ADAM MICKIEWICZ UNIVERSITY
LAW REVIEW

VOLUME 11 ISSN 2083-9782

ADAM MICKIEWICZ UNIVERSITY LAW REVIEW

PRZEGLĄD PRAWNICZY UNIWERSYTETU IM. ADAMA MICKIEWICZA

LA REVUE JURIDIQUE DE L'UNIVERSITÉ ADAM MICKIEWICZ

11
2020

POZNAŃ 2020

ISSN 2083-9782 | ISSN Online 2450-0976
DOI 10.14746/ppuam

Financed by Adam Mickiewicz University Poznan & Faculty of Law and Administration of the Adam Mickiewicz University Poznan

Adam Mickiewicz University Law Review
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Publisher:
Faculty of Law and Administration Adam Mickiewicz University Poznań
Niepodległości 53 61–714 Poznań Poland
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prawo.amu.edu.pl

Typeset: Joanna Askutja
Printed by: Totem, ul. Jacewska 89, 88-100 Inowrocław

Contents

Acknowledgements

The present volume of the *Adam Mickiewicz Universisty Law Review* is supplemented by a new section of the journal devoted to the prominent representatives of the Poznań Faculty of Law and Administration. This section begins with the publication of the English version of Professor Teresa Rabska's text entitled *The position of local government in the constitution*, published originally in Polish in the *Journal of Law, Economics and Sociology* in 1995.

The newly established section is a continuation of the jubilee edition of the Adam Mickiewicz University Law Review, which is a part of a series of initiatives dedicated to the centenary of the Faculty of Law and Administration of Poznań University. The pages of the Review commemorate the achievements of deceased professors of the Faculty, with their work taking on a new form thanks to the English language translations. Thus, the homage that we pay to the former masters of the Poznan legal community also allows us to make the historic scholarly achievements of our Faculty accessible to foreign readers.

Professor Teresa Rabska was a co-founder of legal studies on public business law, head of the Department of Public Business Law, editor-in-chief of the *Journal of Law, Economics and Sociology*, and the first female Vice-Rector in the history of the Adam Mickiewicz University, Poznań. Her academic achievements include studies on the constitutional principles of the market economy, government and self-government administration, the role of economic self-government, management in state-owned

enterprises, the legal position of regions in the decentralized structure of the state, regional policy, and the implementation of public tasks. Professor Teresa Rabska's public service is reflected in her contribution to the shape of the legal foundations of the Polish democratic transformation: as an expert and advisor of the President of the Republic of Poland, Polish Governments, Parliament, the Constitutional Tribunal, the Public Administration Reorganization Team, the Local Government Council, the State System Reform Council and the Civil Service Council.

Professor Rabska's article was selected by Professor Bożena Popowska and Professor Katarzyna Kokocińska, and was translated by Stephen Dersley, to whom we wish to express our heartfelt thanks. We would also like to thank the heirs of the copyright, who agreed to the publication of Professor Rabska's article.

Paweł Kwiatkowski
Editor-in-Chief of the Adam Mickiewicz University Law Review

Teresa Rabska

The Position of Local Self-Government in the Constitution of the Republic of Poland[1]

Basic assumptions

The need to strengthen democratic forms and deepen the processes of administrative decentralization poses a challenge for contemporary state systems. For Poland, it is also a condition for effective cooperation with EU Member States, and for becoming a member of the EU in the near future. This is not to state anything new, since these principles have been widely proclaimed[2] and accepted. However, it is much more difficult to give these processes proper expression in legal form, and even more difficult to implement them in the structure of the state apparatus, especially as the political and economic system is currently undergoing transformation in Poland.

On the legislative level, one of the obstacles is the fact that the legal system is burdened with conceptual constructions from past epochs, and it is often difficult to break free from the outdated language of legal provisions. However, reshaping the contemporary administration requires new legal institutions and that the content of legal acts be updated. As far as actual relations are concerned, apart from basic political issues, one hindrance to change is the lack of recognition of the fact that rebuild-

1 Translated from: T. Rabska, *Pozycja samorządu terytorialnego w konstytucji*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1995, no. 2, pp. 41–56 by Stephen Dersley. Translation and proofreading was financed by the Ministry of Science and Higher Education under 848/2/P-DUN/2018.

2 In this regard see a very interesting article by E. Schmidt-Assmann, *Demokracja i samorząd w państwie konstytucyjnym*, „Samorząd Terytorialny" 1993, no. 11, p. 3; Z. Ziembiński, *Wartości konstytucyjne*, Warszawa 1993, in particular pp. 73–79.

ing the state administration is one of the necessary conditions for the transformation of the entire system. A well-known American theoretician who specializes in issues associated with administrative reform wrote: "Administrative reform cannot substitute for political, economic or institutional reform. On the other hand, political, economic, and institutional reforms can rarely succeed without administrative reform."[3]

The constitution is the basic legal act that is appropriate for resolving fundamental problems that concern the organization of the state. Presently, there is a unique opportunity to define the foundations and political framework of a modern administration. These decisions cannot be postponed any longer—lack of decision here will constitute a real danger, which could lead to a breakdown in the functioning of public authority and to the tasks of the state not being carried out.

The need for change in this area is completely apparent and widely recognized,[4] which constitutes both an indispensable condition and a strong incentive for undertaking reforms.[5] An additional argument in favour of effecting changes is also the fact that many concepts for rebuilding public administration have already been developed,[6] and more protracted discussion will not contribute anything new.

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3 G.E. Caiden, *Administrative reform comes of age*, Berlin–New York 1991, p. 11.

4 There is a lot of evidence of this, especially in *Informacja rządu o stanie prac nad reformą "centrum gospodarczego"*, which was presented in the Sejm on 3 February 1995.

5 Explanations of a range of phenomena concerning introducing changes should also be sought in the theoretical assumptions, in particular the theory of "change management": see *The management of change in government*, The Hague 1976; J.J. Hesse, *Institutional transformation in Central and Eastern Europe: A challenge for public administration* and S.A. Pappas, *Institutional change and administrative modernization: The transit from a centrally planned economy to a market system*, in: *Public Administration in the Nineties: Trends and Innovations*, Vienna 1992; T. Rabska, *Der Übergang von einer zentralen PlanwiHschuft zu einer MarktwiHschaft am Beispiel Polens*, *Verwaltung und Fortbildung* 1993, especially p. 120 ff.

6 Work on the reorganization of public administration has been taking place since at least 1991. From the published projects v. *Wstępne założenia przebudowy administracji publicznej*, *Zespół do spraw Reorganizacji Administracji Publicznej*, URM, Warszawa 1992; *Założenia i kierunki reformy administracji publicznej*, Materiały reformy administracji publicznej, Warszawa 1993.

Local self-government is an integral part of a state system. Therefore, when analysing the position of local self-government and its place in the constitution—and only this issue will be discussed in this article—it must be stressed very strongly at the outset, however, that until a general concept of public administration is developed, efforts to develop local self-government and guarantee it an appropriate place in the executive authorities of the State will continue to encounter significant difficulties. Therefore, it should be expected that at the same time a new and up-to-date model of public administration will be established, corresponding to contemporary principles of the organization and functioning of a state in the conditions of a market economy. A change of the economic system absolutely necessitates changes in the state administration and, above all, a departure from centralized management structures.[7]

The Legal Subjectivity of Local Self-Government

The problems of local government include a number of important legal issues. However, two seem to play a special role in determining the place of local government in the State structure. These are the two legal "pillars" on which the construction of self-government is based: the nature of self-government's legal subjectivity; and decentralization, in close connection with the principle of subsidiarity.

It is indisputable that local self-governments (individual local self-government units) have legal personalities. This is clear from the Constitutional Act of 1952 (Article 70, sec. 2)[8] and the Local Self-Govern-

7 The introduction of a market economy is also a challenge for the entire public administration. The demonopolization of the state economy requires the democratization and the decentralization of management. Although the interrelations between the economic system and the system of public administration have not been the subject of specific research, the existence of these dependencies is undoubtedly the case. Practice has also revealed the close dependence and regularity of relations between the monopolistic structure of the state economy and the centralization of administration.

8 The Constitutional Statute of 17.10.1992 on the Mutual Relations Between the Legislative and Executive Powers (Journal of Laws, no. 84, item 426, as amended)

ment Act (Article 2, sec. 2).[9] This feature is commonly addressed in the scholarly literature. However, the problem is that the legal personality of self-government is understood from a civil law perspective, in a sense equating—from a theoretical and dogmatic point of view—all the legal entities to which the law attributes legal personality (both those that have it by virtue of law and those that acquire it as a result of certain acts, mainly registration). Such a (civil law) conception[10] of the legal personality of self-government is undoubtedly justified primarily by the separate nature of municipal assets (municipal property) and the fact of its financial independence (having its own budget and independent financial management), as well as by the need for it to act in on its own behalf legal transactions. The municipality meets all the generally recognised requirements of the law in order for it to be attributed legal personality,[11] and no one has any doubts about this.

In comparison with other legal entities, however, there are positive differences between these entities and the municipality as a legal entity. First of all, it is not the primary task of the municipality to administer assets and make declarations of intent in this respect, on its own behalf and at its own risk. These assets are of great importance for the activities of self-government units, but their management cannot be treated as a means to achieve specific goals. Neither is it a basic task of the municipality to provide services directly to residents in contractual form. This is due to the fact that municipalities are appointed (by law) to carry out public tasks.

9 The Act of 8 March 1990 On Local Self-Government (Journal of Laws, no. 16, item 95, as amended).

10 Such an understanding of the legal personality of self-government is quite common in the literature, see: Kieres, *Problemy ustrojowo-prawne samorządu terytorialnego*, "Samorząd Terytorialny" 1994, no. 12, pp. 12 & 14; Z. Niewiadomski, *Ustrój gminy. Gminne i ponadgminne instytucje samorządu terytorialnego*, in: *Samorząd terytorialny i rozwój lokalny*, Warszawa 1992, p. 157; S. Prutis, *Zasady reprezentacji komunalnych osób prawnych w obrocie cywilnym*, "Samorząd Terytorialny" 1991, no. 1–2, p. 63; A. Oleszko, *Gmina jako osoba prawna*, "Samorząd Terytorialny" 1992, no. 6.

11 The concept of legal personality is widely analyzed in the literature on legal theory v. H. Kelsen, *Pure Theory of Law*, Gloucester 1989, p. 168 ff.; Z. Ziembiński, *Problemy podstawowe prawoznawstwa*, Warszawa 1980, p. 336.

They perform these tasks independently, but they cannot independently decide to relinquish their performance. Nobody apart from the legislator may change or take away tasks.

Western European legislation, the development of which has not been impeded by a foreign legal system, attributes public-law personality to such entities.[12] Pre-war Polish legislation also introduced this concept into legal regulations,[13] and the construction of legal personality was widely analyzed in juristic literature.[14] This structure was considered to be of great importance for systemic solutions regarding non-governmental administration entities.

For the above reasons, this construction was unacceptable in a socialist legal system, being contrary to the principle of a 'uniform' system of power. Along with its elimination from positive law, local self-government was also liquidated, since it was essentially based on a public-law personality.

At present, all the prerequisites—both systemic-political, and legal—are in place for the restoration of local self-government. The use of legal concepts in constitutions and statutes that unambiguously resolve fundamental issues concerning the organization and functioning of the state apparatus (in a broad sense) is entirely advisable. The use of such constructions would have a great advantage as a qualifying criterion and would

12 This is indicated by the legal regulations currently in force and the views expressed in literature. In the British system, the construct of 'public corporation' refers to economic entities with a particular legal status. The corporation is understood as "a public authority that pursues public objectives, but is not an entity that is, however, a government entity, nor does its competence overlap with the scope of government". It fulfils its duties for the public good and not for private profit. On this subject, see the ruling cited in A. W. Bradley, *Constitutional and Administrative Law*, Longman 1987, pp. 302–303 and the commentary contained therein. The author highlights that currently the legal regulations which create a 'corporation' usually directly define its legal status p. 303. V. J. Schwarze, *European Administrative Law*, London 1992, particularly pp. 151–152.

13 Articles 65 and 109 of the March Constitution of 1991; Article 75 of the Constitution of 1935; Article 10 of the Act of 23 March 1933 on a Partial Change to the Local Self-Government System.

14 The leading place is occupied by the monograph of T. Bigo, *Związki publiczno-prawne w świetle ustawodawstwa polskiego*, Warszawa 1928, which fully preserves its scholarly merit and value to this day.

allow the legal situation of the self-government and its relation to other state authorities to be settled unambiguously.

It is not my goal to analyze the concept of public-law personality. It occupies a place in both the pre-war Polish legal scholarship and the international literature.[15] Nowadays, in Polish legal science proposals in this area are formulated very timidly.[16] It seems important, however, that a number of attributes that the constitution and statutes attribute to local self-government entail that it fulfils the criteria of a public-law person. The interpretation of provisions undertaken by the Constitutional Tribunal is of great help for understanding statutes and determining their significance for the legal construction of self-government.[17]

Polish legislation does not directly introduce the notion of a public-law personality or grant the same to local self-government units. However, the Local Self-Government Act, by granting a self-government legal personality by virtue of law (Article 2, sec. 2) at the same time equips it with attributes that other legal persons do not have.[18] There-

15 As an example, one should mention: T. Bigo, *Związki publiczno-prawne…*; A. Peretiatkowicz, *Podstawowe pojęcia prawa administracyjnego*, Poznań 1947, p. 28 ff.; E. Schmidt-Assmann, *Demokracja i samorząd…*, in particular p. 5. J. Schwarze, *European Administrative…*, pp. 151–152, clearly distinguishes three types of entity: 'central administration', 'public corporation' and 'local authority'.

16 V. W. Miemiec, M. Miemiec, *Podmiotowość publiczno-prawna gminy*, "Samorząd Terytorialny" 1991, no. 11–12, p. 19; R. Turpin, *Określenie własności i osób prawa publicznego*, "Rzeczpospolita" 8 XI 1994. The latter states that Article 2.2 of the Local Self-Government Act does not define the legal nature of legal personality. "This system deficiency can be supplemented only by the relevant constitutional norm."

17 I am referring in particular to the ruling of the Constitutional Tribunal of 27 September 1994, W. 10/93. Although its main purpose is to interpret Articles 85 and 87 of the Local Self-Government Act and to explain the expression 'municipal activity', it nevertheless formulates a number of important conclusions regarding the tasks and activities of the local self-government itself; see "Rzeczpospolita" of 2 November 1994, pp. 17–18.

18 T. Bigo states: "Legal personality is one in the whole area of law. It is the ability to become the subject of rights and obligations. The conceptual distinction of the so-called public-law personality is a false method. In truth, certain legal organizations with legal personality can occupy a special position in the State (e.g. Independent divisions, public law associations). The justifications for this distinction cannot be sought in the very essence of the legal personality, since this is always the same. Answers to the question of what this particular position consists in must be sought in positive law"; T. Bigo, *Związki publiczno-prawne…*, p. 27.

fore, this justifies treating the legal personality of a self-government at least as a very specific form of personality. The most important prerequisites include the following:

- participation of local self-government in the exercise of power (Article 5 of the Constitution)
- the establishment of self-government for the purpose of performing public tasks and the public character of self-government objectives recognised by the State; this is clearly defined in the provisions of the Constitutional Act (Article 71) and the Local Self-Government Act (Article 4, sec. 2, Article 6, Article 97, sec. 1);
- the tasks performed by local self-governments do not differ in kind from the tasks of the State, they perform the functions of the State. The division of tasks between self-government and government bodies is determined by formal and legal criteria, and not by a specific type of tasks (Article 71 of the Constitutional Act and Article 6 of the Local Self-Government Act)[19];
- the legal existence of self-government is based on statute. The establishment, transformation or merger of individual local self-government units is decided by the state authorities (Article 4 of the Local Self-Government Act). Members ("community residents") cannot dissolve local government[20];
- the membership of "community residents" in a given local self-government unit is created *ipso iure* (Article 1 of the Local Self-Government Act);
- being equipped with the same legal means of action as the state administration, the application of coercive measures by local self-government organs, and the execution of administrative du-

19 This is definitely the view of T. Bigo: "In my opinion, the content of the activities of self-government associations is not where one could find the criterion of separateness […]. In terms of content, the activities of self-government associations do not reveal any separateness". Ibidem, pp. 58–59.

20 This feature of local government is strongly emphasized by T. Bigo, *Związki publiczno-prawne…*, p. 57 ff. The Constitutional Tribunal also referred to local government as a "compulsory link". Ruling of the Constitutional Tribunal of 27 September 1994, W. 10/93.

ties of a non-monetary nature (Articles 39 and 102 of the Local Self-Government Act and the Law on Administrative Enforcement Proceedings).[21]

It is clear from the above that local self-government was equipped by law with specific attributes—the attributes of a public authority.[22] It may constitute legal norms for other entities by virtue of law, without their consent. Such a legal person, having administrative power, must be considered a public-law person.

On the basis of administrative law, these features render the position of self-government bodies equal to those of government administration bodies. At the same time, they differ fundamentally from other legal entities (under a given legal system) which do not have such competences.

The legal personality of self-government is associated with a number of specific attributes, while at the same time it is to some extent limited by the public purposes for which the self-government was established.[23]

The recognition of the public-law nature of local self-government has a number of important consequences. They result from the very foundations of the political and economic system of the State. The obligation falls on the self-government (its organs) to respect the laws of the Republic of Poland and to act on the basis of legal regulations on the same principles as "every state organ" and "all organs of authority and state administration" (Article 3, sec. 1 and 2 of the Constitution).[24] The activity of local self-government is also subject to all the other principles of the new system. Therefore, local self-government is obliged to guarantee within its territory freedom of economic activity, regard-

21 V. the Act of 17 June 1966 on executive proceedings in administration, Journal of Laws 1991, no. 36, item 161, in particular Articles 1–3, 20.

22 The Constitutional Tribunal states this unambiguously; cf. the cited judgment, p. 18.

23 Here, of particular relevance is the characteristic position of A. Bradley on the legal capacity of local authorities, the law based on the purposes for which that power was established. A. Bradley, *Constitutional and administrative law*…, p. 382.

24 The applicability of the same rigors in the activities of local self-government as those applicable for all state organs is raised by the judgment of the Constitutional Tribunal. See also an interesting judgment of the Supreme Court, in which it was concluded that the principle of "what is not prohibited is allowed" does not apply to municipalities.

less of the form of ownership (Article 6 of the Constitution). This has a significant impact on the position of local self-government organs in the field of economy in general, as well as on the type and scope of their own activities in this field.

In order to express these special situations in the language of legal acts, the institution of public-law personality is introduced. The attributes of local government set forth in legal provisions justify the application of this construction directly in the constitution and local government acts.

Among the various drafts of the constitution currently under discussion, only the draft of the President of the Republic of Poland contains a provision stating that "local self-government units have public-law personality as existing under the law of the community of residents of a given territory" (Article 80, sec. 2 of the draft).

The Dysfunctional Provisions of the Constitutional Act of 1952

Recognition of the public-law personality of local self-government units was to have far-reaching consequences in many spheres, especially in terms of determining the place of local self-government units in the structure of state organs. In this respect, constitutional regulations would also require reconstruction.

Not only did the Constitutional Act of 17 October 1992 and the contents of a number of its provisions fail to enable clear determination of the place of local self-government in the system of state organs, but it also raises many fundamental doubts. For example, the suggestion that local self-government is a fourth power in the State (next to the legislative, executive and judicial powers) would not be unfounded. In any case, it could be assumed that local self-government occupies a position outside the executive power. The following constitutional determinations could lead to such a conclusion:

- Firstly, the title of the Constitutional Act of 1992 itself, "on mutual relations between the legislative and executive powers of the Republic of Poland and on local self-government" might suggest that the Act concerns two completely separate spheres of systemic issues. Meanwhile, there should be no doubt that the relationship between the legislative and executive powers should—at least to a certain extent—depend on the nature of the executive powers (the degree of its democratization, the nature of organizational structures, etc.);
- Secondly, Article 1 of the Constitutional Act of 1992 establishes the state organs in the area of individual powers, and in the area of executive power enumerates: The President of the Republic of Poland and the Council of Ministers, leaving open not only the issue of public ("state") administration[25], but also that of local self-government. This self-government is regulated in a separate chapter of the Act (chapter 5), in principle without any connection with the others.[26]
- There is, therefore, a clear dysfunctionality in the systemic provisions.[27] Such a state of affairs indicates the inconsistency of legal solutions and, above all, the lack of a comprehensive vision

25 The issue concerns the legal position of the minister, for which the legislator uses the content of an article taken directly from the Constitution of 1952. At present, it is Article 56 of the Constitutional Act of 1992 which stipulates that "the Minister shall manage a specific department of state administration. The scope of activity of the minister is defined in the Act". The issues of public administration have been completely omitted, and only Article 69 concerns a voivode in this respect, referring to it as a "governmental administration organ" (previously referred to as "state administration"). Therefore, in this situation it is difficult to speak about any legal model of public administration.

