning of markets, and ultimately induce more stable economic development.

33 M. Czerska, R. Rutka, *Metody diagnozowania przedsiębiorstwa*, Katowice 1998, p. 69.

As has been described, in Polish regulations concerning the application of the principles of corporate governance, emphasis is placed on the control system of accounting and corporate financial reporting. It was assumed that this is a prerequisite for improving the quality of financial reporting, as well as reducing the possibility of actions that cause damage to the company and its stakeholders, including the falsification of accounting and other crimes. As a result, the application of the principles of corporate governance and publishing information about the area increases companies' credibility. With the introduction of a code of good practice, the Polish capital market has become more transparent, and thus more competitive for European partners. For many companies, the application of the principles of corporate governance is followed by an increase in their share prices on the stock exchange.

Literature

A Guide to Corporate Governance Practices in the European Union, International Finance Corporation, World Bank Group, 2015, http://www.ifc.org/wps/wcm/connect/c44d6d0047b7597bb7d9f7299ede9589/CG_Practices_in_EU_Guide.pdf?MOD=AJPERES [access: 22.09.2016].

A Modern Regulatory Framework for Company Law in Europe, The High Level Group of Company Law Experts, Brussels, 4 November 2002, http://ec.europa.eu/internal_market/company/docs/ modern/report_en.pdf [access: 14.02.2017].

Blair M.M., *Reforming Corporate Governance: What History Can Teach Us*, Berkeley 2004.

Brackett E., *Why Consistency is important?*, Visible Logic, http://www.visiblelogic.com/blog/2009/04/why-consistency-is-so-important-to-branding/ [access: 6.10.2016].

Commission Recommendation of 9 April 2014 on the quality of corporate governance reporting ('comply or explain') (2014/208/EU), Official Journal of the European Union L 109/43.

Coolidge R., *Corporate Consistency*, Executive Blueprint, http://www.executiveblueprints.com/tips/080503_corporateconsistency.htm [access: 6.10.2016].

Corporate Governance, Investopedia, http://www.investopedia.com/terms/c/corporategovernance.asp [access: 23.09.2013].

Cronqvist H., Makhija A., Yonker S., *Behavioral consistency in corporate finance: CEO personal and corporate leverage*, "Journal of Financial Economics" 2012, vol. 103, no. 1.

Czerska M., Rutka R., *Metody diagnozowania przedsiębiorstwa*, Katowice 1998.

Daily C.M., Dalton D.R., Cannella A.A., *Corporate Governance: Decades of Dialogue and Data*, "Academy of Management Review" 2003, vol. 28, no. 3.

Dignam A., Galanis M., *The Globalization of Corporate Governance*, Burlington 2009.

Dobre praktyki spółek notowanych na GPW, Appendix to Resolution no. 19/1307/2012 of Council Board of 21 November 2012.

European Corporate Governance. Cleaning the Augean Tables. Corporate Governance in Continental Europe is Improving Rapidly, "The Economist" June 2011.

Flieger M., *Zarządzanie procesowe w urzędach gmin. Model adaptacji kryteriów dojrzałości procesowej*, Poznań 2012.

Guidance on Good Practices in Corporate Governance Disclosure, United Nations Conference on Trade and Development, New York – Geneva 2006.

Ivaschenko I., Brooks P., *Corporate governance reforms in the EU: Do they matter and how?* IMF Working Paper WP/08/91, International Monetary Fund, Washington DC 2008, cit. after: *A Guide to Corporate Governance Practices in the European Union*, International Finance Corporation, World Bank Group, 2015.

Komitet Dobrych Praktyk, Forum - Corporate Governance, (2005), Dobre praktyki w spółkach publicznych 2005, Warszawa. Retrieved May 5, 2011 from http://www.corp-gov.gpw.pl/assets/library/polish/dp2005.pdf.

Lynch A., *A difference between a good brand and a great brand. Consistency*, Northstar Marketing, http://www.northstarmarketing.com/2015/05/07/the-difference-between-a-good-brand-and-a-great-brand-consistency [access: 8.10.2016].

Obłój K., *Strategia organizacji*, Warszawa 1999.

OECD Principles of Corporate Governance, OECD, 6 October 1999, http://www.oecd-ilibrary.org/governance/oecd-principles-of-corporate-governance_9789264173705-en [access: 23.09.2013].

OECD Principles of Corporate Governance, OECD, 29 April 2004.

Pulido A., Stone D., Strevel J., *The three Cs of customer satisfaction: Consistency, consistency, consistency*, March 2014.

Report on the application by Member States of the EU of the Commission Recommendation on directors' remuneration, Brussels, 13.07.2007, SEC (2007) 1022.

Robshow-Bryan S., *The importance of brand consistency*, Surfire 2013.

The EU Approach to Corporate Governance, Essentials and Recent Developments, International Finance Corporation, World Bank Group, Washington DC 2008, http://www.ifc.org/wps/wcm/connect/f515ff804af4fc7da869b9b94e6f4d75/IFC_EUApproach_Final.pdf?MOD=AJPERES [access: 14.02.2017].

Transparency and Disclosure Requirements for Corporate Governance: Report by the Ad Hoc Consultative Group of Experts on Corporate Governance Disclosures, United Nations Conference on Trade and Development, TD/B/COM.2/ISAR/15 26 July 2002 (1.10.2013).

Accounting Act of 29 September 1994 (Dz.U. no. 121 item 591).

Directive 2013/34/EU of The European Parliament and of The Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the Euro-

pean Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC, Official Journal of the European Union L 182/19 2013.

Directive 2014/95/EU of The European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, Official Journal of the European Union, L 330/1 2014.

Ordinance of the Minister of Finance dated 19 February 2009 on current and periodic information disclosed by issuers of securities and the conditions of recognising this information as equivalent to the information required by the laws of non-EU Member States (Dz.U. no. 3 item 259).

SUMMARY

Corporate Consistency and the Regulations of the Corporate Governance System

Corporate governance involves not only working out the relationship between a company and its shareholders, but also a search for consistency on a daily basis. When consistency is achieved, the shareholders' satisfaction is higher and relations improve. Consistency is a prerequisite for a company's effectiveness and efficiency, and it is the board's task to make a corporation consistent. The first part of the paper introduces M. Flieger's concept of corporate consistency, where platforms of consistency are introduced and the consistency model is proposed. This is the first time that such an introduction has been made, and this may lead to further discussion and research. The author points out that managers are rarely aware of the consistency problem, and there are no tools which enable a consistent system to be worked out. This makes the concept of corporate consistency worth investigating. In the second part of the paper, R. Kaminski focuses on the development of the European Union and Polish regulations, which were introduced as a consequence of the changing conditions in company activity. This section determines the content and sequence of the main issues discussed in the article. These include: the characteristics of the concept of a corporate governance system, the presentation of changes in regulations regarding a corporate governance system in the EU and the presentation of Polish regulations on corporate governance. The primary sources used in the work were literature and the rules and standards (mandatory and optional) on corporate governance. Both authors used descriptive analysis and the comparative method.

Keywords: corporate consistency, consistency concept, platforms of consistency, consistency model, corporate governance, UE regulations

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Sector Inquiry into Cross-Border E-Commerce: the Challenges and Practical Implications for European Union Completion Law

Introduction

On 6 May 2015, the European Commission launched a competition inquiry into the European Union's[1] e-commerce sector.[2] As such, the investigation should be seen in the context of the Commission's wider digital enforcement and policy agenda, especially the Digital Single Market Strategy,[3] which is a key priority for the Juncker Commission. The sector inquiry will focus on identifying and addressing private and – in particular – contractual barriers to cross-border online commerce in digital content and sales of goods.[4] As the Commission states, in 2014, half of all EU consumers shopped online, but only around 15% bought something from a seller based in another EU Member State.[5]

Commissioner Vestager highlighted a number of factors that may currently be limiting cross-border e-commerce: language barriers and different national consumer preferences; differences in legislation across Member States; technical barriers erected by companies, such as geo-blocking, which restrict cross-border online sales by preventing consumers from accessing certain websites on the basis of their residence or credit card

1 Hereinafter: EU or Union.

2 V. the Commission Decision of 6 May 2015 initiating an inquiry into the e-commerce sector pursuant to Article 17 of Council Regulation (EC) no. 1/2003, C (2015) 3026 final. For the purpose of this decision, the e-commerce sector is defined as the online trade of goods and the online provision of services.

3 Communication from the Commission of 6 May 2015 to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Single Market Strategy for Europe, COM (2015) 192 final (hereinafter: DSM Strategy).

4 Commissioner Vestager stated that she will formally propose the inquiry to the wider Commission also in May and – on the expectation that it is endorsed – aim to publish the preliminary findings by the middle of 2016. Previous sector inquiries have taken around 18 months to two years to conclude. Given the complex markets involved and the diversity of participants, it is to be expected that this inquiry, too, will last at least as long.

5 Press release of 6 May 2015, *Antitrust: Commission launches e-commerce sector inquiry,* IP/15/4921.

details; and restrictions that are the result of agreements between manufacturers and content owners on the one hand, and their distributors on the other. Therefore, it is believed that businesses may themselves establish barriers to cross-border online trade, with a view to fragmenting the internal market along national borders and preventing competition.[6]

The aim of this article is to show what the practical implications are regarding this investigation, in the context of a general integration objective – creating an internal market comprising all the territories of the EU member states, in which national borders are no longer an obstacle to commerce.[7] Because of their specific and dynamic nature, the application of competition law to online markets may prove challenging. Therefore, the focus will also be directed to challenges that could be faced when anti-competitive practices in the e-commerce sector will be strictly enforced. The question is whether traditional competition analysis may be sufficiently able to reflect the way in which competition takes place on digital markets.

The legal context of the EU sector inquiry

What is a sector inquiry?

The sector inquiry launched by the Commission is regulated by Article 17 of the Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.[8] Under this provision, the Commission may conduct its inquiry into a particular sector of the economy or into a particular type of agreement across various sectors, when it suspects that competition may be restricted or distorted within the common market. Therefore, a sector inquiry as such is a general investigation that is carried out by the European Commission into those sectors of the economy where it believes competition may not be working effectively. They are comparatively rare, because before the current e-commerce sector inquiry, the last one was launched in January 2008 to investigate the EU pharmaceuticals industry. However, they are suitable for looking at markets that are rapidly evolving, and at where the future competitive environment will be shaped by a commercial framework that is already in place but whose effects are not fully understood. It is worth noting that there is no need for the Commission to

6 Commissioner Vestager's speech of 26 March 2015, *Competition policy for the Digital Single Market: Focus on e-commerce*, SPEECH/15/4704.

7 The Court of Justice of European Union (hereinafter: CJEU or Court) defined the internal market as transnational market operating under conditions similar to an internal – i.e. national – market. V. Case 159/78, *Commission v. Italy* [1979], EU:C:1979:243.

8 Council Regulation (EC) no. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, pp. 1–25 (hereinafter: Regulation 1/2003).

have evidence of an infringement of an EU competition law before commencing a sector inquiry.[9]

What are the Commission's Powers when Conducting Sector Inquiries?

The Commission has wide-ranging investigatory powers in the context of an inquiry. In practice, at least initially, the Commission has tended to engage in dialogue with, and address questionnaires to, the various stakeholders in the sector under investigation. The Commission could request extensive information relating to market structure, customers, distribution and supply agreements, and commercially sensitive economic and pricing information, as well as background information on the relevant national legislative and regulatory frameworks. The Commission typically issues a voluntary request in the first instance. However, if a company does not voluntarily reply to questions, then the Commission has the ability to order it to do so. The Commission's powers in that respect are broadly comparable to those it has in a cartel investigation, including the ability to fine respondents for supplying incorrect, incomplete or misleading information. Of course, the Commission is legally obliged to state the legal basis and the purpose of the request for information, specify what information it is requesting, and set the time limit within which the information must be provided.[10]

What is more, the Commission may authorise specific persons to enter any premises, property, or means of transport; examine and take copies of the books and other records related to the business; seal the premises and the materials under inspection; and ask questions to the representatives or staff of the companies or associations under inspection, and record their answers. The companies and associations concerned have the duty to submit to the inspection ordered by the Commission. It is important that the companies' commercially sensitive information, which has been collected by the Commission during the course of a sector inquiry, will be kept confidential.[11]

The Commission's review of the perceived company-erected barriers

An integrational objective of EU competition law and geo-blocking

According to Roberta Bork: "Antitrust policy cannot be made rational until we are able to give a firm answer to one question: what is the point of the law – what are its

9 M. Timothy, A. Pomana, A.M. Heemsoth, *European Competition Commissioner announces proposed sector inquiry into cross-border e-commerce*, "European Competition Law Review" 2015, vol. 36, no. 9, p. 367.

10 Article 18(2) Regulation 1/2003.

11 Article 28 Regulation 1/2003.

goals?"[12] European Union competition law is based not just on economic aspects (consumer welfare), but also on the policy objectives of European integration. In particular, EU competition policy is strongly influenced by the goal of creating an internal market comprising all the territories of the EU Member States, in which national borders are no longer an obstacle for commerce.[13] Indeed, private barriers to trade and competition would risk replacing the public barriers to free movement that have already been dismantled.[14]

As far as economic efficiency is concerned, the e-commerce sector has been growing for years and continues to grow. In the literature, by way of illustration, it is noted that "in the USA, the total revenue deriving from e-commerce sales in business-to-business trade alone was USD 5.4 trillion in 2012. In Europe, it has been estimated that in 2013, 14% of the revenue of EU companies with ten or more employees was generated from e-commerce."[15] The Commission expects that a properly functioning digital market could increase the EU's gross domestic product by EUR 315 billion.[16] This may partly explain the economic rationale for the sector inquiry, but it is not only reason in terms of EU competition goals.

The Internet boosts cross-border commerce between Member States and thereby enhances the functioning of an internal market. As is pointed out in the relevant literature, in online markets the role of the physical distance between consumers and the place where digital content is made available to the public has sharply diminished.[17] The oft-cited catch-phrase claims anything is "just one click away" – no geographical barriers seem to exist in electronic trade.[18] This is not only due to the enhanced communication channel, but also to the drop in costs faced by businesses, which are now able to serve larger geographical markets. In this context, distance can be interpreted only as a measure of cultural difference between countries and as preference for cultural proximity.[19]

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12 R. H. Bork, *The Antitrust Paradox: A Policy at War with Itself*, Oxford 1997, p. 50.

13 T. G. Funke, *Territorial Restraints and Distribution in the European Union*, Distribution and Franchising Committee: ABA Section of Antitrust Law, September 2013, p. 3.

14 D. J. Gerber, *Law and the Abuse of Economic Power in Europe*, "Tulane Law Review" 1987, no. 62, p. 85.

15 F. Carloni, S. S. Megregian, M. Bruneau, *The E-Commerce Sector Inquiry: Can It Stop National Competition Authorities from Adopting an Overly Restrictive Approach?*, "European Competition Law Review" 2015, vol. 6, no. 9, p. 643.

16 Press release of 6 May 2015, IP/15/4921.

17 See, e.g., G. Mazziotti, *Is geo-blocking a real cause for concern in Europe?*, EUI Working Paper, Italy 2015, p. 9.

18 Cf. K. Kohutek, *Rynki wyszukiwarek internetowych a zarzut nadużycia pozycji dominującej (na tle unijnej sprawy przeciwko Google)*, "Europejski Przegląd Sądowy" 2014, no. 10, p. 35.

19 E. Gomez, B. Martens, *Language, Copyright and Geographic Segmentation in the EU Digital Single Market for Music and Film*, European Commission, Joint Research Centre, JRC Technical Reports (2015), p. 12.

Therefore, the Internet is believed to have substantial pro-competitive effects that can enhance consumer welfare.

However, in the EU, although more and more goods and services are traded over the Internet, cross-border online sales within the EU are only growing slowly. Cultural differences are not the only issue, because, as was pointed out above, business may themselves establish barriers to cross-border online trade. According to the Commission, such perceived barriers could result in the territorial fragmentation of the EU single market and the restriction of price competition.[20] The Commission's contention regarding the perceived company-erected barriers relies on the findings of the studies, according to which:

- 32% of retailers mentioned contractual restrictions in their distribution agreements as the reason for refusing to supply cross-border services,[21]
- 19.1% of companies currently active in cross border e-commerce and 29% of companies that are not yet active stated that "suppliers' restrictions affecting sales on online platforms constituted or would constitute a problem for their business when selling online."[22]

The Commission proposes to outlaw "unjustified" geo-blocking, which refers to practices used for commercial reasons involving online sellers either denying consumers access to a website based on their location, or re-routing them to a local website with different prices. Such blocking means that different prices can be applied on the basis of geographic location. In effect businesses are prohibited from providing different prices, products or services on the basis of a consumer's location unless restrictions on supply or price can be justified by specific laws.[23] This can be illustrated by the Commission's investigations, which will be described in the subsequent sections of this article.

The Murphy (Premier League) case

As regards trade in digital content, the Commission referred to the Court of Justice of the European Union's ruling in *Murphy*[24] as the leading precedent. In *Murphy*, the Football Association Premier League granted broadcasters the exclusive live broadcasting rights for Premier League matches in the UK and for 3-year terms. In order to protect the territorial exclusivity of each broadcaster, all the broadcasters undertook in the license agreement to prevent the public from receiving their broadcasts outside the

20 Press release of 6 May 2015, IP/15/4921.

21 ECC Net report on the application of Articles 20.2 and 21 of the Services Directive, 2013.

22 Flash Eurobarometer 413; the studies are cited in the Commission's Fact Sheet of 6 May 2015, *Antitrust: Commission launches e-commerce sector inquiry*, MEMO/15/4922.

23 DSM Strategy, § 2.3.

24 Joined cases C-403/08 and C-429/08, *Murphy* [2011], EU:C:2011:631 (hereinafter: Case Murphy).

licensed territory (i.e. another Member State). In particular, the broadcasters had to ensure that all broadcasts that could be received outside their territory – in particular those transmitted by satellite – were securely encrypted and were prohibited from supplying decoding devices giving access to the football matches if they were used outside their licensed territory. Under these contractual restrictions, broadcasters issued decoder cards subject to the condition that customers did not use them outside the territory of that broadcaster.

As a result, absolute territorial protection was afforded to the broadcasters as television viewers were prevented from accessing and watching matches broadcast by broadcasters established outside of the Member State where they resided. The CJEU concluded that these restrictions were unjustifiable. It took the view that agreements partitioning national markets and rendering the inter-penetration of national markets more difficult may frustrate the Treaty's objective of achieving the integration of those markets through the establishment of a single market. The Courts refer to this objective as the single market imperative. On this basis, the agreements must be regarded, in principle, as those whose object is to restrict competition within the meaning of Article 101(1) of the Treaty on the Functioning of the European Union (hereinafter: TFEU).[25]

Pay-TV investigation

In January 2014 the European Commission announced that it is conducting an investigation into licensing agreements between major film studios and Pay-TV broadcasters.[26] Audiovisual content, such as popular sports coverage and films, is licensed by rights holders to Pay-TV broadcasters on an exclusive and territorial basis, i.e. typically to a single Pay-TV broadcaster in each Member State. As a result of its findings, the Commission has opened formal antitrust proceedings to examine certain provisions in licensing agreements between several major US film studios (Twentieth Century Fox, Warner Bros., Sony Pictures, NBC Universal, Paramount Pictures) and the largest European Pay-TV broadcasters such as BSkyB of the UK, Canal Plus of France, Sky Italia of Italy, Sky Deutschland of Germany, and DTS of Spain. The investigation, as the Commission has been keen to point out, does not call into question the possibility to grant licenses on a territorial basis, or try to oblige studios to sell rights on a pan-European basis. However, the Commission is concerned that the licensing arrangements continue to grant Pay-TV broadcasters absolute territorial protection which ensures that the films licensed by the major studios are shown exclusively in the Member State where each broadcaster operates via satellite and the Internet. According to the Commission, films cannot be made available outside that Member State, even in response to unsolicited requests from

25 Case Murphy, § 139.

26 Press release of 23 July 2015, *Antitrust: Commission sends Statement of Objections on cross-border provision of pay-TV services available in UK and Ireland*, IP/15/5432.

potential subscribers in other Member States.[27] Such arrangements may constitute an infringement of EU antitrust rules that prohibit anti-competitive agreements. While the focus of the current investigation is on the major film studios, the case will be watched closely by the European film industry. To this extent, cultural considerations are likely to form a key part of the Commission's assessment of the licensing arrangements.[28]

If this antitrust initiative were successful, the liberalisation of online passive sales might become the "Trojan horse" through which the Commission would reform copyright laws and eventually revisit its principle of territoriality.[29] Significantly, the *Premier League* judgment and this investigation have shown that the application of EU competition law in digital settings might trigger unexpected consequences for territorial licensing, therefore, significantly erode the *Coditel II* principles.[30]

Restrictions on online sales in distribution agreements

General consideration

The Commission states that EU competition rules applicable to vertical restrictions are the same for offline and online sales. Although this statement is obviously true, in a superficial sense, the way in which rules and principles can be adapted to online sales leaves many crucial issues open. The Vertical Agreements Block Exemption Regulation (hereinafter: VABER) provides a safe harbour for most vertical agreements,[31] to the extent that such agreements contain vertical restraints. The VABER provides that the prohibition in Article 101 TFEU does not apply to vertical agreements between undertakings with market shares not exceeding 30%.[32] However, if a vertical agreement contains any of the so-called hardcore restriction listed in the VABER, the entire agreement ceases to benefit from the VABER, and Article 101 TFEU applies directly to the agreement. The most important examples of hardcore restrictions are resale price maintenance (RPM) and restrictions on the territory into which, or the customers to whom, a distributor

27 *Ibidem*.

28 B. Keane, *The Application of Competition Law in the Entertainment and Sport Sectors*, "Journal of European Competition Law & Practice" 2014, vol. 5, no. 8, pp. 592–593.

29 I. Colomo, *Copyright reform through competition law? The Commission's statement of objections in the pay TV investigation*, Chillin' Competition, 24.07.2015.

30 Based on the classic distinction between the existence and the exercise of copyright, the Court made it clear that a licensing/distribution agreement containing an exclusivity clause for a given territory during a specified period did not, as such, infringe Article 101(1) TFEU. V. Case 262/81, *Coditel II* [1982], EU:C:1982:334.

31 Commission Regulation (EU) no. 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L 102, pp. 1–7.

32 Article 3 VABER.

may sell.[33] Restrictions that are classified as hardcore by the VABER will generally be found to be 'by object' restrictions in an individual assessment under Article 101 TFEU. 'By object' restrictions are defined as those which, in the light of the objectives pursued by the Union competition rules, are so likely to have negative effects on competition, in particular on the price, quantity, or quality of goods or services, that it is unnecessary to demonstrate any actual or likely anticompetitive effects on the market.[34] Agreements containing a 'by object' restriction are almost always null and void and, if found, are, as a rule, prohibited, with a high likelihood that the authority will impose a fine. There has been debate about whether the VABER and the Guidelines[35] adequately cover on-line sales. In particular, there has been discussion about the extent to which suppliers may restrict on-line sales within their selective distribution systems,[36] and whether such restrictions should be classified as hardcore.

One could state that restrictions of online sales should not be allowed, as the Internet is now an essential means of reaching customers – it reduces costs, enhances competition, and facilitates cross-border trade.[37] On the other hand, some manufacturers in particular argued that it is important that they should be allowed, within their selective distribution systems, to set rules for the use of the Internet. They emphasised that competition can take place over parameters other than price, such as after-sales services, quality and brand. Unrestricted on-line sales may increase the risk of counterfeiting and free-riding on certain distributors' sales efforts and may dampen suppliers' incentives to innovate, invest and increase productivity, which could harm the EU's competitiveness.[38]

The Commission assessed and evaluated both sets of arguments and drew conclusions with the aim of protecting competition and consumers. On the one hand, it made clear in the Guidelines that online sales are very important for reaching certain customers – "the Internet is a powerful tool to reach a greater number and variety of customers than by more traditional sales methods."[39] Therefore, the Commission found that certain – but not all – restrictions on the use of the Internet should be considered hardcore

33 Article 4 VABER.

34 Commission Staff Working Document of 25 June 2014, *Guidance on restrictions of competition "by object" for the purpose of defining which agreements may benefit from the De Minimis Notice*, SWD (2014) 198 final.

35 Commission Guidelines on Vertical Restraints, OJ C 130, p. 1 (hereinafter: Vertical Guidelines).

36 J. Hederström, L. Peeperkorn, *Vertical Restraints in On-line Sales: Comments on Some Recent Developments*, "Journal of European Competition Law & Practice" 2016, vol. 7, no. 1, pp. 10–23.

37 The literature on e-commerce has mainly reviewed four issues: (i) search costs, (ii) how e-commerce affects the geographic scope of transactions, (iii) the distribution cost and (iv) how e-commerce affects the existence of information asymmetries between consumers and suppliers.

38 OECD, *Vertical Restraints for On-line Sales 2013*, DAF/COMP (2013) 13, p. 5.

39 Vertical Guidelines, § 52.

resale restrictions under Article 4(b) and/or (c) of the VABER40. On the other hand, the Commission recognised the potential problems of free-riding and the potential of vertical restraints to help achieve efficiencies in the interest of consumers.[41]

Lastly, the VABER and the Guidelines are based on the principle that the same rules should apply, irrespective of whether sales take place offline or on-line, not least because many transactions are in practice a mix of online and offline sales and purchase activities. This means that to the extent that suppliers are allowed under the VABER and the Guidelines to give instructions to their distributors on how their products are to be sold offline, the same approach should apply to online sales.[42]

Examples of restrictions on Internet sales

Competition authorities and courts have already dealt with a significant number of vertical restraints imposed on online sales by suppliers who adopted a selective distribution system. These cases mostly concern products that can be qualified as luxury, experience, or credence goods. The case law can be presented by delineating three sets according to the type of restrictions examined: the first identifies those restrictions that are generally considered compatible with antitrust rule – soft regulations; the second set includes those restrictions that raise serious doubts – strong regulations; and the third set relates to the general ban of Internet trade and other extreme regulations.[43]

As far as soft regulations are concerned, competition authorities have clarified that a supplier can legitimately impose quality standards for e-commerce on its appointed dealers.[44] These quality standards may refer to the graphical and text content of the website, the delivery time, the return policy, the provision of means through which customers can obtain advice, the stock of products that must be made available to buyers,

40 Therefore, in principle, every distributor must be allowed to use the Internet to sell products. V. Vertical Guildness, § 52.

41 For many products, Internet sales can free ride off of the promotional effort exerted by brick and mortar retailers, leading manufacturers to attempt to control the availability and pricing of their products over the Internet. V. W. D. Carlton, J. A. Chevalier, *Free riding and sales strategies for the Internet*, "Journal of Industrial Economics" 2001, vol. 49, no. 4, pp. 441–461.

42 The Commission explains that it does not mean that the criteria imposed for online sales must be identical to those imposed for offline sales, but rather that they should pursue the same objectives and achieve comparable results, and that the difference between the criteria must be justified by the different nature of these two distribution modes. V. Vertical Guidelines, § 56.

43 P. Buccirossi, *Vertical restraints on e-commerce in the case of selective distribution*, "Journal of Competition Law & Economics" 2015, vol. 11, no. 4, p. 764.

44 Therefore, under the VABER the supplier may require quality standards for the use of the Internet site to resell its goods, just as the supplier may require quality standards for a shop or for selling by catalogue, or for advertising and promotion in general. This may be relevant in particular for selective distribution. V. Vertical Guidelines, § 54.

and the like.[45] The conditions determined by these standards must be equivalent to those imposed on physical stores and cannot imply obligations "which dissuade appointed dealers from using the Internet to reach a greater number and variety of customers."[46]

In terms of strong regulations, a frequently discussed example of a restriction of online sales is the general prohibition for dealers participating in a selective distribution system to use independent marketplace platforms. This restriction is currently being implemented by a vast number of manufacturers of branded goods.[47] In some cases this prohibition on using independent marketplace platforms even applies if a marketplace platform is fully integrated into the online offer of an internet dealer who is also a member of a selective distribution system. As the Commission states, suppliers may require that customers do not visit the website of a retailer through a site carrying the name or logo of a third party platform, as is usually the case for such marketplace platforms.[48] Consequently, such a prohibition is not regarded as a hardcore restriction by the Commission. This is a view that is also often shared in the literature, in particular with regard to the prohibition of online auctioning platforms.[49] However, the case law has been ambiguous in this matter. For instance, The German Federal Cartel Office (*Bundeskartellamt*) and the Schleswig Court of Appeals (*Oberlandesgericht*) have held that the highly-renowned brands Adidas, ASICS and Casio must allow their approved resellers to use Internet auction sites and online marketplaces to resell their goods.[50]

According to the decision of the CJEU in the *Pierre Fabre* case, a contract clause prohibiting *de facto* the use of the Internet as a marketing method "at the very least has as its object the restriction of passive sales to end users wishing to purchase online and located outside the physical trading area of the relevant member of the selective distribution system."[51] An individual exemption under Article 101(3) TFEU remains possible. In order to obtain this, the companies would have to explain to what extent the criteria listed under Article 101(3) TFEU are cumulatively satisfied: in the case of a total prohibition of internet sales, even if there are efficiency gains, it will be difficult to prove that the restriction is indispensable and that consumers have been granted a fair share of the benefits.[52]

45 V., e.g., Conseil de la Concurrence, Décision no. 07-D-07 du 8 mars 2007 relative à despratiques mises en oeuvre dans le secteur de la distribution des produits cosmétiques etd'hygiène corporelle, http://www.autoritedelaconcurrence.fr/pdf/avis/07d07.pdf [access: 2.03.2017].

46 Vertical Guidelines, § 56.

47 Bundeskartellamt, *Vertical Restraints in the Internet Economy*, Meeting of the Working Group on Competition Law, Bonn 2013, p. 22.

48 Vertical Guidelines, § 54.

49 Bundeskartellamt, *op. cit.*, p. 22.

50 Press Release of 28 April 2014, *Bundeskartellamt takes a critical view of restriction of online distribution by ASICS*.

51 Case C-439/09, *Pierre Fabre* [2011], EU: C: 2011: 649.

52 Bundeskartellamt, *op. cit.*, pp. 21–22.

Other extreme regulations, which are considered to be hardcore restrictions, include the following restrictions: (1) preventing customers located in another (exclusive) territory from viewing a website or automatically re-routing customers to the manufacturer's or other (exclusive) distributors' websites, (2) terminating consumers' transactions over the Internet once their credit card data reveal an address that is not within the distributor's (exclusive) territory, (3) limiting distributors' proportion of overall sales made over the Internet (requiring a minimum turnover from offline sales would be legitimate, which implies that it is equally legitimate to exclude pure online distributors from the manufacturer's distribution network), and (4) imposing higher wholesale prices for products intended to be resold by the distributor online than for products intended to be resold offline.[53]

Conclusions

Information gained through sector inquiries could inevitably inform the legislative process in that market. This is especially true for a sector inquiry such as e-commerce, which concerns one of the key pillars of the Commission's 2020 Agenda: achieving a digital single market. Sector inquiries also often form the basis of major enforcement actions. Where the Commission finds competition infringements in the investigated sector, it will subsequently conduct specific investigations into individual market participants.[54]

A wide-ranging antitrust inquiry will involve hundreds of suppliers, content owners and online resellers. The focus is electronics, clothing and shoes, as well as digital content.[55] The first mandatory requests for information have been received. They seek information on allegedly illegal practices to restrict online sale of products and content via contractual means, discriminatory pricing or technical geo-blocking measures. The sector inquiry could well lead to specific prosecutions of companies found to have engaged in illegal restrictions on online sales. Officials have stated privately that at minimum the output of the sector inquiry is likely to lead to changes to the rules on online distribution, as set out in the Vertical Restraints Guidelines. Fierce lobbying can be expected on the rules according to which suppliers can restrict products to appointed dealers under a "selective distribution system" and whether they are permitted to exclude certain retailers.[56]

53 Vertical Guidelines, § 52.

54 B. Batchelor, B. Allgrove, M. Agnew, *Digital disruption: the practical implications of the EU's Digital Single Market agenda*, "European Competition Law Review" 2015, vol. 36, no. 9, p. 379.