26 This gap cannot be filled by the sole provision that "the Council of Ministers […] shall exercise, within the limits and form as defined in the Constitutional Act and other laws, supervision over local self-government and other forms of local government…" Article 52, sec. 2, item 1 of the Constitutional Act. All the more so as the Constitutional Act states that "Supervision over the activity of local self-government units shall be determined by statute" (Article 74). The Act on Local Self-Government entrusts supervision to the Prime Minister (Article 86).

27 On the dysfunctionality of the Constitution, V. S. Wronkowska, *Kilka uwag w sprawie funkcjonalności i dysfun – kcjonalności konstytucji*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1995, facsim. 1, p. 3 ff.

when it comes to public administration. The negative impact of this legal status on the actual functioning of public administration as a whole is indisputable.[28]

New Guarantees for Decentralization Processes – the Principle of Subsidiarity

The structure of contemporary, modern administration should be based on the principles of decentralization and subsidiarity[29], and they should be introduced into the organisational structure of administration in close connection with each other. One should therefore speak of the principle of decentralization (in its classical sense), enriched with the principle of subsidiarity, and the principle of "at the level of the nearest citizen" (which will be covered later).

The European Association Agreement[30] and the prospect of membership in the European Union oblige Poland to adapt its administrative structures in alignment with commonly respected principles.[31] It does not seem possible that a State with a centralized administration would

28 A broader and more detailed analysis of this fundamental problem for the country's political system is beyond the scope of this article.

29 The principle of subsidiarity, derived from the social teachings of the Church, is undergoing a great renaissance in the donation law of the European Union and there is quite extensive literature on the subject. See in particular D. Lasok and Bridge, *Law and Institutions of the European Union*, Butterworths 1994, pp. 36–38; *The Principle of Subsidiarity*, in: *Communication of the Commission to the Council and the European Parliament*, Brussels 1992; F. Norall, A. Sutton, *The European Crisis, The Maastricht Treaty and the Future of the European Community*, Brussels 1992, p. 15 ff.; and from Polish scholarship: M. Radwan, *Zasada pomocniczości w polityce regionalnej EWG*, "Samorząd Terytorialny" 1993, no. 9, p. 12 ff.

30 The European Association Agreement, which establishes an Association between, on the one side, the Republic of Poland and, on the other side, the European Communities and their Member States; Journal of Laws of 1994, no. 11, item 38.

31 A few years ago, S. Cassese wrote "Public administrations and their administrative law systems are considered to be the last enclaves of nationalism"; S. Cassese, *Toward a European model of Public Administration*, in: *Comparative and Private International Law*, Berlin 1990, p. 353 ff.

be able to cooperate with decentralized European structures.[32] Relations within a national administration should not differ significantly from those prevailing in the EU.

Therefore, it would be appropriate to transfer the relevant applicable provisions of European acts in this respect to internal relations. The Treaty of the European Union, as adopted at Maastricht on 7 February 1992[33], states that "This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen." Although this provision refers directly to the organization and functioning of the European Union, the idea of the Union can only be fully realized if this principle is transposed to and respected in national relations.

As far as local self-government is concerned, the European Charter of Local Self-Government contains a provision which is fundamental and directly binding for our country.[34] Article 4(3) of the Charter reads: "Public responsibilities shall generally be exercised, in preference, by those authorities which are closest to the citizen." This document therefore directly concerns the internal relations of the administration and the scope of the activities of local self-government. The Charter has become a part of the Polish legal order. By ratifying it, Poland pledged to that the Charter "will be inalterably maintained."

The principle of subsidiarity is equally important for the system of relations between various organs. It significantly enriches the issues associated with building organizational structures, introducing essential elements concerning the criteria for the division of tasks undertaken in these structures. These are the criteria which concern the object of

32 The issue of contemporary state administration structures is a subject of growing interest in the West; see. e.g. J. Usher, *Principles of Good Administration. The Continuing Development of Law and Institutions…*, p. 33 ff.

33 The Maastricht Treaty of 7 February 1992 came into force on 1 November 1993, introducing a number of significant changes to the Treaty of Rome of 1957. For this reason, a debate was begun in the West on whether a Constitution of a United Europe should not be drawn up.

34 Cf. European Charter of Local Self-Government, drafted in Strasbourg on 15 October 1985, ratified by Poland on 26 April 1993; Journal of Laws of 1994, no. 124, item 607.

decentralization, and thus are of a substantive nature. The principle of subsidiarity has become one of the fundamental principles of European constitutional law, as the commentators of European law unanimously emphasize.[35]

In the light of the provisions of the Treaty on European Union (Article B *in fine* and Article 3b), the Community should take action "only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member states and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community", and the objectives of the Community can only be attained "in accordance with the principle of subsidiarity…".

Again, it must be made clear that the provisions of the Treaty refer to the Member States of the Union and directly concern the relations between the Union and these countries. Indirectly, however, they should be reflected in internal state agreements. In reality, their internal application depends on constitutional traditions.[36]

This new content should be reflected in the provisions of our Polish Constitution. If the Constitution is to be a modern act, and only such should be considered, then its role should not be limited to 'correcting' existing structures when applying old legal constructions. The changes should be comprehensive and far-reaching. In order for the new institutions to be effective, changes should include the entire local self-government and government administration.

The basic conclusion that can be drawn from the above is that decentralization processes must be consistently implemented with their new content. Entities with public-law personality ensure their implementation to the fullest extent. Decentralization is thus an inherent feature of

35 F. Norall, V.A. Sotton, op.cit., p. 15 ff.; D. Lasok, *Law and Institutions of the European Union*, Butterworths 1994, p. 37.

36 An example of this is provided by the Federal Republic of Germany. This rule was used primarily to determine the scope of the economic activity of local self-government associations.

local government.[37] Decentralized self-government bodies by definition carry out public administration, independently, at the level closest to the citizen. Activities undertaken by higher public authorities should be limited.

Legal science also distinguishes functional decentralization.[38] Although it must be admitted that this form of decentralization can also be useful in 'perfecting' the administrative apparatus, it cannot fundamentally and qualitatively change the structure of the entire administration. Functional decentralization means that changes are made within the central government apparatus itself. Therefore, it would be difficult to agree with the view that, for example, increasing the independence of the voivodeship, as a component of the government administration, may contribute to strengthening the position of self-government[39].

According to D. Lasok, "Subsidiarity is opposed to centralism and the unnecessary exercise of power (central government) directed downwards"[40]. The issue of 'subsidiarity' being opposed to central-

37 T. Bigo indicated the particular significance of the element of decentralization in the construction of local self-government, T. Bigo, *Związki publiczno-prawne…*, pp. 120 ff. He held that decentralization is an element that distinguishes public-law associations from government administration and other types of administration. On the other hand, he clearly stressed that the local self-government does not exhaust the forms of decentralization, as it is only one of its types T. Bigo, *Związki publiczno-prawne…*, p. 124.

38 The problem of functional decentralization was raised in particular in the German science of administrative law particularly in the work of H. Siedentropf. See also *Institutional change and administrative modernization*: *The transit form a centrally planned economy to a market system*. S.A. Pappas defines functional decentralization as a "process in which tasks, competences and responsibilities are transferred to public authorities, while the ministerial responsibility is of a limited nature. There is no hierarchical connection between the minister and the agency" (*Public Administration*…, p. 142).

39 V. L. Kieres, *Problemy ustrojowo-prawne samorządu terytorialnego*, „Samorząd Terytorialny" 1994, no. 12, p. 14. Admittedly, the position of local self-government will depend on the change in the status of government administration bodies, but it is doubtful that increasing the independence of the local government administration body could have a positive impact on the situation of municipal self-government.

40 V.D. Lasok, *Law and Institutions…*, p. 36. The author further writes that 'subsidiarity' may serve to check the excessive tendency towards centralism and in this sense may act as a brake on the accidental actions of the Union institutions, on the ambitions of their bureaucracy. Ibidem, p. 38.

ized decision-making systems is raised in the documents of the EU bodies and in the Western literature[41]. It may come as a surprise that elements of subsidiarity can also be found in pre-war Polish legislation. An example is the Sanitary Act of 1919, in which, at the end of Article 1, it is stated that: "Care for the health of the population and direct execution in this regard is the obligation of local self-government bodies within the territories entrusted to them, under the supervision and care of the state authorities[42]. This task of 'caring' for the execution of public tasks (a notion which had been hitherto rather alien to our legislation) should be properly defined and developed in legal provisions (however, this is not to be confused with the concept of the "welfare state").

Local administration cannot, therefore, in the light of these fundamental general principles, operate only on the fringes of state activity, or be limited to the exercise of functions ancillary to the central government, which would bring together all the powers. In modern systems these relations have been reversed.

Such assumptions should also have an impact on the scope of the tasks delegated to the local self-government, i.e. those tasks that the government administration delegates to the local government, but which remain in the power of the government apparatus. Here too, the division of tasks should be appropriately selected from the point of view of the requirements of the new rules, and taking into account the proper relations between the local self-government's own tasks and the tasks delegated to it. This would not entail the complete abandonment of this form of delegation from the central to the local government. There should be no doubt that there are certain categories of public tasks that can or should be centrally managed for various reasons. It is therefore a matter of adopting appropriate criteria for division.

The adoption of the principle of subsidiarity, as a complementary and content-building principle of decentralization, entails yet other spe-

41 See especially F. Norrall and A. Sutton, *The European Crisis.…*, p. 3.

42 The Basic Sanitary Law of July 19 1919, Journal of Laws of 1919, no. 63, item 371.

cial consequences. Namely, this principle could be an effective barrier against the permanent limitation of the scope of tasks and independence of local authorities and their secondary takeover (by various means) by the central authority. A common practice that accompanied all administrative reforms was that the competences granted at the time of the reforms were then returned (in various ways) back to the central level, or—at least—were gradually and significantly reduced. In principle, there were no guarantees that could hinder such processes. With the adoption of the subsidiarity principle, which would define permanent criteria for the allocation of tasks, decentralization processes would be clearly supported. The allocation of public tasks could not result from changing directions of government policy, but would be based on principles that are not subject to arbitrary evaluation. It is precisely the tasks—their character and scope—that should determine the organizational structures that meet their needs. The basic assumption should be that organizational solutions should match the tasks, and not vice versa. That the opposite processes are in operation is evident if the structures remain intact while tasks are shifted within their framework (this is—so far—the frequent scenario of reforms).

The Privatisation of Public Tasks – Economic and Professional Self-Government

A particular (and recent) direction of transformations in the field of public administration is the privatization of public tasks[43]. Therefore, it can be assumed that the privatization of public tasks will constitute the next stage in the transformation of public administration activity. In such

43 The issue of the privatization of public tasks takes on great importance in Western practice and scholarly literature. See, for example, R. Schmidt, *Die Privatisierung öffentlicher Aufgaben aid Problem des Staats – und Verwaltungs rechts*, in*: Grundfragen des Verwaltungsrechts und der Privatisierung*, Stuttgart–München 1994, p. 210 ff. In Polish scholarship, this problem was presented in a comprehensive way by S. Biernat, *Prywatyzacja zadań publicznych. Problematyka prawna*, Kraków 1994. It should be noted that "privatization of public tasks" can be understood in different ways cf. ibidem, p. 25 ff.

a situation, there could be a kind of competition between different ways of achieving transformation, namely, between the decentralization of public administration on the one hand, and the privatisation of public tasks on the other—which would also have an impact on the position of local self-government.

From the perspective of legal theory, there are basically two different issues to be resolved, at different levels: structural and functional. These changes can therefore take place in parallel. However, it seems to be indisputable that privatizing public tasks should lead to a reduction of the public administration apparatus (both centralized and decentralized).

Although it may be understood in different ways, the privatization of public tasks consists in removing a specific task (or part of it) from administrative structures.[44] An example of privatization may be private schools, private clinics, i.e. matters traditionally falling under the remit of the State and undertaken by the public administration. Decentralization, on the other hand, means a qualitative change in organisational arrangements, the independence of individual administrative entities, and a different distribution of public tasks. Both the administrative apparatus and the tasks remain public.[45]

It can be assumed that in the future the privatization of public tasks and their assumption by private entities will give rise to a natural tendency for these entities to associate. In this way, apart from local self-

44 The American and English literature indicate different understandings of 'privatization'. V. E.S. Savas, *Prywatyzacja. Klucz do lepszego rządzenia*, Warszawa 1992; T. Prosser, *Privatisation and Regulation*, in: *The legal control of public power in Europe*, London 1994.

45 I analyzed the concept of centralization more broadly in the work *Samorząd robotniczy w PRL* (1962), especially pp. 10 ff. The concept of decentralization is most clearly characterized by T. Bigo, *Związki publiczno-prawne…*, p. 120. He emphasizes in particular that "Decentralization means a system in which there is a greater number of public administration centers", that administer independently. He adds further, and characteristically: "*Ex definitione* it follows that there must be one administration center behind these independent centers, a source of common norms that maintain unity, but they have independence in relation to this center". T. Bigo, *Związki publiczno-prawne…*, p. 121.

government, other forms of self-government—economic, professional, cultural, religious, etc.—may develop more intensively.[46]

In my opinion, it would be difficult to express directly in the Constitution the idea of the privatization of public tasks in any other way than through the freedom to pursue professions (as in the German Constitution[47]) and the guarantee of freedom of economic activity. This is, however, an issue that goes beyond the scope of this paper. On the other hand, it would already be possible to introduce into the Polish Constitution provisions on fundamental issues related to the economic and professional self-government, without referring all the regulations to future laws (as is currently the case). Such a reference is a blank provision, which makes a given institution completely dependent on ordinary legislation. Meanwhile, this issue has become a political issue and requires solutions on the constitutional level. This is evidenced, *inter alia*, by the disputes that are already taking place over the draft act On Economic Self-Government.[48]

The Development of the Structure of Local Self-Government

The issue of the territorial division of the State for administrative purposes is a separate issue. The territorial grid is the spatial basis for the administration. Making this division should be justified first of all by the types of public tasks and their scope, based on the criterion of rationality. There is also talk of the criterion of the "administrative capacity"

46 For more detailed discussion on economic self-government, v. T. Rabska, *Rechts – und Organisationsfragen der Wirts chaftlichen Selbstverwaltung*.

47 Article 12, sec. 1 of the Basic Law of the German Federal Republic guarantees the right to free choice of profession, place of work and education. Also Article 2 sec. 1, which stipulates: "Everyone has the right to free development of their personality". Grundgesetz für die BRD of 23 May 1949, as amended. Both of these constitutional provisions have extensive case-law.

48 The draft law on economic self-government, Sejm Print no. 132 of 16 November 1993.

of territorial units[49] with regard to the implementation of specific public tasks. On the other hand, the question of the nature of the administrative entity should not have—at this stage and in these matters—decisive significance. For this reason, neither territorial division nor the number of territorial division units (or possibly their size) will be considered here.[50]

Once again, we arrive at the fundamental problem, namely the dependence of the position of local self-government on the general conception of public administration, taking into account all the elements that are included within the scope of this concept. Until the concept of state administration is defined as a whole, the further development of local self-government and the establishment of its position in the Basic Law will encounter fundamental difficulties. Without this, the adoption of any concept of local self-government will be implemented in a systemic vacuum, in an uncertain structure of state organs, the formation of which would depend on the centralized organs of the central administration. In any case, on the basis of the experience gained so far, it can be concluded that a single-level self-government organization established only at the municipal level does not yet sufficiently implement the principles of the decentralization of public administration. The curtailment of further development of local self-government and the failure to implement further decentralization processes has led to an inevitable confrontation between the decentralized local self-government administration and the entire remaining, large machine of hierarchical central administration, which is constantly expanding and maintaining departmental divisions. This imbalance in the structural and competence systems seriously endangers the proper functioning of the entire executive

49 It is worth pointing out the very interesting materials on the administrative division of the State, developed in 1931. *Materiały Komisji dla usprawnienia administracji publicznej*, especially vol. V, Warszawa 1931, p. 14 ff.

50 I addressed the problem of the spatial division of the public administration in the article *Refleksje na temat układu przestrzennego administracji publicznej i jego konsekwencji w zakresie administrowania*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1992, facsim. 2, p. 25 ff.

apparatus. This state of affairs, which is more than evident in current government practice, can no longer be maintained.

Therefore, there is now an urgent need to introduce into the new constitution such provisions that would directly determine the development of local self-government to higher levels and extend the participation of local self-government in the exercise of public authority.

The consequence of expanding local self-government by further links would be the creation of a whole system of local government bodies, operating at various levels of territorial division. Therefore, within the organisational framework of local self-government, new relations will be established between local self-government units and their organs. The problem is of particular importance and its significance for the functioning of the whole institution in the future cannot be disregarded.[51] Hitherto, only issues concerning the mutual relations between local self-government bodies at the same level have been subject to regulation, i.e. the legislative and executive body of the municipality, and therefore within the same self-government unit. The establishment of a higher level of self-government (*powiat* – county) or higher levels (*powiat* and voivodeship) would at the same time require a clear definition of the mutual relations between different self-government units, whose areas of activities overlap.

Contrary to popular opinion, it does not seem realistic to base these relations on the principle of the total separation of each link, nor does it seem possible to make such a separation of public tasks which would focus on only in one level of the complex self-government organization. Moreover, I do not think that it is advisable to pursue such an aspiration. The performance of tasks cannot be separated from the area in which they are executed, nor can the residents be separated according to the public services provided. It would also be unacceptable to assume

51 I am raising this problem because the draft bill On County (*Powiat*) Self-Government and the ongoing discussions concerning county (*powiat*) self-government seem to completely avoid this problem. Sejm Printed Document, no. 295 of 29 January 1995.

that higher-level self-government organs do not represent the entire community living in a given area, but only the group that would benefit from their services. This would, above all, contradict the principle of the universality of the institution of local self-government.

On the other hand, one feature of self-government is that each of its links (each local government unit) is an independent legal entity and constitutes a decentralized public administration entity. This means that a lower link of the self-government is not dependent on a higher link. Therefore, there can be no talk of any kind of supremacy and subordination, because that would deny the legal essence of self-government. Another issue, however, is the need for cooperation and mutual solidarity wherever it is necessary due to the commonality of residents and the area inhabited by them. Thus, when entrusting tasks to a higher-level self-government unit, the legislator should take into account—as the European Charter of Local Self-Government states—"the extent and nature of the task and requirements of efficiency and economy" (Article 4(3)).

Recognition of the need for mutual cooperation between local self-governments and their unity as a political institution would support the need to establish a general national self-government representation, which would crown the entire system. An organization of this kind would have to in fact unite all local government units, by virtue of the law. Its existence would be independent of the possibility of establishing and operating other self-governing associations as well, on a voluntary basis, connecting only particular groups of self-government units, based on the criterion of common (group) interests and the joint performance of specific public tasks.

The issue of establishing a national association is potentially controversial, although in principle it would only involve formalizing an institution which, from the very beginning of the introduction of local self-government, has been established by the representation of mu-

nicipalities and which actually operates without any special legal authority.[52]

The Conditions for Co-Responsibility for Public Administration

The paper presents some of the legal conditions of local self-government and those issues whose introduction into the public administration system *requires* unambiguous constitutional regulations. Leaving these matters to future statutory regulation (by means of a stereotypical reference: "… will be determined by law")[53] would be an irreversible mistake and would amount to a missed opportunity to restructure the administration.