55 http://ec.europa.eu/competition/antitrust/sector_inquiries_e_commerce.html.

56 B. Batchelor, *op. cit.*, p. 379.

Literature

Batchelor B., Allgrove B., Agnew M., *Digital disruption: the practical implications of the EU's Digital Single Market agenda*, "European Competition Law Review" 2015, vol. 36, no. 9.

Bork R.H., *The Antitrust Paradox: A Policy at War with Itself*, Oxford 1997.

Buccirossi P., *Vertical restraints on e-commerce in the case of selective distribution*, "Journal of Competition Law & Economics" 2015, vol. 11, no. 4.

Bundeskartellamt, *Vertical Restraints in the Internet Economy*, Meeting of the Working Group on Competition Law, Bonn 2013.

Carloni F., Megregian S.S., Bruneau M., *The E-Commerce Sector Inquiry: Can It Stop National Competition Authorities from Adopting an Overly Restrictive Approach?*, "European Competition Law Review" 2015, vol. 6, no. 9.

Carlton W.D., Chevalier J.A., *Free riding and sales strategies for the Internet*, "Journal of Industrial Economics" 2001, vol. 49, no. 4.

Case 159/78, *Commission v. Italy* [1979], EU:C:1979:243.

Case 262/81, *Coditel II* [1982], EU:C:1982:334.

Case C-439/09, *Pierre Fabre* [2011], EU:C:2011:649.

Colomo I., *Copyright reform through competition law? The Commission's statement of objections in the pay TV investigatio*n, Chillin' Competition, 24.07.2015.

Commission Decision of 6 May 2015 initiating an inquiry into the e-commerce sector pursuant to Article 17 of Council Regulation (EC) no. 1/2003, C (2015) 3026 final.

Commission Guidelines on Vertical Restraints, OJ C 130.

Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L 102.

Commission Staff Working Document of 25 June 2014, *Guidance on restrictions of competition "by object" for the purpose of defining which agreements may benefit from the De Minimis Notice*, SWD (2014) 198 final.

Commission's Fact Sheet of 6 May 2015, *Antitrust: Commission launches e-commerce sector inquiry*, MEMO/15/4922.

Commissioner Vestager's speech of 26 March 2015, *Competition policy for the Digital Single Market: Focus on e-commerce*, SPEECH/15/4704.

Communication from the Commission of 6 May 2015 to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Single Market Strategy for Europe, COM (2015) 192 final.

Conseil de la Concurrence, Décision no. 07-D-07 du 8 mars 2007 relative à despratiques mises en oeuvre dans le secteur de la distribution des produits cosmétiques et d'hygiène corporelle, http://www.autoritedelaconcurrence.fr/pdf/avis/07d07.pdf [access: 2.03.2017].

Council Regulation (EC) no. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1.

ECC Net report on the application of Articles 20.2 and 21 of the Services Directive, 2013.

Funke T. G., *Territorial Restraints and Distribution in the European Union*, Distribution and Franchising Committee: ABA Section of Antitrust Law, September 2013.

Gerber D. J., *Law and the Abuse of Economic Power in Europe*, "Tulane Law Review" 1987, no. 62.

Gomez E., Martens B., *Language, Copyright and Geographic Segmentation in the EU Digital Single Market for Music and Film*, European Commission, Joint Research Centre, JRC Technical Reports (2015).

Hederström J., Peeperkorn L., *Vertical Restraints in On-line Sales: Comments on Some Recent Developments*, "Journal of European Competition Law & Practice" 2016, vol. 7, no. 1.

Joined cases C-403/08 and C-429/08, *Murphy* [2011], EU:C:2011:631.

Keane B., *The Application of Competition Law in the Entertainment and Sport Sectors*, "Journal of European Competition Law & Practice" 2014, vol. 5, no. 8.

Kohutek K., *Rynki wyszukiwarek internetowych a zarzut nadużycia pozycji dominującej (na tle unijnej sprawy przeciwko Google)*, "Europejski Przegląd Sądowy" 2014, no. 10.

Mazziotti G., *Is geo-blocking a real cause for concern in Europe?*, EUI Working Paper, Italy 2015.

OECD, *Vertical Restraints for On-line Sales 2013*, DAF/COMP (2013) 13.

Press release of 6 May 2015, *Antitrust: Commission launches e-commerce sector inquiry*, IP/15/4921.

Press release of 23 July 2015, *Antitrust: Commission sends Statement of Objections on cross-border provision of pay-TV services available in UK and Ireland*, IP/15/5432.

Press release of 28 April 2014, *Bundeskartellamt takes a critical view of restriction of online distribution by ASICS*.

Timothy M., Pomana A., Heemsoth A. M., *European Competition Commissioner announces proposed sector inquiry into cross-border e-commerce*, "European Competition Law Review" 2015, vol. 36, no. 9.

SUMMARY

Sector Inquiry into Cross-Border E-Commerce: Challenges and Practical Implications for European Union Completion Law

The aim of this article is to show what the practical implications are regarding the Commission inquiry into e-commerce sector launched on 6 May 2015. Because of their spe-

cific and dynamic nature, the application of competition law to online markets may prove challenging. Therefore, the focus will be also directed to challenges that could be faced when anti-competitive practices in e-commerce sector are strictly enforced. The question is whether traditional competition analysis may be sufficiently able to reflect the way in which competition takes place on digital markets.

Keywords: EU competition law, e-commerce, sector inquiry, selective distribution, geo-blocking

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Enhanced Cooperation and Free Movement. Territorial Aspects of 'Harmonisation'*

Introduction

'As Community law stands at present, and in the absence of Community standardization or harmonization of laws, the determination of the conditions and procedures under which the protection of designs and models is granted is a matter for national rules', the EU's Court of Justice[1] has frequently concluded for many years.[2] This implies that certain forms in which proprietors executed their intellectual property rights[3] were then evaluated from the point of view of conformity with the European Union's primary law, and most often with the provisions on free movement or rules concerning competition.[4] Clearly, there was a need to harmonise or unify intellectual property rights at the European Union level. This has been successfully completed in a number of fields. What remains to be done is work on those IPRs which have the biggest influence on market behaviours, namely patents.

The project of creating the 'Community (or later: Union) patent' dates back to the 1950s and overflows with examples of discord and lack of compromise.[5] The bumpy road leading to patent unification directed the European Union to the advanced project of the European unitary patent. The European unitary patent is currently introduced by a procedure of enhanced cooperation. The application of that procedure within internal

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1 Hereinafter: the Court.

2 See, e.g., C-238/87 *Volvo v. Veng*, ECLI: EU: C: 1988: 477, § 7.

3 Hereinafter: IPRs.

4 I. Govaere, *The use and abuse of intellectual property rights in E.C. law. Including a case study of the E.C. spare parts debate*, Ann Arbor 1996, p. 190.

5 Th. Jaeger, *What's in the Unitary Patent Package?*, "Max Planck Institute for Innovation & Competition Research Paper" no. 14-08, pp. 2–14.

markets opens a general and systemic question concerning the actual meaning of the concepts of 'harmonisation' or 'unification' of laws at the EU level.

Therefore, in this article we would like to examine whether the application of enhanced cooperation in the internal market redefines (or improves) the concept of harmonisation.[6] So far, harmonisation has been defined only with respect to substantive issues. However, the case of the European unitary patent exposes further layers of the problem: when speaking about harmonisation, should we consider its actual territorial reach within the EU? And should the broader, international law context be taken into account when deciding if particular regulations provide for harmonisation or not?

These questions have both theoretical and practical significance. Answering them will not only help us to understand more deeply the concept of harmonisation and its importance within the internal market context. It will also allow us to determine if actions taken by the European unitary patent proprietor (or, more broadly, by any entity deriving its rights from the law introduced through enhanced cooperation) are to be evaluated solely from the point of view of the secondary legislation establishing these rights, or will evaluation from the primary law perspective still be possible? In other words, does the European unitary patent solve the problems of 'the absence of EU standardisation or harmonisation of laws', or maybe actions taken within its framework are still to be questioned in view of the Treaties?

We will limit our analysis to the relationship between harmonisation[7] and the Treaty provisions on the free movement of goods.[8] However, the conclusions formulated in this article are general and apply to other fields of substantive primary law, e.g. to the rules on competition.

The concept of 'harmonisation' in terms of the application of Article 34 TFEU

In the context of the interplay between secondary law and free movement provisions we will speak of 'harmonisation' in its functional sense.[9] It should be understood as aiming

6 Some thoughts on the interplay between minimum harmonisation and closer cooperation (the predecessor of enhanced cooperation) may be found in: M. Dougan, *Minimum Harmonization and the Internal Market*, "Common Market Law Review" 2000, no. 37, pp. 853–885. Due to the nature of the unitary patent system, in this article we do not address the issue of minimal harmonisation or its influence on the application of free movement provisions.

7 This term will be understood broadly, encompassing both actual harmonisation, i.e. approximation of laws, and also unification (standardisation).

8 The free movement provisions determine the method of understanding the relationship between primary and secondary law in the internal market. At the same time, jurisprudence and doctrine are most elaborated on the free movement of goods in that aspect.

9 More on inconsistencies and ambiguities of 'harmonisation': E.J. Lohse, *The meaning of harmonisation in the context of European Union law – a process in need of definition*, in *Theory and Practice of Harmonisation*, ed. M. Andenas, C. Baasch Andersen, Cheltenham 2011, p. 284 *et seq*.

to advance market integration beyond the stage achieved by the application of the primary rules on free movement.[10] In these terms, harmonisation establishes a level playing field for commercial activity in the Union by replacing the diverse national rules which might obstruct intra-Union trade.[11]

Consequently, in this article we will discuss harmonisation as a broad and general term, regardless of the nature of the harmonising legal act: Directive (actual harmonisation, or approximation of laws) or Regulation (in this case one would most often speak of the unification or standardisation of laws).[12] In both of these cases, as long as secondary law concerns the internal market and effectively goes beyond the objectives of free movement provisions, in the context of the discussed problem it should be defined as harmonisation in a broad sense. It is worth stressing that generally 'harmonisation' and 'unification' are different and nuanced concepts, however.[13] Sometimes the method of 'full harmonisation' by means of a Directive might influence the national legal order more than introducing EU law by a Regulation;[14] one also should be aware of differences in the application of Article 34 TFEU in respect of minimum and maximum harmonisation[15]. However, these specific questions are not the subject of this article.

The broad understanding of this concept conforms to the Court's conclusion that if national rules influence the movement of goods which is subject to full harmonisation, then these rules are evaluated from the perspective of harmonising legislation[16] and preclude application of Article 34 TFEU. The same applies to justification of breaching the basic prohibition set out in Article 34 TFEU on the basis of Article 36 TFEU. Likewise, if protection of a certain value is harmonised fully at the level of the EU, then Member

10 S. Weatherill, *Union Legislation Relating to the Free Movement of Goods*, in *Oliver on Free Movement of Goods in the European Union*, ed. P. Oliver, Portland 2010, p. 427.

11 *Ibidem*. V. also: I. Maletić, *The Law and Policy of Harmonisation in Europe's Internal Market*, Cheltenham 2013, pp. 6–27.

12 Likewise: A. Ohly, *Concluding Remarks: Postmodernism and Beyond*, in *The Europeanization of Intellectual Property Law. Towards a European Methodology*, ed. A. Ohly, J. Pila, Oxford 2013, p. 260.

13 W. van Gerven, *Harmonization of Private Law: Do we need it?*, "Common Market Law Review" 2004, no. 41, pp. 505–507; B. Kurcz, *Harmonisation by means of Directives – never-ending story?*, "European Business Law Review" 2001, no. 11–12, p. 288.

14 Ch. Timmermans, *Community Directives Revisited*, "Yearbook of European Law" 1997, no. 17, p. 5; J. Karsten, A. R. Sinai, *The Action Plan on European Contract Law: Perspectives for the Future of European Contract Law and EC Consumer Law*, "Journal of Consumer Policy" 2003, no. 26, p. 165.

15 S. Weatherill, *Maximum versus Minimum Harmonization: Choosing between Unity and Diversity in the Search for the Soul of the Internal Market*, in *From Single Market to Economic Union. Essays in Memory of John Usher*, ed. N. Nic Shuibhne, L. Gormley, Oxford 2012, p. 176.

16 Cf. C-37/92 *Vanacker and Lesage*, ECLI:EU:C:1993:836, § 9; C-324/99 *Daimler Chrysler*, ECLI:EU:C:2001:682, § 32; C-322/01 *Deutscher Apothekerverband*, ECLI:EU:C:2003:664, § 64; C-309/02 *Radlberger Getränkegesellschaft and Spitz*, ECLI:EU:C:2004: 799, § 53; C-470/03 *A.G.M.-COS.MET*, ECLI:EU:C:2007:213, § 53.

States may not rely on Article 36 TFEU[17] (or the doctrine of mandatory requirements) in order to justify the infringement of the free movement of goods.

When giving 'harmonisation' a broader meaning, we aim to examine whether it is not more nuanced in other aspects. While it is indisputable that harmonisation is a means for further integration, the question of how the new methods of 'diverse integration' modify the existing understanding of what harmonisation is needs to be answered. The recently witnessed methods of that integration in the internal market are: enhanced co-operation and including international agreements as an inherent part of the legal scheme introduced by EU law. Both methods have been employed in the case of the unitary patent protection system.

Enhanced cooperation

Before discussing the issues outlined above in detail, it is worth recalling the basic features of the enhanced cooperation procedure. It allows a group of Member States to introduce a European Union legal act with respect only to those states. Enhanced cooperation is regulated by Article 20 TEU and Articles 326–334 TFEU. It is not the aim of this article to discuss that procedure in any detail. For the purposes of our contribution, it is sufficient to conclude that when adopted successfully, enhanced cooperation results in introducing an act of EU law which is effective only with regard to the participating Member States, but not applicable in other ones. However, enhanced cooperation should remain open for non-participating Member States as long as they fulfil the same conditions that the cooperating Member States initially had to satisfy.

In the European Union, the method of enhanced cooperation has been implemented three times so far. Benefitting from this procedure before the Lisbon Treaty came into force was hardly possible for any group of Member States, due to the barrier conditions for implementation. The first time the procedure was applied was in the area of law applicable to divorce and legal separation, in the so-called Rome III Regulation, which has been applied from 21 June 2011.[18] The second time its implementation directly interfaced the internal market was by the creation of the European patent with unitary effect. The

17 Although, one needs to keep in mind that Article 36 TFEU might be basis for maintaining some national provisions even after harmonization – see Article 114(4)–(5) TFEU; more on that issue: I. Maletić, *Theory and practice of harmonization in the European internal market*, in *Theory and Practice of Harmonisation*, ed. M. Andenas, C. Baasch Andersen, Cheltenham 2011, p. 316 *et seq*.

18 Council Regulation (EU) no. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, OJ L 343 from 29.12.2010, pp. 10–16.

structure of the unitary patent protection system will be discussed below.[19] The third time was when enhanced cooperation was implemented with regard to the financial transactions tax,[20] albeit in this case no substantive act has been adopted yet.

To sum up, after the Lisbon Treaty came into force, Member States have been able to take full advantage of enhanced cooperation. As can be seen from the above examples, adoptions of the procedure concern not only the sensitive moral questions, but also matters connected to the internal market. Therefore, by analysing the example of the European unitary patent, we can examine how enhanced cooperation may influence the understanding of harmonisation within the internal market.

Harmonisation and unification of intellectual property rights from the perspective of the Free Movement of Goods

Without any doubt, IPRs interfere with the principle of free movement. If there is no harmonisation of IPRs, Member States may introduce rules protecting intellectual property into their legislation. Those rights are, however, subject to the principle of territoriality: the protection derived from an IPR begins and ends on the borders of that state. Such a situation creates inevitable tension between the principle of free movement and the protection of exclusive rights which are limited to the Member State's territory.[21]

Indeed, when an IPR holder executes their right by preventing a third party from using their invention (or another item protected by IPRs), this situation may fall within the scope of prohibition set out in Article 34 TFEU. In other words, exercising IPRs in certain circumstances might be considered as a measure having an equivalent effect to import restrictions. At the same time, it should be stressed that it is the Member State that is breaching Article 34 TFEU in such a situation and not the individual IPR proprietor.[22] However, this conclusion has severe consequences for that right holder too, since execution of the very essence of IPRs paradoxically turns out to be unlawful. Such an infringement of the provision for the free movement of goods may, in turn, be justified on the basis of Article 36 TFEU.[23]

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19 See a comprehensive elaboration of that issue: H. Ullrich, *Enhanced cooperation in the area of unitary patent protection and European integration*, "ERA Forum" 2013, no. 13, pp. 589–610.

20 Council Decision of 22 January 2013 authorising enhanced cooperation in the area of financial transaction tax (2013/52/EU), OJ L 22 from 25.01.2013, pp. 11–12.

21 D.T. Keeling, *Intellectual Property Rights in EU Law*, vol. I: *Free Movement and Competition Law*, Oxford 2003 (reprinted 2011), p. 22. On that tension see also: C. Seville, *EU Intellectual Property Law and Policy*, Cheltenham 2009, pp. 310–403.

22 D.T. Keeling, *op. cit.*, p. 23.

23 For elaborate discussion of that problem: Ch. Stothers, *Article 36 TFEU: Intellectual Property*, in *Oliver on Free Movement of Goods in the European Union*, ed. P. Oliver, Portland 2010, p. 313 *et seq*.

Harmonisation (understood as both the harmonisation and creation of unitary IPRs) is a possible solution to the conflict between the free movement of goods and intellectual property rights. In that sense, the use of the broad meaning of that term is justified.[24] By either establishing a level playing field or creating a union-wide IPR, it helps to abandon the principle of territoriality of these rights. In consequence, the IPR proprietor will no longer be able to prevent goods (or services) from being used and circulated from one Member State to another. Harmonisation leverages the problem of the potential infringement of an IPR to the European Union level, because it is not possible any more to obtain a different scope of protection only with respect to some Member States and not the entire EU. Therefore, the barriers to trade that result from national IPR protection are eliminated.

So far, the picture of EU harmonisation in the field of IPRs has been complex. Unitary rights were created through Regulations with respect to trademarks, designs and plant varieties. Other Regulations introduced unified rules with respect to supplementary protection certificates (regarding patent protection of pharmaceuticals). Apart from that, there is some sectoral harmonisation (by means of directives) relating to biotech inventions, trademarks, designs and, partly, copyrights.

Given that background, it is clear that that the method chosen with respect to the European unitary patent is unique and thus will be discussed shortly below.

The European patent with unitary effect

It cannot be said that there was a unanimous will to introduce the European patent with unitary effect into the European Union legal order.[25] At the same time, the Lisbon Treaty introduced some changes, not only with respect to conditions for employing enhanced cooperation. It also contained Article 118 TFEU (introduced in the same chapter as Article 114 TFEU, the usual legal basis for harmonisation). This provision provides for competence to create European intellectual property rights that would provide uniform protection of IPRs throughout the entire EU. This competence shall be executed 'in the context of the establishment and functioning of the internal market'.

The wording of Article 118 TFEU resulted in the adoption of two Regulations that established the European unitary patent: one on the creation of unitary patent protec-

24 J. Smits, W. Bull, *The Europeanization of Patent Law: Towards a Comparative Model*, in A. Ohly, J. Pila, *op. cit.*, p. 40 *et seq*. For more nuanced differentiation, cf. Judge Briss QC, *Unitary rights and judicial respect in the EU – Bringing cool back*, "Queen Mary Journal of Intellectual Property" 2013, vol. 3, no. 1, p. 196.

25 A more detailed description of the unitary patent system may be found in: M. Malaga, *The European Patent with Unitary Effect: Incentive to Dominate? A Look from the EU Competition Law Viewpoint*, "IIC – International Review of Intellectual Property and Competition Law" 2014, vol. 45, no. 6, pp. 623–630.

tion (the UPP Regulation)[26] and the second on translation arrangements concerning the unitary patent (the translations Regulation).[27] Those two Regulations were adopted within the procedure of enhanced cooperation. Only two Member States, i.e. Spain and Italy, did not join the system at that stage.

The two Regulations have already come into force, but their application has not yet commenced. It is contingent upon the a third legal act coming into force which, together with the remaining Regulations, constitutes a so-called unitary patent package. This third element does not belong to the European Union legal order: it is an international agreement which is expected to be concluded by the Member States that participate in enhanced cooperation. The agreement establishes the Unified Patent Court (UPC Agreement) and is largely composed of unified patent litigation rules.

The ratification process of the UPC Agreement is still in progress. Before it comes into force, Article 89 of the Agreement requires ratification of thirteen Member States, including Germany, United Kingdom and France ("the three Member States in which the highest number of European patents had effect in the year preceding the year in which the signature of the Agreement takes place"). So far, some Member States have announced that they would not ratify the Agreement (e.g. Spain and Poland[28]).

The Unified Patent Court will hold exclusive competence in hearing cases concerning the European unitary patent. However, the UPC Agreement regulates a few more aspects than just the jurisdiction and organisation of that court. One of those aspects is crucial from the point of view of the interplay between IPRs and free movement provisions.

Articles 25–26 of the UPC Agreement establish the right of the unitary patent proprietor to prevent third parties from both direct and indirect use of the protected invention:

> Article 25
> Right to prevent the direct use of the invention
> A patent shall confer on its proprietor the right to prevent any third party not having the proprietor's consent from the following:

26 Regulation (EU) No 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection.

27 Council Regulation (EU) no. 1260/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements.

28 However, in the case of a Member State that participates in enhanced cooperation (like Poland), Advocate General Bot suggests that the principle of sincere cooperation requires such Member State to ratify the UPC Agreement as well (paragraph 94 of the opinion submitted in the case C-146/13 Kingdom of Spain v. European Parliament and the Council, ECLI:EU:C:2014:2380).

(a) making, offering, placing on the market or using a product which is the subject matter of the patent, or importing or storing the product for those purposes;
(b) using a process which is the subject matter of the patent or, where the third party knows, or should have known, that the use of the process is prohibited without the consent of the patent proprietor, offering the process for use within the territory of the Contracting Member States in which that patent has effect;
(c) offering, placing on the market, using, or importing or storing for those purposes a product obtained directly by a process which is the subject matter of the patent.

Article 26
Right to prevent the indirect use of the invention
(1) A patent shall confer on its proprietor the right to prevent any third party not having the proprietor's consent from supplying or offering to supply, within the territory of the Contracting Member States in which that patent has effect, any person other than a party entitled to exploit the patented invention, with means, relating to an essential element of that invention, for putting it into effect therein, when the third party knows, or should have known, that those means are suitable and intended for putting that invention into effect.
(2) Paragraph 1 shall not apply when the means are staple commercial products, except where the third party induces the person supplied to perform any of the acts prohibited by Article 25.
(3) Persons performing the acts referred to in Article 27(a) to (e) shall not be considered to be parties entitled to exploit the invention within the meaning of paragraph 1.

It is noteworthy that these provisions were originally put in the UPP Regulation (the then Articles 6-7) and only afterwards transferred to the Agreement.[29] Consequently, in order to infer the actual substantive scope of the patent, one will need to read the UPP Regulation and the UPC Agreement together.[30]

What is crucial from the context of the present article is the twofold territorial non-uniformity of the system. The first layer of the problem results from adopting enhanced cooperation. Despite the name of the patent, there still will remain Member States in the European Union in which the entire system will not be effective. Therefore, when

29 More on this intervention: Ch. Wadlow, *Hamlet without the prince: Can the Unitary Patent Regulation strut its stuff without Articles 6–8?*, "Journal of Intellectual Property Law & Practice" 2013, no. 8, pp. 207–212.

30 More on the European unitary patent's and the UPC's structure: A. Nowicka, *Patent europejski o jednolitym skutku – konstrukcja prawna i treść*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2013, no. 4, pp. 19–35; eadem, *Jednolity Sąd Patentowy – z perspektywy Polski*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2014, no. 1, pp. 13–28.

goods will be circulating from the participating Member State to the non-participating one, the question arises of whether a patent proprietor invoking his rights deriving from the unitary patent protection system might be breaching Article 34 TFEU. In other words, we need to determine whether the concept of "harmonisation" embraces only "substantive harmonisation" or whether other aspects as well, such as territorial ones, are necessary to exclude application of free movement provisions. To put it briefly, the question is whether enhanced cooperation employed in the internal market implies that we can speak of harmonisation with respect to the entire EU, or with regard to the participating Member States only. More interestingly, the question of what happens when these two orders of participating and non-participating Member States collide needs to be answered.

Secondly, we need to take into the account the above-mentioned transfer of substantive provisions from the UPP Regulation to the UPC Agreement. As has already been mentioned, the transferred provisions contain the essence of the problem relating to the interplay between free movement and intellectual property rights, i.e. the right to prevent the use of the protected invention. In consequence, one may doubt if that aspect of the system is in any way harmonised at the EU level. This question therefore is if an international agreement that forms part of the system established within the European Union and concluded by its Member States may be considered as a means of harmonisation even though it is not a source of European Union law itself. More specifically: will a unitary patent holder's actions be evaluated from the viewpoint of unitary patent package legislation only, or will Articles 34-36 TFEU still be applicable?

How much harmonisation is there in the unitary patent?

As we have outlined the two layers of non-uniformity of the system, we need to observe that those layers do not exclude each other and in fact might be intertwined. Therefore, four different scenarios can be distinguished when it comes to Member States' engagement in the system. Spain is expected to participate neither in enhanced cooperation, nor in the UPC Agreement. At the same time, the majority of Member States intend to participate in both enhanced cooperation and the UPC Agreement. In that group we can for instance identify France, which has already signed and ratified the Agreement. There are also less obvious scenarios. Firstly, Italy has not joined enhanced cooperation yet, but has signed the UPC Agreement. Secondly, if we ignore the suggestion that the principle of sincere cooperation implies an obligation to ratify the UPC Agreement once a Member State participates in enhanced cooperation, we can speak of the Polish scenario. Poland has joined enhanced cooperation, yet does not wish to sign and ratify the UPC Agreement.

Enhanced cooperation

The question of the extent to which the unitary patent legislation can be perceived as a means of harmonisation is even more interesting when we take into account the dynamic analysis of the problem. Effectively, the problem of the interplay between free movement and IPRs (which harmonisation aims to solve) arises in the event of trade between states that have different scopes of protection of the same matter. If we only consider the first layer of non-uniformity (i.e. enhanced cooperation), it seems that the unitary patent is indeed unitary when it comes to trade relations between participating Member States. For instance, obstacles to trade resulting from different patent protection systems would indeed be abandoned between France and Belgium once the UPC Agreement enters into force.

The situation becomes less clear in the event of trade with a non-participating Member State. By creating the unitary right and introducing it by means of Regulation, the EU legislator has definitely chosen the most radical form of harmonisation (or, unification) which was available. Therefore, in the case of the unitary patent one can definitely speak of "full harmonisation" that excludes application of Article 34 TFEU to a patent holder's activities. As harmonisation is indeed "full" in substantive terms, we cannot say the same when it comes to the territorial issue. Therefore, in the event of trade in patented goods between Spain and France, the question is if the principle of the free movement of goods may be invoked by a party to such relationship.

When we analyse the relationship between a participating Member State and a non-participating one, it seems that it would be pointless to conclude that there is definitely no harmonisation in that regard. It should be stated that unitary patent rights are harmonised at least with respect to the participating Member State (in our example: France), for it is a party to enhanced cooperation. Such a conclusion leads however to two alternative implications for a non-participating partner (e.g. Spain).

The first possible implication is that we consider the unitary patent as harmonised in France, but not in Spain. This conclusion leads to serious doubt: who could invoke the free movement of goods defence, and against whom? Would it be possible for a Spanish defendant (patent infringer) against a French patent proprietor? Or the other way round?[31] What would then be the point of the patent for its holders? Moreover, how would it be possible to justify the fundamental inequality in the relationships between entities from participating and non-participating Member States? These doubts lead definitely to the conclusion that it is impossible to consider unitary patent legislation

31 We need to remember that entities from non-participating Member States will be able to obtain unitary patent protection for their inventions. It is only in the territory of those states that the unitary patent gives no effect.

as a means of harmonisation with respect to one party, without stating the same when regarding the other. The extent of actual harmonisation must be the same for all parties of a legal relationship at one time.

If we maintain the assumption that unitary patent acts constitute harmonisation with respect to France, then the other possible implication for the Spanish partner remains. Namely, that despite its non-participation, in the event of a trade relation with a participating Member State, harmonisation "extends" to the Spanish territory. That would have been the actual meaning of the conclusion that Article 34 TFEU may not be invoked either by the French, or by the Spanish party. However, such a statement would violate the non-participating Member State's sovereignty, and would also be contrary to European Union law. Article 20 § 4 TEU stipulates that "acts adopted in the framework of enhanced cooperation shall bind only participating Member States". Moreover, according to Article 327 TFEU, "enhanced cooperation shall respect the competences, rights and obligations of those Member States which do not participate in it." Consequently, we should conclude that EU law excludes the possibility of any "extension" of the implications of enhanced cooperation into non-participating Member States. Therefore, the latter analysed solution cannot be accepted, either.

The above arguments lead to the conclusion that in the event of trade relations between parties originating from participating and non-participating Member States, we cannot speak of any harmonisation at all. This means that when trading with a non-participating Member State, the participating one is deprived of the benefits of harmonisation in that regard. Consequently, the free movement provisions would still apply to such situations. These conclusions remain appropriate with respect to the scenario of trade between two non-participating Member States (e.g. Italy and Spain) as well. Therefore, we need to reject the assumption that unitary patent legislation may be regarded as harmonisation in the entire European Union. That conclusion results from the nature of enhanced cooperation when the latter is employed in the field of internal markets.

At the same time, nothing precludes the conclusion that the unitary patent Regulations can be treated as harmonisation in participating Member States as well as in relationships between those states. There is no discriminatory treatment in that regard that would go beyond the nature of enhanced cooperation.

These conclusions seem to conform the Court's appraisal concerning the method of harmonisation adopted in the case of the European unitary patent. When challenging the UPP Regulation before the Court, Spain argued that – among other things – Article 118 TFEU is not an appropriate legal basis for introducing that act in the EU legal order. According to the Spanish government, the UPP Regulation "is devoid of substantial content and its adoption has not been accompanied by measures providing uniform protection of intellectual property rights throughout the Union; nor does it bring about

an approximation of the laws of the Member States for that purpose.[32]" In response to that argument, the Court followed the conclusion submitted by Advocate General Bot in his opinion and stated that "Article 118 TFEU, which forms part of Chapter 3 ('Approximation of laws') of Title VII of the FEU Treaty, does *not necessarily require the EU legislature to harmonise completely* [emphasis added] and exhaustively all aspects of intellectual property law.[33]"

It must be borne in mind that the quoted case concerned the substantive Regulation and did not deal with enhanced cooperation as such. Therefore, it should not be treated as a judicial interpretation of the harmonisation concept analysed within the framework of enhanced cooperation. However, the Court at least recognises the fact that there is no complete harmonisation when enhanced cooperation is adopted within the internal market. In consequence, the conclusion that there is no harmonisation in Member States not engaged in enhanced cooperation – even if they enter into relationships with participating Member States – seems to be fully justified. In turn, this leads to the final conclusion that adoption of EU legal measures by means of enhanced cooperation does not preclude application of Articles 34–36 TFEU in the evaluation of activities undertaken pursuant to those measures.