Summarizing the above, it is only possible to provide a general outline of the issue and a few important aspects. However, I am of the view that the issues raised here allow us to conclude that reducing the transformations of the public administration today solely to the matter of appointing counties (*powiat*) or not, and the heated debates about them, constitutes a big misunderstanding. It is proof that we do not understand the catastrophic state that the entire public administration is currently in, and that we fail to appreciate the extent of the reconstruction necessary for today's administration as a whole—on both central and local levels. The matter requires a completely new vision of public administration, built on different principles, and not only a part of the local self-government organization (although this is of great importance).

The dysfunctionality of the whole structure of the executive apparatus runs so deep that the 'self-government issue' cannot be separated from the entire public administration. From the beginning of the transformation

52 V. L. Kieres, *Problemy ustrojowoprawne samorządu terytorialnego*, "Samorząd Terytorialny" 1994, no. 12, especially p. 14 ff. *Inter alia*, I expressed my view on the need to formally regulate the status of the existing representation of national self-government, namely the National Assembly of Local Self-government, in the article, *Możliwości zmian ustawy o samorządzie terytorialnym*, "Samorząd Terytorialny" 1994, no. 10.

53 This form of 'delegation' is used in the Constitutional Act of 1992, and in matters of fundamental importance concerning the local self-government, e.g. Article 70 sec. 4, Article 74–75.

of the political and economic system, there was little appreciation of the fact that there is a need to adapt the state administration to the completely new state tasks in the changing economic system, and to the requirements of effective action. The links between the transformation of the economy and the administration were not sufficiently taken into account, especially when the 'inherited' administration was shaped entirely for the needs of the bureaucratic system of a centrally planned economy.[54] Currently, the situation is deteriorating, not only due to the time that has been wasted, but also due to the fact that the current views of politicians do not demonstrate a will to change the administration model.[55]

Under applicable law, it is even difficult to determine what constitutes 'public administration'. It is not a question of the theoretical understanding of this term, as there have always been problems of this nature in legal science. The issue concerns the legal situation and its consequences for the functioning of the executive power. It also concerns the constitutional provisions of 1992, the legislation in force, and drafts of the future constitution. Apart from solving issues of a systemic nature, the aim is also to ensure the correct application of law.

The term 'state administration' is most frequently used in legislation, however, it is not possible to determine without reservation which circle of entities this term covers. It would be useful to introduce the term 'public administration' into legislation, as a broader term covering central and local administration, government administration and

54 These problems were widely discussed in the research project KBN no. 1–1016–91–01 *Struktura, zadania i formy działania naczelnego aparatu administracji państwowej w zmienionym ustroju gospodarczym* by T. Rabska, Typescript in the Library of the Faculty of Law and Administration of Adam Mickiewicz University in Poznań; see in particular part VIII – Syntetyczny opis wyniku końcowego.

55 Just by way of example, see *Strategia dla Polski*, Sejm Printed Document, Print no. 447 of 7 June 1994, especially the part concerning the reform of the 'economic center', and critical debate in the Sejm in February 1995 on "Government information on the state of work on the reform of the 'Center'". The content of the new 'coalition agreement' also testifies to the lack of real desire for change. On the other hand, with regard to changing the local administration model, the Speaker of the Senate of the Republic of Poland and the Chairman of the National Assembly of Local Self-Government said: "This is not the most urgent matter at present in terms of stabilizing the situation in Poland". Ibidem, p. 5.

local self-government administration. It is precisely the application of the concept of public-law personality that would justify such a unification. Consistent use of the appropriate language of legal acts would make it possible to determine, in each case, to whom the legal act is applied, who is bound by it, or with regard to which group of entities a given competence may be exercised. In the light of the current language of legal acts and the meaning of the term 'administrative state administration', such issues often cannot be explicitly resolved, nor is it possible to decide whether the term 'state administration' as used in a given case also encompasses local self-government.[56]

The ongoing work on the draft Constitution creates a real chance to outline the basic political framework—structural and functional—of the entire public administration. The need for deep decentralization through the recognition of various public administration entities (government and local self-government), and at the same time the need to pursue common goals, places local self-government high in the hierarchy of executive power organs responsible for the functioning of the State. The foundations of this shared responsibility, i.e. the real division of executive power (with all the consequences this entails), can only be established by an act of the same status as the Constitution, and this is to be expected from the Constitution in the first place. However, making changes only within local self-government—although undoubtedly necessary—may ultimately have a negative impact on the institution of local self-government itself. Given the current poor state of public administration, it seems rather improbable that only one member of the public administration would be able to bear the weight of reforms.

56 Many examples are already provided by the Constitutional Act of 1992; cf. Article 51 sec. 1, para. 2 items 3 and 6; Article 56, Article 69, Article 34 on the Supreme Audit Office (NIK) (maintained in force pursuant to Article 77). However, correctly – Article 71.

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SUMMARY

The Position of Local Self-Government in the Constitution of the Republic of Poland

The paper is an English translation of *Pozycja samorządu terytorialnego w konstytucji* by Teresa Rabska published originally in Polish in the Journal of Law Economy and Sociology from 1995. The text is published as a part of a newly established section of the Adam Mickiewicz University devoted to the achievements of the late Professors of the Faculty of Law and Administration of the Adam Mickiewicz University, Poznań.

Keywords: Constitution of the Republic of Poland, public administration, local self-government.

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DOI 10.14746/ppuam.2020.11.01

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An Attempt to Formulate a Preliminary Definition of the Validity of Norms[1]

Introductory Findings on Norms

The issue of validity in law has been and still is widely discussed in the literature on the subject.[2] In this respect, I would like to propose a preliminary definition of the validity of norms and compare it with the conception of such a definition put forward by Leszek Nowak in the work referred to in the second footnote.

However, it will be necessary to start by making certain preliminary remarks on the understanding of norms. I assume here a linguistic approach that places norms in the linguistic sphere. Thus, I consider each norm to be an expression of a specific language. There are a number of arguments in favour of such an assumption. First of all, norms are assigned a certain meaning and the issue of ambiguity of certain norms and the relationship of synonymity between norms is considered. In semiotics, the prevailing view is that of the meaning of expressions.

1 This article is an English translation of excerpts contained in sections 1–2 of the first chapter of my work entitled *Derogacja norm spowodowana nowelizacyjną działalnością prawodawcy. Próba eksplanacyjnego podejścia* published by Wydawnictwo Naukowe UAM in 2016, to which the Publishing House has given its consent.

2 It would suffice to recall the following items from Polish theoretical and legal literature: W. Lang, *Obowiązywanie prawa*, Warszawa 1962; Z. Ziemba, *Zwrot «norma N obowiązuje» w języku prawnym i prawniczym*, „Studia Filozoficzne" 1963, no. 3–4, pp. 93–115; L. Nowak, *Interpretacja prawnicza. Studium z metodologii prawoznawstwa*, Warszawa 1973; J. Stelmach, *Obowiązywanie prawa w sensie absolutnym i relatywnym*, in: *Teoria prawa. Filozofia prawa. Współczesne prawo i prawoznawstwo*, Toruń 1998, pp. 315–327 or A. Grabowski, *Prawnicze pojęcie obowiązywania prawa stanowionego. Krytyka niepozytywistycznej koncepcji prawa*, Kraków 2009.

If we agree with this dominant view, then a norm carries meaning, or it may be ambiguous or synonymous to other norms only if it belongs to a set of expressions. Moreover, although the theory of law makes a fine distinction between norms and provisions understood as sentences in a grammatical sense, this does not exclude that a certain provision may turn out to be a norm. Since sentences in the grammatical sense are expressions, and provisions are sentences in the grammatical sense, a provision may only be a norm if it (the latter) is an expression. It would be difficult to consider norms identical to provisions as expressions, and to deny other norms this qualification. Finally, the definition of truth based on the concept of fulfillment refers to sentences in a logical sense understood as expressions. Of course, norms are not sentences in a logical sense. Excluding norms from the set of expressions would determine their lack of logical value, but such a conclusion would be the result of assigning them a certain ontological status. On the other hand, a position denying norms logical value because of their content, despite having recognized them as expressions, seems to be ontologically uncommitted. Since norms are expressions, they cannot be statements understood as actions. Nor may they be the meanings of utterances, meanings of expressions or meanings of normative sentences.

At the same time, norms turn out to be complex expressions resulting from the attachment of expressions with specific content to normative operators. Since normative operators are divided into prescriptive and prohibitory only, each norm is either a prescriptive or a prohibitory one. An expression attached to a normative operator consists of a hypothesis and a direction. The hypothesis is the initial fragment of the argument of the normative operator comprising the identification of the addressee of the norm and the description of the circumstances the occurrence of which makes the norm applicable. This specification may, in particular, consist in identifying the initial moment upon which the obligation of the addressee of the norm is updated. It may also be the indication of the

final moment after which the obligation set by the norm becomes obsolete and is no longer binding the addressee of the norm. It may also consist in identifying the beginning and the end of the period during which the addressee of the norm must act in the way it is obligated by the norm. Whereas in the direction of the norm, there is an indication of the action to be taken by the addressee, by virtue of being the object of the addressee's obligation, as long as the latter is in a situation falling within the scope of that norm. What cannot be ruled out altogether is that the direction of the norm will include a more or less precise description of how such an action should be performed. And so this will suffice for the understanding of norms.

The Preliminary Definition of the Validity of Norms

In order to provide a preliminary definition of the validity of norms, I will use the idealization method widely used in empirical sciences.[3] In the approach proposed here, there are eight idealizing assumptions that make up the ideal legislator.

According to the first of them:

(Z1) X is the only legislator in world history.

This assumption introduces a number of simplifications. First of all, it eliminates the so-called multicentricity of the legal system arising from the fact that it is made up of laws created independently by several subjects. Moreover, it eliminates the dependence of the system in question on international law, on another concurrent legal system, or on the normative activity of various social organizations tolerated by the legislator. Finally, this assumption eliminates the influence of previous systems on the legal system in question.

3 The conception of idealization as the fundamental procedure in empirical sciences was most fully proposed by L. Nowak in his work: *The Structure of Idealization*, Dordrecht 1979.

According to the second assumption:

(Z2) if X wants to achieve a certain state of affairs, he separately orders its implementation, and if X wants to avoid a certain state of affairs, then he separately prohibits its implementation.

This assumption removes the extremely complicated issue of the entailment relationship between norms and the no less complex issue of instrumental subordination to norms.

Under the next assumption:

(Z3) the legal system created by X is shaped exclusively by enacting laws in a manner that is always, invariably, the same.

Also this assumption introduces two simplifications. Firstly, it eliminates all other factors that shape the law, apart from the law enacting process, such as precedent, custom, change in the rules of interpretation applied, change of territorial division, change in the type of State or *desuetudo*. Secondly – but no less importantly – this assumption eliminates those changes in the very approach to enacting laws that may have a significant impact on the shape of the legal system based on it.

According to the next assumption:

(Z4) the invariable language of X is a language in the sense of its logical theory.

This assumption also introduces two simplifications. First of all, the language of the legislator is to be a language in the sense in which it is understood in the logical theory of language. The language understood in this way turns out to be free of any imperfections, and thus is free of ambiguity. As a matter of fact a legislator who meets the above assumption is incapable of formulating ambiguous provisions, even if, for some reasons, he would wish to do so. Moreover, the language of the legisla-

tor remains unchanged, which means that he will always be using the same language.

Based on the next assumption:

(Z5) the legal system created by X is not subject to control.

Therefore, the system is not subjected to any review, except of course to the control exercised by the legislator himself. It is also worth noting that the third of the above assumptions, by virtue of which the system created by the legislator is shaped solely by enacting, does not exclude the possibility of influencing this system by controlling actions, as the very operation of making laws may be subject to such actions.

According to the next assumption:

(Z6) the legal system created by X is not based on sanctions.

Therefore, none of the norms in such a system is a norm sanctioning any other norm. Of course, a system that does not contain sanctioning norms does not lose its reputation as a legal system. Nor does it mean that the norms of such a system are not binding on their addressees or that the addressees of such norms never observe them. It only means that the legislator did not entrust any specifically designated bodies with the function of administering sanctions for exceeding the norms of the system he created by addressing sanctioning norms to them, but he undertook this task himself, leaving himself free to react to information about the improper conduct of his subjects.

In accordance with the penultimate assumption:

(Z7) X enacts only one normative act.

Hence all legal solutions are contained in one normative act only. This does not prejudge its content, which, however, must be such that no additional supplementation with decisions contained in other normative acts will be needed.

The formulation of the last assumption requires first of all the following determination of the normative construct: (1) each norm is a normative construct, (2) if A and B are normative constructs formulated in the same language, then A.B is a normative construct. As can be seen, this determination has a recursive form. According to (1), which is qualified as an initial clause, all norms are normative constructs. According to (2), which is an inductive clause, two constructs formulated in the same language and combined with a dot also constitute a normative construct. Thus, the above determination establishes the set of all normative constructs. And now, the last idealizing assumption may be formulated:

(Z8) the normative act enacted by X is a normative construct.

This means that the act contains only norms, and they are norms formulated in the same language. The normative act is therefore limited to the basic text only, and does not include the title of the entire text, the headings of larger editorial units, or the numbering of the provisions. A subject that meets all of the above requirements will be referred to as the ideal legislator.

After these clarifications, we can now proceed to formulating the following definition:

(D1) $\Lambda n \Lambda s \Lambda t$ {n is valid in s created by the ideal legislator at t $\equiv \vee y$ [n is a part of y $\wedge \vee t'$ (t' is earlier than t $\wedge$ y is enacted in t' by the ideal legislator who is the creator of s)]},

where the range of variable "n" is a set of norms, the range of variable "s" is a set of legal systems, the range of variables "t" and "t'" is a set of days, and the range of variable "y" is a set of a subset of normative constructs in which there are no sanctioning norms. In other words, according to the above definition, a given norm is valid in a legal system created by the ideal legislator on a specific date only if it is a part of a normative act previously created by that legislator.

As can be seen, D1 is a normal definition, in which the role of the definitional conjunction is played by the connective of equivalence derived from a sentential calculus. Since the remaining variables and constants contained in it also belong to this calculus or to the first order predicate calculus, this definition is based on the classical logical calculus. It also fulfils all the internal requirements of formal correctness imposed on such definitions. Firstly, the expression defined in it appears only in the *definiendum*, but not in the *definiens*. Secondly, each of the variables present in the *definiendum* appears there only once. Thirdly, all free variables in the *definiens* are also free variables in the *definiendum*. Variables "y" and "t'" do not appear in the *definiendum* but they do appear in the *definiens* as bound variables. Since a defined expression belongs to the same language as the definition containing it, it is therefore an intralingual definition.

The first variable attached to the defined predicate is the variable "n", whose range is a set of norms. Thus, according to the definition proposed here, valid objects are norms. Therefore we cannot talk about the validity of the law, the validity of a legal system or the validity of a provision. The second variable attached to the defined predicate is the variable "s", whose range is a set of legal systems. The need to attach this variable to the predicate causes this predicate to display so called relative validity i.e. the validity in a system created by a particular legislator, differing in this respect from the absolute validity that ignores this relativization. The third variable attached to the defined predicate is the variable "t", which determines the temporal relativization of validity. I assume that such a smallest temporal unit of the duration of validity is one day.

The above definition D1 indicates that, in the simplest case, the validity of a norm is determined solely by the enactment of a normative act containing it. What is more, the enacting subject is an ideal legislator and consequently the only legislator enacting just that one normative act. Therefore an ideal legislator cannot perform his function by virtue of the competence conferred on him by some other higher ranking legislator, or by virtue of the competence that he has conferred on himself earlier,

in another normative act. Thus he may only be characterized in political terms as a subject that has power over individuals and who is therefore, using his authority, coercion or persuasion, capable of practically forcing them to respect the limitations he imposed on them. Consequently, either a single individual with extraordinary authority or a group of people strong enough to force others to respect the limitations imposed on them may be the ideal legislator. It may also be a whole community which, as a result of the mutual persuasion exercised by its members, enacts an act considered by each of them as their own. When the enacting is done by a subject that is not a legislator, no source of law is created as a result.

Since the ideal legislator has not taken over any regulations from anyone, nor has he himself issued any normative act beforehand, he is not bound by any provisions determining the course of the enacting process. The manner of enacting is determined exclusively by the culture of the community for which he is the legislator. The "enacting in the narrow sense … in our legal culture does not require the formulation of any utterance, but is done by an act of voting by authorized subjects (in the case of a collegial legislator) or by the signing of a draft normative act by an authorized subject if the legislator is a single person."[4] As can be seen, in the simplest circumstances proper for an ideal legislator, enacting boils down to the performance of one action, which is not too complicated. The legislator either performs this action, and then enacting occurs, or does not perform this action, and then no enacting takes place. Because D1 makes the validity of a norm conditional upon a non-gradual enacting process of the normative act that contains it, the validity of the norm is also non-gradual. A given norm is either valid or not valid on a specific date in the indicated legal system.

In its entirety, D1 is an expression formulated in a language that for an ideal legislator is a metalanguage. According to Z4, this language is

4 S. Wronkowska, *O źródłach prawa i aktach normatywnych raz jeszcze*, in: *Prawo prywatne czasu przemian. Księga pamiątkowa dedykowana Profesorowi Stanisławowi Sołtysińskiemu*, ed. A. Nowicka, Poznań 2005, p. 128.

a language in the sense of its logical theory; consequently the language of the definition in question also has this status. It is therefore made up of linguistic rules[5] which are divided into syntactic rules and semantic rules. The syntactic rules are formation rules and deductive rules. The formation rules include vocabulary rules and grammatical rules, the latter covering rules that determine grammatical categories and rules that determine the way in which complex expressions are built. One of the vocabulary rules qualifies the sequence defined in D1 as a word of this language. And one of the grammatical category rules classifies this word as a triadic predicate, whereas one of the rules determining how complex expression are built allows a sentence to be built from this predicate, once three singular terms have been attached to it. In turn, deductive rules are divided into axiomatic rules and inference rules. The former include, inter alia, a rule that qualifies all definitions as theses of a given language. D1 is therefore a thesis of the language in which it is formulated, and thus is an analytical sentence in that language. As a result, definition D1 is true in every model of that language. The inference rules include a rule which qualifies as theses of this language all the logical consequences of its theses. What I also assume is that another inference rule qualifies as a thesis every equivalence of sentences that differ only insofar as that in one of them there occurs a defined expression, and in the other one – a defining expression in the definition which is already a thesis of this language.

In a language thus constituted, a definition ensures the synonymity of the expression defined in it with the expression that defines it. According to the conception assumed here,[6] two sentences are synonymous in a given language when the implications created from them are theses of this language. In turn two expressions that are not sentences are synonymous in a given language when any two sentences of this language, differing solely in these expressions, are synonymous in it.

5 For more on this see J. Kmita, *Wykłady z logiki i metodologii nauk*, Warszawa 1973, chapters II and III.

6 V. J. Kmita, *Wykłady*…, pp. 59–62.

While the meaning of an expression in a given language is the feature of this expression and of all and only expressions of this language that are synonymous to it.

Therefore, let us consider the phrase "«Every driver driving a vehicle on a public road must drive on the right side of the road» is valid in legal system A, created by the ideal legislator at 26 September 2020" and the sentence "∀y [«Every driver driving a vehicle on a public road must drive on the right-hand side of the road»" is a part of y ∧ ∀t' (t' is earlier than 26 September 2020 ∧ y is enacted in t' by the ideal legislator who created legal system A)]." The only difference between them is that in the former there is the predicate defined in D1: "…is valid in…created by the ideal legislator…at…"; while in the latter, there is the defining phrase in this definition: "∀y [… is a part of y ∧ ∀t' (t' is earlier than … ∧ y is enacted in t' by the ideal legislator who created…)." Because by virtue of the axiomatic rule mentioned above, D1 is the thesis of the language in question, therefore – based on the other of the inference rules mentioned above – its thesis is also the equivalence built from these sentences as its arguments. Thus the first of the mentioned inference rules qualifies both implications that logically follow from this equivalence as theses. Thus the sentences formulated above are synonymous in their language.

A legislator who meets the previously formulated idealizing assumptions is an ideal legislator thanks to the simplicity and the absence of any complications hindering the resolution of various research problems. He is not, however, the ideal legislator because he is perfect in creating the best, most effective, internal, and fully consistent legal system. The system created by the ideal legislator does not therefore preclude the validity of norms that are in various ways improper. From this point of view, the norms of the system created by the ideal legislator do not differ from those of the real legal system burdened with various shortcomings. First of all, it cannot be excluded that in the system created by the ideal legislator, there will be valid norms whose scope of application also covers situations arising prior to the enactment of the act containing them.

Secondly, such a system does not preclude either the validity of norms which, for logical or empirical reasons, are not feasible, or the validity of norms the realization of which, for logical or empirical reasons, turns out to be necessary. There are some arguments in favour of the admissibility of the validity of such norms. First of all, this is because the legislator sometimes does enact a normative act containing such norms. What I mean here is not only the infamous instruction prohibiting passengers from getting off the plane during the flight, but also normative acts from the early post-war years imposing on individual farmers obligations to supply crops, which were impossible for the majority of them to fulfil. These obligations were so exorbitant that they exceeded the production capacity of most individual holdings. They were nevertheless enforced with all ruthlessness, and many of the farmers unable to fulfil them were sentenced to several months of imprisonment. The convictions were so determined that they could return to their field work in the spring. What is more, sometimes the legislator himself introduces provisions which eliminate obligations that cannot be met. For example, under Article 387 § 1 of the Civil Code, a contract that is impossible to perform is void. If, by the definition itself, a rule ordering (or prohibiting) its addressee to perform (refrain from performing) a specific act for logical or empirical reasons were to be excluded, then this rule would be superfluous. Its presence in the civil code demonstrates that the very definition does not exclude the validity of such norms.

Thirdly, in a system created by the ideal legislator, the existence of mutually incompatible or even mutually contradictory norms is not barred. If the ideal legislator included two mutually contradictory norms in an act that he enacted, both would apply in the system he has created. Due to the assumptions idealizing the legislator, the only indirect but important argument in favour of such a possibility in Poland is provided by the construction of the effects of the rulings of the Constitutional Tribunal (*Trybunał Konstytucyjny*) adopted in our country. This organ adjudicates on the conformity of certain normative acts

with the Constitution and other indicated normative acts, such acts cease to be valid and binding upon the verdict of the Constitutional Tribunal coming into force. However, since until that moment a normative act challenged as unconstitutional or inconsistent with other normative acts had been the source of law, there were norms valid and binding in our legal system and covered by the act in question that were inconsistent with the norms that were also valid in that system at that time, contained in those acts.

I would also like to establish the relationship between the definition of the validity of norms proposed here to legal positivism. In its simplest form, legal positivism boils down to the thesis on the separation of law from morality. Therefore, this thesis would claim that the definition of the validity of norms does not contain a criterion that would make a norm's entry into this relationship contingent upon the fulfilment of any moral requirements. Since D1 indeed does not contain such a criterion, the conception presented here qualifies as a manifestation of legal positivism thus understood. Therefore, in the system created by the ideal legislator, the valid norms would not only be norms with scopes of application extending to situations occurring even before the enactment of a normative act containing these norms, and norms that for logical or empirical reasons are unrealizable, or norms whose realization for these very reasons is inevitable, as well as mutually incompatible norms, but also norms that are extremely improper. A system containing such norms would be immoral and therefore reprehensible, but it would not, for this very reason, cease to be a legal system.

In a slightly more complicated approach, legal positivism may be identified with a set of two theses, namely a thesis on the separation of law and morality as pointed out above, and a thesis on social facts. The latter thesis, in a stronger version, states that the enacting of the law underlying the validity of each separate norm present in a given legal system is a social fact. It is easy to note that the standpoint presented here respects this thesis in this version because according to D1 a norm is valid in a sys-

tem created by an ideal legislator only when it is present in a normative act enacted by him. The point of view presented here also respects this thesis in its weaker version, which states that the legal system as a whole is the result of the enacting performed by a sovereign legislator. The assumptions constituting the ideal legislator include, among other things, Z3, according to which the system created by the ideal legislator is exclusively the effect of enacting, while under Z1 this legislator is the only one in the history of the world, which guarantees him total sovereignty in this area.

In an even more complicated approach to legal positivism, a third thesis is added to the above two ones that characterize it. It is a thesis on the social effectiveness of the law, and one that is also respected by the point of view presented here. It must also be remembered here that I refer to the political characteristics of the legislator, according to which this role may only be played by a subject with real power over his subjects, enabling him to enforce appropriate actions on them.

As can be seen, my research proposal is marked by three theses that are crucial for legal positivism. Already this is sufficient to qualify it as a fundamentally positivist conception. It therefore belongs to a trend considered by many researchers to be leading and capable of absorbing new ideas, and one on which our law, the activity of the Constitutional Tribunal and the entire legal practice is basically founded.

It should also be added that the preliminary definition of the validity of norms turns out to be relatively simple, as it is based on eight idealizing assumptions. As the assumptions are eliminated, the definition itself becomes more complicated. First of all, its *definiens* is expanded. Then, the entire definition is transformed into a recursive definition. These complications, however, are not the subject of my interest here.

An Ideal Legislator and a Perfect Legislator

The proposal for a preliminary definition of the validity of norms presented here is not the first to use the idealization method for this purpose.

Many years ago such a concept was presented by L. Nowak in his earlier work *Interpretacja prawnicza. Studium z metodologii prawoznawstwa* (Legal Interpretation. Study of the methodology of jurisprudence), where he presented a number of related definitions. Now I would like to compare these two proposals, taking into account, however, only the preliminary definition he formulated. I do not hesitate to point out that the approach presented by L. Nowak is a model that I tried to follow here, when I presented my own point of view above. The difference in the results obtained using the same method is primarily due to the discrepancy between the intuitions we have taken into account. In making his proposal, L. Nowak relied on the intuitions nourished in this matter by legal dogmatics, which he was even doomed to do, since it was the first extensive treatment of the problem in the literature on the subject. My main goal is to capture the intuitions of the theorists of law connected with this issue.

When comparing the two approaches, I will focus primarily on establishing similarities and differences in the sets of idealizing assumptions. L. Nowak introduced as many as seventeen of them, namely: (p1) the knowledge of legislator L is not contradictory, (p2) the knowledge of legislator L is a system, that is, it covers all its own logical consequences, (p3) the knowledge of legislator L covers all the rules of the language in which the legislator formulates provisions, (p4) the knowledge of legislator L is the best justified knowledge from the point of view of the current state of science, (p5) legislator L's preferences are asymmetric, (p6) legislator L's preferences are transitive, (p7) legislator L's assessments determining his preferences are a full system of morally just assessments, (p8) all the provisions issued by legislator L are norms, (p9) legislator L orders people what to do only by formulating appropriate provisions, (p10) all the provisions issued by legislator L are practically autonomous, i.e. there is no need to issue separate implementing provisions for any of them, (p11) all the provisions issued by legislator L are axiologically effective, which means that achieving by means of a provision the prescribed (avoidance of the forbidden) state of affairs is the ultimate goal of legislator L, and

is not to be only a means by which he can achieve (avoid) another state of affairs, (p12) all provisions are issued by legislator L collectively, in a single normative act, (p13) legislator L has not taken over any previous provisions, (p14) legislator L does not enact provisions of normative competence, (p15) the legal force of all the provisions issued by legislator L is equal, (p16) legislator L has issued all provisions in a single normative act, (p17) if legislator L wants to achieve a certain state of affairs, he issues a separate provision ordering its implementation. A legislator who meets all these idealizing assumptions is called the perfect legislator.

It is easy to notice that, of the above, I adopted p16 and – having formulated it in my own language – introduced it as Z7, according to which X enacts only one normative act. Also Z3, under which the legal system created by X is shaped solely by enacting carried out in the same way, may be considered to be the faithful counterpart of p9, provided that the latter assumption is correctly expressed. It must not be a matter of formulating appropriate provisions, but of enacting normative acts that consist of these provisions, because only such an operation affects the legal system. Also Z2 – which states that if X wants to achieve a specific state of affairs, he separately orders its implementation, and if X wants to avoid a specific state of affairs, he separately prohibits its implementation – must be regarded as the exact counterpart of p17. Contrary to what it may seem, this last assumption is not weaker than Z2, but is based on a slightly different vision of norms. L. Nowak considered the norms prohibiting the performance of relevant acts to be translatable into norms ordering the forbearance of such acts, and for this reason he only considered the latter. Here, however, I accept that norms are divided into norms that require certain acts to be performed and norms that prohibit certain acts, and with this division, norms of one kind cannot be easily replaced by norms of another kind. In turn, Z1, according to which X is the only legislator in world history, turns out to be stronger than p13. I consider this strengthening of idealization to be necessary because it allows, in the initial, simplest case scenario, the

removal from the field of consideration the complicated problem of the dependence of the legal system not only on its previous form, but also on the neighbouring systems, as well as the norms of various internal and external organizations supported or only tolerated by the legislator. In addition, it allows one to eliminate the phenomenon of multicentricity from the legal system, which was absent at the time when the conception analyzed here was created. Also Z8, which ensures that the act enacted by X is a normative construct, proves to be stronger than p8. Whilst, as a result of each of these assumptions, the act enacted by the legislator covers nothing else but norms, only the first assumption ensures that all the components of the normative act are formulated in one language. Again this strengthening of idealization seems essential, as it is only owing to idealization that we may speak about the language of valid norms and, consequently, the language of a normative act containing them.

However, some of the assumptions that constitute the ideal legislator do not have their counterparts among those that characterize the perfect legislator. Namely, there is no counterpart of Z6, according to which the legal system created by X is not based on sanctions. This omission results from a different view of the semiotic status of decisions imposing sanctions. Sharing the opinions of many researchers,[7] L. Nowak assumed that the decision imposing a sanction contained an individual norm. Thus, the enactment of such a norm must be authorized by a relevant norm of legislative competence. Since, under p14, the legislator does not enact provisions granting such competence, the problem of sanctioning norms also disappears. In my opinion, however, it is the authors who question the presence of an individual norm in judicial decisions, including those imposing a sanction, who are right.[8] Thus a separate idealizing assumption must remove all the complications that may arise in connection with sanctions.

7 See e.g. H. Kelsen, *The Pure Theory of Law*, Berkeley 1970, p. 351.

8 See e.g. K. Piasecki, *Wyrok pierwszej instancji w postępowaniu cywilnym*, Warszawa 1981, p. 95.

The assumptions that constitute the perfect legislator also lack the counterpart of Z4, according to which the invariable language of X is a language in the sense of its logical theory. I consider the absence of a counterpart of this assumption to be a certain oversight, because a legislator who is not bound by any language limits might include in the act that he has enacted norms formulated in different languages, while only those norms for which the predicate defined here were a meta-linguistic expression would have a chance of being valid. This seems counter-intuitive. Further, among the assumptions concerning the perfect legislator, there is no counterpart of Z5, either. Z5 states that the legal system created by X is not subject to control, however, the absence of this counterpart is understandable, because at least in our legal system such judicial review – entrusted to the Constitutional Tribunal – was introduced not so long ago.

Some of the assumptions that constitute the perfect legislator also lack their counterparts among the assumptions that characterize the ideal legislator. Primarily, it is assumptions p1–p7 idealizing the knowledge and preferences of the legislator that do not have counterparts. It should therefore be pointed out that L. Nowak regarded legal interpretation as a variation of humanistic interpretation.[9] Since the latter is based on the assumption that the subject of the action to be interpreted is rational, assumptions idealizing the subject's initial knowledge and preferences must be made at the beginning. However, the preliminary definition of the validity of norms proposed here does not have such dependencies, hence the counterparts of the above mentioned assumptions are unnecessary.

Also p10 has no counterpart among the assumptions concerning the ideal legislator. In this case, however, the reason for this discrepancy is different. As I have already pointed out, L. Nowak aimed to recreate the conception of the validity of norms, which is tacitly assumed by representatives of legal dogmatics. Since their task is to improve the law comprehensively, they use such a conception of validity that

9 On this type of explanation see J. Kmita, *Z metodologicznych problemów interpretacji humanistycznej*, Warszawa 1971.

allows them to perform this role as best as possible. And it is precisely the assumption that is being considered here that is part of this conception. When it is repealed, it allows, on the one hand, one to propose that the norms contained in redundant implementing provisions are not valid and, on the other hand, to propose that the norms necessary for the functioning of those norms are valid, although the relevant implementing acts have not yet been enacted. Meanwhile, my proposal is based on the intuition of the theorists of law. These scholars are not tasked with improving the law but, at most, with explaining its shortcomings. That is why I am not introducing any counterpart to this assumption here. For the same reason, I am not introducing any counterpart of p11.

Among the assumptions that characterize an ideal legislator, there is no counterpart of p12 either. L. Nowak emphasized that, according to this assumption, the legislator puts all provisions in collective normative acts and issues them periodically "once per one time unit (e.g. once a year)."[10] I consider this assumption superfluous since, according to p16 (which has a counterpart of Z7), the legislator enacts only one normative act. For the same reasons, I do not introduce the counterpart of p15 guaranteeing the equal power of all the provisions issued by the perfect legislator. In accordance with p16 (here Z7), the legislator enacts only one normative act, and the power of the provisions in one act is always the same. Assumptions p12 and p15 could at most be used after the repeal of p16 (here Z7) as its weakening, but they should not occur simultaneously with it.

To a certain extent, the situation is similar with p14 which also has no counterpart here; p14 excludes the enacting by the perfect legislator of competence provisions. Zygmunt Ziembiński put forward the conception of competence norms comprising norms that confer legislative competence as well as non-legislative competence.[11] Following this author, L. Nowak assumed that the power to enact laws is conferred by a par-

10 See L. Nowak, *Interpretacja…*, p. 56.

11 V. Z. Ziembiński, *Kompetencja i norma kompetencyjna*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1969, issue 4, pp. 23–41.

ticular type of norm which could therefore be present in an act enacted by a perfect legislator. To rule out this possibility, he introduced the aforementioned assumption. My attitude to the proposal put forward by Z. Ziembiński is not so simple.[12] While I consider the conception of norms conferring competences other than legislative ones to be an important research achievement, I consider the conception of norms conferring legislative competences to be unsustainable, because in this conception the legislative competence is conferred by provisions that are not norms. If that is the case, such provisions cannot exist in an act that contains only norms. Thus, the counterpart of this assumption proves to be superfluous.

Clarification of the idealizing assumptions analyzed above enabled L. Nowak to formulate the following definition:

(D2) if L is a perfect legislator 17, then the norm !(p/A,s) is valid in legal system Q at time t2 if and only if this norm was enacted by legislator L at time t1 not later than t2.

In many respects, this definition differs from the one I proposed. Although the expression "valid in …at…" as defined in D2 is also a triadic predicate that denotes the relationship between a norm, a legal system and a time period, this definition also includes relativization to the legislator. The predecessor of this definition establishes his perfection. Therefore, it is not a normal definition, but a conditional definition. What is more, the right-hand argument of the consequent of the definition, which is the counterpart of *definiens*, stipulates the necessary condition for the validity of the norm, which is its enactment by the legislator. This condition raises a reservation, since it is normative acts that are enacted in this way, but not individual norms. A single norm could only be enacted if it were identical to a normative act, which almost never happens. Finally, in the right-hand argument of the consequent of D2, there is variable 'L', the range of which is a set of legislators, absent in the left-hand argument of this equivalence. This would necessitate its correction.

12 V. W. Patryas, *Performatywy w prawie*, Poznań 2005, pp. 79–87.

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SUMMARY

An Attempt to Formulate a Preliminary Defnition of the Validity of Norms

The aim of the study is to formulate a preliminary defnition of the validity of norms using idealization method for this purpose. The author proposes a preliminary definition of the validity of norms and compares it with the conception of such a definition put forward by Leszek Nowak in *Interpretacja prawnicza. Studium z metodologii prawoznawstwa*.

Keywords: theory of law, validity of norms, idealization method.

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DOI 10.14746/ppuam.2020.11.02

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Remarks About Targeted Killing in the Light of Public International Law

Current events on the world political scene lead us to consider how international law should currently realize its goals. It should be taken into account that, apart from striving to maintain international security and peace by creating rules of cooperation between states, international law should also address the use of various forms and methods of force in international relations. The purpose of the latter is to create regulations defining the behavior of states under international law and aimed at ensuring international order in the world. This is important due to the fact that while in the sphere of domestic solutions the monopoly of state institutions on the use of force was developed, international law refers to this issue as an effect of the fact that it has no special instruments that would not only regulate the use of force, but would also minimize the effects of its use.

Currently, we use the term "use of force" when referring to a situation in which violence is used in a manner close to the technical characteristics of the state of war, as well as to military operations that do not encounter armed resistance.

Without going into more detailed considerations regarding the essence of force, it should be defined as a directed power, in the sense of being turned or used against someone or something. International law regulations concerning its application, not having the character of norms of the value of *iuris cogentis*, accept that force may be resorted

to. However, while its application by UN states and armed forces is, in principle, obvious, controversy arises from non-state participants of the international community resorting to it, through the use of cyber resources and hybrid attacks, against which most countries are basically unprepared.

Can these non-classical ways be compared with the use of armed force? Considering the effects, sometimes comparable to the effect of the classic use of military force, an affirmative answer should not be excluded. This is all the more important when it is taken into account that a victim of assault is defined under international law, but the perpetrator is not clearly defined, which means that the latter may not always be a state.

Therefore, international law must adapt to the existing reality, while striving to recognize the legitimacy of the use of force, often without anyone's consent, despite the possibility of questioning the legality of such actions. Is this a solution to the problem?

Certainly not, because, for example, events in Ukraine, in particular in Crimea, in Syria, or during the fights against the so-called Islamic State of Iraq and Syria (ISIS), reveal that the thesis of the twilight of power as an instrument of politics cannot be defended. On the one hand, to ensure its own security and to defend the international order based on values, not just interests, the role of international law should be emphasized, and, on the other – if it is to be effective, situations justifying recourse to force should be defined.

Therefore, clarifying the situation related to the use of force in the context of new threats is a significant challenge to international law, and one which it must face, otherwise the existing political and economic system will be shaken, and as a consequence the values constituting the basis of international order will be abandoned.

The issue is also important due to the fact that the territory of one state is made available in different forms for operations conducted against another state, which is often associated with undertaking preventive armed operations against another state or non-state actors (e.g. against

the so-called Islamic state). It may also be associated with the so-called deliberate killing of specific persons responsible for planning or performing terrorist acts in another country, but not against it[1], which in the international legal sphere is referred to as targeted killing.[2] This raises numerous doubts, recently particularly emphasized in connection with the order of the President of the United States, Donald Trump, to conduct on 3 January 2020 with the help of an unmanned aerial vehicle, i.e. a drone, an air raid on an airport in Baghdad (Iraq), which was aimed at killing the Iranian general Kasem Suleimani – commander of the Iranian branch of Ghods.[3]

This event raised the basic question: was the action of the American state authorities in accordance with applicable international law, specifically with the right to self-defense functioning in the sphere of international law, guaranteed by both common law and art. 51 of the Charter of the United Nations?

In reply, it should be stated that, although the contemporary framework for the admissibility of recourse to self-defense is set by the UN Charter, which states in art. 51 that "Nothing in the present Charter shall impair the inherent right of individual […] self-defence […], until the Security Council has taken measures necessary to maintain international peace and security"[4], this law as an inherent right is recognized by all legal systems in accordance with the principle that *vim vi repellere omnia iura permittunt* (all laws allow force to be resisted with force).

Nevertheless, the question arises of whether this means that in international law there exists a law that stands above the provisions of Article 51 of the UN Charter, which refer only to the situation involving the occurrence of an armed attack? In answering this question, reference should be made to the 1986 Nicaragua ruling, in which the International

1 J. Kranz, *Zakaz użycia siły* in: *Wielka Encyklopedia Prawa, Prawo międzynarodowe publiczne*, ed. J. Symonides, D. Pyć, Warszawa 2014, vol. IV, p. 578.

2 Ibidem, p. 578.

3 J. Bielecki, *Trump wyczuł Irańczyków*, "Rzeczpospolita" 13 January 2020.

4 Journal of Laws of 1947, no. 23, item 90.

Court of Justice stated, inter alia, that the right to self-defense, which is by its very nature associated with the use of armed force, is a natural right vested in every state both on the basis of common law and the provisions of the UN Charter.[5] However, in order for a state to refer to this right as a part of self-defense, it must be able to prove that it has been the victim of an armed assault. Therefore, the burden of proof falls on such a state, which can sometimes be difficult to establish, especially when there are various types of non-state formations behind the armed attack.[6] And this is all the more important as the definition of armed assault is lacking, although when trying to define it, it should be stated that it is characterized by a larger or smaller scale of short-term or repeated armed attacks. Nevertheless, the legality of recourse to self-defense is subject to control by the UN Security Council, which means that it appertains formally until the Security Council takes the measures and methods necessary to restore peace and security.