International agreements – the case of UPC agreement

In the foregoing section we concluded that in the case of enhanced cooperation there is no harmonisation in non-participating Member States or in relationships between them and participating Member States. However, one may still speak of harmonisation with regard to the group of Member States engaged in the system. And yet the European unitary patent system reveals a more nuanced problem. The quoted plea of the Spanish government concerned more specifically the fact that "the contested regulation refers to the UPC Agreement, which is an international public law agreement concluded by the Member States participating in enhanced cooperation (with the exception of the Republic of Poland) and the Italian Republic". According to Spain, it "is contrary to the principle of the autonomy of the legal order of the European Union", but also – and more importantly from the perspective of the present article – "that regulation has been rendered devoid of content, since *the 'approximation of laws' has been transferred to the UPC Agreement*[34] [emphasis added]".

As has already been mentioned, the Court responded that Article 118 TFEU does not necessarily require complete harmonisation. However, when we adopt the perspective of

32 C-146/13 *Spain v. Parliament and Council*, ECLI:EU:C:2015:298, § 33.
33 *Ibidem*, § 48.
34 *Ibidem*, § 35.

free movement, the question goes further. The Court recognises the fact that part of the harmonising provisions do not belong to the EU legal order, as it is formed by an international agreement. Among those provisions there are the patent proprietor's rights: the crucial element from the perspective of free movement. Therefore, one might ask about the status of those provisions in terms of harmonisation.

On the one hand, the unitary patent package may be looked at as a system. There is no doubt that the creation of the European unitary patent was fully inspired by the EU. This is also true about the unified patent litigation procedure and the Unified Patent Court. Thus, even despite the varied nature of the ingredients of the system, it should be treated with due regard to its coherence, integrity and autonomy. Therefore, from the functional viewpoint of applying the free movement provisions to the actions of a patent's proprietor, it is of less significance whether these actions are derived from the actual EU legal act or from any other part of the unitary patent system. Supporters of this position could argue that any other method of interpretation of this situation might lead us *ad absurdum*. Accordingly, if the majority of substantive aspects of the patent is harmonised by means of Regulations, it would be far too burdensome and impractical to decode the status of the harmonisation in each individual situation. In consequence, the patent proprietor as well as the infringer would lack legal certainty as to their status and right to invoke Article 34 TFEU in their dispute. It is more reasonable to consider the entire unitary patent protection system as a means of harmonisation, even if some of its parts do not belong to the EU legal order (and, in consequence, to the jurisdiction of the Court). This interpretation would result effectively in the conclusion that free movement provisions may not be applied to actions derived from the unitary patent.

The present authors do not agree with such a statement. However broadly and functionally the concept of harmonisation could be defined, one fundamental condition must absolutely be satisfied, namely that approximation (unification) is made by means of European Union law. Circumventing this requirement would be equal to widening the EU's competences, going beyond those been undertaken and performed by this organisation. It would also be contrary to the will of Member States who decided to regulate particular matters outside the European Union legal framework. In other words, if we recognise that, functionally, the UPC Agreement *is* harmonisation, then we actually extend the scope of the EU law into spheres into which it has not been introduced.

Moreover, the practical argument is rather incorrect. At least from the perspective of free movement, all relevant provisions are introduced in the UPC Agreement. Therefore, there is practically no threat of undertaking burdensome and detailed analysis of whether a particular aspect has been harmonised or not. If we conclude that under no circumstances can an international agreement be treated as a means of harmonisation, then all and any actions of a unitary patent proprietor fall out the scope of that concept, and may therefore be evaluated in their compliance with Articles 34–36 TFEU.

It follows from the foregoing that even if an international agreement constitutes an inherent element of the unitary patent protection system, this agreement should not be considered as a means of harmonisation. Nor should this feature be extended from Regulations on that agreement. The fact that originally one of the goals of the entire system was to eliminate obstacles to trade deriving from different national regulations on patents should remain irrelevant to this conclusion.

To conclude this section, the present authors claim that one may speak of harmonisation only when the law is adopted within the European Union legal framework. This concept should not be extended to any other source of law, even if it forms – together with EU legislation – a coherent system. Nor should it be extended territorially: in the event of enhanced cooperation, only territories of fully engaged Member States are covered by harmonisation. Even though this conclusion is hardly revolutionary, it has significant implications for the unitary patent proprietors and, possibly, for any future beneficiaries of acts adopted in an analogous manner.

Even if the normative concept of an internal market calls for intellectual property rights to be harmonised for the reasons described above, in the case of the unitary patent this calling is not satisfied. Even if it seems difficult to accept at first sight, we claim that, in the present shape of the system, Article 34 TFEU will be applicable to the exercise of the unitary patent. Although some obstacles to trade will have been abolished, paradoxically the patent's multi-layered non-uniformity creates new, conceptually difficult barriers. Time will show how those barriers function in practice and if any significant practical aspects of that problem will arise.

In that context it is worth mentioning that by creating new barriers to trade between Member States, the unitary patent may to a certain extent undermine the internal market. Prohibition of the latter is expressed in Article 326 TFEU, which is one of the provisions regulating the enhanced cooperation procedure. This was one of the arguments raised by Spain and Italy in their action for annulment of the Council's decision authorising enhanced cooperation in the field of the unitary patent. Responding briefly to this argument[35], the Court concluded that at the stage of deciding on the legality of authorising a decision it was too early to determine if the internal market might be undermined. However, this argument could have been raised only on the basis of Article 326 TFEU. Therefore, when Spain challenged the substantive Regulations in cases C-146/13 and C-147/13, it could not rely on this plea anymore. Consequently, first (when challenging the enhanced cooperation decision) it was too early and in the next step (when asking for annulment of the substantive regulations) it was too late to invoke this

35 Joined cases C-274/11 and C-295/11 *Spain and Italy v. Council*, ECLI:EU:C:2013:240, §§ 75–78.

problem as infringing EU law[36]. The interesting issue of the possibility of challenging acts introduced through enhanced cooperation deserves further elaboration[37] but this goes beyond the scope of this article. However, the roots of the problem are nevertheless described in the present text[38].

Suggested improvements in understanding the concept of harmonisation

Departing from the specific case of the European unitary patent protection system, we learn novel things about the concept of harmonisation and its significance for applying free movement provisions. Even if we use that concept to broadly describe all the faces of the Europeanisation of intellectual property rights,[39] it still has its limits.

Firstly, if a legal measure is introduced by means of enhanced cooperation, we can speak of harmonisation only with respect to participating Member States. What is more, when we adopt a more dynamic perspective and take into account the relationships between participating and non-participating Member States, no harmonisation in such relationships should be recognised. Any extension of approximating or unifying provisions beyond the group of engaged Member States would breach EU law and the will of non-participating Member States. In other words, the term 'harmonisation' in its territorial aspect should be interpreted strictly and narrowly.

Secondly, when defining 'harmonisation,' one should consider only the legal acts of the European Union. We have been witnessing recently a tendency to employ traditional public international law instruments to regulate EU affairs. However, this phenomenon should not be followed by extending the discussed concept into acts that were adopted without the involvement of EU institutions and without the legal basis spelled out in the Treaties, namely Article 114 TFEU *et seq*. To put it briefly, the concept of harmonisation needs to be understood strictly and precisely with regard to the legal nature and origin of harmonising measures.

The suggested approach results in the possibility of applying the free movement provisions to actions originating from such – to use the Court's words – *incomplete* harmo-

36 Cf. M. Lamping, *Enhanced Cooperation in the Area of Unitary Patent Protection - Testing the Boundaries of the Rule of Law*, "Maastricht Journal of European and Comparative Law" 2013, no. 20, p. 601.

37 The problem of undermining the internal market by the unitary patent through raising barriers to trade was signalled e.g. by: F. Hartmann-Vareilles, *Intellectual property law and the Single Market: the way ahead*, "ERA Forum" 2014, no. 15, p. 162.

38 At the same time, one should remember about the Court's Opinion 1/09 (ECLI:EU:C:2011:123), which was followed by substantial changes in the UPC Agreement that is now believed to be in conformity with EU law.

39 Cf. A. Ohly, *op. cit.*, p. 260.

nisation. It is particularly significant that fundamental freedoms remain applicable safeguards to the preservation and development of the internal market. The new methods of legal integration are an inherent and natural part of the political reality in the EU. Moreover, the practice of the European unitary patent might prove that in fact no real barriers to trade were raised or invoked. However, when the impact of those measures remains unclear, it is reasonable to adopt some precautionary approach and not to deprive the internal market of its well-developed system of checks and balances, i.e. the fundamental freedoms. The suggested method of 'harmonisation' seems to satisfy this postulate.

Conclusions

To conclude, we have examined here the specific problem of the relationship between harmonisation (understood here broadly as both the approximation and unification of laws) and new methods of integration within the EU. These methods constitute enhanced cooperation and involvement of public international law instruments instead of EU sources of law. Both are observed in the case of the European unitary patent package which forms a legally and territorially complex set of legal acts of different scope and nature. It is also the first case of employing enhanced cooperation in the internal market of the European Union.

The problem-oriented analysis of the particular unitary patent example leads to general conclusions concerning the understanding of 'harmonisation.' The present authors suggest interpreting this concept narrowly with regard to its territorial scope and legal nature. One may thus conclude that the discussed term indeed needs 'geographical' and 'legal' improvements. We have also outlined the potential threats resulting from adopting the opposite approach.

The suggested interpretation implies that the fundamental freedoms, with the main focus on the free movement of goods, remain applicable to acts that *prima facie* seem to constitute harmonisation, but do not satisfy the conditions spelled out above. At first sight it might be surprising or even disappointing: one of the aims of creating unitary rights is to move further with integration in the internal market and to desist from applying free movement provisions to activities regulated by that secondary legislation. Indeed, it must be agreed that from the perspective of the suggested interpretation, this aim of the European unitary patent has not been achieved. At the same time, such a deduction should not change the general conclusion that there is no harmonisation beyond the core of enhanced cooperation and where an international agreement is concluded. Moreover, it follows from a more detailed analysis that fundamental freedoms in such cases remain indispensable safeguards to the functioning of the internal market, which otherwise could have been undermined.

Literature

Briss Q.C., *Unitary rights and judicial respect in the EU – Bringing cool back*, "Queen Mary Journal of Intellectual Property" 2013, vol. 3, no. 1.

Dougan M., *Minimum Harmonization and the Internal Market*, "Common Market Law Review" 2000, no. 37.

Gerven W. van, *Harmonization of Private Law: Do we need it?*, "Common Market Law Review" 2004, no. 41.

Govaere I., *The use and abuse of intellectual property rights in E.C. law. Including a case study of the E.C. spare parts debate*, Ann Arbor 1996.

Hartmann-Vareilles F., *Intellectual property law and the Single Market: the way ahead*, "ERA Forum" 2014, no. 15.

Jaeger Th., *What's in the Unitary Patent Package?*, "Max Planck Institute for Innovation & Competition Research Paper" no. 14-08.

Karsten J., Sinai A. R., *The Action Plan on European Contract Law: Perspectives for the Future of European Contract Law and EC Consumer Law*, "Journal of Consumer Policy" 2003, no. 26.

Keeling D. T., *Intellectual Property Rights in EU Law*, vol. I: *Free Movement and Competition Law*, Oxford 2003.

Kurcz B., *Harmonisation by means of Directives – never-ending story?*, "European Business Law Review" 2001, no. 11–12.

Lamping M., *Enhanced Cooperation in the Area of Unitary Patent Protection - Testing the Boundaries of the Rule of Law*, "Maastricht Journal of European and Comparative Law" 2013, no. 20.

Lohse E. J., *The meaning of harmonisation in the context of European Union law – a process in need of definition*, in *Theory and Practice of Harmonisation*, ed. M. Andenas, C. Baasch Andersen, Cheltenham 2011.

Malaga M., *The European Patent with Unitary Effect: Incentive to Dominate? A Look from the EU Competition Law Viewpoint*, "IIC – International Review of Intellectual Property and Competition Law" 2014, vol. 45, no. 6.

Maletić I., *The Law and Policy of Harmonisation in Europe's Internal Market*, Cheltenham 2013.

Maletić I., *Theory and practice of harmonization in the European internal market*, in *Theory and Practice of Harmonisation*, ed. M. Andenas, C. Baasch Andersen, Cheltenham 2011.

Nowicka A., *Jednolity Sąd Patentowy – z perspektywy Polski*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2014, no. 1.

Nowicka A., *Patent europejski o jednolitym skutku – konstrukcja prawna i treść*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2013, no. 4.

Ohly A., *Concluding Remarks: Postmodernism and Beyond*, in *The Europeanization of Intellectual Property Law. Towards a European Methodology*, ed. A. Ohly, J. Pila, Oxford 2013.

Seville C., *EU Intellectual Property Law and Policy*, Cheltenham 2009.

Smits J., Bull W., *The Europeanization of Patent Law: Towards a Comparative Model*, in *The Europeanization of Intellectual Property Law. Towards a European Methodology*, ed. A. Ohly, J. Pila, Oxford 2013.

Stothers Ch., *Article 36 TFEU: Intellectual Property*, in *Oliver on Free Movement of Goods in the European Union*, ed. P. Oliver, Portland 2010.

Timmermans Ch., *Community Directives Revisited*, "Yearbook of European Law" 1997, no. 17.

Ullrich H., *Enhanced cooperation in the area of unitary patent protection and European integration*, "ERA Forum" 2013, no. 13.

Wadlow Ch., *Hamlet without the prince: Can the Unitary Patent Regulation strut its stuff without Articles 6–8?*, "Journal of Intellectual Property Law & Practice" 2013, no. 8.

Weatherill S., *Maximum versus Minimum Harmonization: Choosing between Unity and Diversity in the Search for the Soul of the Internal Market*, in *From Single Market to Economic Union. Essays in Memory of John Usher*, ed. N. Nic Shuibhne, L. Gormley, Oxford 2012.

Weatherill S., *Union Legislation Relating to the Free Movement of Goods*, in *Oliver on Free Movement of Goods in the European Union*, ed. P. Oliver, Portland 2010.

Council Decision of 22 January 2013 authorising enhanced cooperation in the area of financial transaction tax (2013/52/EU), OJ L 22 from 25.01.2013.

Council Regulation (EU) no. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, OJ L 343 from 29.12.2010.

Council Regulation (EU) no. 1260/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements.

Regulation (EU) no. 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection.

SUMMARY

Enhanced Cooperation and Free Movement.
Territorial Aspects of 'Harmonisation'

In this article we examine the notion of 'harmonisation' in its interplay with the application of provisions on the free movement of goods. Due to the introduction of the European unitary patent protection system, we are witnessing the first cases of adopting enhanced cooperation in the internal market. This fact raises new, systemic questions concerning the concept of 'harmonisation' in European Union law. Are only legal, substantive aspects covered by its definition or should the territorial range of a legal act be taken into account? If yes – to what extent? Since the adoption of enhanced cooperation covers the field of intellectual property rights, the above questions concern the relationship between exercising those rights on the one hand and the principle of free movement on the other. A closer look at this matter leads to the conclusion that the unitary patent might not provide the solution to one of the problems that created for. More generally, in this article we conclude that when defining the concept of 'harmonisation', one should take its territorial scope into account narrowly, so as not to infringe the principles of EU law.

Keywords: EU law, harmonisation, unitary patent

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Controversies Concerning the Interpretation of State Resources as a Prerequisite of State Aid: an Illustration Using the Example of Polish Green Certificates and the Auction System

Introduction

The europeanisation of law v. national sovereignty

Since the inception of the European Union, the Member States have been subject to the process of Europeanisation. In the legal field this meant changes in national laws as they were influenced by European law, or the influence of European law on the Member States' legal systems.[1] On one hand this process has resulted in the harmonization of the Member States' legislation, but on the other it has decreased their autonomy and sovereignty. It also recurrently causes conflicts between the Member States and the European authorities. Cases concerning State aid are an excellent example of such conflict, where Member States constantly attempt to preserve as much control as possible over the supporting schemes. At the same time, the European Commission[2] and the Court of Justice of the European Union[3] tend to increase their supervisory power through a set of often controversial decisions and judgements. This article aims to provide a critical reflection on the CJEU and the EC's extensive interpretation of State resources as a prerequisite of State aid in financial schemes by using the example of Polish green certificates and auction systems that support producers of renewable energy sources.[4]

Renewable energy sources in the European Union

In 2007 the Member States of the EU set a target to cut greenhouse gas emissions and to increase energy production from RES, as well as to improve the energy efficiency by

1 A. Wróbel, *Europeizacja polskiego prawa o postępowaniu administracyjnym a autonomia proceduralna państw członkowskich Unii Europejskiej*, in *Europeizacja prawa administracyjnego*, ed. I. Rzucidło, Lublin 2011, p. 24.

2 Hereinafter: the EC.

3 Hereinafter: the CJEU.

4 Hereinafter: RES.

20% by 2020.[5] The targets were enacted in a legislation package called "2020 Climate and Energy Package" that includes, *inter alia*, Directive 2009/28/EC of the European Parliament and of the Council,[6] which set the definition of RES, mandatory targets and the principles concerning the production and supporting of energy from RES. More recently Member States have developed further targets, which include, *inter alia*, an increase of up to 27% of energy production from RES by 2030.

However, the starting costs of energy production from RES are much higher compared to that from conventional sources and thus producers of RES energy would have difficulties in competing with conventional energy producers on a free market. Due to this market failure, the Member States are justified in creating support schemes that would enable RES producers to compete efficiently on the energy market. However, the support schemes cannot be granted arbitrarily since they have to meet the requirements set forth by EU law. Generally speaking, if the scheme fulfils the prerequisites of art. 107(1) of the Treaty of the Functioning of the European Union,[7] it is considered to be State aid and thus the EC has to be notified, which then decides whether or not to raise objections regarding the scheme. In practice there are exceptions to these rules, which entail that the EC does not have to be notified if aid meets certain requirements.[8]

The scope of the article

During the last two decades a lot of controversies have arisen over numerous schemes concerning financial aid for RES. One of the main issues was whether those schemes fulfil the prerequisites of Article 107(1) TFEU, concerning State aid. The most problematic point was the interpretation of the prerequisite that aid is granted "through State resources." This article analyzes the CJEU jurisprudence concerning relevant State aid cases, as well as the EC decisions concerning RES financial aid schemes, to show the evolution of the definition of State resources and provide a critical analysis of the CJEU and the EC's approach. Relevant cases are analyzed by first describing the facts and explaining the reasoning behind each judgement or decision. Thereafter, a more general rule is synthesized and a critical application of the rule to supporting schemes is provided.

5 For some Member States the threshold was set at a lower level.

6 Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, OJ 2009 L140/16 (hereinafter: Renewable Energy Directive).

7 Treaty on the Functioning of the European Union (consolidated version), OJ 2008, C115/47 (hereinafter: TFEU).

8 Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ 2014 L187/1.

In order to show how difficult it can be to establish the existence of State resources in the supporting schemes, this article applies the CJEU and the EC reasoning to Polish green certificates and auction schemes for the four following reasons. Firstly, the EC has recently given a decision on the Polish green certificates scheme, which means it is the most recent ruling concerning these schemes.[9] Secondly, the Polish authorities have already notified the EC of the auction system and this article provides predictions concerning the future decision. Thirdly, these schemes are considered as borderline cases, where it is not clear if they constitute State aid.[10] Finally, there are numerous publications analyzing the Polish green certificates and auction schemes' compatibility with State Aid provisions. The authors of the publications have come to contradictory conclusions and justifications as to the existence of State aid in those schemes. This article therefore summarizes those opinions and provides a critical reflection on the authors' reasoning.

The article does not analyze whether other prerequisites of State aid are fulfilled, since their fulfilment is clear and in general does not raise any controversies. Furthermore, analysis of whether the green certificates and auction schemes comply with art. 107(3) TFEU[11] is beyond the scope of this article.

Polish RES supporting schemes

Legal framework

From 2005, the green certificates scheme was regulated by the Energy Law Act of 1997.[12] However, in 2011 the Polish Parliament started working on a new act that would redefine existing support schemes, introduce new ones, and collect all the regulation concerning RES into one, complex act. In 2015, the Polish Parliament passed the Renewable Energy Sources Act of 2015[13] that introduced a new auction system scheme. There were numerous reasons for a gradual transition from using green certificates towards the auction system. The green certificates system supported mechanisms that could produce energy from RES at the lowest cost possible, rather than a more desired one, which could also

9 Case SA.37345 (2015/N), Polish certificates of origin.

10 W. Kucharski, *Czy systemy wsparcia dla energii z odnawialnych źródeł przewidziane w projekcie ustawy o OZE (druk sejmowy nr 2604) można uznać za pomoc publiczną?*, Lublin 2015, p. 7, http://sjlegal.eu/wp-content/uploads/2015/04/Ustawa-o-oze-2015-om%C3%B3wienie-W.Kucharski-Lublin-2015-r.pdf 21.10.2016].

11 The compatibility of those schemes with the Article 107(3) TFEU is well presented in the article by Z. Z. Romanowska, *Can support systems regarding renewable energy (Parliamentary paper no. 2604) be considered as state aid?*, "Przegląd Prawa Ochrony Środowiska" 2015, no. 2.

12 Dz.U. 2006 no. 89 item 625.

13 Dz.U. 2015 item 478 (hereinafter: Renewable Energy Sources Act).

produce clean energy but for a higher price.[14] Another issue was the increasing oversupply of the green certificates on the market, which had a negative impact on their prices.

Green certificates

The Polish green certificates system is based on certificates of origin. Producers of energy from RES obtain green certificates for the energy that they have produced from the President of the Polish Energy Regulatory Office,[15] and the more energy they produce the more green certificates they obtain. Green certificates can then be sold on the Polish Power Exchange or through a private contract. At the same time, the major energy suppliers are obliged to purchase a certain number of green certificates every year. Instead of buying green certificates, energy suppliers may also pay a substitution fee collected and managed by a public body called The National Fund for Environmental Protection and Water Management. The substitution fee is used by the fund to finance environmental projects in Poland. The Polish green certificates scheme does not fix a minimum or maximum price for a green certificate.

The auction system

The new auction system, which the EC prefers over the green certificates scheme,[16] was introduced by the Renewable Energy Act that replaces the green certificates system for new RES producers. Producers that were operating before the creation of the auction system may still operate under the green certificates scheme until 2030. The Auction system introduces a complicated financial scheme to support RES producers, based on auctions that are organized by PURE. RES producers bid the amount of energy and the desired price. PURE sets the maximum price for the energy, which cannot be exceeded, as well as the amount of energy that will be put up for auction. The producer that bids the lowest price for selling the energy wins the auction. Different auctions are organized depending on the energy source and its power. RES producers that win the auction sell the energy for the price that they bid to the 'obliged sellers,' who are mainly energy suppliers. If the market price of the energy that is sold by obliged sellers is lower than the price paid to RES producers, then the sellers are entitled to compensation. The financial source of the compensation comes from the RES fee imposed on the end consumers. The government has created a special institution – OREO S.A. – which is responsible for the distribution of the RES fee from the end customers to the obliged sellers.

14 Z. Z. Romanowska, *op. cit.*, p. 255.

15 Hereinafter: PURE.

16 Communication form the Commission, Guidelines on State aid for environmental protection and energy 2014–2020, OJ 2014 C 200/1.

The existence of state resources in green certificates and auction systems. A critical reflection on CJEU jurisprudence and EC decisions

State resources as a prerequisite of state aid

According to Article 107(1) TFEU, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market, unless otherwise provided in Treaties. Therefore, based on Article 107(1) TFEU and the CJEU jurisprudence, four prerequisites of State aid may be established. Those are: intervention by a State or through State resources, advantage on a selective basis, actual or potential distortion of competition, and an actual or potential effect of the on trade between Member States. Since it has already been established that green certificates and auction systems clearly meet all the prerequisites of State aid other than intervention through State resources, this article elaborates on the first prerequisite of State aid.

Neither hard law nor soft law provide a clear definition of State resources. In general, the prerequisite is fulfilled if there is a direct or indirect transfer of public resources.[17] State resources can be interpreted as resources that belong to the State, a local government unit, or public or private companies controlled by the State.[18] It is also important to note that the transfer of State resources cannot be understood only as the transfer of some kind of advantage, such as a financial grant. The prerequisite is also fulfilled if the State loses State resources in a way that constitutes a selective advantage for a beneficiary, such as a tax deduction or debt cancellation.[19] One of the most important CJEU rulings that dealt with meeting the State resources prerequisite was the *PreussenElektra* case, which became a basis for further analysis of RES support schemes. The case concerned a financial scheme that was based on an obligation imposed by the German legislature on transmission and distribution system operators to purchase all energy from RES producers connected to their network for a fixed price higher than the market price. The CJEU ruled that this obligation imposed on private entities to purchase energy for such a fixed price involves neither direct nor indirect State resources.[20] The Court stated that the fact that the obligation was imposed by the German legislature in a statute meant that State aid was not possible. The CJEU has also ruled out the argument that such an obligation would decrease the revenues gained by undertakings subject to provisions of

17 C-379/98 *PreussenElektra AG vs. Schleswag AG* (hereinafter: *PreussenElektra*, item 58).

18 C. Koenig, J. Kuhling, *EC control of aid granted through State resources*, "European State Aid Law Quarterly" 2002, no. 1, p. 8.

19 C-518/13 *Eventech Ltd. v. Parking Adjudicator* (hereinafter: Eventech, item 33).

20 *PreussenElektr*a, item 58.

the statute, which would in turn decrease the State's income from taxes. The Court stated that such a consequence is an inherent feature of such a legislative provision and cannot be regarded as constituting a means of granting a particular advantage at the expense of the State.[21] The undoubted importance of *PreussenElektra* is shown by the impact that it had on States in terms of creating support schemes that would shift the burden of financing RES to private parties and, at the same time, not fulfill the prerequisites of State Aid. However, the liberal approach taken in *PreussenElektra* was later narrowed down by both the CJEU and the EC expanding the definition of State resources.

The following criteria for establishing the existence of State resources, created by the CJEU and the EC, will be further analyzed, applied to green certificates or auction systems, and treated to critical reflection:

- the nature of a certificate of origin – the green certificates system,
- the creation of an alternative for payment to a private entity – the green certificates system,
- state control over private funds – green certificates and auction systems.

The green certificate – a thin line between state resources and a document

The approach to the origin of green certificates was not consistent throughout the years and evolved mostly in the EC decisions. In the early decisions concerning green certificates schemes the EC ruled that certificates as such are not a State resource but rather an official documentation that states how much energy from RES a given entity had produced. This approach was taken by the EC, *inter alia*, in the cases concerning the UK green certificates system[22] and the Swedish green certificates system.[23] In its early approach, the EC compared green certificates to the scheme presented in the *Presussen-Elektra* case. The EC explained that an obligation is placed on private parties and the sole purpose of using green certificates is to show the quantity of energy produced from RES. Furthermore, the EC stated that no State resources are involved in such a scheme and there is no loss of revenue for the State.[24] However, this liberal approach was drastically changed by more recent judgements and EC decisions. In a case concerning a Dutch scheme of tradable nitrogen oxides emission rights,[25] the Court ruled that if the State provides documents free of charge that reflect the quantity of emission and which can later be sold, then this fulfills the prerequisite of State resources. Although the Dutch scheme in the *NOx* case did not support RES producers, the transmission documents used in the scheme are in principle identical to green certificates as such. Entities that

21 *Ibidem*, items 61–62.
22 Case N 504/2000, British Renewable Obligation I, OJ 2002, C 30/15.
23 Case N 789/2002, Swedish Green Certificates, OJ 2003, C 120/8.
24 Case N 504/2000, British Renewable Obligation I, OJ 2002, C 30/15, p. 12.
25 C-279/08 P *Commission v. Netherlands* ("Dutch *NOx* trading scheme") (hereinafter: *NOx*).

produced more *NOx* than the amount set by law were obliged to obtain a certain number of transmission documents or to decrease the *NOx* production, or both. The transmission documents were offered by companies with a level of *NOx* production below the threshold set by the regulation on a special market. The reasoning of the Court was that the State creates an asset and a market on which this asset can be traded. By doing this it gives it a certain value that is transferred to the beneficiary of the aid free of charge. Further reasoning is that since those documents have a material value, they can be sold by the State to beneficiaries in a tender or an auction procedure. The fact that they are given something free of charge instead of using a tender or an auction procedure causes a loss to the State, and they therefore constitutes State resources.[26] Identical reasoning was applied by the EC to the Romanian green certificates scheme.[27] Therefore, it was predictable that in the most recent decision issued by the EC, the Polish green certificates system is also considered to be State Aid.[28] It should be pointed out that some Polish authors claimed that Polish green certificates will not be considered as State aid, given the reasoning that stood behind the EC practice set in the UK and the Swedish decision.[29] However, given the more recent EC decisions and CJEU judgements, which were already available at the time those articles were published, this argument cannot be accepted.

The outcome of the decision concerning Polish green certificates was as predictable as it was wrong. The approach taken by the CJEU in the *NOx* case, and further decisions that followed from that judgement, reveal there is a clear misunderstanding of the nature of a green certificate. Although the form of the certificate in fact differs from the approach taken by *PreussenElektra*, the outcome is essentially identical. In *PreussenElektra* the financial support was granted by private entities at a fixed price imposed by a German statute. In the green certificates scheme the aid is also paid by private entities, and it is imposed through national legislation, but the difference is that the price is not fixed, relying rather on the market price of a certificate. The difference therefore is the creation of an extra step in the scheme. In *PreussenElektra* the State grants the right to obtain financial support from a private entity, while in the green certificates scheme the State grants the right to obtain a certificate that details the amount of energy produced, which is converted to financial support from a private entity. Thus the source of the financial support in *PreussenElektra* does not come from a statute itself, but from resources taken from private entities and given to RES producers. In turn, in the green certificates

26 *NOx*, item 111.

27 Case SA.33134 (2011/N), Romanian Green Certificates, OJ 2011, C 244/2.

28 Case SA.37345 (2015/N), Polish certificates of origin, items 137–147.

29 D. Kobiałko, *Czy systemy wsparcia dla energii z odnawialnych źródeł przewidziane w projekcie ustawy o OZE (druk sejmowy nr 2604) można uznać za pomoc publiczną?*, Warszawa 2015, p. 12, http://www.m.cire.pl/pliki/2/2877kobialkod3miejsce.pdf [access: 22.10.2016]; Z.Z. Romanowska, *op. cit.*, p 264.

scheme the source of aid are resources taken from private entities and given to RES producers, and not a certificate as such. The argument provided by the CJEU and EC, namely that the certificates could be sold through an auction or a tender procedure and thus they would not constitute aid, is therefore erroneous since the green certificate is not a source of aid. It is also arguable whether introducing such a scheme would even be possible and effective and thus it may lead to the conclusion that, in order to escape from the State aid regime, States would have to choose less effective systems to support RES producers[30]. Furthermore, the approach taken by the CJEU and EC can be stretched to such an extent that in every case concerning financial schemes the prerequisite of State resources will be met. If the CJEU states that the State loses its resources because it creates a certificate which has a value and gives it away for free, then one may argue that in *PreussenElektra* the State loses its resources as well because it could have issued such certificates, given them value, and then sold them through a tender procedure or an auction. It seems that this reasoning takes the CJEU approach to absurd conclusions. However, there are justified doubts whether the CJEU would give the same ruling on *PreussenElektra* today.