This statement is subject to dispute, because with regard to self-defense all countries are free to act, including with the use of armed force, if the situation so requires, because, as emphasized in a separate opinion expressed by one of the ICJ judges in the judgment of this Tribunal in the abovementioned Nicaragua case – it is dangerous and unnecessary to strictly define the conditions of lawful self-defense, leaving a large area where armed response to violence is in fact prohibited and where there has also been no use of force by the United Nations to fill the gap.[7] In many situations, it is difficult to determine the moment when an armed assault began, and thus establish that the requirements of Article 51 of the UN Charter and thus the conditions for the use of force in self-defense were met. For example, do attacks by various armed associations against for-

5 "International Court of Justice Reports" 1986, pp. 543–544; 76 "International Court of Justice Reports" 1986, p. 349 and 428.

6 J. Kranz, *Zakaz użycia siły*, p. 577.

7 "International Court of Justice Reports" 1986. See MTS advisory opinion: Legalność użycia broni nuklearnej ICJ, Reports, 1996, p. 226 and 246. Y. Dinstein, *Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge 2004, p. 220 and next.

eign diplomatic or consular representations constitute an armed assault justifying self-defense by the state whose representation suffered damage?

The United States takes the view that the response to the use of armed force in such a situation is in accordance with Article 51 of the UN Charter, in which case the right to self-defense is exercised.[8] A similar approach can also be seen in Security Council Resolution 1701 (2006), in which it was recognized that particularly hostile actions of non-state actors could be treated as synonymous with assault, thus justifying the exercise of the victim's right to self-defense.[9]

In relation to the killing of the Iranian general, a number of questions arise, such as whether the US recourse to self-defense was justified by the fact that the country considered itself to have suffered harm, or whether there were there other arguments justifying US actions.

When analyzing US actions, it should be taken into account that the action against the Iranian general was performed without the consultation and consent of the Iraqi authorities, otherwise the problem of Iraq's joint responsibility would have arisen, as the Iraqi authorities had received the official representative of the foreign army on their territory, who had come to Iraq on an official visit aimed at representing Iran in talks with the Iraqi government.

In answer to these questions, it should be noted that the basis / source of the incident at Baghdad airport are the conflicting political and military interests of Iran and the United States. The former country is seeking to become a Middle Eastern hegemon and holds that actions related to the United States and its presence in the Middle East should be countered and combated. On the other hand, the US assumes that the actions taken by the Iranian authorities in the political and military sphere significantly contribute to the violation of American interests in this part of the world, especially when it comes to the freedom of navigation in

8 M.N. Shaw, *Prawo międzynarodowe publiczne*, Warszawa 2011, p. 696; see also: *Contemporary Practice of the United States*, "American Journal of International Law" 1999, vol. 93, p. 161.

9 M.N. Shaw, *Prawo międzynarodowe…*, p. 698.

the Persian Gulf, whose waters transport more than a quarter of the oil extracted. Thus, in response to the damage caused mainly by the Iranian troops of Ghods, recognized as a terrorist formation because of their means and methods of action, it was decided that in this situation preemptive self-defense actions should be taken in Iraqi territory, where according to the intelligence information, General K. Sulejmani would be staying, dictated by the need to thwart the Iranian attack or a series of such attacks against the US and its property.[10]

The question of the legitimacy of this type of action is emerging here.

In response, it should be stated that it does not contradict the essence of art. 51 of the UN Charter[11], while the assessment of demonstrating the lack of other options and taking into account the criteria of immediacy, necessity and proportionality raises a question.

Referring, inter alia, to the already cited ruling of the International Court of Justice of 1986 in the Nicaragua case, it should be noted that the ICJ clearly acknowledges that changing the premises and objectives, as well as the methods and means, of fighting with the use of the armed force, leads to the emergence of new concepts. These, in the event of extraordinary circumstances, are intended to justify the use of unilateral military measures without the consent of the UN Security Council. This represents, to a certain extent, a departure from the essence of the Declaration of principles of international law concerning friendly relations and the cooperation of states in accordance with the United Nations Charter of 24 October 1970, in which it is stated, in the part relating to the prohibition of the use of force, that each country has the

10 Quotation for: <https://www.defense.gov/Newsroom/Releases/Release/Article/2049534/Statement-by-the-department-of-defense/>.

11 See the report of a group of experts appointed by the UN Secretary General: A More Secure World: Our Shared Responsibility, 2004, point 188; Report of the UN Secretary General: In Larger Freedom: Towards Security, Development and Human Right for All: 2005, point 124; H. Waldock, *General Course on Public International Law*, "166 Hague Academy of International Law. Recueil des Cours" 1980, pp. 231–237.

obligation to refrain from organizing in another country activities aimed at committing acts involving the use of or threat to use force.[12]

This is because in recent decades the conditions for referring to the use of force and actors on the political scene have changed. This requires not only adaptation, but also interpretation of international legal norms in the context of new threats which necessitate, *nolens volens*, sometimes using unilateral means of removing an opponent without the consent of the UN Security Council, in the form of 'targeted killing', i.e. physical elimination, at the request of the government of the state and with the help of its organs, of specific persons responsible for the preparation of terrorist acts[13] – in other words acts of violence irrespective of the motives or intentions of the perpetrators, committed to perform criminal acts with the intention of causing a sense of threat to the safety of life, freedom or social stability, violation of territorial integrity, in order to force the government to act or desist from acting.

Intentional physical elimination is carried out on the territory of another state without being directed precisely against it, usually in a situation where the other state is unable to ensure security and does not control the person preparing terrorist acts, or who participates in their implementation. In terms of the activities of General K. Sulejmani, these were directed against the United States, which in this situation justified his possibly quick and even necessary physical elimination, as direct capture of K. Sulejmani was unrealistic. It was assumed that such a precise attack directed against one person falls within the limits of both basic necessity and proportionality in relation to potential other victims, whose death could not have been avoided, including the Iraqi commander of the People's Mobilization Force – the police force fighting on the Iraqi side with the so-called Islamic State (ISIS).

12 K. Kocot, K. Wolfke, *Selection of documents for learning international law*, Wrocław–Warszawa 1976, pp. 524–533.

13 Cit. per: W. Czapliński, A. Wyrozumska, *Prawo międzynarodowe publiczne. Zagadnienia systemowe*, Warszawa 2004, pp. 696–698.

Another example of intentional elimination was the killing of the Saudi Osama bin Laden, the leader of the terrorist organization Al-Qaida (Base) and the main organizer of the terrorist attack on the New York World Trade Center in September 2001, by a special American unit in May 2011 in Pakistan.[14]

These remarks lead to conclusions of a more general nature, namely that modern states, despite the existing legal regulations, are primarily guided by the reason of state, which has primacy over human rights, as well as international legal regulations. In this regard, one can conclude that American actions in the Middle East are part of a broader deterrence strategy not only for Iran, but also for other unnamed enemies of America.

However, looking through the prism of this event, it is a more political than a legal reflection to suggest that the President of the United States, who was at risk of impeachment, sought to show, during an important trial with Iran, that he was determined in to ensure the security of the country and its population.

Finally, there is also the issue of legal assessment of the event in question, which should take the following into account: in order to be an effective guarantor of the existing international order, international law must take into account that, along with changing beliefs about its effectiveness, values also often change with interests. These are manifested in: strength that determines not only the power of the country, but also the goals and directions of the state's activities in a way that often deviates from the established principles of the international order and a policy emphasizing security. This is a value that impacts international legal ventures and something that usually has far-reaching repercussions, pushing the legal boundaries of what is acceptable and imaginable, and therefore, in order for international law to be—to emphasize this once again—effective, it cannot be passive, let alone indifferent.

Hence, being in favor of acknowledging the effects of the case in question, it should be emphasized that, despite obvious controversies

14 J. Kranz, *Zakaz użycia siły*, p. 578.

regarding the use of force as part of pre-emptive defense, the result of which is, inter alia, the deliberate elimination of a specific person / persons, this action should be considered legal, together with the requirement / criterion of necessity and proportionality, which in relation to the second requirement is not always observed or complied with.

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SUMMARY

Remarks About Targeted Killing in the Light of Public International Law

The premises concerning the use of force are currently changing, as are the goals and methods, which entails that appropriate adaptation and interpretation of international legal norms is required in the context of new threats and methods of combating them. This constitutes a significant problem, especially in the event of extraordinary circumstances that are to justify the use of unilateral measures without the consent of the UN Security Council.

This encompasses, inter alia, the issue of targeted killing, i.e. eliminating in the territory of another state, while not operating against such a state, on the order of a specific government, a specific person responsible for the illegal use of force, if other methods of apprehending the perpetrator are unrealistic. This makes such a method, in a given circumstance, a legal form of combat, as long as the criterion of necessity and proportionality is taken into account.

Keywords: international law, targeted killing, pre-emptive self-defense, necessity, proportionality, reason of state.

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DOI 10.14746/ppuam.2020.11.03

Andrzej Gadkowski

The Basis for the Implication of Powers of International Organizations

Introduction

A previous edition of the Adam Mickiewicz University Law Review contained my article on the doctrine of implied powers of international organizations in the case law of international tribunals.[1] In its conlusion, a claim was formulated that the case law of the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ) formed, and still form, the intellectual basis for the analysis of issues concerning the implied powers of international organizations in the doctrine of international law. This article is the continuation of considerations on the topic of implied powers of international organizations, with a particular focus on the basis of the implication of such powers.

Undoubtedly, any academic discussion on this matter must acknowledge the nature of these powers as being additional to the powers expressly granted in constituent instruments. These expressly granted powers therefore form the first basis for implying additional powers. Another basis for implying powers is provided by the purposes and functions of a given international organization. Both these bases were referred to in the case law of the Court of Justice of the European Union (CJEU), but it is worth pointing out that the Court preferred the latter and quoted express powers much less frequently. This is undobtedly connected with the concept of functional necessity. It should be noted,

1 A. Gadkowski, *The doctrine of implied powers of international organizations in the case law of international tribunals*, "Adam Mickiewicz University Law Review" 2016, vol. 6, pp. 45–59.

however, that the preference for using the purposes and functions of an international organization when implying its powers carries certain risks. In this context, Krzysztof Skubiszewski points to situations where it is impossible to separate the purposes and functions of an international organization from its existing powers, which, in practice, makes it impossible to treat these powers and functions alone as a sufficient basis for implication.[2] In practice such a situation clearly results in limiting the doctrine of implied powers.

For example, Manuel Rama-Montaldo, who himself is no supporter of a strict differentiation between the functions and powers of international organizations, is of the opinion that the statutes of most international organizations "do not draw any such distinction between function and powers, and either use those words indiscriminately or else rather tend to use the word function."[3] The UN Charter is a good example of this.

Luigi Ferrari Bravo and Andrea Giardina, who thoroughly discussed this matter in the context of the Treaty on the European Community (TEC), also identify the concept of implied functions. In the comments on Article 235 of the TEC and based on the analysis of the 1962 *Certain expenses* ICJ advisory opinion[4], they argue that while implied powers are used to perform functions that have already been assigned to the organization, the concept of implied functions refers to those tasks of this organization which, although not expressly assigned to it, are "necessary for the fulfilment of its ends."[5]

It can be said therefore, that the functions of an international organization are related to the essence of its activity and, by extension,

2 K. Skubiszewski, *Implied Powers of International Organizations*, in: *International Law at a Time of Perplexity. Essays in Honour of Shabatai Rosenne*, ed. Y. Dinstein, Dordrecht 1989, p. 857.

3 M. Rama-Montaldo, *International Legal Personality and Implied Powers of International Organizations*, "44 British Yearbook of International Law" 1970, p. 151.

4 *Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962, ICJ Reports 1962*, p. 157 et seq.

5 L. Ferrari Bravo, A. Giardina, *Commentario al Trattato Istitutivo della CEE*, vol. III, Milano 1965, p. 1702; M. Rama-Montaldo, *International Legal Personality…*, p. 150.

to the tasks it fulfils. Powers, on the other hand, by their very nature concentrate on measures which are taken by the organization and which produce certain legal effects, both for the organization itself and its member states. There is also no doubt about the connection between the functions and powers of an international organization. This relationship may be illustrated by the concept of implied powers. Implied powers are, after all, powers which, although additional, are necessary or essential for the performance of the organization's statutory functions.

A broad definition or determination of the functions and purposes of an organization in its statute is certainly beneficial from the point of view of assuming additional powers, such as implied powers. In order to imply real and effective additional powers, however, it is important that the constituent instrument provide the international organization with a certain catalogue of express powers and a mechanism for implying these additional powers. International organizations operate in a dynamic international reality. Their statutes often comprise provisions that retain their initial form and shape for decades, despite substantial changes in the international environment. As we know, so far it has been impossible to review the United Nations (UN) Charter, whose provisions have hardly changed for 70 years. Implying additional powers is, therefore, necessary to ensure that the organization exercises the powers expressly granted to it and fulfils its statutory purposes and functions.

The Purposes and Functions of International Organizations as the Basis for Implication

In practice, the definition of the purposes, tasks and functions of international organizations in their constituent instruments is often extremely broad. The real meaning of these terms is consequently often unclear and results in many possible interpretations acting as bases for the implication of powers of international organizations. One needs therefore to highlight

selected decisions of international courts, in which these courts based implied powers on the purposes and functions of international organizations. In the *Work of the Employer* case, the PCIJ stated that the International Labour Organization (ILO) would be prevented from "*the accomplishment of* [*its*] *end*"[6], i.e. the protection of workers and the ensuring of acceptable labour conditions, if the organization could not regulate incidentally the work performed by the employers. The Court's position on the matter, however, was based on more extensive reasoning. It also cited the intention of the states parties to the Treaty of Versailles and the interpretation of the Treaty's provisions.[7] Another PCIJ opinion, the *Danube* advisory opinion, contains references to the limits of the functions expressly bestowed upon the European Commission of the Danube. More precisely, the Court held that the European Commission as "an international institution with a special purpose […] only has the functions bestowed upon it by the Definitive Statute with a view to the fulfilment of that purpose, but it has power to exercise these functions to their full extent."[8]

An interesting reference to the purposes and functions of an international organization was made by the ICJ in the well-known 1949 *Reparation for injuries* case. In this advisory opinion, the Court used general language to justify the UN's power to bring international claims. Based on the assumption that the organization is an international legal person, the Court stated that "the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice."[9]

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6 *Competence of the ILO to regulate Incidentally the Personal Work of the Employer*, PCIJ Publications 1926, Series B – No. 14, p. 18.

7 For an analysis of this opinion, see J. Makarczyk, *The International Court of Justice on the Implied Powers of International Organizations*, in: *Essays in International Law in Honour of Judge Manfred Lachs*, ed. J. Makarczyk, The Hague 1984, p. 506.

8 *Jurisdiction of the European Commission if the Danube between Galatz and Braila*, PCIJ Publications 1927, Series B – No. 14, p. 64.

9 *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion, ICJ Reports 1949, p. 180.

Consequently, the ICJ elaborated on its position stating: "the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties."[10]

It should be noted that the view presented in this opinion was later reflected in the *Effect of awards* case. In this advisory opinion, the ICJ implied the power to establish an administrative tribunal as follows: "[t]he power to establish a tribunal, to do justice as between the Organization and the Staff members, was essential to ensure the efficient working of Secretariat […] capacity to do this arises by necessary intendment out of the Charter."[11] The ICJ also referred to the statutory purposes of an organization in the *Certain expenses* case. In its interpretation of the UN Charter, the Court concluded that "when the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not ultra vires the Organization."[12]

Another reference to the UN's functions regarding the trusteeship system may be found in the *Status of South West Africa* advisory opinion. The ICJ implied the UN's supervisory power over the South West African territory, even though the territory had not been placed in the trusteeship system. In this case the ICJ relied on the necessity for supervision. According to the Court, "[t]he necessity for supervision continues to exist despite the disappearance of the supervisory organ under the Mandates system. It cannot be admitted that the obligation to submit to supervision has disappeared merely because the supervisory organ has ceased to exist, when the United Nations has another international organ performing similar, though not identical, supervisory functions."[13] Fi-

10 Ibidem, p. 182. For an analysis of this opinion, see for example: B. Conforti, C. Focarelli, *The Law and Practice of the United Nations*, The Hague 2005, p. 13 et seq.

11 *Effect of Awards of Compensation made by the U.N. Administrative Tribunal*, *Advisory Opinion*, ICJ Reports 1954, p. 57.

12 *Certain expenses case*, *op. cit*., p. 168.

13 *International status of South-West Africa*, Advisory Opinion, ICJ Reports 1950, p. 136.

nally, in the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* case, the ICJ cited the criteria of implying powers previously used in the *Reparation for injuries* and *Effect of awards* cases. It concluded that implied powers signify "powers which […] are conferred upon [the Organization] by necessary implication as being essential to the performance of its duties."[14]

It should be emphasized that the ICJ did not, however, accept the WHO's power to request an advisory opinion. The ICJ held that "it does not seem to the Court that the provisions of Article 2 of the WHO Constitution [which determine the functions of the WHO] […] can be understood as conferring upon the Organization a competence to address the legality of the use of nuclear weapons, and thus in turn a competence to ask the Court about that."[15]

In addition, one should also note an interesting construct introduced in the *Namibia* case. Here, the Court sought the power to revoke a mandate when no such power was expressly stipulated in any of the applicable international instruments. It would seem that, since the ICJ could not imply powers from those expressly stated in the treaties, it would seek such powers in the purposes and functions of the organization. The Court chose, however, to justify its position differently, and it stated that "[t]he silence of a treaty as to existence of such right cannot be interpreted as implying the exclusion of a right which has its source outside of the treaty, in general international law, and is dependent on the occurrence of circumstances which are not normally envisaged when a treaty is concluded."[16] In his analysis of this opinion, Skubiszewski points out the ICJ 'presumption' in this context.[17] In conclusion, the ICJ stated: "[t]hat this special right of appeal was not in-

14 *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, ICJ Reports 1996, p. 79, para. 25.

15 Ibidem, para. 21.

16 *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, p. 47, para. 96.

17 K. Skubiszewski, *Implied Powers…*, p. 865; J. Makarczyk, *The International Court of Justice…*, p. 510.

serted in the Covenant cannot be interpreted as excluding the application of the general principle of law according to which a power of termination on account of breach, even if unexpressed, must be presumed to exist as inherent in any mandate, as indeed in any agreement."[18]

In this context, one should also refer to the case law of the Court of Justice of the European Union (CJEU), which provides examples of decisions in which powers of the Community were implied from its purposes and functions. It should be noted that the Court was just as cautious about using this basis for the implication of powers as the ICJ had been. Implying the Community's powers based on the Court's case law was not, in fact, of great importance because, as the author emphasised earlier, in Community law, similarly to EU law today, there was a mechanism for determining new powers under Article 308 of the TEC (Article 352 of the Treaty of the Functionning of the European Union (TFEU)). Some decisions of the Court are nevertheless worthy of attention and as such are frequently cited in the literature. The present author shall discuss several of these by way of example only. In one of the earliest decisions, the *8/55 Fédération Charbonnière de Belgique v High Authority* case, the European Court of Justice (ECJ) implied certain powers of the European Coal and Steel Community (ECSC) from the objectives of the constituent treaty. It must be emphasised, however, that the Court relied on this basis for implication in a subsidiary way only and the implied powers were, in fact, based on the express powers of the organization. The Court expressed its view as follows: "without having recourse to a wide interpretation it is possible to apply a rule of interpretation generally accepted in both international and national law, according to which the rules laid down by an international treaty or a law presuppose the rules without which that treaty or law would have no meaning or could not be reasonably and usefully applied."[19]

18 *Namibia case*, op. cit., p. 48, para. 98.

19 *C-8/55 Fédération Charbonnière de Belgique v. High Authority of the European Coal and Steel Community [1954–1956]*, ECR-292, p. 299.