The creation of a sanction system related with the green certificates scheme

Throughout the European Union, Member States have created schemes based on certificates of origin that involved penalties for not acquiring a certain amount of certificates. The issue of paying a fine for not fulfilling the obligation to acquire green certificates was analyzed by the EC in the UK green certificates decision. The EC stated indirectly that a fine as such does not constitute a loss in State resources but that the problem lay in applying rules concerning State control over aid (this issue is discussed in section 3.4 of this article)[31]. The penalty in the UK system was called a buy-out price and the resources granted through the fines were later redistributed to RES producers. An identical approach was taken by the EC in a case concerning Swedish certificates.[32]

However, once again the CJEU took a more restrictive approach to the existence of State resources in the *NOx* case, where it stated that transmission documents are an alternative to paying a fine and therefore they reduce the State's resources.[33] It is difficult to agree with the Court that a fine whose value exceeds the value of the certificate itself can be considered as an alternative. An obligation without a sanction is called a *lex imperfecta* in legal jargon, and in practice it is at least more difficult to enforce. Therefore, in order

30 W. Sauter, H. Vedder, *State aid and selectivity in the context of emissions trading: comment on the NOx Case*, "European Law Review" 2012, vol. 37, p. 334.

31 Case N 504/2000, British Renewable Obligation I, OJ 2002, C 30/15, p. 12.

32 Case N 789/2002, Swedish Green Certificates, OJ 2003, C 120/8, p. 5.

33 T.M. Rusche, *EU Renewable Electricity Law and Policy -From National Targets to a Common Market*, Cambridge 2015, p. 102.

to escape the scope of article 107(1) TFEU, the Member States would have to create an ineffective scheme. The view that a green certificate is an alternative to a sanction cannot be accepted either, since the sanction could not exist without an obligation. A sanction for not fulfilling an obligation is an inevitable part of the scheme, just as a decrease in tax revenues was in the *PreussenElektra* case[34]. The necessity of providing a sanction in the green certificates schemes to ensure the effectiveness of the system has been confirmed by the CJEU in a recent case concerning the compatibility of the Swedish green certificates system with art. 34 TFEU[35].

In the articles concerning the Polish green certificates scheme, two opposite views concerning the existence of a fine may be established. One view shares the Court's reasoning expressed in the NOx case[36], while others take an opposite approach[37]. Their opposite argument is based on the fact that the resources obtained through penalties are used to finance other purposes that do not concern RES producers and thus they are not part of a scheme. Although I agree that imposing a sanction for not fulfilling the obligation to obtain certificates does not involve State resources, I believe that the way that the money obtained through payment is spent is irrelevant. This particular sanction of paying a fine is inevitably correlated with the green certificates scheme and could not exist without it. Therefore, the way that the resources obtained from penalties are spent does not have an impact on the fact that such a sanction does not involve State resources, since it cannot be considered as an alternative to obtaining a certificate.

State control over aid

According to the well-established CJEU jurisprudence, if the resources – although funded from private funds – are controlled or distributed by an entity established by the State, then they are considered to be aid granted through State resources.[38] This approach had been already taken by the CJEU before ruling on renewable energy support schemes. In *Ladbroke Racing LTD*, the Court ruled that even though the aid was not permanently held by the Treasury, the fact that it constantly remained under public control, and was therefore available to the competent national authorities, it was sufficient for it to be categorized as State resources.[39] In the more recent *Essent* case, the CJEU developed and

34 *PreussenElektra*, item 62.

35 C-573/12 *Ålands Vindkraft AB v. Energimyndigheten*, item 116.

36 W. Szopiński, *Czy systemy wsparcia dla energii z odnawialnych źródeł przewidziane w projekcie ustawy o odnawialnych źródłach energii można uznać za pomoc publiczną?*, 2015, pp. 10–11, http://www.cire.pl/pliki/2/szopinskiw2miejsce.pdf [access: 15.03.2017].

37 D. Kobiałko, *op. cit.*, p. 13; Z. Z Romanowska, *op. cit.*, p. 259.

38 See C-83/98 P *French Republic v. Ladbroke Racing Ltd and Commission* (hereinafter: *Ladbroke Racing Ltd*); C-482/99 *French Republic v. Commission*; C-206/06 *Essent Network Noord* (hereinafter: *Essent*); C-262/12 *Vent De Colère and others* (hereinafter: *Vent de Colere*).

39 *Ladbroke Racing Ltd*, item 50.

clarified criteria that establish whether a scheme in which the burden to finance aid lies with private entities constitutes State aid.[40] The case concerned a financial scheme where so-called "stranded costs," which were borne by a public energy company SEM during an investment period, were recompensed through increased electricity prices transferred to the end customer. The aid was based on the Dutch Transitional Law, which imposed a charge on the end customers, while the transfer of money was supervised by the State. According to the Court, the State supervision over the money flow distinguished the *Essent* case from *Pearle* case,[41] where the State could not exercise any control over the aid and the purpose of the aid was not established by law.[42] Therefore, the following criteria may be established, based on the *Essent* judgement, that determine whether State resources are involved in a scheme: 1) the source and the purpose of the aid are defined by law, 2) the State exercises direct or indirect control over the aid, 3) appointment of a private or public body by the State to manage a State resource.[43] This approach narrows down the criteria from the *PreussenElektra* judgement and is applied in the more recent *Vent de Colere* case, in which French law imposed an obligation to buy electricity produced from a wind power for a fixed price which was higher than the market price of that energy.[44] The French scheme resembled the one presented in *PreussenElektra*; however, it granted the State the right to supervise the money flow of the aid, and imposed an obligation on the State to cover the negative difference between the costs borne by the RES producers and the amount of the aid collected from the private entities.[45] Although in my opinion the State's supervision over the aid is in itself not sufficient to fulfil the prerequisite of State resources, the obligation imposed on the State to cover a negative difference clearly fulfils this prerequisite.

Therefore, financial schemes are considered aid imputable to the State and granted through its resources due to the sole fact that the State holds even indirect control over the distribution of those resources. This interpretation of State resources is relevant for both Polish green certificates and auction systems. In the green certificates system, the funds collected from penalties are controlled by a public fund, while in the auction system the redistribution of so-called RES charges is controlled by a public body.

In my opinion, the interpretation of article 107(1) TFEU that is presented by both the CJEU and EC stretches the definition to such an extent that if a State decides to transfer the burden to finance aid to private parties, in order not to fall under the scope of

40 F.R. Carmona, *The Feed-in Tariffs Entanglement: A Comparative Study of the Analytical Approaches Followed by the EU and WTO Judiciary Bodies regarding Renewable Energy Subsidies*, "Legal Issues of Economic Integration" 2016, vol. 43, no. 2, p. 223.

41 C-345/02 *Pearle and Others*.

42 *Essent*, item 72.

43 *Essent*, items 45, 66, 69–70, 72.

44 *Vent de Colere*, items 21–37.

45 *Ibidem*, item 26.

Article 107(1) TFEU, it seems that it does not have any instruments to assure the proper distribution of those resources and therefore it cannot vouch for the effectiveness of the aid. The broad scope of State resources leaves the following dilemma. If the State grants aid financed by private resources, it either has to agree to fall under the scope of Article 107(1) TFEU, with all of the legal consequences that entails, or it has to waive the right to efficiently supervise the aid. Since Member States finance RES producers in order to comply with the obligations under Directive 2009/28/EC, the choice to resign from the right to supervise the aid could expose them to the unwanted risk of not fulfilling their obligations under the Directive. I do not find the argument that exercising public control over private funds renders them available to the public authorities convincing enough to qualify it as a fulfilment of the State resource prerequisite. An even wider approach was taken by the EC in the *PreussenElektra* judgment, where it stated that it is immaterial whether the aid is financed directly through the state resources or indirectly through private funds. According to the EC, such a distinction would make it possible to circumvent the State Aid rules and it would jeopardize the attainment of the objectives of the Treaty[46]. Therefore, according to the more economic approach presented by the EC, which focuses more on the effects of the scheme, rather than on the wording of Article 107(1), the scheme presented in *PreussenElektra* would be considered as State Aid. Although this approach cannot be accepted, as it directly contradicts Article 107(1) TFEU, those financial schemes can still be challenged as contradictory to Article 34 TFEU. Under this provision, all measures having an equivalent effect to quantitative restrictions on imports, including any national measure which is capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are prohibited.[47] For these reasons I find that both the CJEU and EC actions which broaden the scope of the State resources prerequisite to be wrong. Instead of bending the definition of State aid, which unnecessarily causes different aid schemes to fall under Article 107 TFEU, with all the consequences this entails, other measures can be successfully taken to prevent States from distorting competition. It needs to be pointed out that arguments for and against broadening the definition of State resources have consequences that reach much further than renewable energy schemes, and thus cannot be limited to a discussion between environmentalists and free-markets supporters.[48] Such practices extend the EC and CJEU's control over the Member States in a way that does not have any reflection in any hard law, and it also compromises the efficacy of the financial schemes with an

46 R. Callaerts, *State Aid for the Production of Electricity from Renewable Energy Resources*, "European Energy and Environmental Law Review" 2015, vol. 24, p. 21.

47 C-573/12, *Ålands Vindkraft AB v. Energimyndigheten*; Joined cases C-204 to 208/12 *Essent Belgium NV v. Vlaamse Reguleringsinstantie voor de Elektriciteits- en Gasmarkt*.

48 T.M. Rusche, *op. cit.*, p. 111.

extensive control, which could be more proportionally assured by applying Article 34 TFEU instead of stretching the definition of State resources to the maximum.[49]

Conclusions

Tim Rusche very accurately described the *PreussenElektra* judgement as a "Pyrrhic victory."[50] Indeed, although the judgement encouraged the creation of financial schemes that would not fall under the scope of Article 107(1) TFEU, soon the EC and CJEU abruptly deflated the Member States' optimism by gradually expanding the scope of the definition of aid granted through State resources. It is actually astonishing how far the jurisprudence went – from a very simple term to the very narrow conditions set by the *Essent* case concerning State control over the funds, or by proposing unrealistic tender conditions concerning tradable rights to emissions in the *NOx* case. However, given the Court's jurisprudence and the EC decisions, it is certain that both Polish green certificates and the auction system will be considered State aid, this does not preclude the necessity for expressing strong opposition to the practice of misrepresenting the definition of State resources. At the end of the day, this practice will not only affect RES support schemes but the whole State aid system, causing unnecessary bureaucracy and inefficiency instead of supporting and promoting more efficient solutions.

Literature

Callaerts R., *State Aid for the Production of Electricity from Renewable Energy Resources*, "European Energy and Environmental Law Review" 2015, vol. 24.

Carmona F. R., *The Feed-in Tariffs Entanglement: A Comparative Study of the Analytical Approaches Followed by the EU and WTO Judiciary Bodies regarding Renewable Energy Subsidies,* "Legal Issues of Economic Integration" 2016, vol. 43, no. 2.

Kobiałko D., *Czy systemy wsparcia dla energii z odnawialnych źródeł przewidziane w projekcie ustawy o OZE (druk sejmowy nr 2604) można uznać za pomoc publiczną?*, Warszawa 2015, http://www.m.cire.pl/pliki/2/2877kobialkod3miejsce.pdf [access: 22.10.2016].

Koenig C., Kuhling J., *EC control of aid granted through State resources*, "European State Aid Law Quarterly" 2002, no. 1.

Kucharski W., *Czy systemy wsparcia dla energii z odnawialnych źródeł przewidziane w projekcie ustawy o OZE (druk sejmowy nr 2604) można uznać za pomoc publiczną?*, Lublin

49 More information concering the apllication of the Article 34 TFEU may be found in A. Steinbach, R. Bruückmann, *Renewable Energy and the Free Movement of Good*, "Journal of Environmental Law" 2015, vol. 27, pp. 1–16.

50 *Ibidem*, p. 2.

2015, http://sjlegal.eu/wp-content/uploads/2015/04/Ustawa-o-oze-2015-om%C3%B3wienie-W.Kucharski-Lublin-2015-r..pdf [21.10.2016].

Romanowska Z. Z., *Can support systems regarding renewable energy (Parliamentary paper No. 2604) be considered as state aid?,* "Przegląd Prawa Ochrony Środowiska" 2015, no. 2.

Rusche T. M., *EU Renewable Electricity Law and Policy - From National Targets to a Common Market*, Cambridge 2015.

Sauter W., Vedder H., *State aid and selectivity in the context of emissions trading: comment on the NOx Case,* "European Law Review" 2012, vol. 37.

Steinbach A., Bruückmann R., *Renewable Energy and the Free Movement of Good*, "Journal of Environmental Law" 2015,vol. 27.

Szopiński W., *Czy systemy wsparcia dla energii z odnawialnych źródeł przewidziane w projekcie ustawy o odnawialnych źródłach energii można uznać za pomoc publiczną?,* 2015, http://www.cire.pl/pliki/2/szopinskiw2miejsce.pdf [access: 15.03.2017].

Wróbel A., *Europeizacja polskiego prawa o postępowaniu administracyjnym a autonomia proceduralna państw członkowskich Unii Europejskiej*, in *Europeizacja prawa administracyjnego*, ed. I. Rzucidło, Lublin 2011.

Case C-206/06 *Essent Network Noord* [2008] ECR I-5497.

Case C-262/12 *Vent De Colère and others* [2013] ECR I-851.

Case C-279/08 P *Commission v. Netherlands* [2011] ECR I-0000.

Case C-345/02 *Pearle and Others* [2004] ECR I-7139.

Case C-379/98 *PreussenElektra AG v. Schleswag AG* [2001] ECR I-2159.

Case C-482/99 *French Republic v. Commission* [2002] I-04397.

Case C-518/13 *Eventech Ltd. v. Parking Adjudicator* [2015] ECLI: EU: C: 2015: 9.

Case C-573/12 *Ålands Vindkraft AB v. Energimyndigheten* [2014] ECLI: EU: C: 2014: 2037.

Case N 504/2000 *British Renewable Obligation* I, OJ 2002, C 30/15.

Case N 789/2002 *Swedish Green Certificates*, OJ 2003, C 120/8.

Case C-83/98 P *French Republic v. Ladbroke Racing Ltd and Commission* [2000] I-03271.

Case SA.33134 (2011/N), *Romanian Green Certificates*, OJ 2011, C 244/2.

Case SA.37345 (2015/N), Polish certificates of origin.

Commission Regulation (EU) no. 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ 2014 L187/1.

Communication form the Commission, Guidelines on State aid for environmental protection and energy 2014-2020, OJ 2014 C 200/1.

Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, OJ 2009 L140/16.

Joined cases C-204 to 208/12 *Essent Belgium NV v. Vlaamse Reguleringsinstantie voor de Elektriciteits- en Gasmarkt* [2014] EU: C: 2014: 2192.

Treaty on the Functioning of the European Union (consolidated version), OJ 2008, C115/47.

Ustawa z dnia 10 kwietnia 1997 r. Prawo energetyczne (Dz.U. 2006 no. 89 item 625).

Ustawa z dnia 20 lutego 2015 r. o odnawialnych źródłach energii (Dz.U. 2015 item 478).

SUMMARY

Controversies Concerning the Interpretation of State Resources as a Prerequisite of State Aid: an Illustration Using the Example of Polish Green Certificates and the Auction System

The process of Europeanisation in the legal field results in various conflicts between the Member States and European authorities. Cases concerning State aid are an example of such a conflict, where on one hand Member States want to preserve control over various supporting schemes and on the other the European Commission and the Court of Justice of the European Union through a set of judgements and decisions increase their supervisory power over the supporting schemes. The European jurisprudence tend to stretch the scope of State aid by expanding the definition of State resources, which is one of its prerequisites. Applying of such a broad definition of State resources to Polish green certificates scheme and the auction scheme shows negative results of this approach that not only decreases the efficiency of the Renewable Energy Sources supporting schemes but that has a negative reflection on the whole State aid system.

Keywords: State aid, State resources, green certificates, auction, renewable energy sources

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The Principle of Proportionality in European Union Law as a Prerequisite for Penalization

Introduction

The issue underlying the functioning of the European Union, in the achievement of its objectives and performance of tasks, is the observance of the legal principles that govern decision-making processes and common strategic objectives, and which are applicable when establishing European Union legislation and transposing it into national law1, including in the area of criminal law. One of these principles is the principle of proportionality which, due to its complexity and significance for the processes of establishing and applying the law, requires detailed and separate discussion.

The concept of proportionality in the EU legal order

The principle of proportionality, which is one of the few principles expressed explicitly in the European Union acts,[2] is widely applied in the EU legal order and is therefore one of the fundamental principles of the EU system[3]. Its formation proceeded on two planes: normative and case-law.

As regards the primary law of the European Union, the principle of proportionality acquired the status of a treaty when the Treaty of Maastricht entered into force (see

1 M. Witkowska, *Zasady funkcjonowania Unii Europejskiej*, Warszawa 2008, p. 178.

2 See Article 5(4) of the Treaty on European Union (hereinafter: TEU): "Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality."

3 J. Maliszewska-Nienartowicz, *Rozwój zasady proporcjonalności w europejskim prawie wspólnotowym*, „Studia Europejskie" 2006, no. 1, p. 59; W. Szpringer, *Subsydiarność jako zasada ustrojowa w państwie federalnym – członku Unii Europejskiej (na przykładzie RFN)*, in *Subsydiarność*, ed. D. Milczarek Warszawa 1998, p. 116.

the then Article 3b § 3 of the Treaty), but it should be noted that its standardisation in Part I of the EC Treaty ("Principles") means that it has been raised to the rank of a fundamental principle that underpins the legal and institutional order of the European Communities[4]. After the Treaty of Amsterdam entered into force, which did not introduce any substantial changes to this regulation, apart from revising the numbering of individual provisions, the normative basis for the functioning of the principle of proportionality was contained in Article 5(3) of the Treaty establishing the European Community (TEC), providing that: "[any] action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty," detailing the criteria for applying this principle, as well as the practical issues related to its application, contained in 'Protocol on the application of the principles of proportionality and subsidiarity' attached to the Treaty.[5]

Applicable *de lege lata*, the Treaty of Lisbon contains many references to the principle of proportionality. It should be noted that in relation to the previous legal situation, it does not introduce any significant changes in this respect. The normative basis for the application of the principle is Article 5 of the new TEU (replacing Article 5 of the TEC), which provides in § 4: "under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality." Interpretation of this provision allows the assertion that the principle of proportionality has not fundamentally changed. The modifications introduced by this regulation are limited to a number of technical amendments, i.e.: the principle in question no longer concerns only the "Community action" (see Article 5 § 3 TEC), but extends to the "content and form of Union action". Moreover, this general regulation includes a direct reference annexed to the Treaty and thus has the same legal force[6] as the new[7] 'Protocol on the application of the

4 J. Maliszewska-Nienartowicz, *op. cit.*, p. 66 and references therein.

5 It should be noted at the outset that the treaty wording of this principle, despite the extensive ECJ case law already in place at the time of adoption of the Treaty, takes account only of the requirement of necessity, omitting the justification of the measure in relation to the achieved objective and proportionality. With regard to the assessment of this fact, see *ibidem*, p. 68 and references therein.

6 D. Milczarek, *Subsydiarność – próba bilansu*, in *Subsydiarność*, *op. cit.*, p. 327.

7 The Treaty of Lisbon provides that the existing Protocol on the application of the principles of subsidiarity and proportionality, annexed to the EC Treaty, is repealed and replaced by a new protocol with the same title. What is new is the emphasis on the particular importance of the European Commission, which, before submitting any proposal for a legislative act, has been committed to conduct wide-ranging consultations, taking into account, in appropriate cases, the regional and local dimension of the actions carried out (Article 2 of the Protocol). In practice, this means that the Commission will have to take into account the principle of proportionality already at the preparatory stage, i.e. before the formal opening of the legislative process. Furthermore, the Protocol upholds the requirement to justify draft leg-

principles of subsidiarity and proportionality', which contains a set of rules, precise criteria and the practical aspects concerning the application of these two principles,[8] including the provision that each institution, when exercising the powers conferred on it, shall ensure constant respect for the principle of proportionality, as defined in Article 5 TEU. The 'Protocol' also lays down the requirement that each Community legislative act should state the reasons why the principle of proportionality was taken into consideration at the time of its creation.

It is worth noting, however, that, contrary to the case-law of the ECJ, the general provisions of the Treaty and the provisions of the Protocol only cover the European Union's action and, in particular, the exercise of its powers, without taking into account the functions of the principle in question which relate to actions taken by Member States in the application of EU law.[9] It should be stressed, however, that the inclusion of this principle in the Treaties, followed by the indication in the Protocol of criteria allowing the EU institutions to apply it precisely, is of constitutive significance and made it a Treaty principle of general scope, since until then it was applicable only in the field of soft law. Since the Treaty of Maastricht entered into force, it has had priority over the secondary law applied by EU institutions, and moreover has had permanent status, since any change would require revision of the Treaty. This automatically gives the Court of Justice the power to verify the conformity of EU legislation with respect to this principle.[10]

In conclusion, it can be assumed that the function of the principle of proportionality is to control the manner in which the European Union exercises its powers, both in relation to Member States and individuals, and to assess the activities of those states. The overriding aim dictated by the desire to safeguard the interests of Member States and individuals is to prevent the EU from interfering in the freedom of those entities.[11]

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islative acts with respect to the principles of subsidiarity and proportionality (Article 5 of the Protocol), while extending this obligation to include in each justification a detailed statement making it possible to assess compliance with these principles.

8 See § 2 of the preamble of the Protocol. It can therefore be concluded from the content of the Protocol that its provisions do not relate to the substance or scope of the principle in question, but merely contain procedural rules intended to facilitate its implementation.

9 For more on this subject, see J. Maliszewska-Nienartowicz, *Sądowe stosowanie zasady proporcjonalności*, "Europejski Przegląd Sądowy" 2009, no. 1, p. 11 *et seq*.

10 See, e.g., the ECJ rulings in the following cases: *Hauer v. Land Rheinland-Pfalz*, 44/70, p. 3727; *Bela-Mühle v. Grows Farm*, 114/76, p. 1211; *The Queen, ex parte E.D. & F. Man (Sugar) Ltd v. Intervention Board for Agricultural*, 181/84, p. 2889; *The Queen v. Minister of Agriculture, Fisheries and Food and Secretary of State for Health ex parte Fedesa and others*, 331/88, p. 4023.

11 J. Maliszewska-Nienartowicz, *Rozwój zasady...*, *op. cit.*, p. 66 and references therein; eadem, *Zasada proporcjonalności w prawie Wspólnot Europejskich*, Toruń 2007, p. 252. For the sake of clarity, it is worth mentioning two important issues. Firstly, the substantial change introduced by the Treaty of Lisbon into Article 296 TFEU (ex Article 253 TEC) by adding the sentence stating that "where the Treaties do not specify the type of act to be adopted, the institutions shall select it on a case-by-case basis, in compliance with the applicable procedures and

It follows from the above, however, that neither the Treaty's general legislation nor the Protocol include precise criteriafor the principle in question. Its determination should therefore be based on the ECJ case law.

In elaborating on the issue of the principle of proportionality in the case law of the European Court of Justice, it must be noted that, in terms of chronology, this principle appeared in European law (then: the Community) in the rulings of the European Court of Justice in the 1950s.[12] Initially, however, it was not considered to be a general principle of law, and it only acquired the status of a principle for the overall assessment of the Community activities in an ECJ judgment of 1970, where the Court, speaking of it in the context of protection of fundamental rights, stated that "the freedom of action of individuals should not be limited beyond what is required for public interest purposes."[13] In practice, this meant introducing the requirement of proportionality to the Community's interference in the rights of the individual.[14] Under the successive judgements of the Court, the scope of this principle has been gradually extended to other manifestations of action taken by the Community institutions and, consequently, to the actions of Member States. In 1983, the Court in its subsequent ruling introduced a control mechanism for these actions in the light of the principle of proportionality, stating: "in order to determine whether a provision of Community law complies with the principle of proportionality, it must be determined, first, whether the measures which are envisaged for achieving the objective correspond to the significance of the objective, and secondly, whether they are necessary to achieve it."[15] It can be inferred form this word-

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with the principle of proportionality." Secondly, the provisions of the Charter of Fundamental Rights of the European Union (hereinafter: ChFR EU), of which in the context of the application of the principle of proportionality the provisions of Article 49 (principles of legality and proportionality of criminal offences and penalties), and Article 52 (scope of guaranteed rights) of the ChFR EU seem particularly important.

12 See, e.g., the ECJ rulings in *Fédération Charbonnière de Belgique v. High Authority*, 8/55, p. 292; *Compagnie des Hauts Fourneaux de Chasse v. High Authority*, 15/57, p. 211. For more on this subject, see e.g. J. Maliszewska-Nienartowicz, *Sądowe...*, *op. cit.*, p. 60 *et seq*.

13 See the ECJ ruling in *Internationale Handelsgesselschaft GmBH v. Einfuhr- und Vorratstelle für Getreide und Futtermittel*, 11/70, p. 1125; M. Witkowska, *op. cit.*, p. 178; A. Wyrozumska, *Państwa członkowskie a Unia Europejska*, in *Prawo Unii Europejskiej. Zagadnienia systemowe. Prawo materialne i polityki*, ed. J. Barcz, Warszawa 2006, p. 322.

14 Cf. J. Maliszewska-Nienartowicz, *Rozwój zasady...*, *op. cit.*, p. 61; A. Wyrozumska, *op. cit.*, p. 322. See also J. Rivers, *Proportionality and discretion in international and European law*, in *Transnational Constitutionalism. International and European Models*, ed. N. Tsagourias, Cambridge 2009, p. 110 *et seq.*

15 See the ECJ judgement in the case *Fromançais S.A. v. Fonds d'orientation et de régularisation des marchés agricoles (FORMA)*, 66/82, p. 395. This mechanism was also applied in later judgements of the Court, see e.g. *Office belge de l'économie et de l'agriculture (OBEA) v. SA Nicolas Corman et fils*, 125/83, p. 3039; *Commission v. Federal Republic of Germany*, 116/82, p. 2519. For more on this issue, see J. Maliszewska-Nienartowicz, *Rozwój zasady...*, *op. cit.*, p. 62 *et seq*.

ing that the principle of proportionality imposes certain restrictions on law-making and enforcing authorities. These constraints consist in requiring a certain balance between the scope and nature of the activities they undertake, and the intended purpose which they are to serve.[16] In its rulings, therefore, the Court pointed out the need to use the proportionality test. It consists in analysing the compatibility of a given legal measure with the principle in question using a three-tiered mechanism: firstly, it must be stated that the measure is appropriate for achieving a given objective;[17] then that it is necessary for its achievement,[18] and that it is commensurate.[19]

The concept of proportionality therefore allows for two conclusions: the EU acts, and the actions taken on their basis, must be appropriate and necessary for achieving the objectives pursued by the regulation, and proportionate to the adverse consequences. On the other hand, if there are several appropriate measures, those that are the least invasive and burdensome for the Member States' freedom of action must be chosen.[20]

Thus, the principle of proportionality prohibits taking authoritative actions beyond necessity. The literature emphasizes that it serves both to assess the implementation of the provisions of EU law (i.e. legislative and administrative measures taken by the European institutions),[21] as well as measures taken by Member States. In the latter case, it serves to check the compliance with the principle of proportionality of actions taken by Member States, or measures adopted by them, that either limit the rights and freedoms arising from EU primary law, or concern the interpretation of EU law by national

16 J. Maliszewska-Nienartowicz, *Rozwój zasady...*, *op. cit.*, p. 63; A. Witkowska, *op. cit.*, p. 178.

17 This criterion refers to the relationship between the measure used and the intended purpose, which must be justified in the light of Community law. The measure applied must be appropriate to achieve the objective, while the least possibly intrusive in the freedom of action of a Member State. For more on the subject, see J. Maliszewska-Nienartowicz, *Zasada proporcjonalności w prawie Wspólnot Europejskich – kryteria i zakres kontroli dokonywanej przez Trybunał Sprawiedliwości*, in *Zasady ogólne prawa wspólnotowego*, ed. C. Mik, Toruń 2007, p. 256 *et seq*.

18 The measure used must be necessary for the particular situation, i.e. not going beyond what is necessary to achieve the objectives. It is therefore necessary to examine whether there is already a measure less intrusive to the freedom of action, e.g. less stringent provision. For more on the subject, see J. Maliszewska-Nienartowicz, *Zasada proporcjonalności w prawie Wspólnot Europejskich – kryteria...*, *op. cit*., p. 258 *et seq.* These criteria were formulated by the ECJ in *Schräder v. Hauptzollamt in Gronau*, 265/87, p. 2237. See also the ECJ ruling in *The Queen v. Minister of Agriculture, Fisheries and Food and Secretary of State for Health ex parte* Fedesa *and others*, 331/88, p. 4023; N. Emiliou, *The Principle of Proportionality in European Law*, London – The Hague – Boston 1996, p. 191 *et seq*.

19 I.e. proportionate to the adverse effects or restrictions imposed on the individual. This is known as proportionality in the strict sense. For more on the topic, see J. Maliszewska-Nienartowicz, *Zasada proporcjonalności w prawie Wspólnot Europejskich – kryteria...*, *op. cit*., p. 261 *et seq.*

20 Cf. the ECJ ruling in *Schräder v. Hauptzollamt in Gronau*, 265/87, p. 2237.

21 See J. Maliszewska-Nienartowicz, *Sądowe...*, *op. cit.*, p. 11 *et seq*.; eadem, *Zasada proporcjonalności w prawie Wspólnot Europejskich*, *op. cit.*, p. 153 *et seq*.

authorities when they apply it.[22] This supervision may also relate to measures taken by Member States to implement EU law, as well as sanctions imposed by the authorities of the Member States for violation of this law, which are required to be effective, proportionate and dissuasive.[23] At the same time, it should be emphasized that checking if national measures comply with the principle of proportionality may be carried out by both the ETS[24] and – as a result of the ECJ decision – by national courts.[25] However, some authors point out that the Court does not uniformly apply the principle in question, depending on the subject matter of the case, which may lead to the conclusion that it is a rather flexible means of judicial review, with the ECJ[26] adopting substantially different standards for assessing the compatibility of legal acts with that principle.[27]

The principle of proportionality in the criminal law of the European Union

Although the principle of proportionality is one of the basic principles functioning in the national legal systems of the EU Member States,[28] it is not often analysed in the context of European criminal law. This is primarily due to the disputed competence of the EU legislator with regard to establishing standards of criminal law.[29] With the gradual extension of the European Union's legitimacy to the area of criminal law, it is also becoming necessary to apply the basic norms and principles of EU law to this area. This section of the paper will therefore focus on discussing this aspect of the principle of proportionality.

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22 See, e.g., the ECJ rulings in *Tanja Kreil v. Niemcy*, 285/98, p. 66; *Cassis de Dijon*, 120/78, p. 649. For more on this subject, see A. Wyrozumska, *op. cit.*, p. 324 *et seq*.

23 J. Maliszewska-Nienartowicz, *Rozwój zasady...*, *op. cit.* p. 62; eadem, *Sądowe...*, *op. cit.*, p. 13 *et seq*.; eadem, *Zasada proporcjonalności w prawie Wspólnot Europejskich*, *op. cit*., pp. 164 *et seq*.; A. Wyrozumska, *op. cit.*, p. 322 *et seq*.

24 E.g. in *H. Franzén*, 189/95, p. 5909.

25 E.g. in *Questore di Verona v. Diego Zenatti*, 67/98, p. 7289. On the assessment of the possibility of adoption of these two solutions, see J. Maliszewska-Nienartowicz, *Sądowe...*, *op. cit.*, p. 14 *et seq*.