The CJEU also formulated its stance on the matter in the most frequently cited judgment in this context, the *ERTA* case. In this case the Court stressed the need to consider the whole scheme of the EEC Treaty when implying powers, and invoked the transport-related objectives of the Treaty in order to demonstrate the existence of the external powers of the Community, i.e. its powers to conclude agreements in this regard. The Court concluded that this authority of the Community arises "*not only from an express conferment by the Treaty* […] but may equally flow from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions."[20]

The Express Powers of International Organizations as the Basis for Implication

To start with, one may say that powers of international organizations expressly granted in their constituent instruments would seem to be a sufficient basis for implying further powers. These further powers will clearly be additional powers, i.e. subsidiary to express powers. No comprehensive statutory allocation of the powers of international organizations is possible and international organizations operate in a dynamic and constantly changing international reality, which means that exercising their express powers exactly as provided for in their constituent instruments may raise concerns. A response to such a new reality might clearly be provided by amending the statute. As the example of the subsequent EU Treaties shows, not only may one in this way change the legal status of an international organization, but one may also modify its powers. On the other hand, the example of the UN demonstrates that, when faced with the lack of political will to introduce significant changes to the statute, the organization must operate in this new environment often based on outdated or ineffective statutory provisions. In such a case the powers that are implied from previously granted origi-

20 *C-22/70 Commission v. Council (ERTA case) [1971]*, ECR-263, para. 16.

nal powers offer a solution that, in practice, allows the performance of the statutory purposes of the organization. As in the UN Charter there is no mechanism for creating new powers based on existing powers (such as in Article 352 of the TFEU) for this organization and the implication of powers, especially those regarding external relations, may add a new meaning to the previously granted express powers.

When it comes to the ICJ stance on this matter, one should note the Court's lack of enthusiasm with regard to implying the UN's powers in this way and justifying implied powers with powers expressly granted. This view of the ICJ is illustrated by the *Reparation for injuries* case. When implying the powers of the UN in order to bring international claims for damage, the ICJ relied on the purposes and functions of the organization and stated that "the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice."[21]

It is worth noting that the ICJ's position was not unanimous, as demonstrated by the dissenting opinion of Judge Hackworth, who sought to limit any implication of the powers of this international organization to existing powers alone. In this particular case, he based the authority of the UN to make such claims on the express provisions relating to the competences and capacities of the organization provided for in Articles 104 and 105 of the UN Charter and the 1946 Convention of the Privileges and Immunities of the UN. In this context, Judge Hackworth stressed that if the organization was able to exercise these capacities and competences, it must also "be able to assert claims on its own behalf." Therefore, "the organization must have and does have ample authority to take needful steps for its protection against wrongful acts for which Member States are responsible."[22] The essence of Judge Hackworth's view regarding the implication of powers is captured by the following statement: "[p]owers not expressed cannot freely be implied. Implied

21 *Reparation for injuries case*, op. cit., p. 180.

22 Dissenting Opinion of Judge Hackworth, *Reparation for injuries case*, op. cit., pp. 196–197.

powers flow from a grant of expressed powers, and are limited to those that are 'necessary' to the exercise of powers expressly granted."[23]

It could be said that the relevance of Judge Hackworth's doubts over the possibility of implying the powers of international organizations seem to persist today. According to the author of this work, this is demonstrated by the fact that the international instruments of some international authorities substantially limit the scope of what may be implied in their functioning. The 1982 United Nations Convention on the Law of the Sea provides an apt example of this. Article 157(2), which delimits the powers of the International Seabed Authority, stipulates that "[t]he powers and functions of the Authority shall be those expressly conferred upon it by the Convention. The Authority shall have such incidental powers, consistent with the Convention, as are implicit in, and necessary for, the exercise of those powers and functions with respect to activities in the Area."[24] The provisions of this article allow, albeit to a limited extent, the use of implied powers. In this particular case, the capacity of the International Seabed Authority (ISA) to imply powers depends on whether the power in question is based on the provisions of the Convention and whether it is necessary with respect to the ISA's activities.

If we are to refer this stance to the position taken by the CJEU, then, similar to the ICJ advisory opinion in the *Reparation for injuries* case, which reflects the somewhat unclear position of the ICJ on the doctrine of implied powers, in the CJEU case law an example is provided by the afore-mentioned *ERTA* case. Even the earlier decision in the *8/55 Fédération Charabonnière* case indicates that the Court, when implying powers of the ECSC, relied both on the express powers of this organization and, in a subsidiary way, on its purposes and functions. The Court applied an interpretation according to which the rules of an international agreement presuppose the existence of rules "without which that treaty or law would have no meaning or could not be

23 Ibidem, p. 198.

24 United Nations Treaty Series (UNTS), vol. 1833, p. 3.

reasonably and usefully applied."[25] In contrast, in the classic opinion of the *ERTA* case the CJEU implied the powers of the Community to conclude agreements on transport from its express powers, but it also referred to the whole scheme and the objectives of the Treaty. The essence of the Court's view on the matter boils down to the statement that the Community's power in question exists not only if it is expressly stated in the specific provisions of the Treaty, but may also "flow from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions."[26]

In consequence, the Court then elaborated and concluded that, if the Community has internal competence, it follows that it also has external competence, a fact usually referred to as the principle of parallelism.[27] When elaborating on this doctrine, the Court also imposed limits on such implications of external powers and introduced to the principle of parallelism the test of necessity. In its developed form, this test means that the attainment of specific objectives of the TEC in the external sphere must be inextricably connected with the performance of internal acts in a given field of co-operation.[28]

Concluding Remarks

Based on the decisions of international courts, as discussed above, we may observe that implying the powers of international organizations from their expressly granted powers entails certain problems. When relying on expressly granted powers, such as the basis for implying the powers of international organizations in external relations, the courts also usually indicated other conditions that prevented free implication of powers. The pro-

25 *C- 8/55 Fédération Charbonnière*… p. 299.

26 *ERTA case*, op. cit, p. 274, para. 16.

27 See *Opinion 1/76 Draft Agreement establishing a European laying-up fund for inland waterway vessels [1977]*, ECR-741.

28 *Opinion 1/94 Competence of the Community to conclude international agreements concerning services and the protection of intellectual property Art 228 (6) of the EC Treaty [1994]*, ECR I-5267

cess of implying the powers of international organizations must be applied with caution, but this category of powers of international organizations in external relations has been established in practice. Contrary to Finn Seyersted's opinion, it is certainly no fiction.[29] Implying the powers of various entities is never easy, regardless of whether international law, EU law or national law is involved. The judgment on the *McCulloch* case, which initiated the doctrine of implied powers, also points to potential and real problems faced by the US Supreme Court in this case.[30]

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29 In Seyersted's opinion, given the dynamic development of international organizations, the concept of implied powers may be too blunt a tool for describing the true scope of the powers of international organizations, see F. Seyersted, *United Nations Forces*, "37 British Yearbook of International Law" 1961, p. 455. Seyersted even called it 'a fiction of "implied powers' noted that even the ICJ referred to this 'fiction' in the initial years of its activity, see *Common Law of International Organizations*, Leiden 2008, p. 65.

30 See A Gadkowski, *Treaty-making powers of international organizations*, Poznań 2018, p. 125 et seq.

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SUMMARY

The Basis for the Implication of Powers of International Organizations

The aim of this article is to present the basis of the implication of powers of international organizations. This topic is not only of great interest and import from the point of view of the theory of international organizaizations, but also from that of the practice of international organizations, particularly important institutions of international cooperation. The author discusses the nature of the basis for such implication before then examining the implication of powers within the context of international organizations' expressly granted powers.

Keywords: International organizations, International Court of Justice, Permanent Court of Intrenational Justice, Court of Justice of the European Union, powers of international organizations.

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DOI 10.14746/ppuam.2020.11.04

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Reconciliation Processes In Rwanda. The Importance of Tradition and Culture for Transitional Justice

Introduction

In April 2019, 25 years had passed since the Rwandan President, Juvenal Habyarimana, was killed when his aircraft was shot down. This assassination directly ignited ethnic tension in the region and helped spark the mass slaughter in Rwanda. It is estimated that, in the resulting 100 days of genocide, about 500,000 to 1,000,000 people were killed, of which most belonged to the Tutsi ethnic group. In remembrance of those crimes, the President of Rwanda, Paul Kagame, introduced national mourning lasting for 100 days. He also declared that the country had become "a family once again"[1], thereby clearly indicating that Rwandans had managed to reconcile. The statement caused a heated debate on the reconciliation processes in Rwanda and their role in peace and security in the region. This paper aims firstly to analyze what reconciliation is – in the context of the countries and regions which have suffered or are suffering situations of conflict or serious human rights violations, which have affected and divided societies in their various facets. Secondly, it contributes to the assessment of reconciliation processes in Rwanda that have been based on tradition and culture: *gacaca courts*, *reconciliation villages* and *umuganda*. Finally, the paper is an attempt to evaluate whether processes based on elements of culture and tradi-

1 Official speech delivered by the President on 8th of April 2019.

tion may contribute to achieving reconciliation after serious violations of international law.

Reconciliation as an Element of Transitional Justice

'Reconciliation' is viewed as a key term in transitional justice[2] and is often presumed to be one of its goals.[3] It has been used by the UN Secretary General, who clarified that transitional justice denotes a full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of a large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.[4] Reconciliation, however, is difficult to define as the concept is quite vague and diverse. It can vary according to culture and can differ due to the nature of the crime.[5] It can also depend on the political and historical context of the society. Notwithstanding the complexity of the subject, reconciliation can be considered as a process which is aimed at attaining or restoring a relationship between parties that have experienced an oppressive or a destructive situation.[6] During that process, both parties endeavor to heal trauma and put an end to a period of bad relations.[7] Reconciliation may begin either with the leaders (top-down process) or at the grass-roots (bottom-up process).[8] It can be also individual (between

2 See eg.: *Justice and Reconciliation – After the Violence*, ed. A. Rigby, Boulder 2001; *Reconciliation After Violent Conflict*, eds D. Bloomfield, T. Barnes and L. Huyse, Stockholm 2003.

3 *The Place of Reconciliation in Transitional Justice. Conceptions and Misconceptions*, ed. P. Seils, The International Center for Transitional Justice, 2017, p. 3.

4 UN Secretary General, *The rule of law and transitional justice in conflict and post conflict societies. Report of the UN Secretary General*, 2004, S/2004/615, § 8.

5 *Gacaca: Grassroots Justice After Genocide. The Key to Reconciliation in Rwanda?*, ed. A. Molenaar, Leiden 2005, p. 31.

6 L. Kriesberg, *Changing forms of coexistence*, in: *Reconciliation, Justice and Coexistence: Theory and Practice*, ed. M. Abu-Nimer, New York 2001, p. 48.

7 J. Galtung, *After violence, reconciliation and resolution: coping with visible and invisible effects of war and violence*, in: *Reconciliation, Justice and Coexistence: Theory and Practice*, ed. M. Abu-Nimer, New York 2001, p. 3.

8 D. Bar-On, *Reconciliation Revisited for More Conceptual and Empirical Clarity*, in: *Darkness at Moon. War Crimes, Genocide and Memories*, ed. J. Bec-Neumann, Sarajevo 2007,

victim and perpetrator) or collective (between groups or communities). With regard to the first type of the reconciliation, the process should be mutual: both victim and perpetrator must make an effort to overcome the trauma and damages caused by past atrocities.[9] Collective reconciliation should be understood as a societal process that requires not only the mutual recognition of past suffering, but also a change of attitudes and the desire to reach peace.[10]

As already mentioned, reconciliation (as a goal of the transitional justice) is a broad term that is very hard to define clearly. Researchers indicate, however, a few elements that are essential for achieving the reconciliation, both at the individual and social level. The process requires an apology, forgiveness and desire to rebuild the relationships on the basis of trust.[11] Reconciliation also involves searching for the truth, justice and healing.[12] It is important to point out that discovering the truth about past atrocities becomes now the focal point of the reconciliation process, which is very much connected with a development of the right to know the truth (and its growing importance for countries in transition).[13]

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p. 81. See also: D. Bar-Tal, G. H. Bennik, *The Nature of Reconciliation as an Outcome and a Process*, in: *From Conflict Resolution to Reconciliation*, ed. Y. Bar Simon Tov, Oxford 2004, p. 27.

9 M. Forget, *Crime as Interpersonal Conflict: Reconciliation Between Victim and Offender*, in: *Dilemmas of Reconciliation: Cases and Concepts*, eds C.A. Prager, T. Govier, Waterloo 2003, p. 111.

10 See more: *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, ed. P. Harney, New York 2011.

11 W. Lambourne, *Justice and reconciliation: post conflict peace building in Cambodia and Rwanda*, in: *Reconciliation, Justice and Coexistence: Theory and Practice*, ed. M. Abu-Nimer, New York 2001, p. 314.

12 D. Bloomfield, *Reconciliation: An Introduction*, in: *Reconciliation After Violent Conflict: A Handbook*, eds D. Bloomfield, T. Barnes, L. Huyse, Stockholm 2003, p. 12.

13 The right to know the truth, although not mentioned *expressis verbis* in any international treaty, is broadly recognized and enshrined in a number of international instruments, non-binding resolutions and judicature. See eg. *UN Updated Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, 2005, E/CN.4/2005/102/Add.1; *Basic Principles and Guidelines on the Right to Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted by UN General Assembly on 16.12.2005; *Resolution on Right to the truth*, GA 68/165 (18.12.2013).

In this regard, reconciliation should aim to acknowledge experiences, uncover unknown facts and events, and enable victims and perpetrators to tell their stories.[14] The process, therefore, refers to truth-seeking and truth-telling functions. It must be remembered, however, that the truth seems to be a concept that is very hard to pin down. Apart from objective credibility, the "truth" also requires a subjective understanding. This implies an agreement about factual reality, as well as a space for different interpretations. It cannot deepen divisions, but on the contrary, it should lead to healing and coexistence. And this is particularly important in a country such as Rwanda, where the victims and perpetrators were neighbors and still need to live next door to each other.

Gacaca: Grassroot Justice and its Importance for Reconciliation

After the end of the genocide in Rwanda, there were three types of efforts undertaken in order to deal with the perpetrators: the International Criminal Tribunal for Rwanda (ICTR), the formal domestic justice system, and *gacaca courts*. Before evaluating and assessing the *gacaca courts* and their importance for reconciliation process, a few comments must be made with regard to the two other solutions.

The International Criminal Tribunal for Rwanda has undoubtedly had a ground-breaking impact on international criminal justice, e.g. the first-ever conviction by an international court for the crime of genocide. Nevertheless, it should be noted that inside Rwanda the overall assessment of the Tribunal is mixed. The Tribunal is deemed to have been rather inefficient, slow and influenced by policy, and on the other hand, too soft on perpetrators (this negative attitude is maintained mostly by the government of Rwanda).[15] One of the main criticisms concerned the lack of

14 D. Bloomfield, *On Good Terms: Clarifying Reconciliation. Berghof Report No. 14*, Berlin 2006, p. 14.

15 *Judging Criminal Leaders: the Slow Erosion of Impunity*, ed. Y. Beigbeder, Leiden–Boston 2002, p. 221.

death penalty under the ICTR jurisdiction, while the Rwandan national judicial system used to allow this punishment.[16] This discrepancy might have led to the situation in which the masterminds of genocide would have received prison terms, whereas other perpetrators (found guilty at the national level) would have been sentenced to death. The Rwandan government also has reservations about the ICTR's temporal jurisdiction and the location of the Tribunal.[17] These criticism and concerns raise the question of whether the International Criminal Court for Rwanda has contributed in any way to achieving reconciliation inside Rwanda.

The functioning of formal domestic justice in Rwanda and its influence on reconciliation is also a source of some negative assessments. It must be underlined, though, that the national judicial system was almost totally destroyed after the genocide. There were almost no judges or lawyers[18], and there was virtually no infrastructure, knowledge or experience for dealing with such crimes.[19] The Rwandan legal system was not set up to accommodate the prosecution of genocide.[20] Although Rwanda was a party to and ratified the Convention on the Prevention and Punishment of the Crime of Genocide (hereafter also: Convention Against Genocide)[21], it failed to enact the enabling legisla-

16 Ibidem, p. 105.

17 T. Longman, *The Domestic Impact of the International Criminal Tribunal for Rwanda*, in: *International War Crimes Trials: Making a Difference?*, eds S.R. Ratner, J.L. Bischoff, Austin 2003, p. 35.

18 In December 1994 in Rwanda there were only 12 prosecutors, 59 court clerks and 244 judges/magistrates. D. Bikesha, *Administration of Criminal Justice in Aftermath of the Genocide Against the Tutsi: The Case of Gacaca Courts*, presentation for Never Again Rwanda, Peace Building Institute, June 2019.

19 I. Martin, *Hard Choices After Genocide: Human Rights and Political Failures in Rwanda*, in: *Hard Choices: Moral Dilemmas in Humanitarian Intervention*, ed. J. Moore, Oxford 1998, pp. 152–153.

20 J.B. Mutanga, *Domestic Justice Mechanisms: perspectives on referred cases. Paper presented at the International Symposium on the legacy of the ICTR*, 2014, <https://unictr.irmct.org/sites/unictr.org/files/publications/compendium-documents/v-domestic-justice-mechanisms-mutangana.pdf>.

21 *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signatures 9 December 1948, A/RES/3/260. In Rwanda the Convention was ratified by the *Presidental Decree No 08/75* adopted 12.02.1975, Official Gazetee 1975 [230].

tion (the enabling legislation is required by the Convention since the act is not self-executing).[22] The Rwandan parliament passed the first law punishing genocide only on 1st of September 1996: *Organic Law on the Organization of Prosecutions for Offenses constituting the Crime of Genocide or Crimes Against Humanity committed since 1 October 1990* (hereafter also: "Organic Law" 1990).[23] The purpose of the law was the organization of criminal proceedings against persons who were accused of either the crime of genocide or crimes against humanity, as defined in the Convention Against Genocide. Moreover, the persons accused of such offences were classified in four categories, with different types of penalties (Chapter II).[24] The law also established a special confession and guilty plea procedure (Chapter III), under which perpetrators could get reduced sentence in exchange for their confessions. Confession, however, had to include a detailed description of all offences (including the names of victims), information about accomplices or conspirators, an apology, and an offer to plead guilty to the offences. Despite all the efforts made to adopt the Rwandan legal system to the post genocide situation, a few issues still remained unresolved. The main problem was the slow speed of the trials due to the huge number of genocide suspects. The Rwandan government estimated that it would take about

22 W.A. Schabas, *Genocide in International Law*, Cambridge 2009, p. 405.

23 *Organic Law No. 08/1996 of 1996 on the Organization of Prosecutions for Offenses constituting the Crime of Genocide or Crimes Against Humanity committed since 1 October 1990*, adopted 1.09.1996.

24 Category 1 includes: a) planners, organizers, instigators, supervisors and leaders of the crime of genocide or of a crime against humanity; b) persons who acted in positions of authority at the national, prefectoral, communal, sector or cell level, or in a political party, the army, religious organizations or in a militia and who perpetrated or fostered such crimes; c) notorious murderers who by virtue of the zeal or excessive malice with which they committed atrocities, distinguished themselves in their areas of residence or where they passed; d) persons who committed acts of sexual torture. Category 2 includes persons whose criminal acts or whose acts of criminal participation place them among perpetrators, conspirators or accomplices of intentional homicide or of serious assault against the person causing death. Category 3 includes persons whose criminal acts or whose acts of criminal participation make them guilty of other serious assaults against the person. Category 4 includes persons who committed offenses against property.

200 years, at that speed, to prosecute all the suspects.[25] Another serious issue was the fact that prisons in Rwanda were (and still remain) heavily congested. Moreover, imprisonment of the great number of perpetrators caused (and still causes) a tremendous burden economically, socially and psychologically.[26] These issues call into question the contribution of formal domestic justice system to reconciliation in Rwanda.