26 A. Frąckowiak-Adamska, *Zasada proporcjonalności jako gwarancja swobód rynku wewnętrznego Wspólnoty Europejskiej*, Warszawa 2009, p. 32 *et seq*.; J. Maliszewska-Nienartowicz, *Rozwój zasady...*, *op. cit.*, p. 64 *et seq*.; eadem, *Sądowe...*, *op. cit*., p. 16 *et seq*.

27 For more on this topic, see A. Frąckowiak-Adamska, *Podwójne zasady badania proporcjonalności przez Trybunał Sprawiedliwości*, in *Zasady ogólne...*, *op. cit.*, p. 271 *et seq*.

28 Cf., *inter alia,* Article 42 section 1 of the Constitution of the Republic of Poland; Article 103 section 2 of the Constitution of the Federal Republic of Germany (*Grundgesetz*).

29 In this issue cf., *inter alia*: J. Piskorski, *Legitymizacja prawa karnego Unii Europejskiej*, Poznań 2013; M. Szwarc-Kuczer, *Kompetencje Unii Europejskiej w dziedzinie harmonizacji prawa karnego materialnego*, Warszawa 2011.

The concepts of proportionality

As regards European criminal law, the concept of proportionality appears in many contexts. It can be found in the extensive ECJ case law discussed above, the Charter of Fundamental Rights (see. e.g. Article 49(3) ChFR EU), as well as many acts of the Community's secondary legislation, which often contain the wording whereby "sanctions (also: penalties or measures) [which] shall be effective, proportionate and dissuasive"[30] must be envisaged. This differentiation of the normative bases of the analysed principle allows us to conclude that proportionality in EU law is not a homogeneous notion. This view is also reflected in a doctrine in which two concepts of interpretation of this principle are distinguished.[31]

The first of these, known as retrospective proportionality, refers to the principle of proportionality in criminal law. Its essence is the assumption that the severity of the penalty must be commensurate with the seriousness of the offence, thus indicating that it is derived from the guaranteed function of criminal law.[32] With the retrospectiveness of proportionality, the basis for the penalty is the fact that the act was committed by the perpetrator in the past.[33] Because this criminal approach to proportionality focuses on a certain degree of dependence between the the seriousness of the offence and the severity of the penalty imposed for committing it, it is desirable to formulate criteria on the basis of which which the required degree of correlation can be estimated. In criminal law, it is assumed that this function has two main components: the degree of fault of the perpetrator and the degree of social harm of the offence.[34]

The second concept of proportionality relates to proportionality in the context of administrative law, which was broadly discussed in the first part of this study. In this context, the principle is expressed in the fact that all the measures taken (understood as regulations prohibiting specific conduct and providing specific sanctions for infringing

30 See e.g. Article 58 § 1 of the Directive of the European Parliament and of the Council 2015/849 of 5 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (Official Journal of the European Union of 5 June 2015, L 141 et seq) or Article 2 § 1 of the Convention of 26 July 1995 on the protection of the financial interests of the European Communities (Official Journal of 27 November 1995, C 316 p. 48 *et seq.*).

31 See, e.g., P. Asp, *Two notions of Proportionality*, in *Materials from the 22nd IVR Word Congress*, p. 1, www.crimpol.eu/?p=200 [access: 12.02.2017]; N. Jareborg, *Criminalization as Last Resort (Ultima Ratio)*, "Ohio State Journal of Criminal Law" 2004, no. 2, pp. 529, 532 *et seq.*

32 With regard to the principle of proportionality in criminal law, see e.g. M. Królikowski, *Sprawiedliwość karania w społeczeństwach liberalnych. Zasada proporcjonalności*, Warszawa 2005, p. 209 *et seq.*

33 See the ECJ rulings in the cases: *Criminal proceedings v. Messner*, 265/88, p. 4209; *Skanavi*, 193/94, p. 929.

34 See also Article 53 § 1 of the Polish Criminal Code (hereinafter: PCC).

these prohibitions) must be proportionate to the objective to be achieved. This approach to proportionality defines the relationship between the measures taken and the objectives pursued, taking into account three essential elements, namely: the appropriateness, necessity and proportionality (*sensu stricto*) of the measures taken. Contrary to the principle of proportionality in criminal law, in this case one can speak of potential proportionality, since it concerns the relationship between certain measures and the objectives to be achieved in the future.[35]

Since the principle of potential proportionality – unlike the principle of retrospective proportionality – is updated not only with respect to the determination of the commensurability of the offence, but also with regard to many other aspects, the question arises of whether - when analysing the compliance of sanctions provided for by EU law with the principle of proportionality - the principle of retrospective proportionality, the principle of potential proportionality or both principles should be applied together.[36] This problem also implies the existence of a relationship between both these principles.

An aspect that links these two concepts of proportionality seems to be a correlation with the issue of determining the adequacy of sanction severity. However, a cursory analysis suggests that both concepts refer to the issue of the proportionality of sanctions from two completely different perspectives. In accordance with the principle of potential proportionality, the sanction must be commensurate with the objective to be achieved. On the other hand, the implementation of the principle of proportionality in criminal law involves the imposition of a penalty proportional to the gravity of the offence already committed.

The purposes behind the implementation of this principle are also fundamentally different. In administrative law, its implementation is primarily a matter of establishing the objective to be achieved by applying a specific measure. Then it must be determined whether the measure is appropriate, necessary and proportionate to that objective. On the other hand, in criminal law, this objective is primarily preventive, consisting in the elimination of certain types of behaviour that are considered forbidden under penalty. These arguments could therefore lead to the conclusion that there are no major points of contact between the two concepts.

In the literature, however, there are views indicating a certain link between these two principles in the context in question. Asp recognizes it in relation to two elements of the principle of proportionality in the administrative-legal sense. Firstly, it is a condition of the need for a measure in relation to the objective to be achieved through its application. According to Asp, in the fact that the adoption of the requisite necessity is determined

35 See P. Asp, *op. cit.*, p. 3; N. Jareborg, *op. cit.*, pp. 529, 532.

36 An example of cumulative treatment of both principles by the ECJ is the judgement in *Buitoni v. Fonds d'orientation et de régularisation des marchés agricoles (FORMA)*, 122/78, p. 2 *et seq*.

by the assessment of the measure as the least intrusive and cumbersome, one can see a certain analogy to the criminal law concept of proportionality, which consists in assessing the relationship between the seriousness of the offence committed and the severity of the penalty for committing it, based on the assessment of the degree of fault of the perpetrator and the degree of social harm of the offence.[37] Asp notes a similar correlation in relation to the condition of proportionality in the strict sense (according to which the measure must be commensurate with the adverse effects or restrictions imposed), however, a fundamental difference is emphasized here, namely that the principle of potential proportionality concerns negative results that could arise in the future as a result of illegal conduct, while the retrospective concept makes it possible to assess the proportionality of the violation only in the context of an act that has already been committed.[38]

Although the above arguments cannot be denied, this does not mean that both concepts of proportionality have one cohesive element in the form of the commensurability of an adverse effect. It should be stressed that in both cases the compliance with the requirement of proportionality in the strict sense is assessed from two completely different perspectives. Moreover, the principle of proportionality that is applicable in criminal law contains additional restrictions that affect the scope of its application.[39] This primarily concerns the principle of the individualization of penalties and punitive measures, which consists in adapting them to the individual characteristics and personal circumstances of the perpetrator and the opportunities and prospects for preventive and educational influence on the offender. This principle also implies that the circumstances affecting the penalty are taken into account only in relation to the person to whom they apply (see Article 55 of the PCC). The severity of the penalty is therefore dependent not only on the adverse effects of committing a particular offence, but also on the degree of fault of the individual offender.

The principle of proportionality and European criminal law

The next issue to be addressed is the definition of the extent to which the principle of proportionality affects the development of European criminal law, primarily with regard to the principle of retrospective proportionality. There is no doubt that the direct transfer of the interpretation of the principle, created on the basis of administrative law, to the area of criminal law is not possible.

37 For more on the subject, see P. Asp, *op. cit.*, p. 6 *et seq.*
38 *Ibidem*, p. 7 *et seq*.
39 For more details on this subject, see *ibidem*, p. 8 *et seq.*

Based on the concept of retrospective proportionality, the starting point is, however, a distinction between two of its models.[40] The first one, known as ordinal proportionality,[41] refers to the relative threat of penalty. Its essence is that the perpetrator who committed the crime is sentenced to a punishment commensurate with the degree of culpability and the gravity of the offence committed. However, it should be emphasized that, according to this concept, proportionality is assessed within a particular legal order. The relativity of punishment for a perpetrator means that the punishment must fall within the statutory penalty envisaged for the type of offence which corresponds to a catalogue of penal sanctions applicable in a particular legal system and the rules for meting out penalties by a court. This model of proportionality is therefore intended to indicate that retrospective proportionality does not only serve to determine the limits of permissible punishment for a given type of crime in a particular criminal law system, but also determines the type and level of penalty imposed for an offence committed by a particular offender.

The second model of retrospective proportionality, known as cardinal proportionality,[42] concerns the correlation between the gravity of the act committed and the upper limit of the statutory penalty for its commitment. It therefore determines what maximum penalty will be commensurate with the type of offence. In practice, this approach to retrospective proportionality should be applied by national courts and the ECJ in determining whether or not the penalty laid down in the EU regulations is commensurate with the gravity of the offence.

Article 49 § 3 of the Charter of Fundamental Rights and the principle of proportionality

Looking for the normative basis of the principle in question in regulations that are relevant from the perspective of the regulation of European criminal law, attention should be paid to the aforementioned Article 49 of the Charter of Fundamental Rights, which states in § 3 "that the severity of penalties must not be disproportionate to the criminal offence." Referring the above to the observations made in the context of defining the semantic scope of the retrospective proportionality principle, one should consider to which of the presented models of the principle this regulation applies.

Given the fact that the first of the discussed concepts of retrospective proportionality refers to the assessment of proportionality in the light of principles in a particular legal system, applying it on the ground of EU legislation, and therefore in a situation where

40 See *ibidem*, p. 9 *et seq*.; A. von Hirsch, *Past or future crimes: deservedness and dangerousness in the sentencing of criminals*, Manchester 1985, p. 38 *et seq*.

41 P. Asp, *op. cit.*, p. 9.

42 *Ibidem*, p. 10; A. von Hirsch, *op. cit.*, p. 43.

there is no single coherent legal system, but rather the many legal systems of Member States which contain separate and often very different regulations, specifying a catalogue of penalties and rules for sentencing (and thus pursuing their separate national concept of ordinary proportionality), does not seem to be justified. This is further supported by the fact that EU law does not contain provisions defining a catalogue of penalties for criminal offences of a particular type that are uniformly applicable in all Member States and which could serve as a benchmark in the examination of compliance with the principle. Certain secondary legislation acts (i.e. essentially directives, and in the pre-Lisbon legal framework, also the third-pillar framework decisions) contain provisions setting a minimum level for maximum penalties for committing crimes that exhaust strictly defined constitutive elements, however, this "solely" means that Member States are obliged to incorporate into their national legal systems a minimum standard laid down in European regulations. However, this minimum standard covers not only the obligation to combat certain pathologies by means of criminal law instruments, but also the need to take into account in the national legislation a certain minimum threshold of the upper limit of penalty[43]. It must be noted, however, that these EU minimum standards often do not coincide with what was previously envisaged in the national penal provisions of individual states. In such situations, these states are obliged to take these standards into account and adapt their legal regulations to them.[44] This harmonisation of criminal law does not mean, however, that in this way a coherent catalogue of penalties and a system of sentencing will be established that will apply in all the Member States.

The arguments presented thus prove that the provision of Article 49 § 3 ChFR EU does not refer to the first model of retrospective proportionality. It should therefore be assumed that it is linked to the cardinal proportionality model. And that means, in turn, that the role of this regulation is solely to set criteria for determining what the maximum penalty must be for committing an offence of a particular type, so that the severity of that penalty is commensurate with the gravity of the act committed. This circumstance entails that the regulation in question for European criminal law is of relatively small

43 See e.g. Article 2 of the Council Framework Decision 2001/500/JHA of 26 July 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and proceeds of crime (Official Journal L 182/1 of 5 July 2001); Article 5 § 3 of the Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism (Official Journal L 164/3 of 22 June 2002); Article 4 § 2 of the Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector (Official Journal L 192/54 of 31 July 2003); Article 4 §§ 1–4 of the Council Framework Decision 2004/757/JHA of 25 Oct. 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of drug trafficking (Official Journal L 335/8 of 11 November 2004).

44 See also U. Scheffler, *Standardy minimalne Rady Europy versus standardy minimalne Rady Unii Europejskiej*, in *Europeizacja prawa karnego w Polsce i w Niemczech – podstawy konstytucyjnoprawne*, ed. A.J. Szwarc, J.C. Joerden, Poznań 2007, p. 106.

significance,[45] and the retrospective proportionality principle, laid down in Article 49 § § 3 ChFR EU, sets only a general framework for the actions of the EU legislator in the area of criminal law.[46] Nevertheless, it should be noted that, due to the ChFR EU status,[47] individuals can rely on it directly if they consider that punishment imposed on them is disproportionately severe to the act they committed.

EU regulations governing police and judicial cooperation in criminal matters and the principle of proportionality

More attention should be paid to the analysis of legislative actions taken under one of the EU's policies, i.e. police and judicial cooperation in criminal matters, which has been 'communitarised' under the Treaty of Lisbon. However, before the EU's three pillar structure was abolished, the European Union (since the Treaty of Amsterdam entered into force) increasingly often set, by means of secondary legislation instruments (formerly in particular framework decisions and currently directives), specific requirements (known as minimum standards) for Member States, concerning the constituent elements of criminal offences and penalties for their commitment [see ex Article 31(1)(e) TEU; *de lege lata* Article 83 § 1 TFEU].[48] The justification for such a state of affairs can be seen in the (disputed) assumption that combating cross-border crime also requires a cross-border response.[49] In the context of European criminal law, the principle of pro-

45 The doctrine also suggests that the principle of proportionality should be interpreted strictly in line with Article 49 of the ChFR EU, i.e. only in the context of those minimum maximum penalties provided for by EU law, and thus make these minimum standards an element of the classification of the different types of offences subject to harmonization; or to interpret it as a principle functioning only in relation to establishing the relationship of EU law with the rules laid down by the national law of a particular Member State. This limited understanding of this regulation does not, however, deserve recognition; critically also see P. Asp, *op. cit.*, p. 11 *et seq*.

46 It should however be noted that some representatives of the doctrine advocate the application in this area of the concept of potential proportionality which mainly functions in administrative law; see. e.g. P. Asp, *op. cit.*, p. 12 *et seq*.

47 Let us recall that the Treaty of Lisbon did not incorporate the provisions of the ChFR EU as one of its parts, although under Article 6 of the new TEU – taking into account its objections – the ChFR EU has the same legal force as the Treaties, which means - with the entry into force of the LT – the provisions of the Charter of Fundamental Rights will be the primary law of the Union. Cf. J. Barcz, *Przewodnik po Traktacie z Lizbony. Traktaty stanowiące Unię Europejską*, Warszawa 2008, p. 59 *et seq*.; A. Frąckowiak-Adamska, *Zasada proporcjonalności...*, *op. cit.*, p. 90 *et seq*.

48 See also U. Scheffler, *op. cit.,* p. 104 *et seq*.

49 As a counter argument, it could be pointed out that the approximation (harmonisation) of Member States' criminal laws as part of judicial cooperation in criminal matters constitutes a threat to the sovereignty and independence of the criminal law systems of individual states, traditionally recognized as the bastions of national sovereignty. Critically, see also J. Piskorski, *Subsidiaritätsprinzip im Gemeinschaftsrecht als Voraussetzung für die Kriminalisierung*, in

portionality should, therefore, be referred not only to the issue of determining the scope of the European Union's legislative powers, but also to the scope of permissible criminalisation and penalisation and, above all, the admissible limits of criminal sanctions. In the acts of EU secondary legislation there is a repeatedly expressed requirement[50] that penalties for committing specific crimes should be dissuasive, effective and commensurate.[51] It would seem that such an approach to the condition of the proportionality of penalties implies the prohibition of excessive interference with individual rights, and can therefore be interpreted as an emanation of human rights and fundamental freedoms. In the doctrine (mainly German), however, there are many different views.[52] In this context, it is worth noting in particular the study by Gröblinghoff, who attempted to make a clear distinction between these concepts by assuming that "deterrence" should be understood as potential offenders refraining from infringement due to fear of punishment (negative

Vergleichende Strafrechtswissenschaft. Festschrift für Andrzej J. Szwarc zum 70. Geburtstag, ed. J. C. Joerden, U. Scheffler, A. Sinn, G. Wolf, Berlin 2009, p. 75 and references therein.

50 See e.g. Article 6 § 1 of the Council Framework Decision 2000/383/JHA of 29 May 2000 on greater security by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the Euro (Official Journal L 329/3 of 4 December 2001); Article 5 § 1 of the Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism (Official Journal L 164/3 of 22 June 2002); Article 5 § 1 of the Council Framework Decision 2003/80/JHA of 27 January 2003 on protection of the environment through criminal law (Official Journal L 29/55 of 5 February 2003); Article 4 § 1 of the Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector (Official Journal L 192/54 of 31 July 2003); Article 58 § 1 of the Directive of the European Parliament and of the Council 2015/849 of 5 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (Official Journal of the European Union of 5 June 2015, L 141, p. 73 *et seq.*).

51 The concept of requirements, however, was created by the Council, which had already applied them in joint actions which were the predecessors of the framework decisions under the Maastricht Treaty (see e.g. Title II, Section B, point B, Joint Action 97/154 / JHA of 24 February 1997 on combating trafficking in human beings and sexual exploitation of children, Official Journal L 63/2 of 4 March 1997]; Article 2 § 1 and Article 3 of the Joint Action 98/733/JHA of 21 December 1998 on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union (Official Journal L 351/1 of 29 December 1998), but derive from ECJ jurisprudence, where it first appeared in the judgement on "Greek maize": *Komisja v. Grecja*, 68/88, p. 2965. They can also be found in Article 2 § 2 of the Convention of 26 July 1995 on the protection of the financial interests of the European Communities (Official Journal C 316/49 of 27 November 1995). See also T. Weigend, *Mindestanforderungen an ein europaweit geltendes harmonisiertes Strafrecht*, in *Strafrecht und Kriminalität in Europa*, ed. F. Zieschang, E. Hilgendorf, K. Laubenthal, Baden-Baden 2003, p. 59; K. Tiedemann, *Gegenwart und Zukunft des Europäischen Strafrechts*, ZStW 2004, no. 116, p. 953.

52 See, e.g., T. Weigend, *op. cit.*, p. 79: "Within the meaning of the ECJ jurisdiction, the substantive distinction between the three prerequisites, 'effective, proportionate and dissuasive' is almost impossible." And also S. Gröblinghoff, *Die Verpflichtungen des deutschen Strafgesetzgebers zum Schutze der Interessen der Europäischen Gemeinschaften*, Heidelberg 1996, p. 37: "each of these constituent elements is undefined."

general prevention); effectiveness means that the sanction must be adequate to stop the individual from further infringements (individual prevention), and to deter the general public, by introducing commensurate sanctioning standards and their adequate application, to voluntarily adhere to these standards (positive general prevention); and finally, proportionality covers the gravity of the infringement.[53] Satzger is also of a similar opinion, treating effectiveness and deterrence as a homogeneous criterion and assuming that proportionality refers to at least the necessary threat of punishment imposed in connection with committing an offence.[54]

The conclusion should therefore be that the criterion of proportionality, as it appears in the regulations of the EU secondary legislation, does not serve to set a minimum level of maximum criminal penalty permissible under a national legal system, but rather to prohibit disregard for violation of EU regulations by imposing disproportionately low sanctions. It may, therefore, be accepted that it is rather intended to establish "minimum sanctions" aimed at excluding ineffective and non-dissuasive penalties.[55]

In conclusion, it should be noted, however, that the assessment of the appropriateness of adopting EU minimum rules for criminal sanctions in the light of compliance with the principle of proportionality seems to be important. Much more problematic is the presentation of convincing arguments, advocating the need for uniform EU-wide measures, where each Member State has its own national catalogue of criminal sanctioning, a system of penalties and anti-crime instruments. It seems that, in the light of the requirement to comply with the principle of proportionality, it would be easier to establish a catalogue of prohibited acts that would be subject to joint combat in the EU area, as well as penalties for committing them, than to harmonise the criminal law institutions existing in the Member States.

Conclusions

As a summary of these considerations, two main conclusions can be drawn. First, the application of the principle of proportionality in the law of the European Union is horizontal, i.e. at all levels of legislation and, in practice, it permeates the EU legal system.[56] In this context, the principle of proportionality is primarily a judicial control instrument – the role of the ECJ is dominant here, although the role of national courts cannot be overlooked. This control is performed not only in relation to legislative actions taken by the EU institutions, but also in relation to different kinds of measures that are imposed on the basis of the regulations of EU law, including sanctions. This is because

53 S. Gröblinghoff, *op. cit.*, p. 25 *et seq*.
54 H. Satzger, *Die Europäisierung des Strafrechts*, Köln 2001, pp. 368, 372.
55 See also U. Scheffler, *op. cit.*, p. 109; T. Weigend, *op. cit.*, p. 79.
56 J. Maliszewska-Nienartowicz, *Stosowanie...*, *op. cit.*, p. 16 and references therein.

the Court of Justice is of the opinion that the penalty should be proportionate to the infringement.[57] By applying the control mechanism described above, the individual interest is related in this case to the sanction imposed, whereas the public interest (EU) is related to the guarantee of the application of European Union law. In this case, the ECJ will investigate whether the sanction is proportionate - i.e. whether it contributes to the achievement of the Treaty objective and whether the entity on which it has been imposed does not suffer undue burdens.[58] As regards the determination of compliance with the principle of proportionality of the sanctions imposed by the EU institutions or by Member States for infringing EU law, the criterion of proportionality is applied in the strict sense. So there is a kind of "balancing of interests," i.e. the effect of deterring from acting compared to the cost of punishing the perpetrator.[59]

On the other hand, the application of the principle of proportionality in the area of European criminal law requires above all an answer to the question of the legitimacy of extending the powers of the EU to the field of criminal law and the potential scope of permissible intervention of the EU legislator in the freedom and rights of the individual. As shown above, this principle is developing in two ways: in the ECJ case law and in EU secondary legislation, and its subject is a mechanism for the determination of penalties, the severity of which must be proportionate to the gravity of the offence. Bearing in mind that not all Member States formulate their national system of penalties and the rules of sentencing based on the principle of proportionality, and that the national criminal law regimes of the Member States may differ significantly in terms of the degree of repression, instruments of EU law defining a minimum standard somehow automatically impose an obligation on states with less repressive punishment to adapt their laws to those of more repressive states. In my opinion, this circumstance stems from the unreasonable assumption that the differences between Member States regarding the degree of repression of domestic criminal law systems constitute a problem that can only be solved by adopting harmonising measures consisting in setting a minimum standard at the level foreseen in states with more repressive law. The assumption that increased repression of criminal law provisions contributes to the effectiveness of combating crime is highly controversial. Even among the Member States of the European Union with high crime-fighting statistics, it is possible to distinguish those whose criminal law is rather repressive from those whose criminal law is more liberal. It is not an easy task to deter-

57 See the ECJ judgement in *Atalanta Amsterdam BV v. Produktschap voor Vee Ne Vlees*, 240/78, p. 2137.

58 J. Maliszewska-Nienartowicz, *Sądowe...*, *op. cit.*, p. 12; eadem, *Zasada proporcjonalności w prawie Wspólnot Europejskich – kryteria...*, *op. cit.*, p. 265 *et seq.*; eadem, *Zasada proporcjonalności w prawie Wspólnot Europejskich*, *op. cit.*, p. 96 *et seq*.

59 For more details on this subject: J. Maliszewska-Nienartowicz, *Sądowe...*, *op. cit.*, p. 12; eadem, *Zasada proporcjonalności w prawie Wspólnot Europejskich – kryteria...*, *op. cit.*, p. 264 *et seq.*; eadem, *Zasada proporcjonalności w prawie Wspólnot Europejskich*, *op. cit.*, p. 95 *et seq*.

mine the correct correlation between the degree of repression of criminal law and actions taken on its basis that are intended to effectively prevent and combat specific pathologies.[60] The same difficulties arise in the process of establishing a minimum framework for the threat of punishment for committing a crime of a particular type. For this reason, the legitimacy of the EU legislator setting increasingly repressive minimum standards that specify a maximum penalty for committing a particular crime seems to raise reasonable doubts. Especially since the analysis of European legislation that provides for such standards often leads to the conclusion that the principle of proportionality has not been taken into account in the process of its creation.

Literature

Asp P., *Two notions of Proportionality*, in *Materials from the 22nd IVR Word Congress*, www.crimpol.eu/?p=200 [access: 12.02.2017].

Barcz J., *Przewodnik po Traktacie z Lizbony. Traktaty stanowiące Unię Europejską*, Warszawa 2008.

Emiliou N., *The Principle of Proportionality in European Law*, London – The Hague – Boston 1996.

Frąckowiak-Adamska A., *Podwójne zasady badania proporcjonalności przez Trybunał Sprawiedliwości*, in *Zasady ogólne prawa wspólnotowego*, ed. C. Mik, Toruń 2007.

Frąckowiak-Adamska A., *Zasada proporcjonalności jako gwarancja swobód rynku wewnętrznego Wspólnoty Europejskiej*, Warszawa 2009.

Gröblinghoff S., *Die Verpflichtungen des deutschen Strafgesetzgebers zum Schutze der Interessen der Europäischen Gemeinschaften*, Heidelberg 1996.

Hirsch A. von, *Past or future crimes: deservedness and dangerousness in the sentencing of criminals*, Manchester 1985.

Jareborg N., *Criminalization as Last Resort (Ultima Ratio)*, "Ohio State Journal of Criminal Law" 2004, no. 2.

Królikowski M., *Sprawiedliwość karania w społeczeństwach liberalnych: zasada proporcjonalności*, Warszawa 2005.

Maliszewska-Nienartowicz J., *Rozwój zasady proporcjonalności w europejskim prawie wspólnotowym*, "Studia Europejskie" 2006, no. 1.

Maliszewska-Nienartowicz J., *Sądowe stosowanie zasady proporcjonalności*, "Europejski Przegląd Sądowy" 2009, no. 1.

Maliszewska-Nienartowicz J., *Zasada proporcjonalności w prawie Wspólnot Europejskich*, Toruń 2007.

60 Cf. P. Asp, *op. cit.*, p. 13.

Maliszewska-Nienartowicz J., *Zasada proporcjonalności w prawie Wspólnot Europejskich – kryteria i zakres kontroli dokonywanej przez Trybunał Sprawiedliwości*, in *Zasady ogólne prawa wspólnotowego*, ed. C. Mik, Toruń 2007.

Milczarek D., *Subsydiarność – próba bilansu*, in *Subsydiarność*, ed. D. Milczarek, Warszawa 1998.

Piskorski J., *Subsidiaritätsprinzip im Gemeinschaftsrecht als Vorraussetzung für die Kriminalisierung*, in *Vergleichende Strafrechtswissenschaft. Frankfurter Festschrift für Andrzej J. Szwarc zum 70. Geburtstag*, ed. J.C. Joerden, U. Scheffler, A. Sinn, G. Wolf, Berlin 2009.

Piskorski J., *Legitymizacja prawa karnego Unii Europejskiej*, Poznań 2013.

Rivers J., *Proportionality and discretion in international and European law*, in *Transnational Constitutionalism. International and European Models*, ed. N. Tsagourias, Cambridge 2009.

Satzger H., *Die Europäisierung des Strafrechts*, Köln 2001.

Scheffler U., *Standardy minimalne Rady Europy versus standardy minimalne Rady Unii Europejskiej*, in *Europeizacja prawa karnego w Polsce i w Niemczech – podstawy konstytucyjnoprawne*, ed. A.J. Szwarc, J.C. Joerden, Poznań 2007.

Szpringer W., *Subsydiarność jako zasada ustrojowa w państwie federalnym – członku Unii Europejskiej (na przykładzie RFN)*, in *Subsydiarność*, ed. D. Milczarek, Warszawa 1998.

Szwarc-Kuczer M., *Kompetencje Unii Europejskiej w dziedzinie harmonizacji prawa karnego materialnego*, Warszawa 2011.

Tiedemann K., *Gegenwart und Zukunft des Europäischen Strafrechts*, ZStW 2004, no. 116.

Weigend T., *Mindestanforderungen an ein europaweit geltendes harmonisiertes Strafrecht*, in *Strafrecht und Kriminalität in Europa*, ed. F. Zieschang, E. Hilgendorf, K. Laubenthal, Baden-Baden 2003.

Witkowska M., *Zasady funkcjonowania Unii Europejskiej*, Warszawa 2008.

Wyrozumska A., *Państwa członkowskie a Unia Europejska*, in *Prawo Unii Europejskiej. Zagadnienia systemowe. Prawo materialne i polityki*, ed. J. Barcz, Warszawa 2006.

SUMMARY

The Principle of Proportionality in European Union Law as a Prerequisite for Penalization

The paper analysis the principle of proportionality, which is widely applied in the EU legal order and is therefore one of the fundamental principles of the system of the European Union. It is one of the legal principles that govern decision-making processes and common strategic objectives, and which are applicable when establishing European Union legislation and transposing it into national law, including in the area of criminal

law, although the current analyses do not often focus on discussing this aspect. Due to its complexity and significance for the processes of establishing and applying the law, the principle of proportionality requires detailed and separate discussion, especially in the context of European criminal law.

Keywords: European criminal law, principle if proportionality in the EU, penalization

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The Conditions and Procedure for the Admission of Children of Incarcerated Mothers to Mother-and-Baby Units at Prisons in Poland

The issue of dealing with incarcerated women is a specific problem connected with the nature of the penitentiary, and it is determined primarily by psychological and biological gender conditioning. Women endure imprisonment much worse than men and have more difficulties in adjusting to the isolation of prison. To make matters worse, imprisoned mothers tend to be concerned about the future and fate of their children.

On the one hand, the punishment assigned to pregnant women and mothers cannot be rendered meaningless. On the other hand, the rule of law and humanitarian considerations should be brought to the fore – for example, a strict definition of the situation of pregnant women and nursing mothers should be provided. For particular solutions, consideration should be given to professional opinions on the influence that the course of foetal development (and the living conditions and experiences of a woman during pregnancy) have on the later physical and mental health of the child.[1] Pregnancy, childbirth and the postnatal period, during which the mother's care of the child are crucial, are subject to a variety of legal solutions in many areas, including criminal law.[2]

In Poland there are 156 penitentiary units, of which 21 can house female prisoners. It should be emphasized that the vast majority of these (up to 15) are in fact prisons for men which also have separate branches for convicted women. Women are mainly held in four prisons, located in Czersk, Grudziadz, Krzywaniec and Lubańcu.[3] In the whole of Poland, there are two prisons for women who are held in custody with their children. In

1 J. Niedworok, *Matki więźniarki i ich dzieci w zakładach penitencjarnych. Zagadnienia podstawowe*, Wrocław 1988, p. 66.

2 J. Mazurkiewicz, J. Niedworok, *Ochrona macierzyństwa w polskim prawie karnym*, "Państwo i Prawo" 1975, no. 10, pp. 75–76.