Given the problems with the ICTR and the formal national courts, the third, alternative, solution was adopted in Rwanda: *gacaca courts* (*"gacaca"* in Kinyarwandan, a local language, means *"the grass lawn"*). By establishing the institution, recourse was made to traditional mechanisms used in Rwanda. The proposal for the *gacaca courts* was made by presidential commission in June 1999, but legislation enacting the courts was passed in January 2001.[27] The *gacaca* were only implemented, however, in 2006[28] and were officially ended in 2012. Traditionally, the courts were held outside – in markets, yards or other public places in a community. It involved the confessions of perpetrators, expressions of remorse, asking for forgiveness and reparation.[29] Rwandans had been familiar with the *gacaca* for many years and, therefore, it was easier for them to participate in the whole process of accounting for genocide.[30]

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25 E. Daly, *Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda*, "New York University Journal of International Law and Politics" 2002, no. 34, p. 369.

26 M. Sosnov, *The Adjudication of Genocide: Gacaca and the Road to Reconciliation in Rwanda*, "Denver Journal of International Law and Policy" 2008, no. 36(2), p. 132.

27 "Organic Law" 2000, no. 40, *Setting Up Gacaca Jurisdictions and Organizing Prosecutions For Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed Between October 1, 1990 and December 31, 1994*, adopted 26.01.2001, The law was modified few times, including the revision in 2004: "Organic Law" 2004, no. 16, *Establishing the Organization, Competence and Functioning of Gacaca Courts Charged With Prosecuting and Trying the Perpetrators of the Crime of Genocide and Other Crimes Against Humanity, Committed Between October 1, 1990 and December 31, 1994*, adopted 19.06.2004.

28 There was a pilot program started in July 2002 but it was applied only in some sector levels of a geographic administration. Since March 2005, in the whole country, information has been collected, and all suspects have been classified within four categories. After July 2006, actual proceedings started.

29 *Genocide, Justice and Rwanda's Gacaca Courts*, eds H.N. Brehm, Ch. Uggen, J. Gasanabo, "Journal of Contemporary Criminal Justice" 2014, no. 36(3), p. 336.

30 M. Sosnov, *The Adjudication of Genocide*…, p. 135.

The *gacaca courts*, although they were meant to be an alternative to the national judicial system, were still deeply rooted in culture and tradition. The linkages were visible in the structure of the institution, including the selection of judges. As there were just a few professional judges left after the genocide, it was decided that members of community would serve as *gacaca judges*. It must be emphasized that no legal training was required; the judges were selected only on the basis of their commitment to justice and truth.[31] References to the culture and tradition were also made while setting the objectives for the *gacaca*. The courts were designed to achieve five main goals:

- to discover the truth about what happened,
- to speed up the genocide trials,
- to eradicate the culture of impunity,
- to reconcile the Rwandans and reinforce their unity,
- to prove that Rwandan society has the capacity to settle its own problems through a system of justice based on Rwandan customs.[32]

Taking into account these objectives, divergent views regarding the purpose of the *gacaca* may appear. A point of contention is whether the institution had mainly a retributive purpose or whether it had rather restorative nature. The *gacaca courts*, indeed, aimed to hold the perpetrators accountable[33] and punish them,[34] as is confirmed by numbers: 1,958,634 cases were tried

31 Additional requirements: the judges had to be 21 year old or older, have no criminal record and were not allowed to have had a political background. More about this see H.N. Brehm, op. cit.

32 The objectives set by National Service of Gacaca Jurisdiction, The Objectives of the Gacaca Courts.

33 *Gacaca courts* were allowed to adopt the same four categories of genocide suspects that were implemented by traditional courts. See "Organic Law" 2000, no. 40 [§3 and §51]. In 2004 the number of suspects categories were reduced from four to three. See "Organic Law" 2004, no. 16 [§51].

34 For the perpetrators that were classified to category 1, the death penalty or life imprisonment could have been applied ("Organic Law" 2000, no. 40 [§68] and "Organic Law" 2004, no. 16 [§72]. The death penalty was abolished in 2007 and after this life imprisonment was the most severe penalty.

in total, 1,681,648 of which resulted in convictions and 277,066 in acquittals. Just to compare, in the period of 1996–2008 national courts completed only 10,248 cases.[35] Yet, on the other hand, the victims and the local community were also strongly taken into account by the *gacaca courts*. Restoring the peace, truth, healing and forgiveness were among the main goals of the institution, which has great promise for achieving reconciliation.[36]

Despite the earlier hope of the *gacaca's* contribution for achieving reconciliation in Rwanda, the role of the institution still remains unclear. The courts indeed had a great potential to provide a more complete picture of atrocities and to enable both parties to reconcile, but the question arises as to whether the potential was fully realized. The Rwandan government has argued that people accused before the *gacaca* demonstrated their willingness to confess and for the truth about their crimes to be discovered.[37] According to data provided by the National Service of Gacaca Jurisdiction, there were 225,012 confessions made before the *gacaca*, which one can consider as a significant achievement. In this regard, an important issue should be elaborated – a special plea bargaining system laid down by art. 72 et seq. of the "Organic Law" 2004, no. 16. The system allowed perpetrators to have their penalties significantly reduced. For instance, for defendants in the second category, who confessed during *gacaca*, the time in prison could be reduced by 50% (art. 73). The plea bargaining system required, though, some criteria to be fulfilled. The perpetrator had to give a detailed description of their crimes, including information of where and when the offences had been committed, information about the victims and about the place where the death occurred or where the body was left. Furthermore, the defendant had to reveal the co-authors and accomplices, and to apologize. Apologies had to be made publicly, in front of the victims

35 The dates provided by National Service of Gacaca Jurisdiction.

36 See more: P. Clack, *The Gacaca courts, post-genocide justice and reconciliation in Rwanda: Justice without lawyers*, New York 2010.

37 See National Service of Gacaca Jurisdiction, The Objectives of the Gacaca Courts. More about this: M. Sosnov, *The Adjudication of Genocide*…

if they were still alive (art. 54). There were also other benefits received by perpetrators when they plead guilty (also for perpetrators that had already been in prisons). They were offered a less strict prison regime, they could participate in labor projects, and they were allowed to have more meetings with friends and relatives.[38]

The plea bargaining system did indeed contribute to perpetrators making confessions, but it is questionable whether it greatly helped in uncovering the truth and achieving reconciliation. The confessions did not provide full disclosure of people's participation in genocide.[39] People tended to confess to only one or two crimes and to blame others for more serious atrocities.[40] This, in turn, not only did not allow Rwandans to reconcile, but it rather encouraged uncertainty and suspicion between people. It referred, in particular, to crimes which were considered as a source of shame and contempt. In the case of rape, public confessions were very rare, and neither did victims want to testify.[41] This was mostly caused by the fact that the crime of rape is of an intimate nature, as well as the fact that sexuality and carnality are very much influenced by Rwandan tradition, culture and beliefs. Rape victims very often had to face ostracism from the community, and even from their families.[42] It was also believed that discussing sexual violence would cause ethnic tensions and stop the process of reconciliation.[43]

The analysis of the *gacaca courts* would be incomplete without mentioning some legal issues caused by the institution. It is not the main goal of the paper, nevertheless brief mention needs to be made of the fact that the *gacaca* violated several fair trial standards established by international and national law. These include the right to defence,

38 A. Molenaar, op. cit, pp. 54–55.

39 Ibidem, p. 72.

40 E. Zorbas, *Reconciliation in Post-Genocide Rwanda*, "African Journal of Legal Studies" 2004, no. 29, p. 36.

41 S.L. Well, *Gender, Sexual Violence and Prospects for Justice at the Gacaca Courts in Rwanda*, "Southern California Review of Law and Women's Studies" 2005, no. 14, p. 187.

42 Ibidem.

43 Ibidem.

judicial independence, and the presumption of innocence. The *gacaca courts* were, without doubt, the solution taken to deal with the specific situation in Rwanda (e.g. a huge number of perpetrators, no judges nor legal structures in the country, no trust among people) and they were empowered by Rwandan tradition and culture. The institution enabled Rwandans to participate in the whole process of accounting for genocide and to make public confessions. However, it is questionable whether it contributed to achieving reconciliation in Rwanda.

Umuganda and Reconciliation Villages: Tradition-Based Practices in Reconciliation Policy

Reconciliation, as already mentioned, is a complex process that should also be carried out between groups and communities. The process cannot be finished until the society has peace and security, until coexistence between survivors and perpetrators is reached. In post-conflict societies, coexistence should be understood as going beyond just living together. It should include mutual tolerance, forgiveness and even respect.[44] In order to reach such a level of coexistence, it is first required to free people from isolation, fear and hate. Great efforts should be directed towards initiating special policy and dialogue between victims and defendants.[45] Those initiatives have to be realistic and not cause additional trauma, and preferably they should be based on local traditions and culture.

The issue of peaceful coexistence remains very current problem in Rwanda, as many perpetrators have been released from prisons. An issue arose with regard to their inclusion and integration with society. To address this, a few initiatives were undertaken by Rwandan authorities and institutions, one of which is a *reconciliation village*. The project is carried out by the non-governmental organization Prison Fellowship Rwanda, with the support of the National Unity and Reconciliation Com-

44 L. Kriesberg, *Changing forms of coexistence*, p. 48.
45 B. Bloomfield, op. cit., p. 18.

mission.[46] The aim of the *reconciliation villages* is mainly to provide victims and perpetrators with a chance to live together and to integrate. The NGO supplies survivors and defendants with materials that they use to build houses in which they live side by side and work together to maintain. Since 2003, 8 *reconciliation villages* have been established in Rwanda, about 820 houses have been constructed, accommodating more than 4,000 Rwandans.[47] The initiative, although supported by local authorities and Rwandans themselves, arouses controversy. The controversy is mostly centred on trauma and the continued victimization of survivors who have to live next door to their perpetrators.

The project of *reconciliation villages* is supported by other homegrown initiatives based in Rwandan culture and history, such as *umuganda*. The concept of *umuganda* takes root from the Rwandan culture of self-help and cooperation, and in Kinyarwanda it can be translated as 'coming together in common purpose to achieve an outcome'. Traditionally, Rwandans would call upon their family, friends and neighbors to help them complete a difficult task. Nowadays, *umuganda* became mandatory and was institutionalized with the laws passed in 2007[48] and 2009.[49] On the last Saturday of each month, all citizens (able persons aged 16 to 65) work together (on activities such as tree planting, building houses, cleaning streets) in order to foster growth and reconcile.

The concept of *reconciliation villages*, as well as *umuganda*, is justified by the Rwandan culture and tradition. These initiatives seem to be well-known and understood by Rwandans, which may lead to their stronger involvement in the reconciliation. Nevertheless, *umuganda*, like *reconciliation villages*, still raises some doubts over its real contribution to the process. With reference to *reconciliation villages*, it should be con-

46 National Unity and Reconciliation Commission (hereafter: NURC) was created in March 1999 by a parliamentary law to promote unity and reconciliation among Rwandans ("Law" 1999, no. 3). The NURC became a permanent body in 2002.

47 Data provided by Prison Fellowship Rwanda: <https://pfrwanda.com>.

48 "Organic Law" 2007, no. 53, *Governing Community Works*, adopted on 17.11.2007.

49 *Prime Ministerial Order No. 58/03*, adopted on 24.08.2009.

sidered whether victims and perpetrators living next door to each other does not cause more trauma and further victimization. In my opinion, it does, or at least it may lead to such a situation. Regarding *umuganda*, the activity may create further fear and mistrust, as forced social bonds are well-known from earlier times. Furthermore, during *umuganda* people have to implement governmental instructions and plans, as they do in *reconciliation villages*. Therefore, some Rwandans participate in the initiatives out of fear, in order to avoid being seen as antigovernment.

Conclusions

In the transitional period that follows a time of serious violations of international law, a few questions arise with regard to the social attitude towards the past. This includes not only the official perception of the history, but also the relations between survivors and perpetrators. The State and the whole community must decide what is the most essential for them in order to close the period of suffering and to reconcile. It must be clarified whether the offenders will be severely punished or whether it is more valuable for the society to refrain from punishment in order not to perpetuate social division and hate. In a transitional period it is crucial to perform processes that enable the community to learn the truth about past atrocities, to forgive and to coexist peacefully. Only by reaching these goals will survivors and perpetrators, and consequently the whole society, be able to achieve reconciliation.

The issues mentioned above are still highly topical in Rwanda, and their pursuit remains a key priority for Rwandan authorities and society. A few initiatives have been undertaken in order to help victims and perpetrators overcome the results of past atrocities and to reconcile. The initiatives were both of a repressive and retributive nature. They were, to a large extent, based on elements of Rwandan culture and tradition that were well known in the whole of society. The aim was to increase the public contribution in the reconciliation process. However,

the evaluation of the results of these initiatives still remains uncertain and may lead to doubts. Using traditional methods made the whole process more community-centered, open and transparent. It permitted victims and defendants to participate actively in the initiatives and, consequently, it made their reconciliation more likely and more successful. The *gacaca courts* allowed perpetrators to plead guilty and apologize, and on the other hand, it enabled victims to offer mercy and forgiveness. There was a similar situation with *umuganda* and *reconciliation villages*, which provided an opportunity to work together in order to reach a common purpose. The initiatives covered the basic needs and expectations of the victims and perpetrators, and gave them the sense of influence over their future. The institution was affordable and open for everyone seeking justice, irrespective of social status or past experience. This, in turn, can significantly accelerate the reconciliation process in the whole country.

Despite all the advantages of the traditional mechanisms adapted in Rwanda in order to bring about reconciliation, a few weaknesses have to be pointed out. It is questionable whether these initiatives (living next door to victims and perpetrators and working hand in hand, in particular) do not cause more trauma and are not a source of further victimization. It is mandatory to participate in these initiatives, as well as to contribute to the mercy and forgiveness process. This in turn entails that victims may not have the space necessary for grief and the slow process of healing. It may also lead to the reconciliation being achieved only out of fear, as it might have been foisted upon Rwandans.

To sum up, traditional mechanisms are very useful in reconciliation and peace-building processes. They have great potential to enable victims and perpetrators to reintegrate and heal. They can be easily associated with something familiar and understandable and, therefore, can increase public participation. It must be remembered, however, that these mechanisms cannot only be imposed from the top down, because this may have negative outcomes and consequently hamper the reconciliation process.

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SUMMARY

Reconciliation Processes in Rwanda. The Importance of Tradition and Culture for Transitional Justice

In 1994, Rwanda suffered one of the worst genocides in history. It is estimated that up to 1,000,000 people were killed in the 100 days of mass slaughter. In 2019, 25 years after the atrocities, Rwanda and Rwandans are still involved in transitional processes aimed at rebuilding the country, handling the past crimes and, ultimately, achieving reconciliation. In the first part of the paper the significance of the reconciliation is elaborated. Reconciliation is often presumed to be one of the main goals for transitional justice and an essential element for rebuilding peace and security in post-conflict countries. It is also the process during which victims and perpetrators attain or restore a relationship and heal their trauma. In the second part of the paper, the importance of local tradition and cultures for transitional justice is discussed. The attention is paid to *gacaca courts*, *reconciliation villages* and *umuganda*, and to their roles in achieving reconciliation in Rwanda.

Keywords: Rwanda, reconciliation, gacaca courts, umuganda, reconciliation villages

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DOI 10.14746/ppuam.2020.11.05

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Regionalisation or Regionalism? The Contemporary Legal Status of Cooperation in the South Pacific

Introduction

This article aims to analyse the legal status of regional cooperation among the South Pacific countries and territories, as not every entity in the Pacific Basin possesses the International law features of a state.[1] Regionalisation, as well as regionalism, as illustrated by the example of the South Pacific region, is a new topic to examine, especially in Polish and European scholarly literature. Therefore, this topic does need further and deeper analysis. First of all, both regionalism and regionalisation are international phenomena that were set against the process of globalisation only in the last two decades of the 20th century. Secondly, the Pacific Ocean became more dominant in geopolitics than the Atlantic Community at the beginning of 21st century. It has to be added that there are many publications regarding local cooperation mechanisms worldwide, but few on the South Pacific itself. Most of them, though, concern political and economic integration, while neglecting the legal aspects of regional integration.[2]

1 In accordance with Montevideo Convention on the Rights and Duties of States from 26 December 1933. The differentiation of the Pacific entities will be described in the further part of this article.

2 Compare: G. Bertram and R.F. Watters, *New Zealand and its Small Island Neighbours: A Review of New Zealand Policy toward the Cook islands, Niue, Tokelau, Kiribati and Tuvalu*, Victoria University of Wellington, Wellington 1984; R. Crocombe, *The South Pacific*, University of the South Pacific, Suva 2001; K. Graham, *Models of Regional Governance: Sovereignty and the future architecture of regionalism*, Canterbury University Press, Christchurch 2008; U.F. Neemia, *Cooperation and Conflict: Costs, Benefits and National Interests in Pacific Regional Cooperation*, South Pacific Books Ltd, Suva 1986.

The argumentation in this article will proceed from the following broad issues prior to focusing on the more detailed area of research−Pacific regionalism: What is the nature of regionalism and regionalisation? What forms do they take worldwide? Why do states prefer to cooperate within their regions and not globally? What are the potential benefits of such integration? Why is there a need for such international action? Next, the current state of Pacific regionalisation will be analysed by asking: What forms do regionalism or regionalisation take in the Pacific? What kind of entities (depending on international law status) cooperate with each other in the Pacific? In which areas do the Pacific states integrate at the regional level? What aspects of island states might push them towards regionalism? And finally, are the South Pacific island states able to create a united, integrated region, using the existing legal arrangements?

The Pacific Ocean, being the largest of the Earth's oceanic divisions, is subdivided by the equator into the North Pacific Ocean and the South Pacific Ocean. For the purpose of this article, the term "Pacific" will be used to refer to the English-speaking countries in the South Pacific. The reason for this is that regionalisation is deeper and more complex in Commonwealth countries than in those with French or American connections. Secondly, French and American affiliated countries have colonial or treaty constraints on their ability to participate regionally. Their impact is therefore relatively limited.[3]

The area of research is Pacific island countries divided into three groups: Micronesia, Melanesia, and Polynesia.[4] However, they are very often engaged in cooperation with the larger, more developed states − Australia and New Zealand. For this reason, analysis of the regional cooperation among Pacific states should not be made without consider-

3 This article emphasises international law and regional relations among states. Thus, the intention is not to explore historical or colonial relations between former metropolises and their territories. Only key aspects relating to regionalisation and the regionalism processes of legal subordination will be touched upon.

4 The distinction between those groups of islands was first made by a French explorer, Jules Dumont d'Urville. His purpose was to denote the geographical and ethnic grouping of islands.

ation of the relations within the neighbourhood. It is necessary to determine both the internal (national) and external (regional) purposes of the Pacific countries in creating a united and prosperous region.

Finally, Pacific regionalism has to be clearly distinguished from two similar areas of cooperation: Pacific Rim and Asia Pacific regionalism. There are 42 sovereign bordering countries[5] and 23 dependent territories in the Pacific Ocean. Those states are considered to constitute the "Pacific Rim". The concept of this socioeconomic region reflects the American sphere of interest, and thus is being performed by its educational-research organization based in Honolulu, the East-West Center.[6] As for Asia Pacific regionalism, here the main focus is on the Asian states, including Asian islands, at the same time neglecting islands from the Australian continent.[7] In other words, the term Asia Pacific is not used to refer to the Oceania islands states very often at all. The author wishes to emphasise in this article that the Pacific is a region that is separate and independent from any other, especially Asia.

Definition of the Key Terms

The term "region" is derived from a Latin word *regiō*, which means a direction, a location, an area. Additionally, other sources recall the verbs *regō* – to reign, to govern, to guide, to order, and finally *rēgius* –

5 The legal status of Taiwan is disputed.

6 The report to the US Congress of. Comptroller General made by E.B. Staats, *East-West Center: progress and problems. Report to Congress*, 1978, p. 9; *The East-West Center and the Pacific*, East-West Center, Los Angeles 1985, pp. 3–27.