3 Zarządzenie nr 55/13 Dyrektora Generalnego Służby Więziennej z dnia 20 grudnia 2013 r. w sprawie określenia przeznaczenia zakładów karnych i aresztów śledczych, http://www.bip.sw.gov.pl/SiteCollectionDocuments/CZSW/aktyprawne/zarzadzenie_w_sprawie_przeznaczenia_zk_i_as.pdf [access: 23.01.2014].

prison No. 1 in Grudziadz there is a maternity ward and a mother-and-baby unit (MBU) for children under 10 months of age, while women and children up to the age of three are held in the prison in Krzywaniec.[4]

Polish law provides for preferential treatment of pregnant women who are in custody. This results directly or indirectly from the regulations that govern the serving of a prison sentence. The leading provision in this matter that shapes the standard treatment for pregnant women, is Article 87 § 3 of the Executive Penal Code, which stipulates that a pregnant woman shall be provided specialist care.[5]

Other provisions (Article 87 § 4 and § 5 of the Executive Penal Code) apply to mothers who are deprived of their liberty. They are designed to enable women to exercise constant and direct child care. This goal is achieved by creating mother-and-baby units, which are located at the prisons in which women are held.[6]

The laws grant not only special status to incarcerated pregnant women, but also provides them with special conditions after they have given birth. It is expressly stated that the women are given an opportunity to be together with their children.[7] Pregnant women or nursing mothers should be given opportunities for constant exercise, guaranteed direct care of their child, and ensured constant specialist care. At the request of the mother, it is possible for the child to stay in her care, under the guardianship of the prison, until the child is three years old. However, it should be noted that this period may be shortened or extended, in accordance with the opinion of the doctor or psychologist. The final decision in this regard shall be made by the court.[8] It is worth mentioning that women who could have been assigned to different types of prisons are allowed to reside in mother-and-baby units (this is referred to in Article 69 Executive Penal Code).[9] This means that a very diverse group of convicted women is housed in the mother-and-baby units.[10]

Particular attention should be paid to the issue of women serving prison sentences and in the context of their motherhood. The solutions that have been adopted by the Polish penitentiary model try to ensure that the treatment of women takes into account

4 S. Lelental, *Kodeks karny wykonawczy. Komentarz*, Warszawa 2014, p. 395.

5 K. Szczechowicz, *Zasady wykonywania kary pozbawienia wolności i tymczasowego aresztowania wobec kobiet w ciąży*, "Studia Prawno-ustrojowe" 2009, no. 10, pp. 190–191.

6 E. Rekosz, *Analizy. Raporty. Ekspertyzy, Postępowanie z kobietami skazanymi na kary długoterminowe – kilka refleksji na marginesie badań*, no. 2/2009, SIP, p. 8.

7 K. Szczechowicz, *op. cit.*, pp. 193–194.

8 M. Ciosek, *Psychologia sądowa i penitencjarna*, Warszawa 2001, p. 196.

9 According to Article 69 of the Act of 6 June 1997 Executive Penal Code (Dz.U. no. 90 item 557). Imprisonment is carried out in separate prisons: prisons for juveniles, for first time offenders, for repeat offenders and those sentenced to military custody.

10 J. Lachowski, in *Kodeks karny wykonawczy. Komentarz*, ed. J. Lachowski, Warszawa 2015, p. 379.

the specificity of their personality. According to H. Machel,[11] these actions are beneficial from the point of view of social rehabilitation. Convicted women who give birth in prisons have the opportunity to take constant care of their children in the mother-and-baby units. This solution is particularly beneficial for rehabilitation and, perhaps more importantly, fulfills the need of motherhood.

According to Article 87 § 4 of the Executive Penal Code, the Polish penitentiary system organizes mother-and-baby units, which are located at the indicated prisons.[12] Pursuant to Article 87 § 4 of the Executive Penal Code,[13] a Regulation of the Minister of Justice was issued on the procedures for the admission of children of incarcerated mothers to mother-and-baby units. The Executive Penal Code and this Regulation are the only regulations in the Polish penitentiary system which determine the execution of a prison sentence in relation to men and women. It is particularly noteworthy that the organization and operation of mother-and baby-units, in accordance with Article 87 § 4 of the Executive Penal Code, does not apply Article 69 of the same Code, which covers the enforcement of sentences in certain types of prison. Therefore, as Z Hołda writes,[14] it does not matter whether a woman is a convicted juvenile, a repeat offender or a first-time offender. All of these different women have to be housed in a prison equipped with a mother-and-baby unit.

The admission of mother and child to a mother-and-baby unit is governed by the Regulation of the Ministry of Justice of 17 September 2003, which covers the admission of incarcerated mothers to mother-and-baby units at particular prisons and specifies the detailed rules for the organization and operation of these facilities.[15]

According to the regulation, a mother in custody taking permanent and direct care of her child is housed in a mother-and-baby unit at a prison, called a 'home' in both Prison no. 1 in Grudziadz and the Correctional Facility in Krzywaniec. These units have 61 places at their disposal. As is pointed out by Dybalska,[16] only 40% of these places are being used by mothers with children, and according to her this number is sufficient.

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11 H. Machel, *Sens i bezsens resocjalizacji penitencjarnej – casus polski. Studium penitencjarno-pedagogiczne*, Kraków 2006, p. 133.

12 T. Kalisz, *Populacja kobiet osadzonych w polskich jednostkach penitencjarnych*, in L. Boguni (red.), NKPK, vol. XX, Wrocław 2006, p. 265.

13 Ustawa z dnia 6 czerwca 1997r. Kodeks karny wykonawczy (Dz.U. no. 90 item 557).

14 Z. Hołda in Z. Hołda, K. Postulski, *Kodeks karny wykonawczy. Komentarz*, Gdańsk 2005, p. 361.

15 Rozporządzenie Ministra Sprawiedliwości z dnia 17 września 2003 r. w sprawie trybu przyjmowania matek pozbawionych wolności do domów dla matki i dziecka przy wskazanych zakładach karnych oraz szczegółowych zasad organizowania i działania tych placówek (Dz.U. no. 175 item 1709).

16 I. Dybalska, *Polski model wykonywania kary pozbawienia wolności wobec kobiet, matek dzieci do lat trzech*, in *Kobieta w więzieniu – polski system penitencjarny wobec kobiet w latach 1998-2008*, ed. I. Dybalska, Warszawa 2009, p. 43.

The admission of a mother and child to the unit is conducted on the basis of a written application, which the mother submits to the director of the prison in which the mother-and-baby unit is located (§ 3.1). The mother who is applying has an obligation to attach a copy of the child's abridged birth certificate (§ 3.2). Once the the mother has made the request, the prison director should notify the relevant guardianship court. For a woman to be temporarily detained in a mother-and-baby unit, the consent of the body responsible for her detainment is required (§ 3.3).[17] It should be noted, however, that the prison director is not bound by the consent of the guardianship court, in the sense that the director may refuse to house the mother together with the child, if health or educational reasons, confirmed by the opinion of a psychologist or doctor, speak for the separation of the child from the mother.[18]

As Sitnik rightly points out,[19] the guardianship court's decision in this regard shall be issued under the provisions of the Family Code. Article 109 of the Family Code makes it possible for the guardianship court to approve the placement and stay of a child in a mother-and-baby unit. The prison director, after taking the decision of the guardianship court into consideration, has to decide whether or not to refer the convicted mother with her child to the unit. The legal situation of each child is unique. The District Court, in particular, takes into account how the prisoner coped with previous parental responsibilities – if she had other children, the lifestyle of the prisoner before her arrest, and above all, the caring capacity of the mother or both parents.[20]

Pursuant to § 3.5 of the Regulation, in order for the baby to be housed in the mother-and-baby unit, the father's consent is required, if he has parental authority. In the absence of such consent, or if it is impossible to obtain, the guardianship court decides the issue. Upon the approval of the guardianship court, the mother with the child are accepted into the mother-and-baby unit. However, if there is special justification, the mother and child can be admitted to the unit at the time of submitting the written request and remain in it until the approval of the guardianship court (§ 3.6).

It should also be noted that despite prior approval from the guardianship court, such decisions are – pursuant to Article 34 Executive Penal Code – subject to review by a penitentiary judge. In addition, court decisions can also be appealed by the prisoner on the basis of Article 7 of the Executive Penal Code and are also subject to control under Article 78 § 2 of the Executive Penal Code. Decisions on sending a convicted woman and child to a mother-and-baby unit, and on their residence there, are not decisions

17 Rozporządzenie Ministra Sprawiedliwości z dnia 17 września 2003 r., *op. cit.*

18 K. Postulski, *Kodeks karny wykonawczy. Komentarz*, Warszawa 2012, p. 405.

19 K. Sitnik, *Uwagi dotyczące wykonywania kary pozbawienia wolności w przywięziennych Domach dla Matki i Dziecka*, in NKPK, vol. XXVIII, ed. T. Kalisz, Wrocław 2012, pp. 236–241.

20 H. Reczek, *Oddziaływania wychowawcze w Domu dla Matki i Dziecka przy Zakładzie Karnym nr 1 w Grudziądzu*, in *Kobieta w więzieniu...*, *op. cit.*, p. 227.

which refer a convict to the appropriate type of prison, and so in connection with the circumstances mentioned earlier, these decisions do not pertain to the prison committee.[21]

If a female prisoner gives birth, the mother and child's admission to the mother-and baby-unit is regulated by § 3 of the Regulation. The mother should submit an application to the prison director together with a copy of the child's abridged birth certificate (§ 4). The transfer of the child into the unit is arranged – in consultation with the director of the prison – by people who actually supervise the child, or by the childcare institution into which the child was placed (§ 5).[22]

It should be emphasized that children who were born in the prison hospital, or have been brought to the mother-and-baby unit at the mother's request are not stigmatized by this fact in the documentation. This concerns the child's personal documentation such as their birth certificate or baptism certificate. In addition, no mention is made of the child being in prison in the medical documentation. However, in the child's health booklet there is a stamp, for example, of the mother-and-baby unit in Grudziadz, Wybickiego 10/22, but this address does not stigmatize the child because the name of the home – 'the House of the Virgin and Child' – reminds one of the many existing care institutions in Poland.[23]

There is a rule that a mother who is allowed a temporary release from prison, leaves the prison with the child (§ 6.1). However, there is an exception to this rule, regulated in § 6.2. When there is sufficient justification, the prison director can – at the request of the mother – agree that the mother can leave her child at the mother-and-baby unit during the time when the mother is granted the temporary release. If a mother should fail to return to the prison (§ 6.3), then the director of the prison is obliged to notify the guardianship court. This provision also applies if the mother should fail to return to prison without her child (§ 6.4).

If the mother is unable to exercise constant and immediate care for her child, then that child is put under the care of nurses and carers (§ 6.5). In situations where the physician or psychologist give an opinion in writing to the effect that for health or behavioural reasons it is necessary to separate the child from the mother, or to extend or shorten the period of the child's stay in the unit, the prison director is obliged to notify the guardianship court together with the attached opinion (§ 7). When it is necessary for the child to leave the unit before the mother is released from prison, the prison helps the mother to to return the child to the care of her family or to place the child in a care facility located near the prison (§ 8).

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21 K. Sitnik, *Odmienności w wykonywaniu kary pozbawienia wolności wobec kobiet w obowiązującym ustawodawstwie polskim*, "Acta Erazmiana" 2011, pp. 297–298.

22 Rozporządzenie Ministra Sprawiedliwości z dnia 17 września 2003 r., *op. cit.*

23 H. Reczek in *Kobieta w więzieniu...*, *op. cit.*, p. 231.

In accordance with § 9 of the Regulation, the head of the mother and baby unit is subordinate to the prison director. The unit staff consists of: a pediatrician, psychologist, nurse, educator and dietician.

All rooms in the unit should have similar equipment for the home environment. The unit should consist of rooms such as bedrooms for mothers with children, rooms for nursing and educational classes, facilities for the provision of health services, space for preparing meals, bathrooms and a utility room, rooms for staff, and an infirmary (§ 10).

There is a rule that Prison Service officers who have direct contact with children while working in the unit do not wear official uniforms (§ 11). In the area of the prison (in accordance with § 12.1) which houses women prisoners and their children, the director appoints an educational and care team. This team is an example of another collegiate body, in addition to the penitentiary commission in each prison, which is provided for in Article 77 of Executive Penal Code.[24] The tasks of this team should be mainly (based on § 12.2): scheduling classes that focus on parenting, education, and the mothers' rehabilitation and treatment; running care activities with the mothers, which aim to ensure the children's appropriate physical and mental growth; make quarterly assessments of the maternal attitudes of the mothers; and prepare the appropriate social adaptation of mothers and their children by maintaining contact with their families, the social welfare authorities and public childcare institutions.

The composition of this team includes the following members: a director of the unit (who also serves as the team leader), a pediatrician, a psychologist, a nurse and a teacher.

Children who stay with their mother in prison are provided with medical care, from pediatricians or nurses who are employed in health care institutions for persons deprived of liberty (§ 13.1). In situations where a pediatrician or a nurse cannot provide health care for such children, they refer them to an appropriate health care facility (§ 13.2). If sick children require the full-time care of a physician, the pediatrician has an immediate obligation to refer the child to a hospital that can provide the relevant care (§ 13.4).

Children who have been admitted to the mother-and-baby unit can be placed with their mother for a period of time specified by a physician (§ 13.3).

The regulation in § 14 also covers the issue of food standards for children. Meals are prepared in the unit kitchen under the strict supervision of a dietician, taking into account the recommendations of a pediatrician. The selection of products and the number of meals per day is determined by a pediatrician.[25] At the pediatrician's request it is possible to exceed the budget when feeding sick children, when justified. Children have food in accordance with standard "L". The Regulation of the Minstry of Justice of 20 October 2011 amended the definition of daily food standards and the kind of diets provided to

24 K. Sitnik, *Odmienności w wykonywaniu kary pozbawienia wolności*..., *op. cit*., p. 298.

25 Rozporządzenie Ministra Sprawiedliwości z dnia 17 września 2003 r., *op. cit.*

prisoners in correctional facilities and detention centers, and it was determined that the dietary norm "L" is easy to digest, the value of which amounts to a daily rate of 5,70zł.[26]

The regulations regarding mother-and-baby units also cover a child's personal belongings. According to § 15 of the regulation under consideration, children are entitled to underwear, clothing and footwear appropriate for their needs and age. All the items that can be received for personal use, in accordance with standards, are included in Annex 2 to the Regulation.[27]

The mother-and-baby unit (in accordance with § 16) shall maintain the following documentation: the child's record book,[28] the child's equipment card,[29] the child's personal records,[30] the protocol record of the educational and care-providing team,[31] and the child's medical records.[32]

The mother-and-baby unit is well-known in Polish legislation. Despite a great deal of criticism, the Executive Penal Code continues to maintain it. The idea of mother-and-

26 Rozporządzenie Ministra Sprawiedliwości z dnia 20 października 2011 r. zmieniającego zarządzenie w sprawie określenia wartości dziennej normy wyżywienia oraz rodzaju diet wydawanych osobom osadzonym w zakładach karnych i aresztach śledczych (Dz.U. no. 236 item 1402).

27 According the regulations, children living in mother and baby units are entitled to: 1) per one year of life: four summer jackets, four winter jackets, four-piece śpioszków, two hats, sixty cloth diapers, six shirts, two pairs of tights, two pairs of children's panties, four pairs of children's socks for children, two sweaters, one pair of slippers, one pair of shoes, three washers, two bottles, four teats, one dummy, four pillowcases and blankets for the winter, one pair of gloves; 2) for 2 years of life: one ceratka, six sheets and four pillowcases; 3) for 3 years of life: Two pajamas, one children's jacket, two pairs of shorts, three towels and a winter scarf; 4) on four years of life: two blankets; 5) for 5 years of life: one mattress and one pillow; 6) at seven years of life: one base under a blanket.

28 The child's record book contains the following information: the child's name, date and place of birth, parents' names and their home addresses, names of persons who actually exercise care of the child, date of admission of the child and the reason for the deletion of records, address of the person for whom the child has been transferred, or the address and name of the institution where the child has been transferred. This documentation is the responsibility of the head of the unit.

29 The equipment card contains the following information: the child's name, date of arrival and leaving the facility, underwear, clothing, footwear and other equipment that is owned by the child at the time when it was accepted into the home and obtained at the time of the placement. The documentation is the responsibility of house manager.

30 The child's personal records shall contain: an abridged copy of birth certificate, the court's decision, the registration documents, correspondence on matters child, conclusions and guidance in educational care. The evidence is the responsibility of the house manager.

31 The protocol record of the educational and care-providing team is a dossier containing information on the tasks of the educational and care-providing team. The protocol record is maintained by the head of the house

32 The child's medical records, which are maintained by a pediatrician, are: child's health book, child health card, immunization card, the card feverish card psychomotor development of the child as well as the results of laboratory tests.

baby units in prisons is very controversial. Opponents of the incarceration of pregnant women and mothers with children claim that a child brought up behind bars will have a permanent memory of this experience.[33]

The goal is that a child who has reached the age of three should leave the prison, because at that age the child will still be able to forget being in the unit. Such children are sent to their families or to orphanages. Every effort is made to ensure that the child has the opportunity to maintain frequent contact with the mother. If the mother has only a short part of her sentence remaining after the child reaches the age of three, she often applies for parole or pardon. Psychological studies have shown that children who lived in prison until the age of three go on to develop much better than children who reside permanently in an orphanage. Contact between mother and child while she serves a custodial sentence also helps mothers to fulfill their role in bringing up the child. Children have to get used to their mother's authority, which these women probably did not exercise prior to their conviction. The Ombudsman directly observed these prisons, and the observations showed that the units which accommodate children together with their mothers are run very well. Babies and mothers are ensured the best possible living conditions.[34]

No one claims that the children staying with their mother in prison is the best option. However, it is necessary to bear in mind that no other way of solving this problem which would save the child from the 'abandoned child syndrome' has been proposed.[35] The presentation and detailed discussion of all the implications and impact of the mother's imprisonment on the child are beyond the scope of this article. However, the most dangerous of these is the 'abandoned child syndrome' and the threat to the child's personal rights. Among the most dangerous phenomena associated with the imprisonment of a parent, the following are worth particular mention:

- preventing or significantly reducing mother-child relations,
- depriving children of love and maternal care,
- the danger of a convicted mother suddenly losing her authority,
- hiding the actual whereabouts of the mother from the child,
- posture, gestures and behavior in a neighborhood, school and peer environments, which stigmatize children of convicted mothers,
- the general deterioration of the financial situation of children,
- less interest in the children from the father or other guardian,

33 K. Sitnik, *Uwagi dotyczące wykonywania kary pozbawienia wolności w przywięziennych Domach dla Matki i Dziecka,* in *Nowa kodyfikacja prawa karnego*, vol. XXVIII, ed. T. Kalisz, Wrocław 2012, p. 235.

34 E. Wichrowska-Janikowska, *Prawa kobiet w działalności Rzecznika Praw Obywatelskich*, Materiały Rzecznika Praw Obywatelskich, no. 30, Warszawa 1996, p. 257.

35 A. Kantor, *Matki i dziecko w izolacji więziennej*, "Forum Penitencjarne" 2009, no. 8(135), p. 15.

- lower levels of children's self-esteem,
- emotional disorders,
- unfavorable changes in personality,
- the need to be housed an orphanage[36].

Literature

Ciosek M., *Psychologia sądowa i penitencjarna*, Warszawa 2001.

Dybalska I., *Polski model wykonywania kary pozbawienia wolności wobec kobiet, matek dzieci do lat trzech*, in *Kobieta w więzieniu – polski system penitencjarny wobec kobiet w latach 1998–2008*, ed. I. Dybalska, Warszawa 2009.

Hołda Z. in Z. Hołda, K. Postulski, *Kodeks karny wykonawczy. Komentarz*, Gdańsk 2005.

Kalisz T., *Populacja kobiet osadzonych w polskich jednostkach penitencjarnych*, in NKPK, vol. XX, ed. L. Boguni, Wrocław 2006.

Kantor A., *Matki i dziecko w izolacji więziennej*, "Forum Penitencjarne" 2009, no. 8(135).

Lachowski J. in *Kodeks karny wykonawczy. Komentarz*, ed. J. Lachowski, Warszawa 2015.

Lelental S., *Kodeks karny wykonawczy. Komentarz*, Warszawa 2014.

Machel H., *Sens i bezsens resocjalizacji penitencjarnej – casus polski. Studium penitencjarno-pedagogiczne*, Kraków 2006.

Mazurkiewicz J., Niedworok J., *Ochrona macierzyństwa w polskim prawie karnym*, "Państwo i Prawo" 1975, no. 10.

Niedworok J., *Matki więźniarki i ich dzieci w zakładach penitencjarnych. Zagadnienia podstawowe*, Wrocław 1988.

Postulski K., *Kodeks karny wykonawczy. Komentarz*, Warszawa 2012.

Reczek H., *Oddziaływania wychowawcze w Domu dla Matki i Dziecka przy Zakładzie Karnym nr 1 w Grudziądzu*, in *Kobieta w więzieniu – polski system penitencjarny wobec kobiet w latach 1998–2008*, ed. I. Dybalska, Warszawa 2009.

Rekosz E., *Analizy. Raporty. Ekspertyzy, Postępowanie z kobietami skazanymi na kary długoterminowe – kilka refleksji na marginesie badań*, SIP 2009, no. 2.

Sitnik K., *Odmienności w wykonywaniu kary pozbawienia wolności wobec kobiet w obowiązującym ustawodawstwie polskim*, "Acta Erazmiana" 2011.

Sitnik K., *Uwagi dotyczące wykonywania kary pozbawienia wolności w przywięziennych Domach dla Matki i Dziecka*, in NKPK, vol. XXVIII, ed. T. Kalisz, Wrocław 2012.

Szczechowicz K., *Zasady wykonywania kary pozbawienia wolności i tymczasowego aresztowania wobec kobiet w ciąży*, "Studia Prawno-ustrojowe" 2009, no. 10.

Wichrowska-Janikowska E., *Prawa kobiet w działalności Rzecznika Praw Obywatelskich*, Materiały Rzecznika Praw Obywatelskich, no. 30, Warszawa 1996.

36 J. Niedworok, *op. cit.*, pp. 83–84.

Rozporządzenie Ministra Sprawiedliwości z dnia 17 września 2003 r. w sprawie trybu przyjmowania matek pozbawionych wolności do domów dla matki i dziecka przy wskazanych zakładach karnych oraz szczegółowych zasad organizowania i działania tych placówek (Dz.U. no. 175 item 1709).

Rozporządzenie Ministra Sprawiedliwości z dnia 20 października 2011 r. zmieniające zarządzenie w sprawie określenia wartości dziennej normy wyżywienia oraz rodzaju diet wydawanych osobom osadzonym w zakładach karnych i aresztach śledczych (Dz.U. no. 236 item 1402).

Ustawa z dnia 6 czerwca 1997 r. Kodeks karny wykonawczy (Dz.U. no. 90 item 557).

Zarządzenie nr 55/13 Dyrektora Generalnego Służby Więziennej z dnia 20 grudnia 2013 r. w sprawie określenia przeznaczenia zakładów karnych i aresztów śledczych, http://www.bip.sw.gov.pl/SiteCollectionDocuments/CZSW/aktyprawne/zarzadzenie_w_sprawie_przeznaczenia_zk_i_as.pdf [access: 23.01.2014].

SUMMARY

The Conditions and Procedure for the Admission of Children of Incarcerated Mothers to Mother-and-Baby Units at Prisons in Poland

The admission of mother and child to the a mother-and-baby unit has a positive effect on both the development of the child as well as the social rehabilitation of the mother. Children in mother-and-baby units are provided the right conditions for development. The mother learns to fulfill her parental responsibilities. In addition, incarcerated women who are in prison with their children want to change for the better, in order to provide their children a better future.

Keywords: convicted women, children, serve a sentence of imprisonment, House of the Mather and Child in prison

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The Dominant Position of Regional Facilities for the Processing of Municipal Waste

Introduction

On February 6 2015, the Act of 15 January 2015 amending the Waste Act and certain other acts came into force.[1] Article 5 of this act imposes on the regional assemblies of the voivodeships the obligation to update the voivodeship Waste Management Plans,[2] and the resolutions concerning their implementation by 30 June 2016. As a consequence, all the voivodeships are now intensively working on updating and adopting these documents. Due to the still insufficient number of facilities in the country that fulfil the requirements necessary for granting them the status of a Regional Municipal Waste Processing Facility,[3] there will undoubtedly be regions of the waste management industry where the number of RMWPF facilities does not ensure the fulfilment of the conditions of full competition. In this context, the provision Article 9, section 1, item 2 of the Maintenance of Cleanliness and Order in Municipalities Act of 13 September 1996,[4] in accordance with which mixed municipal waste and green waste have to be processed at a facility with RMWPF status. It is therefore rather likely that, in certain cases, a RMWPF operator will have a very strong position on the market of this kind of waste treatment, which will constitute a dominant position in accordance with the provisions of the Competition and Consumer Protection Act of 16 February 2007.[5] In this paper, the authors discuss the conditions that must be met in order to be able to assert that the

1 Dz.U. of 2015, item 122, hereinafter: WA.

2 Hereinafter referred to as WMP.

3 Hereinafter also: RMWPF These requirements are specified in detail in Article 35 section 6 of the Waste Act of 14 December 2012 (Dz.U. of 2013, item 21 as amended). They concern, *inter alia*, the facilities' guarantee that certain waste treatment processes are in place, that appropriate technology or technology is available, and that a specific capacity is available to service a region inhabited by at least 120,000 residents..

4 Dz.U. of 2016, item 250, hereafter also referred to as MCOM.

5 Dz.U. of 2015, item 184, hereafter also: CCPA.

management entity of a given municipal waste treatment facility has a dominant position, indicating in particular the two most 'drastic' cases, namely the situation where in a given municipal waste management area there are only one or two facilities operating with RMWPF status.

A dominant position as defined by the Office of Competition and Consumer Protection

The problem to be tackled at the outset, before further discussion of the issue, is one of definition, i.e. in which situations can it be said that a given entity holds a dominant position in a particular market, according to the Competition and Consumer Protection Act?

As a starting point, we must refer to Article 4, item 10 CCPA, wherein it is stated that an undertaking holds a dominant position when its position "allows it to prevent effective competition in a relevant market by enabling it to act to a significant degree independently of its competitors, contracting parties and consumers". The same article also contains the assumption that if the market share of an undertaking in the relevant market exceeds 40%, then the undertaking holds a dominant position. Further to this, Article 4, item 9 defines a 'relevant market' as the market in goods

> which by reason of their intended use, price and characteristics, including quality, are regarded by the buyers as substitutes and are offered in the area in which, by reason of the nature and characteristics of such goods, the existence of market barriers, consumer preferences, significant differences in prices and transport costs, the conditions of competition are sufficiently homogeneous.[6]

At this point, therefore, it has to be said that such a definition of a market can certainly cover the market designated – in the geographical sense – by the areas of all the municipalities included in the appropriate voivodeship plan for the municipal waste management region.

6 It is worth mentioning that the President of the Office for Competition and Consumer Protection expressed the view that the concept of a relevant market refers to all types of goods (services) of one kind which, because of their specific characteristics, differ from other products (services) in such a way that there is no possibility to exchange them. A relevant product market covers all the goods that meet the same needs of buyers, have similar characteristics, similar prices, and represent a similar level of quality. An essential element of the relevant market is also its geographical dimension, which means the need to indicate an area where the conditions of competition applicable to certain goods are the same for all competitors. Therefore, in order to designate a relevant market, a particular activity is analyzed from the product (range) and geographical point of view (RWR 30/2009 and RWR Decision 17/2013).

It is obvious that with regard to the notion of "dominant position" it is possible to find numerous statements of the judiciary[7] and the representatives of the doctrine.[8] Drawing on these resources for the purposes of this article/paper, the following can be assumed:

- a dominant position is a position which, due to an undertaking having access to technical knowledge, raw materials or capital, entails that the undertaking can set prices or control the production and/or distribution of essential products[9];
- a dominant position is "thus qualified and defined in the legal category of market power;"[10] whereas the economic sense of dominant position "is expressed by the undertaking's market power in the relevant market;[11]" this entails that market power should be identified with the effective exercise of influence on prices, supply, innovation, the variety and quality of goods and/or other parameters over a long period of time; in addition, the notion of dominant position can be associated with the phenomenon of "institutional monopoly," the source of which can be legal and non-legal (factual) barriers to market entry;[12]
- the legal definition of dominant position contained in Article 4, item 10 of CCPA indicates three structural elements of this notion: the first being the possibility of preventing effective competition on the relevant market, the

7 V. for example the judgement of the CJEU of 1.02.1978, 27/76, United Brands Company and United Brands Continental BV v Commission of the European Communities, Court Reports p207, or the judgement of CJEU of 13.02.1979, 85/76, Hoffmann-La Roche & Co. AG v Commission of the European Communities, Court Reports, p. 461. On the other hand, in the Polish context, for example, the judgement of the High Court of 19.10.2006, III SK 15/06, OSNAPiUS 2007, no. 21–22, item 337, or the judgement of the High Court of 16.10.2008, III SK 8/08, Legalis.

8 V. for example N. Szadkowski, *Drapieżnictwo cenowe w teorii ekonomii i w praktyce orzeczniczej polskiego organu antymonopolowego*, in *Konkurencja w gospodarce współczesnej*, ed. C. Banasiński, E. Stawicki, Warszawa 2007; A. Brzezińska-Rawa, *Dyskryminacja jako przejaw nadużycia pozycji dominującej w unijnym prawie konkurencji*, PiP 2011, no. 1; *eadem*, *Zakaz nadużycia pozycji dominującej we wspólnotowym i polskim prawie antymonopolowym*, Toruń 2009; M. Szydło, *Nadużywanie pozycji dominującej w prawie konkurencji*, Warszawa 2010; M. Sieradzka, *Pozew grupowy jako instrument prywatnoprawnej ochrony interesów konsumentów z tytułu naruszenia reguł konkurencji*, SIP LEX 2012; K. Kohutek, *Praktyki wykluczające przedsiębiorstw dominujących. Prawidłowość i stosowalność reguł prawa konkurencji*, SIP LEX 2012.

9 B. Majewska-Jurczyk, *Dominacja w polityce konkurencji Unii Europejskie*j, Wrocław 1998, p. 51. Cf. M. Bernatt, *Orzecznictwo Trybunału Sprawiedliwości Wspólnot Europejskich w sprawach gospodarczych*, Warszawa 2006, p. 337.

10 M. Szydło, *op. cit.*, p. 79.

11 M. Bernatt, A. Jurkowska-Gomułka, T. Skoczny, *Zakaz nadużywania pozycji dominującej*, in *Prawo konkurencji. System Prawa Prywatnego*, vol. 15, ed. M. Kępiński, Warszawa 2014.

12 *Ibidem*. On the issue of market power, v. *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, ed. T. Skoczny, Warszawa 2009, p. 233.

second – the ability to act to a large extent independently of competitors, contractors or consumers, whereas the third is the legal presumption of a dominant position based on a quantitative criterion;[13]

- the aforementioned "possibility of preventing effective competition" derives from a privileged position on the market (market power), whether this results from a monopoly, or from a sufficient economic advantage over other market players (mainly competitors); significantly, a monopoly (exclusivity) can derive from the law (legal monopoly), from an administrative decision, e.g., a concession (administrative monopoly), from a natural characteristic of a given branch of the economy (natural monopoly), or from the undertaking having at its disposal (*de iure* and/or *de facto*) networks and/or facilities that are necessary for the provision of services on the relevant market or relevant markets associated with it (network monopoly); these networks and devices are 'essentials facilities' for these markets![14]
- in this respect, Skoczny emphasizes that when an undertaking holds a monopoly it is in a position to inhibit effective competition on every other market that it operates on, if that market is connected to the market over which it holds a monopoly;[15]
- in order to be recognized as possessing a dominant position on a market, an undertaking must be possessed of the power to 'operate independently' of other market players, that is, be able to implement its own individual market strategy, and must therefore be able to unilaterally set prices, *inter alia*, as well as the terms of contractual relations with other market participants, such as contractors;[16]
- the presumption of an undertaking holding a dominant position, if the undertaking has a market share exceeding 40%, has the character of a rebuttable presumption.[17] Its rebuttal is possible by demonstrating that despite the fact that the undertaking has a strong market position, at least one of the require-

13 *Ibidem*. On the issue of the quantitative presumption of dominant position cf. *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, ed. C. Banasiński, E. Piontek, Warszawa 2009, pp. 129–131; This problem was also addressed by European case law, v. the judgement of the CJEU 3.07.1991 in the case 62/68 AKZO Chemie BV v Commission of the European Communities, Court Reports 1991, p. I-3359.

14 *Ustawa...*, *op. cit.*, ed. T. Skoczny, p. 238; cf. the judgement of the CJEU of 29.04.2004 in the case C-418/01 IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG, Court Reports 2004, p. I-05039.

15 *Ustawa...*, *op. cit.*, ed. T. Skoczny, p. 239.

16 Ibidem, p. 242; cf. the judgement of the High Court of 16.10.2008, File ref. no. III SK 8/08, unpublished.

17 *Ustawa...*, *op. cit.*, ed. T. Skoczny, p. 243.

ments, as indicated in the above points related to the existence of a dominant position, is not fulfilled.[18]

In the context of these arguments, it should be noted that the assessment of whether a given undertaking holds a dominant position on a particular market must be carried out on a case-by-case basis, through consideration of the particular circumstances of the case. At the same time, it must be emphasized that the mixed waste management market, with which this paper is concerned, is an unusually specific market, subject to strong regulation. Thus, despite this qualification, it can be argued that when, in accordance with a resolution of the regional assembly authorities on the implementation of a waste management plan, there is only one installation with RMWPF status in a given waste management region, this entity will have – *de facto* and *de iure* – a dominant position.

A single RMWPF facility in the region

The above assertion is to a large extent based on an analysis of selected provisions of the Maintaining Cleanliness and Order in the Municipality Act, or the Waste Act. From the former of these normative acts, the provision previously mentioned in the introduction should be referred to again, namely Article 9e, section 1, which obliges the entity collecting municipal waste from property owners to: firstly, transfer segregated municipal waste to the recovery and disposal facility in accordance with the waste management hierarchy; secondly, transfer mixed municipal waste collected from property owners, as well as green waste and the stored residues from the sorting of municipal waste, to a RMWPF facility.[19]

In turn, it is clear from the regulations of the Office of Competition and Consumer Protection that, with the division into municipal waste management regions, together with the designation of municipalities belonging to these regions, and the designation of regional municipal waste treatment facilities in particular municipal waste management regions, and those facilities stipulated for replacing services in these regions, should there

18 *Ustawa..., op. cit.*, ed. C. Banasiński, E. Piontek, p. 129; K. Kohutek, M. Sieradzka, *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2008, p. 201.

19 The breach of such a warrant is an administrative offense for which the legislator has provided sanctions (Article 9, section 1, item 3 MCOM). In turn, under Article 9l, section 1 the RMWPF operator is obliged to conclude an agreement – for the management of mixed municipal waste, green waste or residues from the sorting of municipal waste for disposal – with all entities that collect municipal waste from property owners whose activity falls within the municipal waste management region. It is worth adding that under Article 9 MCOM, entities running RMWPF facilities face fines, *inter alia*, for not concluding a contract for the management of mixed municipal waste, green waste or residues from the sorting of municipal waste intended for storage with a municipal waste collector from property owners whose activities within the municipal waste management region.

be a malfunction at a facility, or if a facility is unable to receive waste for other reasons, or until such time as a regional facility for processing municipal waste has commenced operation, an instrument such as a Provincial Waste Management Plan is put into effect (see Article 35, section 4 WA). *Nota bene* that although the legislature grants local government assemblies considerable leeway[20] in the process of drawing up such plans, they are not fully autonomous, since Article 34, section 1 WA[21] stipulates that the objectives and purposes of waste management plans should determine the form of the provisions of the plans, as well as the executive decrees which are ancillary to them, which are referred to in Article 38 WA.[22]

In the course of analysing the provisions of the Waste Act, mention should also be made of a part of Article 20, which stipulates that waste, taking into account the waste management hierarchy, should be first subject to processing at its place of origin (section 1), and waste which cannot be processed at its place of origin is to be transferred – into consideration the waste management hierarchy and the best available method, as stated in Article 207 from the Environment Protection Act of 27 April 2001, and technology, referred to in Article 143 of this Act[23] – to the nearest location at which it

20 It is true that in Article 35, section 4 WA the legislator defines in general terms the specific elements a municipal waste management plan should take (i.e. the elements characteristic for this level of planning act). However, it should be noted that not only does it leave the local governments much more leeway in dividing the area of the voivodeship into regions, as well as in designating the facilities, but neither does it provide any specific or precise preconditions on the basis of which this 'designating' process should take place.

21 Article 34, section 1 WA: "To achieve the objectives set in environmental policy – of separating growth trends in the amount of waste produced and its environmental impact from the country's economic growth trends, implementing the waste management hierarchy and the principles of self-sufficiency and proximity, and creating and maintaining in the country an integrated and sufficiently integrated network of waste management systems that meet environmental protection requirements – waste management plans must be developed." Then Article 17 WA introduces the following hierarchy of waste management methods: 1) prevention of waste generation; 2) preparation for recycling; 3) recycling; 4) other recovery processes; 5) neutralization.

22 It is worth mentioning here that this last provision entails, inter alia, that the resolution on the implementation of the municipal waste management plan stipulates the regions for municipal waste management, as well as the regional waste facilities in particular municipal waste management regions, and the facilities specified as replacements in those regions should the installations in question fail or are unable to receive waste for other reasons, and until the launch of a municipal waste treatment facility.

23 Article 143 of the Environmental Protection Act: "The technology used in newly commissioned or substantially revised facilities and equipment should meet the following criteria: 1) the use of substances with low potential risks; 2) efficient generation and use of energy; 3) ensuring rational consumption of water and other raw materials and materials and fuels; 4) use of waste-free and low-waste technologies and the possibility of recovering the resulting waste; 5) type, coverage and size of emission; 6) using comparable processes and methods that have been successfully applied on an industrial scale; 8) scientific and technical progress."

can be processed (section 2); however section 7 also places an unambiguous prohibition on processing the following outside their place of origin: mixed municipal waste, the residue from the sorting of municipal waste, and the residue of mechanical-biological processing of municipal waste, as far as they are designated for storage or green waste. Significantly, importing the waste referred to in section 7 into the region is also prohibited, if it is produced outside this region (section 8).[24]

To sum up these considerations, it is clear from the cited provisions of the Maintaining Cleanliness and Order in the Municipality Act and the Waste Act, which very precisely regulate the market of mixed municipal waste and green waste, that if in a given region of municipal waste management there is only one facility with RMWPF status, considering such a facility as having a dominant position is justified, in the light of the provisions of the Competition and Consumer Protection Act. Undertakings that collect mixed communal waste and green waste are unable to choose an alternative facility to which these types of waste can be transported, and thus they are obliged to make use of the services provided by the sole RMWPF facility.

It is significant that this state of affairs is confirmed by the case-law of the President of the Office of Competition and Consumer Protection. It is worth referring to the decision of 27 June 2013,[25] in which the President of the Office of Competition and Consumer Protection stated that the fact that the Chemeko-System partnership was the "administrator of the only RMWPF facility in the first six months of 2013 that received municipal waste from the area of municipalities concerned" was sufficient to conclude that Chemeko-System held a "very dominant position (monopolistic)" on the local market for the treatment and disposal of municipal waste in the designated municipalities. The authority posited that the partnership had such economic power over the market that it was able to prevent not just effective competition, but was also able to operate to a large extent independently from counterparties, and actually to exploit its position on the market at their expense. It was emphasized that no other entity apart from Chemeko-System was entitled to set prices for services provided by a RMWPF facility in Rudna Wielka. In the factual and legal state of this case, the dominance of the company was evident in the power to impose exploitative conditions, including prices, on the counterparties – which in these relationships are companies providing services in the field of collecting mixed municipal waste. Consequently, the authority decided

24 At the same time, the legislator allowed (section 9), in the event of designation of a facility for replacement service in the region, referred to in Article 38, section 2 item 2 WA, outside the area of the municipal waste management region where the waste was generated, bans were not implemented under sections 7 and 8.

25 Ref. no. RWR 17/2013. A similar position was taken by the President of the Office of Competition and Consumer Protection (CCPA) on the grounds of the non-binding waste law of 27 April 2001, in the decision of 13 November 2009 (RWR 30/2009) concerning the Municipal Union of Commerce CZG-12 in with headquarters Dlugoszyn.

that Chemeko-System, having a dominant position on the waste treatment and disposal market in the areas mentioned, has a significant influence on the level of competition on the interdependent market for the provision of services related to the collection and treatment of municipal waste, and is able to set prices in the market, thereby fulfilling the conditions necessary for establishing market dominance, as set out in the previously mentioned Article 4, section 10 CCPA.

Two RMWPF facilities in a region

The situation in the mixed municipal waste and green waste management in a given region takes on a distinctly different shape if two facilities with RMWPF status are operating there. In such a situation, undertakings dealing with waste collection are not obliged to deliver the mixed municipal and green waste to one, specific RMWPF facility, but can choose between two or more facilities which compete with each other, at least theoretically. In this situation, the market for this type of waste should be described as a duopoly. At the same time, even when there is a duopoly, in certain situations it is possible that a dominant position will emerge. However, this is not possible with regard to one undertaking, but rather to the existence of a 'collective dominant position' on a given market. There is no legal definition for this concept in the Polish legal system, however. Furthermore, the concept has not been developed in autonomous case-law by Polish bodies responsible for competition protection. It is therefore important to base the definition on European case-law.

Prior to this, however, two general observations need to be made. Firstly, the notion of collective dominant position is inextricably associated with there being a certain economic relationship between two economic entities on the same, relevant market,[26] allowing them to enter into a so-called 'silent collusion,' which leads to coordinated conduct and a common market strategy through parallel actions.[27] Secondly, when considering the existence of a dominant position, the same qualitative criteria must be met, regarding the possibility of preventing effective competition in the relevant market and acting to a great extent independently of competitors, contractors and consumers.[28]

Turning to European case-law, it has to be mentioned that the concept of collective dominant position evolved over many years. To begin with, on the basis of the case *Société alsacienne et lorraine de télécommunications et d'électronique Alsatel vs. SA Novasam*,[29] the Court of First Instance linked the emergence of collective dominant position with

26 The doctrine indicates that a collective dominant position can only be held by competitors, i.e. entrepreneurs, operating in the same relevant market, v. *Ustawa...*, *op. cit.*, ed. T. Skoczny, p. 251.

27 M. Modzelewska de Raad, T. Skoczny, *Kolektywna pozycja dominująca*.

28 M. Bernatt, A. Jurkowska-Gomułka, T. Skoczny, *Zakaz nadużywania...*

29 Zbiory Orzecznictwa Trybunału Europejskiego 1988, p. 5987, items 21–22.

the existence of structural links, such as capital or contractual relations. In subsequent years, however, European authorities moved away from such a narrow understanding of the concept of collective dominant position, as in the judgment of the Court of First Instance in *Gencor Ltd v Commission of the European Communities*,[30] where it was stated that there is no reason why in establishing collective dominant position 'economic links' should be restricted to 'structural links.' The court indicated that the confirmed existence of collective dominant position also facilitates 'ordinary' economic interdependence, without structural links.[31] Nevertheless, it was only in the subsequent judgments of the Court of First Instance, such as *Airtours plc v Commission of the European Communities*, or *Laurent Piau v Commission of the European Communities* that enabled the development of the three conditions that must be fulfilled in order for the existence of such market dominance to be confirmed. On their basis, so as to establish the emergence of a collective dominant position, it is necessary to demonstrate:

- sufficient incentives for a company to enter into silent collusion; collective dominant position can thus be confirmed when every member of an oligopoly can know how the other members conduct themselves, and thereby confirm whether or not they employ a common strategy; the market must therefore be sufficiently transparent in order for its participants to react quickly and precisely to the conduct of others;
- the chance that this collusion will endure; the situation of silent collusion (implementing a common strategy) must endure for a certain time, i.e. there must be sufficiently effective (harsh) penalties for derogating from the common strategy;
- lack of opportunity for rivals outside the oligopoly or consumers to undermine this collusion; it must therefore be stated that there is no competitive pressure from other participants in this market (competitors, counterparties/buyers and consumers), including potential participants.[32]

Furthermore, it should be reiterated that, in order to establish the existence of a collective dominant position as defined by CCPA, all the qualitative conditions pertaining to Article 4, section 10 CCPA must be met.

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30 Zbiory Orzecznictwa Trybunału Europejskiego 1999, p. II-753.

31 This position was also confirmed in subsequent judgments by both the Court of First Instance in *Compagnie maritime belge transports SA (C-395/96 P)*, *Compagnie maritime belge SA (C-395/96 P) and Dafra-Lines A/S (C-396/96 P) v Commission of the European Communities*, and of the European Court of Justice in the joined cases *Compagnie maritime belge transports SA (C-395/96 P)*, *Compagnie maritime belge SA (C-395/96 P) and Dafra-Lines A/S (C-396/96 P) v Commission of the European Communities.*

32 *Ustawa...*, *op. cit.*, ed. T. Skoczny, N.B. 441 regarding Article 4 CCPA.

To sum up the above considerations, according to the doctrinal indications,[33] it is possible to distinguish two situations in which the existence of a collective dominant position can be confirmed, fulfilling all the qualitative conditions of Article 4, section 10 CCPA:

1. A situation of collective dominance based on capital ties or agreements;
2. A situation of collective dominance resulting from economic interdependence, without structural links, that is, 'ordinary silent collusion.'

Therefore, it should be emphasized that it follows from both the views of the European authorities and the indigenous doctrine of competition protection law that the occurrence of a collective dominant position is inextricably linked to the fact of there being an understanding between at least two undertakings that operate on the same relevant market. It must thus be unequivocally stated that only the existence of such an agreement could lead to the conclusion that undertakings operating on a market of a duopoly nature have a 'collective dominant position'. It cannot be said that there is such a position in a situation when undertakings do indeed compete with each other, without co-ordinating their activities or implementing a common market strategy.

At this juncture, it is necessary to point out that a collective dominant position is in practice the only type of dominant position that can exist on a market that functions as a duopoly, because Polish antitrust case-law has consistently found that one entity does not have a dominant position in a market structured as a duopoly. To confirm this thesis, it is worth referring to the judgment of the Antitrust Court of 6 April[34] that is often cited in subsequent case-law[35]. In this judgement, the Antitrust Court indicates that "a duopoly justifies rebuttal of the supposed dominant position held by them [undertakings functioning on a relevant market], as referred to in antitrust law. The duopoly type market, where competing entities have a similar share, is characterized by significant competition. Neither of the two competitors" has the ability – which is a characteristic ability for a dominant position on the market – to prevent effective competition that would leading to a rival sugar plant having a reduced market share, nor the ability to undertake other independent actions without taking into account the behavior of competitors and customers. "In principle, when there is a duopoly any new market proposal of one competitor is met with the immediate counter-proposal of the other, and the actual

33 E. Modzelewska-Wąchal, *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2002, pp. 45–47 and 56; *Ustawa...*, *op. cit.*, ed. T. Skoczny, N.B. 442 regarding Article 4 CCPA.

34 XVII Amr 52/93.

35 This judgement is referred to in the Decision of the President of the Office of Competition and Consumer Protection (CCPA) no. RBG 2/2001, of the President of the Office of Competition and Consumer Protection (CCPA) RKR-39/2005, of the President of the Office of Competition and Consumer Protection (CCPA) no. RGD.8/2003, of the President of the Office of Competition and Consumer Protection (CCPA) no. RKR-71/2007, and also in the Judgement of the Antitrust Court of 25.07.2001, XVII 96/00.

competition of the entrepreneurs refutes the presumption of them holding a dominant position."

Such a position, put forth in the case-law of an antitrust authority concerning duopoly markets, is an extraordinarily strong argument in support of the conclusion that, in a situation where two facilities with RMWPF status are operating in one municipal waste management region, it will not be possible to claim that either of the undertakings managing the facilities actually holds a dominant position. However, it is worth reiterating that it is possible to establish the existence of a dominant position if there is an agreement between the entities running the RMWPF facilities, for example concerning setting prices for receiving certain types of waste to the facilities. Such an agreement would entail that the market could be accurately described as being characterized by a collective dominant position.

Conclusions

In conclusion, it is clear that the existence of a dominant position on the mixed municipal waste management market, and green waste management market, in a given area of municipal waste management, can be confirmed with certainty when there is only one facility granted with the statuss of regional facility for processing municipal waste. This results from the lack of choice with regard to the facility to which mixed municipal and green waste can be delivered, as stipulated in the Waste Act and the Maintaining Cleanliness and Order in the Municipality Act. These provisions introduce the necessity of delivering this type of waste to a RMWPF facility, and consequently *de facto* set up a monopoly on their processing, should only one RMWPF facility operate in the given region.

However, if in a given waste management region there two (or more) competing facilities with RMWPF status, it cannot be said that the entities running either (or any) of them holds a dominant position on the market. Such facilities can actually compete to receive the delivery of the same types of waste. In such a situation, a dominant position is only possible in the form of 'collective dominant position', for which the existence of an agreement between the entities managing the facilities in the region is essential.

Lastly, it is necessary to emphasize that the mere holding of a dominant position on a given market by an entity does not in itself result in an automatic breach of the provisions of the Competition and Consumer Protection Act. According to Article 9, section of this normative act, only abuse of a dominant position on the relevant market is prohibited. Undoubtedly, however, as the case-law European Court of Justice highlights, an entity having such market power bears a special responsibility for the risks that its position pose to the proper functioning of the market.[36]

36 The judgement of the CJEU of 13.02.1979, 85/76, Hoffmann La Roche v. the Commission, Court Reports 1979, p. 461.

Literature

Bernatt M., *Orzecznictwo Trybunału Sprawiedliwości Wspólnot Europejskich w sprawach gospodarczych*, Warszawa 2006.

Bernatt M., Jurkowska-Gomułka A., Skoczny T., *Zakaz nadużywania pozycji dominującej*, in *Prawo konkurencji. System Prawa Prywatnego*, vol. 15, ed. M. Kępiński, Warszawa 2014.

Brzezińska-Rawa A., *Dyskryminacja jako przejaw nadużycia pozycji dominującej w unijnym prawie konkurencji*, PiP 2011, no. 1.

Brzezińska-Rawa A., *Zakaz nadużycia pozycji dominującej we wspólnotowym i polskim prawie antymonopolowym*, Toruń 2009.

Kohutek K., *Praktyki wykluczające przedsiębiorstw dominujących. Prawidłowość i stosowalność reguł prawa konkurencji*, SIP LEX 2012.

Majewska-Jurczyk B., *Dominacja w polityce konkurencji Unii Europejskiej*, Wrocław 1998.

Sieradzka M., *Pozew grupowy jako instrument prywatnoprawnej ochrony interesów konsumentów z tytułu naruszenia reguł konkurencji*, SIP LEX 2012.

Szadkowski N., *Drapieżnictwo cenowe w teorii ekonomii i w praktyce orzeczniczej polskiego organu antymonopolowego*, in *Konkurencja w gospodarce współczesnej*, ed. C. Banasiński, E. Stawicki, Warszawa 2007.

Szydło M., *Nadużywanie pozycji dominującej w prawie konkurencji*, Warszawa 2010.

SUMMARY

The Dominant Position of Regional Facilities for the Processing of Municipal Waste

This paper addresses the issue of the functioning of regional facilities for the processing of municipal waste in the light of the provisions of the Competition and Consumer Protection Act of 16 February 2007. The authors seek answers to the question of whether in certain specific situations it is possible to conclude that a given facility holds a dominant position on the market in which it operates. Two situations will be subjected to close analysis, namely those in which only one or two facilities with RMWPF status operate in a given region of municipal waste management.

Keywords: waste management, competition protection, dominant position, municipal waste, maintenance of cleanliness and order in a municipality, voivodeship waste management plans

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Why Legal Reasoning has to be Unique*

Introduction

Lawyers sometimes maintain – or at least wish it to be so – that the reasoning they employ in their work is of a unique nature, i.e. that it is distinctly different from the way in which people reason in matters of everyday life or in disciplines other than law.[1] I venture to contend, however, that what makes legal reasoning special is not the scheme of inference (its premises and general mode of reaching the conclusion), but rather the specific nature of the environment in which this reasoning takes place. That is, a scheme/general mode remains here more or less the same, being in essence: analogical (based upon the judgment of similarity), deductive (amounting to the subsumption of a concrete phenomenon under a general proposition), pragmatic (aiming to protect values and the achievement of goals we desire in the world), argumentative (consisting in balancing the pros and cons of the outcomes that are at stake) or intuitive (driven by internal insights, hunches or feelings).[2] Yet how legal reasoning proceeds – what turns the cogs

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1 "Legal reasoning differs in number of ways from the sort of reasoning employed by individuals in their everyday lives." V. G. Lamond, *Precedent and Analogy in Legal Reasoning*, in *The Stanford Encyclopedia of Philosophy*, 2006, http://www.science.uva.nl/~seop/entries/legal-reas-prec/ [access: 11.12.2016]. "It is widely believed that legal reasoning is somehow special, not just in its subject matter but in its very form." V. L.L. Weinreb, *Legal Reason: The Use of Analogy in Legal Argument*, Cambridge 2005, pp. 1–2.

2 As for intuitive reasoning (as opposition to a rational or deliberative one) see for instance Ch. Guthrie, A.J. Wistrich, J.J. Rachlinski, *Judicial Intuition*, http://law.vanderbilt.edu/files/archive/Judicial_Intuition.pdf [access: 11.12.2016], pp. 5–10; S. Epstein, *Integration of the Cognitive and the Psychodynamic Unconscious*, "American Psychologist" 1994, vol. 49, pp. 709–724; M. Gladwell, *Blink. The Power of Thinking without Thinking*, London 2006; *Handbook of Intuition Research*, ed. M. Sinclair, Cheltenham 2011; *Heuristics and Biases. The Psychology of Intuitive Judgment*, ed. Th. Gilovich, D.W. Griffin, D. Kahneman, Cambridge 2002; *Intuition in Judg-*

of its mechanism – is strongly influenced by the conditions under which advocates and judges are forced to operate; the unavoidable necessity of dealing with a phenomenon such as the law itself. As a result, the very form of legal reasoning – though it be ordinary, having nothing that makes it stand out as distinct from the form of reasoning presented in other spheres of human activity – is plunged into the odd, complex, unfathomed substance that adds some deep unrepeatable colour to legal thinking when perceived as a whole. This thinking thus becomes in effect difficult to probe and elucidate, especially if one wishes to do so by simple recourse to the inferences that are known and applied elsewhere.[3]

Bearing in mind the above, in this paper I will endeavour to highlight the characteristic features of law that appear to be responsible for the notion that thinking like a lawyer is not the same as reasoning in everyday matters or as reaching conclusions in demonstrative or empirical sciences, or in a wide range of social sciences. While the most – as I take them – conspicuous and obvious of those features will be presented first, the more subtle and disputable ones shall be discussed later.

Being not only of a normative but also of a prescriptive character

First and foremost, considering the very nature of law, one has to stress that the main feature-cum-function of law is to be normative – i.e. to indicate how people ought to behave or not, what they may or may not require from others, and what they have to or have not to do if someone ask for that. This normativity of law has, however, to be distinguished from the normativity which occurs and is known in other provinces of science, especially empirical ones. Namely, in the latter, the expressions indicating what should or should not happen are usually of a descriptive, causal or explanatory character. In law, this is certainly not the case.

When one says that the sun should rise tomorrow at 8 o'clock, one is referring to some regularity which may be discerned in nature and thus merely describes a fact about how the physical world is arranged. Similarly, by making an assertion that an object should fall if dropped, one reports nothing more than the observable causal relation between

ment and Decision Making, ed. H. Plessner C. Betsch, T. Betsch, New York 2008, with the literature referred there.

3 A similar outlook seems to be put forward by Robert Alexy. When speaking about 'special arguments of legal logic,' he asserts that: "Of course this is not quite correct, since the forms characterized here as 'legal' [*analogy*, *argumentum e contrario*, *argumentum a fortiori*, *argumentum ad absurdum*] are also applicable to other domains. Of course, it has been in the jurisprudential context that many of them have been exposed to particular development. This justifies the terminology used above." V. R. Alexy, *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification*, transl. R. Adler, N. MacCormick, Oxford 1989, p. 279.

the dropping of an object and the falling. In law, in contrast, the essence of normativity lies in its prescriptiveness. Law neither tells us what is normal nor what regularly or statistically happens (as geography does). Nor does it reveal some causalities between objects and events (as physics does), nor does it explain human behaviour and reactions (as economics and psychology do). The normativity of law consists in ordering (prescribing) what one and others can, are entitled to, or have to do, regardless of whether they really will do so or not.[4] Abiding by the precepts of law – be they known or not to law addressees – depends to a great extent on the decisions and choices law addressees make (their will) and to far lesser extent on the accidents and chances that these addressees have no control over. As a corollary, in advance it is never known with certainty whether one will act in the way the law mandates.

In consequence, the normativity of law is – by definition – oriented towards the future, not stating any empirical fact or causality. Even when a given legal regulation is deemed to be retroactive (acting backwards), it is in fact addressed to these citizens', judges' or officials' actions which are to come after this regulation enactment, not having any normative influence on the actions and events prior to the enactment.[5] The law neither describes nor explains phenomena. Its normativity consists in (and at the same time exhausts) the will to regulate and control human behaviours/decisions that have not yet occurred or been taken. Looking from the perspective of law addressees, one may say that it constitutes for them a – more or less compelling – reason for an action.[6]

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4 As Weinreb notices: "Although we talk about what the law is, as though it is a matter of fact like a medical diagnosis or the weight a bridge will support, the content of the law is normative: It prescribes what is – that is to say, ought – to be done." V. L.L. Weinreb, *op. cit.*, p. 2. For more detail on the prescriptive and normative nature of law: F. Schauer, *Playing by The Rules. A Philosophical Examination of Rule-Based Decision-Making in Law and in Life*, Oxford 1991, pp. 1–3; G.C. Christie, *Law, Norms & Authority*, London 1982, p. 3; S.J. Burton, *An Introduction to Law and Legal Reasoning*, Austin 2007, pp. 82–85.
I do not address here the question of whether the normativeness of law has to manifest itself in rules, norms, principles, maxims and so on or can do without them (much less the question what in legal context, a norm or a rule stands for). For these issues: J. Frank, *Law & Modern Mind: with a New Introduction by Brian H. Bix*, New Brunswick 2009, pp. 132–148; cf. G.C. Christie, *op. cit.*, pp. 1–10, 16–43 and F. Schauer, *op. cit.*, pp. 112–128.

5 A separate question is whether one would have change his or her behaviour when it is known to him/her what the specific law will govern his/her case with retrospective effect, as to such doubts cf. B.N. Cardozo, *The Nature of the Judicial Process (With Notes)*, New Haven 2008, p. 61.

6 The remarks in this paragraph should not be understood in the vein that we cannot predict or explicate human behavior by reference to the content of the binding law. Assuming that people usually abide by the law, a social scientist – all the more so if also paying attention to other relevant factors such as the harshness of legal sanctions and the (in)determination of the legal regulation and these sanction enforcement – is able to make a probabilistic judgment as to how people will behave as well as to account post factum for motives of human decisions, even with a high degree of accuracy. However, this is neither a function nor a feature of law, being far rather its by-product.

Similarly, legal reasoning is employed not – as reasoning in empirical sciences – with the aim of learning something new about the surrounding nature, the regularities taking place therein, or causal relations between physical objects and their movements. Nor does it enable, at least not by definition, the understanding of human goals, wishes, and decisions. Instead of all of that, legal reasoning is an instrument, and the only instrument, through the use of which we are able to get to know what the law prescribes in concrete instances.[7]

Difficulties with empirical and 'logical' verification

The second important aspect of law, strictly connected with the prescriptive nature of its normativity, concerns the possibility and availability of the means and ways of the potential verification of legal content. Namely, in the empirical sciences (as chemistry, physics, biology, medicine) and even in the majority of the social sciences (e.g. economics, psychology, sociology, political science), sooner or later, we are able to test the correctness of a particular proposition in an objective or inter-subjective fashion. Indeed, in these kinds of sciences, a given statement – be it a norm or an assertion – as a rule is susceptible to empirical verification, especially via simple observation (by the direct use of human senses) or more complex (with the use of specialist equipment and devices). In a way that is difficult to question for others, such verification either definitely shows whether the statement (norm, proposition, assertion) is right and must be accepted, or at least justify the adoption of this statement until further evidence indicates its falsity.[8] As Keith J. Holyoak and Paul Thagard aptly remark, even theories which propose unobservable things, such as subatomic particles, black holes and gravity waves, must eventually be evaluated in relation to observable evidence.[9]

In law, however, the possibility of empirical verification is not only impaired but to many, it does not exist at all. Obviously, particular laws may order us to effect or to prevent the occurrence of certain events and changes in the physical world, which is possible to put to empirical test. Yet, the very question whether the law should or should not

7 As Burton, probably being of the same view, notices: "Scientific and legal reasoning serve different functions requiring differences in how they are used. Propositions of the empirical sciences function to describe, explain, and predict events and relationships in the empirical world. Hypotheses are offered and tested by observation to confirm or refute their accuracy qua descriptions, explanations, and prediction. [...] Propositions of law differ fundamentally from propositions of the empirical sciences: They do not describe, explain, or predict anything. Instead, to review, laws guide conduct by *prescribing* lawful behavior; that is, they are normative." V. S.J. Burton, pp. 83-84.

8 Cf. K. Popper, *The Logic of Scientific Discovery*, London 2002, pp. 17–26.

9 K.J. Holyoak, P. Thagard, *Mental Leaps: Analogy in Creative Thought*, Cambridge, MA 1996, p. 10. Cf. L.L. Weinreb, *op. cit.*, pp. 76–77.

comprise precepts of such-and-such import, as it appears, remains far beyond empirical proof. That is, the contents of 'oughtness' – unless one firmly clings to a specific ontological doctrine such as the natural law approach or some form of legal realism, especially in a Scandinavian variant – is not derivable from 'physical being,' and as such cannot be verified by the epistemological measures typical of learning about this latter sphere.

Not only are the mandates of law not susceptible to any empirical proof but, in addition, their correctness (aptness) does not lend itself to be determined in the terms of logic or 'mathematics'. Despite the efforts made by legal positivists and the like, including the transplantation of deductive terminology into law,[10] law does not allow itself to be closed in the fixed system of axioms and theorems, being linked with the changing conditions of the physical and spiritual world that are in constant flux (see the next two sections).[11] In consequence, the proof of the truthfulness of the precepts of law – if feasible at all – is condemned to be of the non-empirical and non-demonstrative kind (see Section 5).[12]

In view of the foregoing, too, neither legal reasoning nor its outcomes appear to be amenable to empirical or logical/mathematical verification.[13] That question is, however, more intricate than one may *prima facia* suppose. The outcomes of legal reasoning, if not constituting law itself (see Section 10), has to be based upon the content of law, and as such it does not inevitably need to inherit the impossibility of being demonstratively and empirically tested. If law mandates us to attain some specific social aims (e.g. equal rights for minorities) or to protect some values (e.g. human life or the environment) we can verify on empirical grounds whether the effects of legal reasoning (in the form of a specific legal decision/human action) are in conformity with the pertinent precepts of the law. Demonstrative proof of the outcomes of legal reasoning is, however, much

10 However, it is worth noting that, in fact, also mathematics and its calculus are to a large extent dependent upon conventional practice and the mode in which people are trained. As Ludwig Wittgenstein endeavors to demonstrate in his series of lectures: 'What is called a mathematical discovery had much better be called a mathematical invention.' V. *Wittgenstein's Lectures on the Foundations of Mathematics Cambridge 1939: From the Notes of R.G. Bosanquet, Norman Malcolm, Rush Rhees, and Yorick Smythies*, ed. C. Diamond, Chicago 1989, p. 22.

11 As perfectly captured by Max Radin: 'Since mathematics can do us little good in the law for the practical purposes that we dare not disavow, we cling to it as an emotional discharge. We can think out mathematical metaphors which relieve us from being too oppressively conscious of experience.' V. M. Radin, *Law as Logic and Experience*, Clark 2012, p. 7.

12 By saying this I do not suggest that lawyers and judges should disregard logic, statistics, empirical knowledge, and mathematical calculus. These resources and tools, although useful in the legal profession, are not however aims in themselves, being mere means to attain that which is prescribed by the law. Indeed, while they serve to realize that which "oughtness" dictates, they do not decide what this "oughtness" should be. The latter question is prior to them.

13 As Weinreb explains: 'The reasoning of a doctor or an engineer is readily and in the normal course put to the test. The patient's health improves, or it does not; the bridge stands, or it falls. There is no comparable test of legal reasoning.' V. L.L. Weinreb, *op. cit.*, p. 2.

more perplexing. Here, the main obstacle is not a lack of theoretical possibility, but the threat of gross absurdity and the injustice of legal reasoning's conclusions. The medium through which legal mandates are communicated is a language of a given community, a language which, because of the generality of its terms (features known as vagueness, ambiguity and open texture), cannot – insofar as we insist on the demonstrative character of legal reasoning – provide a just and reasonable answer to real life cases in all instances. Because of these linguistic features, outcomes of legal reasoning may often be uncertain and indeterminate, something which contradicts the foundations of the conception of one right thesis, which is fundamental for mathematics and logics, at least in their ordinary form.

It must be also stressed that the above-mentioned thesis on the lack of the possibility of the experiential verification of legal contents obviously does not pertain to the facts of the case at hand. That these facts can be proved on empirical grounds, at least to some extent, is beyond question. (The same cannot be said, however, about the 'legal facts', which belong to a completely different ontological category.) But proving them is not a question of law, but rather of the evidence and hence it is not addressed it in this paper, the aim of which is rather to highlight the uniqueness of legal reasoning against the background of the unique features of law.[14]

Links with the physical world

Though the content of law is prescriptive and not amenable to empirical verification, it is, in some sense, evidently dependent on the shape of the physical world and the limitations inherent in it. As was hinted at in the context of the peculiarity of legal normativity, the law is designed to have an impact on human behaviour. This behaviour, however, is mostly – if not solely – a part of the physical world, that is, as a rule, the behaviour takes place therein, not in human minds (as a possible exception, one may mention a precept from canonical law forbidding thinking about adultery). As this is the case, the normative power of law is also – under the threat of being utterly inefficient – restricted to that which is viable for human beings in the physical world. In this vein, the law cannot, for instance, disregard that fulfilling such-and-such an obligation is not feasible and hence it cannot be imposed on its addressees (hence, for example, keeping grass on the Moon or living forever is clearly not within the area of the possible "oughtness"). Moreover, this

14 On the other hand, however, one should be aware that any ascertainment on facts, including that done by a judge in the courtroom, is frequently affected by the use of intuition (intuitive reasoning) and schematic thinking, being not a pure product of objective empirical proof. V. A. Glöckner, I.D. Ebert, *Legal intuition and expertise*, in *Handbook of Intuition Research*, ed. M. Sinclair, Cheltenham 2011, pp 159–160; Ch. Guthrie, A.J. Wistrich, J.J. Rachlinski, *op. cit.*, especially pp. 18–21, 25–29.

dependence, in a sense, also acts the other way round. The physical world, its needs and conditions of life, as well as the events which happen therein, more often than not need to be handled by the law. And the law can hardly ignore such a calling.[15]

The aforementioned relation between the law and the structure of the physical world, including the human capabilities within it, seems equally important for legal reasoning. In a manner identical to the content of law precepts, the outcomes of legal reasoning cannot go beyond the imposed limits. One is even tempted to say that they are expected to do something more, i.e. that these outcomes should – if the content of law fails to do so – refine legal content in order to make it workable.[16]

A human mind dependence

Law not only hinges on the constraints which flow from the human possibilities in the physical world, but also on humans themselves. Regardless of whether one comprehends legal rules as a human product or not (coming from God or being a part of nature), humans are those who breathe life into and make room for the law. What would the law be without them? Nothing. To be a reason of action, the basis for judgment, an argument in dispute, the law needs people as a plant needs soil and water to grow, develop and flourish. It is man, not anyone else, who make, interpret, apply, enforce and abide by the law.

As a corollary, law as such also inherits human traits: virtues and vices, limitations and powers, weaknesses and strengths, wickedness and arresting beauty. It hardly – if at all – can transcend them, being under the influence of human experiences, senses of justice, outlooks, preconceptions and biases. It has its place in consciousness and in the subconscious. It is learnt from law books as well as from practical examples. But in every case, it can only be the people who may allow it to be. The law happens in human minds and most probably – i.e. if it does not have its roots in infinity or is not an element of nature – has its beginning and the end therein.

The same applies to legal reasoning, which is partly rational and partly intuitive. Its resources and premises are not always revealed; they frequently rest hidden, somewhere deep in the fathomless depths of the subconscious. The outcomes of legal reasoning can thus be a product of insight, prejudice, partiality, affect, or past events one took part in and remembered or forgot.[17]

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15 Cf. K. Nickerson Llewellyn, *The Bramble Bush. The Classic Lectures on the Law and Law School. With a New Introduction and Notes by Steve Sheppard*, New York 2008, pp. 58–60, 115–127.

16 Another question is whether the law, a norm consisted therein, constitutes a part of the physical world (especially in the context of the possible external observation of people adjusting their conduct to and obeying certain laws). As for that question: G.C. Christie, *op. cit.*, pp. 11–13.

17 As for the dependence of the law on human mind: J. Frank, *op. cit.*, pp. 108-124; B.N. Cardozo, *op. cit.*, pp. 70-71; L. Petrazycki, *Law and Morality: With a New Introduction by A. Javier Treviño*, New Brunswick 2011, not least pp. 6–12, Llewellyn, *The Theory of Rules*, Chicago 2011,

Incidentally, the dependence of the human mind so comprehended means that the inability to provide experiential verification of the prescriptive content of law does not necessarily entail that some other means of verification cannot be found. Indeed, that which law orders us to do may be put to different sorts of non-empirical tests, for instance, against moral judgment, common sense, economic (cost-and-benefit) analysis, the current needs of society or goals of the legislature or government, or against the prevailing opinions of legal doctrine or the public. These possibilities lead to a vast array of ways by which one may claim to check the aptness of the results of legal reasoning in concrete instances. And even more interestingly, the aforementioned factors that enable us to test the outcomes of legal reasoning can influence – if not govern – legal reasoning itself. They may thus have a direct or indirect impact on deciding whether the cases being compared are sufficiently similar (analogues), whether the argument raised in a dispute by one party is more persuasive than the countervailing argument of the second party, or whether the case at hand is to be subsumed under a given rule, and how this rule is to be interpreted for that purpose.

None of the aforementioned means of verification, however, is universally compelling, much less an exclusive one. To assess legal content or the aptness of the outcomes of legal reasoning, some may prefer to refer to mores and folkways, other to dictates of economy, and yet others to policies and values the government or legislature purports to pursue and protect. Moreover, people may have different senses of justice, insights and intuitions; the public or doctrinal stance in a given question may not be settled; the experts might not agree on what is the optimal solution from the perspective of the economy and so forth. In consequence, this lack of congruence makes the results of such testing far from conclusive, at least in the sense of being exempt from the possibility of being challenged by others. However, that does not mean that in law there are no points of general consent which can constitute the foundation for legal content, as well as for the reasoning based upon it.[18]

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pp. 39–40. Cf. an interesting assertion that the law is limited by morality – if not a part of it – due to the threat of rebellion and resistance on the part of the community, which was made by O.W. Holmes, *The Path of the Law*, "Boston University Law Review" 1965, vol. 45, pp. 26–27.

18 For good examples of the points one is not able to question, albeit rather from morals and ethics than law: R.A. Posner, *The Problems of Jurisprudence*, Cambridge, MA 1990, pp. 76, 77 ('It is almost as certain that killing people for pure sport is evil as it is that cats don't grow on trees'... So the fact that we cannot prove that napalming babies is bad does not imply that we cannot know that it is bad'... 'You and I are driving; you are the driver and I the passenger. A child appears in the middle of the road, and you turn to me and say, "Should I try to avoid killing the child?" This question would mark you as crazy, just as if you told me that you had discussed this book with Plato last night.").

An oversimplifying notion of the sameness and constant indeterminacy as corollaries of a human mind dependence

There are many specific manifestations of the dependence of law on human minds. Here, I confine myself to only two of them: the notion of sameness and inescapable indeterminacy.

Nature is unique in each and every inch of its being; there are no two things which are really identical to one other. The differences are sometimes slight but they always exist. Nonetheless, people are inclined and able to make generalizations and, as a result, to treat two or more items as if they were in effect the same. This is clearly visible in language, which comprises a multitude of generalizations such as a notion of a 'car,' a 'leaf,' a 'toy,' an 'animal' and so on. While we speak of them as belonging to a generic class, despite being fully aware that cars, leaves, toys and animals may differ considerably from each other and they in fact do so. This inclination to make oversimplifying generalizations is transferred to law. And, as a rule, law orders us to treat unique events and behaviours as if they are identical, linking with them – at least *prima facia* – the same legal consequences. Thus also legal reasoning is often premised upon the generalities present in law, notwithstanding the awareness that they do not correspond to the diversity of the phenomena they address. This is exemplified by the fact that legal reasoning is sometimes employed not with regard to concrete situations, but *in abstracto* – for example, in order to expound the meaning of legal provisions to students attending lectures at law school without any reference to a real or hypothetical case.[19]

Turning to the second aspect, one must bear in mind that human convictions and beliefs, the values or needs of a given community, are in constant flux. There are several reasons for this. One is constant technological advance, which brings new possibilities and options but also yields new challenges and problems to face and resolve, such as cybercrimes or new bioethical questions. A second are the changes in public consciousness and trends which hold sway in different moments in the life of a given society. Even language, the main medium of law, changes with time, giving different meanings to its terms and expressions. All of that is of the uttermost significance for the content of law and legal reasoning. They too, as they are influenced by these factors, cannot remain the same, being forced to keep up with the changes that have taken place around them. Hence, in contrast to empirical science where, as Posner put it, 'scientists have procedures which allow them to resolve the question at hand, and move on to other and more

19 Cf. an interesting suggestion that 'one of the earliest and most persistent stimuli to growth of generalization, and classification, and so of rational thought, especially that branch of rational thought which we call formal logic, is attributable more to law than to any other phase of civilization expect perhaps language' was made – against such a background – by K.N. Llewellyn, *op. cit.*, p. 127.

difficult questions' (thus gaining constant progress),[20] in law many problems can never be solved once and for all. We can answer them at a given time, but we are not able to decide them in the confidence that they will not need to be reopened in the future. Posner adds here: 'This lack of closure, of convergence, of progressivity – the sheer interminability of so much legal debate – makes the problem of legal indeterminacy fundamentally different from that of scientific or mathematical indeterminacy.'[21] And Burton argues: 'As math is not the kind of thing to be criticized for lacking empirical support, law may not be the kind of thing to be criticized for lacking comprehensive determinacy of results.'[22]

In consequence, indeterminacy is a vital mark of law as well as of legal reasoning. The conclusions of the latter that are good today may turn out to be erroneous tomorrow. As it appears, this applies even to the instances in which the content of law will still remain the same but a change that takes place in the meantime somewhere else will demand a different legal outcome from that reached previously in the given sort of case.[23]

Its 'unspecialized' nature due to legal agents

Another aspect of law which is highly relevant to legal reasoning is that, generally, the persons who deal with it neither know of, nor adhere to, any complex doctrines or theories. Law is very often directed to ordinary citizens who are not always well-educated, have vague ideas about the current state of the arts in particular sciences and speak everyday language. Moreover, even the craft of law lies in the hands of people who are not – if they are taught them at all – specialists in fields other than law. Thus, more often than not, judges and advocates are not psychologists, logicians, philosophers, social scientists and so on. Neither do they possess specialist knowledge in matters regulated by law either. They know hardly anything about the construction industry, the stock exchange, hydrology, animal husbandry, farming or other industries.[24] In the main, in practice the

20 R.A. Posner, *op. cit.*, p. 83.

21 *Ibidem*, p. 84.

22 S.J. Burton, *op. cit.*, p. 83

23 As Cardozo reveals before us: "s the years have gone by, and as I have reflected more and more upon the nature of judicial process, I have become reconciled to the uncertainty, because I have grown to see it as inevitable." V. B.N. Cardozo, *op. cit.*, p. 68. On the inescapable character of indeterminacy in law and how to accept it: J. Frank, *op. cit.*, pp. 172–182.

24 Instead, reference to and use of specialist knowledge seems to take place within the process of legislation. Firstly, some members of Parliament (parliamentary commissions) and of the government may possess it. Secondly, these members may also consult a board or committee composed of experts in some field of science, e.g. economy, social or labour matters, in order to assess the effects of the proposed regulations. The same goes for the possibility of consulting other specialised bodies, including non-governmental organizations. Obviously, judges, too, invoke experts in fields other than law, but that applies rather only to matters of evidence, not to the very contents of law.

law operates without overarching theories and doctrines on what is right or wrong, or which values are to be realized and in which degree and order.[25]

The above-mentioned aspect is also of paramount importance for legal reasoning, which, being employed as a rule not by interdisciplinary experts or philosophers, has to – despite the complexity of the law – be more down-to-earth, not aimed at achieving total coherence of the values law serves.[26] Furthermore, legal reasoners frequently do not possess well-founded logical and psychological knowledge about reasoning and its modes, reaching their conclusions rather in an intuitive or commonsensical ways.[27]

The prominent role of authority

The above-presented characterisation of law, especially the impossibility of experiential verification, dependence on the human mind and the 'unspecialized' nature of its agent, contributes to and is supplemented by the enormous role of authority in legal science and practice. Indeed, in law authority seems to be indispensable, coming to the fore probably to a greater extent than anywhere else.[28] Thus it is, for instance, genuinely claimed that: "The boundaries of law are set by the boundaries of legal authority..."[29]

In addition, authority in law presents itself as remarkably different from authority in the empirical and demonstrative sciences. It is not necessarily based upon widespread agreement between the members of the profession, but rather deriving its force from the renown and standing of the speaker.[30] The more prestigious the post, title, position in the bar, or rung in the academic or judicial hierarchy a speaker has, the greater the authority of the propositions or statements on the contents of law he/she proffers. Accordingly, the opinions of the Justices of the Supreme Court count more than those which come from judges who sit in the courts of lower rank, and the views of a well-known and recognizable professor are of far more importance than the views a mere law graduate

25 Thus Cass R. Sunstein states: "Lawyers (and almost all other people) typically lack any large-scale theory." V. C.R. Sunstein, *Legal Reasoning and Political Conflict*, New York 1996, p. 68. Incidentally, he appears to be very content about that, claiming that deep theories about the good or the right seem to be "too sectarian, too large, too divisive, too obscure, too high-flown, too ambitious, too confusing, too contentious, too abstract." *Ibidem*, p. 63.

26 Cf. L.L. Weinreb, *op. cit.*, pp. 60–61, 71–73.

27 As Larry Alexander and Emily Sherwin succinctly contend: "In the world as it exists, judges are not perfect reasoners." V. L. Alexander, E. Sherwin, *Demystifying Legal Reasoning*, Cambridge 2008, p. 43, 44; J. Frank, *op. cit.*, pp. 125–126.

28 Thus Schauer remarks: "In law, however, authority is dominant, and only rarely do judges engage in the kind of all-things-considered decision-making that is so pervasive outside of the legal system." V. F. Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning*, Cambridge, MA 2009, p. 67.

29 *Ibidem*, p. 84.

30 R.A. Posner, *op. cit.*, pp. 79–80.

holds. The same applies to high-ranking governmental officers and their colleagues from inferior offices.

Furthermore, even more importantly, authority in empirical sciences, even when unanimously accepted, immediately loses its force when it is falsified by a credible empirical proof (such as a reliable experiment or observation). In law, instead, the authority which to others appears – from the very beginning or as time goes on – to be patently absurd or unjust may retain its force. As Posner puts it: "Authority in intellectual matters is best understood as a transmission belt that carries news of scientific or other intellectual discovery to persons lacking the time or background to verify the discovery themselves and that also authenticates the discovery for them. Authority in law is different. Judicial decisions are authoritative because they emanate from a politically accredited source rather than because they are agreed to be correct by individuals in whom the community reposes an absolute epistemic trust."[31] An authority in law is also generally resistant to the negative outcomes of the test or the tests mentioned in Section 5.[32] What can weaken its force or nullify it is, in turn, another authority which – explicitly or implicitly – contradicts its theses or undermines these theses' foundations.[33]

The enormous role of authority in law has significance with regard to legal reasoning. It is of great importance *whose* such reasoning is, and this has a direct impact on the aptness and force of the outcome. I venture even to say that this correlation occurs here even to the extent that a great authority can sometimes make very poor legal reasoning seem to be excellent or superior.

The procedure in which legal decisions are made

The unique nature of legal reasoning is an effect of the specific features of the law as such but, no doubt, it is also a corollary of the procedure in which legal decisions are usually made, a procedure that differs considerably from the fashion in which questions in empirical and demonstrative science are resolved.

First and foremost, the decision-makers in law, i.e. the judges and officers of all sorts, are forced to answer questions which they do not choose or even want to answer. A judge is denied the right to say that his or her skills or knowledge are too weak and narrow

31 *Ibidem*, p. 82.

32 In the context of authority in law, there also occurs the problem of making an evaluation by persons who do not possess sufficient expertise on the topics which a given authority concerns. This problem is exacerbated in the process of assessing the credibility of evidence. V. F. Schauer, *op. cit.*, p. 71, footnote 26.

33 On the role and basic differences of authority in the empirical sciences and law see R.A. Posner, *op. cit.*, pp. 79–86. On the concept of authority against the legal background: F. Schauer, *op. cit.*, pp. 61–84.

to decide the case at hand.[34] Moreover, judges and other legal decision-makers operate under the pressure of time. They cannot postpone the decision until their experience, wisdom, and abilities develop to the point where they feel to be able to give a correct answer to the questions posed. As Posner noted, "actually the judge is in the uncomfortable position of having both to act and to offer convincing reasons for acting. He does not have the luxury of the pure thinker, who can defer coming to a conclusion until the evidence gels."[35] "Tthe scientific community itself largely determines the field of its inquiries; it is not forced to butt its head against a stone wall. Judges decide virtually all issues society flings at them, however intractable the issue may be."[36] The difficulties caused by the limited time and the obligation to render a decision in cases one does not know much about are additionally compounded by the fact that judges often decide upon tough cases. Easy ones, i.e. such in which the outcome is predictable and obvious, are as a rule – i.e. if emotional background or extremes such as insolvency of the debtor or complete ignorance/dishonesty are not a factor[37] – settled by the parties themselves and do not need a trial at all.

Secondly, it is commonplace that legal decisions are expected to be made upon the basis of the law, whatever this law means.[38] The parties, as well as the public, are unwilling to allow judges to be arbitrary or to decide the cases submitted to them with the toss of a coin. As Neil MacCormick remarks, judges 'must do justice indeed, but "justice according to law,"[39] and as Weinreb underscores, one of the distinctive features of adjudication is "that the court's decision is to be based entirely on the law."[40] The admission by a person who has made a legal decision that this decision is not grounded in law substantially weakens, if not deprives, this decision of lawfulness.

Thirdly, legal decisions, contrary to many questions that are answered in everyday life, are not delivered in a spontaneous or informal way. For that purpose, there is envisaged

34 As Weinreb remarks: "A judge who can find no statute or judicial precedent that deals directly with the matter before her does not throw up her hands and tell the litigants to fight it out." L.L. Weinreb, *op. cit.*, p. 81.

35 R.A. Posner, *op. cit.*, p. 72.

36 *Ibidem*, p. 84. See also S.J. Burton, *op. cit.*, p. 84 ("A scientist can conclude that the answer to a question remains unknown for decades or centuries; however, a judge should decide a law case according to the law and without undue delay").

37 As Posner points out, since "the parties or their lawyers are obtuse or stubborn or because of acrimony arising from the underlying dispute or from the litigation itself." See R.A. Posner, *op. cit.*, p. 78.

38 G.C. Christie, *op. cit.*, p. 32.

39 N. MacCormick, *Legal Reasoning and Legal Theory*, Oxford 1978, p. 166 (also p. 73). At this juncture, he also elucidates that: "That does not, indeed cannot, mean that judges are only to decide cases in a manner justifiable by simple deduction form mandatory legal rules; yet on the other hand, it cannot mean that they are left free to pursue their own intuitions of justice utility and common sense free of all limitations."

40 L.L. Weinreb, *op. cit.*, p. 80.

a formal, scrupulous and casuistic procedure which is supposed to provide the case with impartial, rigorous thought and consideration.[41]

Fourthly, judges are compelled not only to decide cases which they would not choose, but also to give justifications – also in such unwanted cases – as to why their decisions are defensible or even the only correct/right ones. As Posner explains, the rationale of this requirement is: "The judge is not deciding what to do in his life; he is deciding what the litigants should have done in their lives, and the litigants and society demand a statement of reasons."[42] That obligation is fundamental to the extent that it applies even to a judge who feels that his/her decision is right but is not alert to the factors which influenced that decision and nonetheless is expected to propound somehow the reasons which speak for rendering it.[43]

And fifthly, from the actors (litigants) angle, the procedure in which legal decisions are issued drastically limits the occasions for the verification of these decisions. The parties are usually entitled to one, or at best two, instances in which their case can be reconsidered. Afterwards, with the exception of extraordinary circumstances chiefly regarding matters of evidence, such as newly disclosed proofs or misconduct on the part of a judge (officer), the decision made in their case, even if manifestly wrong, cannot be revised and reversed.[44] [45]

As a result, it is not surprising that the legal reasoning employed by judges (officers) while they decide cases turned over to them is also time-limited and in a sense mandatory, being in addition supposed to be, explicable, transparent and, above all, not hap-

41 *Ibidem*, p. 75; E.H. Levi, *The Nature of Judicial Reasoning*, "The University of Chicago Law Review" 1965, vol. 32, no. 3, p. 397.

42 R.A. Posner, *op. cit.*, p. 72.

43 On that problem see for instance A. Peczenik, *On Law and Reason*, Lund 2009, pp. 278–279.

44 Naturally, there are also other possible ways of the verification of correctness of legal decisions, viz. those mentioned in section no. 5. For most judges, especially prominent are probable remarks coming from other judges, self-critique and the opinion of law academics. However, on the weakening – because of their alienation – of respect for the works of scholars from leading law schools among judges in the USA see R.A. Posner, *How Judges Think*, Cambridge, MA 2008, pp. 204–229.

45 Obviously a judicial process (reasoning) can also be described in other terms, and its other attributes may be underscored. For instance, Levi points to such obligations of a judge that give uniqueness to judicial reasoning (in relation to the USA legal system and society) as: "the duty of representing many voices, of justifying the new application in terms of prior rule and the equality of other cases, the assumption that reason is a sufficient and necessary guide, the responsibility for moral judgment and the importance of sincerity." V. E.H. Levi, *op. cit.*, pp. 397–398. Weinreb in turn seems to underline the argumentative and the two- or more sided aspect of legal decision-making in saying that: "A judicial decision of any significance is carefully considered and is not likely to be reached until the issue has been debated and alternative outcomes forcefully defended." V. L.L. Weinreb, *op. cit.*, p. 75.

hazard . A separate question is that due to its dependence on the human mind, all such attributes are not – at least completely – in practise attainable.

Obviously, not only judges (officers) but also academics reason in law, especially while they work out commentaries, glosses and treaties. This is also the case with advocates during their counselling, with parties themselves when in dispute, and with citizens who want to get to know what their legal duties and rights are. The reasoning of these actors may differ from that of judges: it may not be conducted under considerable time pressure and generally be less formal and rigorous. However, in order to be effective and to serve the aims of the person who employs it (this person's client), also this time it cannot be unlimited in terms of time nor obscure or random.

Relation of the content of law to legal reasoning (its outcomes)

Hitherto, it has been taken for granted that legal reasoning and the content of law are separable and could be considered separately from one another. Such an assumption is, however, highly dubious and I would not be content to endorse it. I rather believe that legal reasoning and legal contents are two faces of the same phenomena which is law as such and, in fact, are indissoluble. This, *inter alia*, finds support in the fact that the law – in common law but also in civil law legal families – to a great extent amounts to the outcomes (or its prophecies) of legal reasoning employed in relation to concrete or hypothetical cases. This stance is not a common opinion,[46] being for instance in overt contradiction with the movement of so-called legal positivism, and this paper is not a good place to argue for it. However, if the suggested fusion really takes place, the influence of peculiar features of law, which have been taken up in this paper, on legal reasoning would only be more definite and explicit.[47]

Conclusions

The uniqueness of legal reasoning, its distinctiveness from the reasoning present in other fields of the sciences and everyday life, seems to stem not from the very form (scheme, mode) of this reasoning, but rather to be a result of the complexity of law and the procedure in which legal decisions are delivered. Thus, because of the non-descriptive character of law, legal reasoning is also not employed in order to get to know something

46 Interestingly, Christie appears to reserve the name 'law' for only uninterpreted cases and statutes (i.e. the raw form of them, not their meaning), since only they are – in his opinion – definite enough to be called so. V. G.C. Christie, *op. cit.*, p. 58.

47 Another question is the separation of law and the facts of the case at hand, which can also be seen as not – at least completely – possible. See S.J. Frank, *op. cit.*, p. 125.

new about the physical world. Instead, it is conducted in order to establish what the law prescribes, i.e. what people may do or are required to do, as well as what they can demand from others. Similarly, both legal reasoning and law itself are largely dependent on the limits the physical world places upon people, as well as on people's mental and non-mental capabilities. These limits and capabilities, together with the conditions in which men live, constrain the possible prescriptive content of the law, strongly influencing how legal reasoning proceeds and where it may bring us. In particular, the outcomes of legal reasoning – analogous to the law itself – are not stable, and with time, even if originally correct, may be brought into question and arguments supporting them are no longer compelling. One must also remember that legal reasoning, as with the law in general, is not the domain of those who are experts in fields other than law. Despite the lack of specialist knowledge on the part of most judges and lawyers, or perhaps just because of this fact, the role of authority in law is extremely large. Authority coming from the position and standing of a person who reasons has a direct impact on the force of (and paradoxically also on quality of) the conclusions this person comes to.

Apart from the above-mentioned features, legal reasoning – especially in its judicial kind – is also conditioned by the procedural setting in which legal decisions are usually made. This setting poses an additional requirement on how legal decision-makers are expected to proceed, above all putting emphasis on the need for legal reasoning to be formal, transparent, externally justifiable and, at the same time, relatively fast.

Literature

Alexander L., Sherwin E., *Demystifying Legal Reasoning*, Cambridge 2008.

Alexy R., *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification*, transl. R. Adler, N. MacCormick, Oxford 1989.

Burton S.J., *An Introduction to Law and Legal Reasoning*, Austin 2007.

Cardozo B.N., *The Nature of the Judicial Process (With Notes)*, New Haven 2008.

Christie G.C., *Law, Norms & Authority*, London 1982.

Epstein S., *Integration of the Cognitive and the Psychodynamic Unconscious*, "American Psychologist" 1994, vol. 49.

Frank J., *Law & Modern Mind: with a New Introduction by Brian H. Bix*, New Brunswick 2009.

Gladwell M., *Blink. The Power of Thinking without Thinking*, London 2006.

Glöckner A., Ebert I.D., *Legal intuition and expertise*, in *Handbook of Intuition Research*, ed. M. Sinclair, Cheltenham 2011.

Guthrie Ch., Wistrich A.J., Rachlinski J.J., *Judicial Intuition*, http://law.vanderbilt.edu/files/archive/Judicial_Intuition.pdf [access: 11.12.2016].

Handbook of Intuition Research, ed. M. Sinclair, Cheltenham 2011.

Heuristics and Biases. The Psychology of Intuitive Judgment, ed. Th. Gilovich, D.W. Griffin, D. Kahneman, Cambridge 2002.

Holmes O.W., *The Path of the Law*, "Boston University Law Review" 1965, vol. 45.

Holyoak K.J., Thagard P., *Mental Leaps: Analogy in Creative Thought*, Cambridge, MA 1996.

Intuition in Judgment and Decision Making, ed. H. Plessner, C. Betsch, T. Betsch, New York 2008.

Lamond G., *Precedent and Analogy in Legal Reasoning*, in *The Stanford Encyclopedia of Philosophy*, 2006, http://www.science.uva.nl/~seop/entries/legal-reas-prec/ [access: 11.12.2016].

Levi E.H., *The Nature of Judicial Reasoning*, "The University of Chicago Law Review" 1965, vol. 32, no. 3.

Llewellyn K.N., *The Bramble Bush. The Classic Lectures on the Law and Law School*, New York 2008.

Llewellyn K.N., *The Theory of Rules. Edited and with an Introduction by Frederic Schauer*, Chicago 2011.

MacCormick N., *Legal Reasoning and Legal Theory*, Oxford 1978.

Peczenik A., *On Law and Reason*, Lund 2009.

Petrazycki L., *Law and Morality: With a New Introduction by A. Javier Treviño*, New Brunswick 2011.

Posner R.A., *How Judges Think*, Cambridge, MA 2008.

Popper K., *The Logic of Scientific Discovery*, London 2002.

Posner R.A., *The Problems of Jurisprudence*, Cambridge, MA 1990.

Radin M., *Law as Logic and Experience*, Clark 2012.

Schauer F., *Playing by The Rules. A Philosophical Examination of Rule-Based Decision-Making in Law and in Life*, Oxford 1991.

Schauer F., *Thinking Like a Lawyer: A New Introduction to Legal Reasoning*, Cambridge, MA 2009.

Sunstein C.R., *Legal Reasoning and Political Conflict*, New York 1996.

Weinreb L.L., *Legal Reason: The Use of Analogy in Legal Argument*, Cambridge 2005.

Wittgenstein's Lectures on the Foundations of Mathematics Cambridge, 1939: From the Notes of R.G. Bosanquet, Norman Malcolm, Rush Rhees, and Yorick Smythies, ed. C. Diamond, Chicago 1989.

SUMMARY

Why Legal Reasoning has to be Unique

This article addresses the issue of the uniqueness of legal reasoning and, specifically, the author advances the thesis that what makes legal reasoning different from the reasoning

employed in demonstrative and empirical sciences and matters of everyday life is not the actual form (scheme) of this reasoning but the legal milieu. Thus, he tries to demonstrate that some features of law – such as its normative and prescriptive nature, difficulties with the verification of its content on empirical grounds, its limitations stemming from the physical world and dependence on humans and their minds, as well as the 'unspecialized' character of law agents and the extraordinary role of authority – influence legal reasoning as well. At the same time these features also allow this reasoning to be unique, despite its adoption of forms of inference that are present elsewhere.

Keywords: law, legal, lawyers, reason, reasoning, thinking, inference, peculiarity, specific, features

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