7 Asia Pacific regionalism will be therefore used as the ground of relations between the biggest economies, like China, Japan, the United States, South Korea and Russia. More on this approach see R. Crocombe, *The South Pacific*, pp. 601–602; Y. Deng, *Chinese Relations with Japan: Implications for Asia-Pacific Regionalism*, "Pacific Affairs" 1997, no. 70(3), pp. 373–391; Ch.M. Dent and J. Dosch (ed.), *The Asia-Pacific, Regionalism and the Global System*, Edward Elgar Publishing Limited: Cheltenham/Northampton 2012; M. Sutton, *Open Regionalism and the Asia Pacific: Implications for the Rise of an East Asian Economic Community*, "Ritsumeikan International Affairs" 2007, no. 5, pp. 133–152.

royal.[8] Consequently, a specified region would be an area separated from its surroundings in the sense of geography, sociology, politics and culture, remaining under legal power.[9] Another definition refers to an entity formed purely because of the geographical proximity of states.[10]

The question from the title is "regionalisation or regionalism". But there are also similar definitions in the literature describing the process of integration among sovereign states. Collaboration, cooperation and coordination do differ from each other in terms of the scope and extent of partnership: from organisational independence to integration. Integration can be understood as the process of increased intensification of interactions between their participants.[11] The main purpose of this process is to establish an international community of states which retain self-determination in both internal and external matters. To achieve this, the consent of states is needed.[12] From the normative point of view, the level of decision-making changes from international to supranational.[13] Cooperation is the first step in a continuum. It involves a process of sharing expertise and information from entities still possessing an autonomous position from each other. Coordination introduces a higher degree of integration by making mutual adjustment for a better, joint outcome. The

8 P. Wahl, *Europejska polityka regionalna*, Wyższa Szkoła Integracji Europejskiej, Szczecin 2003, pp. 9, 53.

9 E. Stadtmüller, *Regionalizm i regionalizacja jako przedmiot badań naukowych w stosunkach międzynarodowych*, in: K. Jędrzejczyk-Kuliniak, L. Kwieciński, B. Michalski, E. Stadtmüller (ed.), *Regionalizacja w stosunkach międzynarodowych; Aspekty polityczno-gospodarcze*, Wydawnictwo Adam Marszałek, Toruń 2008, p. 21.

10 Definition by L.J. Cantori and S.L. Spiegel, *The International Politics of Regions*, Palgrave Macmillan Journals, New Jersey 1973, p. 2.

11 Definition by P.J. Borkowski, *Polityczne teorie integracji międzynarodowej*, Difin, Warszawa 2007, p. 15.

12 Any forced cooperation would mean forbidden imperial aspirations. Imperialism, especially territorial aggrandisement is forbidden by the norms of modern international law. See Charter of the United Nations (opened for signature 26 June 1945, entered into force 24 October 1945), art. 2(4); W.J. Raymond, *Dictionary of Politics: Selected American and Foreign Political and Legal Terms*, Brunswick Publishing Corporation, Lawrenceville 1992, Imperialism, p. 228.

13 *Stosunki międzynarodowe: geneza, struktura, dynamika*, eds E. Haliżak, R. Kuźniar, Wydawnictwo Uniwersytetu Warszawskiego, Warszawa 2006, p. 250.

next step is collaboration with the most complex degree of integration, leaving some discretion to the entity. In some countries, this concept is referred to by its synonym: partnership. It involves a quasi-formal organisational arrangement for interactions between state (government), society and business.

Regionalism refers to the political idea of forming regions through a formal program:

> Regionalism means the body of ideas, values, and objectives that contribute to the creation, maintenance, or modification of a particular region or type of world order. It is usually associated with a formal policy and project and often leads to institution building. Further, regionalism ties agents to a specific project that is limited spatially and socially but not in time.[14]

Regionalism is undeniably connected with regionalisation. Regionalisation refers to the process of region formation, by which regions come into existence and are consolidated as separate entities.[15] Region formation has to be based on suitable grounds: regional space (set on a particular territory, having its own social identity), regional complex (with trans-local relations), regional society (organised in a formal way), and regional community (a multitude of contacts with shared values and goals).[16] This process could be characterised by a long-term intensification and deepening of relations, mainly economic, between subjects (namely states) in geographic proximity to each other. Through those economic, social, cultural and political linkages, the whole region becomes intensely correlated. Hence, one can assume regionalisation is perceived as regional cooperation *de facto*, while regionalism – *de iure*.[17]

14 *International Encyclopedia of Political Science*, eds B. Badie, D. Berg-Schlosser, L.M. Badie, SAGE Publications Inc., Los Angeles 2011, Regionalism p. 2244.

15 Ibidem, Regionalization, p. 2246.

16 E. Stadtmüller, *Regionalizm i regionalizacja.…*, pp. 25–26.

17 R. Orłowska, K. Żołądkiewicz, *Globalizacja i regionalizacja w gospodarcze światowej*, Polskie Wydawnictwo Ekonomiczne, Warszawa 2012, pp. 169–171.

Regionalisation and regionalism are international phenomena that have been set against the processes of globalisation since the last two decades of the 20th century. Very often, they are opposed to global integration.[18] Regional cooperation is also seen as an "antidote", a counterbalance to the negative results of unfair globalisation. Those disadvantages of global integration include: increased consumerism, liberal welfare achieved at the cost of poverty of less developed or prosperous countries or nations, growing inequity between regions, and domestic problems affecting other countries or regions which are not involved directly in the case.[19] Therefore, regionalisation, along with regionalism, can guarantee more effective cooperation between certain states and local groupings, and a fairer distribution of benefits coming from international trade and the global exchange of goods.[20]

So why do states decide to cooperate with neighbouring countries? Similar legal culture, common traditions, including customary law, the influence of religion, as well as shared history and geopolitical background, persuade governments to enter into close relations locally. States in close geographical proximity have similar problems, aims and needs. Such limitations in managing overall purpose leads to homogeneity, the uniform character of regional organisations, frameworks, forums etc.[21] Additionally, the aim of every state is to mutually work in the region in order to maximise its own trade and to ensure safety and welfare. The scope of regional interest is manifested by the development of regional communities (regionalisation). This appears through membership and the degree of participation, as well as regional structure building (re-

18 Globalisation as a form of transnational cooperation was widely used, and even abused in many cases, by Europeans during the Age of Discovery in the 15th century. Nonetheless, that is the 19th century, "century of colonization" which can be noted as the beginning of the international order creation.

19 R. Bieniada, *Regionalizm i regionalizacja w definicji. Wybrane problemy teoretyczne*, "e-Politikon" 2013, no. 6, p. 289.

20 Ibidem, p. 290.

21 J. Klabbers, *An introduction to international institutional law*, Cambridge University Press, New York 2002, p. 25; J. Menkes, A. Wasilkowski, *Organizacje międzynarodowe; Prawo instytucjonalne*, Oficyna Wolters Kluwer Polska, Warszawa 2010, p. 76.

gionalism). Sometimes, one can observe a process of redefining a state's interests, from the national level to the common regional level.[22] The examples of those state-led regional frameworks are: the Association of Southeast Asian Nations (ASEAN), the African Union (AU), the North American Free Trade Agreement (NAFTA) and the Southern Common Market (MERCOSUR). Next, European integration took deeper legal shape in 1985 through the Single European Act[23], harmonising laws in the member states' national orders.[24]

The Main Issues of the Pacific as a Region

The Pacific region is a unique geopolitical region. However, this is not only due to the diversity of the subjects of international law. The crucial fact seems to be the maritime, oceanic system. Geographical factors have indeed influenced the features of the region, such as social structure, inter-island relations, their national economy, the position among other islands, and possible integration building. Pacific islanders depended on their own resources and inter-island assistance, until colonial times. Even now, they are strongly dependent on foreign aid, in both the political and economic sense.

The analysed region consists of island microstates (also called microeconomies). This implies the necessity of facing some of the challenges associated with being small and remote. But what is more relevant is physical separation from continental lands. There is great dependence

22 The redefinition of national interests can also be made through global partnership. In this case, such rethinking of domestic priorities and partnerships is usually caused by some crucial international factor. See P. J. Borkowski, *Polityczne teorie integracji…*, pp. 21–22; C. Rice, *Rethinking the National Interest: American Realism for a New World*, "Foreign Affairs" 2008, July/August.

23 Single European Act signed 17 February 1986 and 28 February 1986, entered into force 1 July 1987, however no longer in force.

24 Ch. Oman, *Globalisation and Regionalisation: the Challenge for Developing Countries*, OECD, Paris 1994, pp. 34–35; J.U. Wunderlich, *Regionalism, Globalisation and International Order: Europe and Southeast Asia*, Ashgate Publishing Limited, Aldershot 2007, p. 29.

on sea and air transport to establish and maintain both domestic and international links. This logistic convenience is visible in every area, such as business, education, medical care, and many other basic needs of islanders. The geographical and economical separation requires frequent interactions with the rest of the world. This in turn results in increased openness to international trade. As a consequence, the Pacific islands have made themselves more exposed to financial flows and possible crises. There are not many instruments to deal with external shock, especially when island states decide to be functionally predicated on independence. Also, small states do not possess a sufficient number of qualified personnel. The human resources in government, administration, education and other vital sectors are lacking. Another aspect of the small population in microstates is difficulties in separating personal, political and institutional interests.[25] This situation appears at both the local levels of villages and certain islands, but also at the whole state level.

It can be observed that there is a growing awareness of the affiliation to the Pacific by the involvement of many IGOs, NGOs and other non-state institutions acting with the purpose of regional integration.[26] Loyalties, along with feeling of affiliation to one community, the Pacific community, are very often developed through the family and cultivated at the national level. Islanders regard their states as the basic elements of the Pacific Community.[27] Participation and further actions through the regional agendas bring an even stronger sense of Pacific identity, while Pan-Pacific feelings are also growing. This affiliation is evident in the increased membership in regional institutions, with their meetings and scholarships across the nations. Therefore, one can observe in this two-way process a kind of "self-driven" regionalism.

25 B. Warner, *Caribbean integration – lessons for the Pacific?*, Development Policy Centre Discussion Paper 2012/25, Crawford School of Public Policy, Australian National University, Canberra.

26 Those organisations and other ad hoc institutions will be presented in a subsequent part of the article.

27 R. Crocombe, *The South Pacific*, p. 591.

"The Pacific Way" is a slogan that emerged to promote the Pacific identity. Another reason was to increase the regional formation in order to create one united region. It was coined by Ratu Sir Kamisese Mara, the first Prime Minister of Fiji in 1970. He is perceived as the most prominent regional leader in the Pacific. His main achievement was to make Fiji the biggest beneficiary of Pacific regionalism.[28] Nonetheless, the other important outcome of Prime Minister's regional politics was to elaborate the Pacific reputation outwards, and to stimulate regional identity inwards.[29]

Features of Regional Cooperation in the Pacific

There are three kinds of entities in the Pacific, according to international law: independent states, dependencies and freely associated states[30]. Various legal statuses affect the form and degree of participation in regionalism. Precisely because of that, one needs to be aware of the legal and political modifications among the Pacific countries. Such knowledge will be useful in understanding the areas of potential cooperation and further regional integration. The primary subjects of international law (states) possess a full degree of self-determination and can freely act on both internal and external matters. The other two types of countries (dependent territories and freely associated states) are governed by other states and have to follow their policies. Many dependent territories passed their own legislative acts, which nonetheless have to be in accordance with the acts of their partner states. Also, every island dependency appoints symbols of nationhood, like flags or anthems. From the legal point of view, though, these are not criteria of statehood.

28 Ibidem, p. 157.

29 Interviews made by the author with Prof. Tony Angelo, constitutional lawyer at the Victoria Univeristy of Wellington. He was also a supervisor of the author during her PhD scholarship in 2015–2016.

30 Resolution defining the three options for self-determination GA Res 1541, XV (1960), Principle VI.

The subjective scope of the geopolitical region of the South Pacific therefore covers the following: 1) sovereign states: Australia, Fiji, Kiribati, Nauru, New Zealand, Papua New Guinea (PNG), Samoa, Tonga, Tuvalu, Vanuatu, and the Solomon Islands; 2) the associated state with New Zealand: Niue and the Cook Islands; and the associated states with the United States: the Federated States of Micronesia (FSM), Palau and the Marshall Islands; 3) dependencies. From this international legal fact, we can observe that the limited scope of decision-making indeed affects external relations, including regionalism procedures. This also concerns the potential input into the region creation process. More importantly, each island contributes differently to the regional integration processes.

Examples of such limited capacity are numerous, but lay beyond the scope of this article. The membership of dependent territories in IGOs is either impossible or very narrow. The latest illustration of this legal dilemma was the broadening access to New Caledonia and French Polynesia, which were initially granted observer status, and in 2006 – associated membership. In 2017 though, there was a huge change as PIF decided to include those two French territories as full members, despite them being non/sovereign states.[31] The same path applied to Tokelau (in 2005 and 2014, respectively). Currently, the observer status of the Forum is held by Wallis and Futuna, however, the government in Paris is seeking to upgrade this status to associate membership.[32]

The basis for international cooperation can be found in both legal and extrajudicial (extra-legal) norms. The form of unifying standards and mechanisms between states depends only on their will. Therefore, it is states which create a legal order composed of norms of universal, regional or local validity. In line with the system of international law, they bear responsibility for implementation new rules.[33]

31 Pacific Islands Forum Secretariat, Forum Foreign Ministers Meeting – Outcomes, Suva, 11 August 2017.

32 N. Maclellan, *France and the Blue Pacific*, "Asia & the Pacific Policy Studies" 2018, no. 5(3).

33 N. Blokker, H. Schermers, *Proliferation of International Organizations; Legal Issues*, Kluwer Law International, The Hague 2001, pp. 83–84.

The development of regionalism is taking place mainly through the signing of treaties[34] and establishing intergovernmental organizations.[35] Contrary to well-known and primarily used hard law methods, there are also many soft law instruments. The latter are more flexible, easier and desirable for states. Why is that? Governments of certain states might not very often have the intention to formalise and maintain definitive bilateral or multilateral relations. Through international actions, such as signing a treaty, attendance at an intergovernmental conference, participation at international organisations, establishment of diplomatic or consular relations, states impose on themselves international rights and duties. Those duties may be *de iure* enforced in the future.

Therefore, the facilitation of regional integration is one of the soft law methods employed in the sphere of modern international relations. More importantly, states themselves help to establish entities equipped in those informal mechanisms. Non-binding instruments might *de facto* ensure a bigger influence than states could exert alone. Thus regional cooperation takes place above all through occasional meetings and regular gatherings of politicians, diplomats, judges and civil servants. Taking advantage of less formal gatherings, or behind-the-scenes talks during official meetings, paradiplomacy appears to be the key form of regional integration.[36] This is also the case in the Pacific.

There are over 30 regional organizations, the status of which is sometimes hard to ascertain.[37] They are either IGOs or NGOs, a fact which it will further affect the creation of the possible legal norms for their member states.[38] Likewise, there are a dozen or so informal regional forums

34 In accordance with the Vienna Convention on the Law of Treaties from 22 May 1969.

35 Therefore, not every regional grouping can be called an international organization.

36 J. Sutor, *Leksykon dyplomatyczny*, Dom Wydawniczy Elipsa, Warszawa 2010, pp. 99–124; S. Wolf, *Paradiplomacy: Scope, Opportunities and Challenges*, "The Bologna Center Journal of International Affairs" 2007, no. 10.

37 According to the author's calculation. The Pacific institutions very often are so informal that they do not create a website or publish any documents after the gatherings.

38 It has to be remembered though that not only a state can become a member of an organization. We can observe the growth of "non-states actors" (NSA) in the 21st century. NSAs become more and more influential. At the same time, the informal character of many ad hoc

gathering in the Pacific Basin. What seems to be essential here is the fact that the Pacific organizations quite often change their names, due to the expanding scope of their territorial activity, and thus also membership. Additionally, some other regional bodies were incorporated by the largest or newest institutions, which sometimes also broaden their aspects onto more general ones. Consequently, there is the so-called "spaghetti effect" in Pacific regionalism, where singular states are members of numerous formal organizations or informal gatherings, as well as parties to some regional treaties or agreements establishing regional organizations, which at the end become less effective or simply blur in the whole process of regionalisation.

The most important and influential are the following IGOs: Pacific Community, established under the name of the Secretariat of the South Pacific[39] (SPC)[40], Pacific Islands Forum (PIF)[41], and the newest platform – the Pacific Islands Development Forum (PIDF).[42] Again, they all present the same values of the Pacific Community and humanitarian-economic development, while their members are either the same, or smoothly switch from one to another regional gathering. There are finally subregional organizations: Melanesian Spearhead Group (MSG)[43], Polynesian Leaders Group (PLG)[44], and Micronesia Challenge.[45] How-

types of regional networks, their characteristic pluralism and multidimensionality, give rise to a variety of new entities participating in regionalisation.

39 Due to the political aim of spreading the membership to other countries, also to those from the North Pacific, that is, above the equator, the SPC decided to change its name. Still, it is well-known and recognisable under the old name, as well as its old acronym. The author is in constant collaboration with the Deputy Director-General at the Pacific Community Cameron Diver.

40 Functioning on the legal basis of Canberra Pact: Agreement establishing the South Pacific Commission from 6 February 1947.

41 Agreement Establishing the Pacific Islands Forum from 27 October 2005.

42 Charter of the Pacific Islands Development Forum from 4 September 2015.

43 Agreement Establishing the Melanesian Spearhead Group from 23 March 2007.

44 Memorandum of Understanding Establishing the Polynesian Leaders Group from 17 November 2011.

45 This group does not function as an organization and thus does not have any forming agreement. See The Micronesian Challenge http://themicronesiachallenge.blogspot.com/p/about.html [access: 20.08.2019].

ever, the smaller, grass-rooted initiatives create the potential threat of putting subregional interests over general, regional ones. On one hand, the Pacific region's strength lies in its multiplicity. Sadly, on the other – stratification among the Pacific economies is immense and generates even more spheres of interests.[46]

Conclusion

At the beginning of the 21st century, in the Pacific context, it is highly likely that the contemporary regional cooperation will be sufficient to cope with many of the regions' challenges. Despite the fact that the Pacific states' preferred method of regionalism is working at the level of two Forums – PIF and, since 2015, PIDF[47], not many regional challenges are being overcome though legally binding measures. Unquestionably, given the Pacific's unique characteristics, the members of regionalisation were, and still are, motivated by the other formal regional groupings, mainly by the EU. Such reorientation was inspired by the European model of common goals: cooperation, harmonisation, and the collaborative use of natural resources.[48] Those "deep" forms of regionalism, achieved through the increased regional provisions of services and regional market integration, can *de facto* and *de iure* create the necessary pool of benefits needed to make regional institutions suitable and beneficial to its members in the Pacific.[49]

46 The poorest extreme is represented by Kiribati, Solomon Islands, Tonga or Vanuatu. M. Jędrusik, *Wyspy tropikalne. W poszukiwaniu dobrobytu*, Wydawnictwa Uniwersytetu Warszawskiego, Warszawa 2005, p. 143.

47 J. Siekiera, *The Pacific Islands Forum 2015, Port Moresby*, "New Zealand Yearbook of International Law" 2015, no. 13, p. 147; S. Tarte, *A New Regional Pacific Voice? An Observer's Perspective On The Pacific Islands Development Forum*, Inaugural Summit, Denarau, Fiji, 5–7 August 2013, "Pacific Islands Brief" 2013, no. 4.

48 T. Angelo, *Commentary of the Pacific Islands Forum*, "New Zealand Yearbook of International Law" 2005, no. 2, p. 267.

49 Pacific Studies Series, *Towards a New Pacific Regionalism*, An Asian Development Bank–Commonwealth Secretariat 2005, p. 52.

To sum up, in order to answer the question posed in the title of this article, the Pacific is now at the moment of regionalisation, within the process of region development, where the separate entity is being created and is becoming aware of its own uniqueness, potential, as well as obstacles, which can be overcome by the local means and methods. Those economic, social, cultural and political linkages have, since the 1980s, been establishing long-term intensification, and finally erecting the term of "Pacific". Conversely, the South Pacific region is not yet (if ever) at the moment of regionalism. This expected and indeed desired process of region formalization is in the distant future for the small, poor and undeveloped island microstates. They have their own national barriers, including those of a legal nature, and as soon as they manage them, they will be able to build a harmonized legal order at the level of the whole region.

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SUMMARY

Regionalisation or Regionalism? The Contemporary Legal Status of Cooperation in the South Pacific

This article aims to analyse the legal status of regional cooperation among the South Pacific countries and territories, as not every entity in the Pacific Basin possesses International law features of a state. Regionalisation, as well as regionalism, as illustrated by the example of the South Pacific region, is a new topic to examine, especially in the Polish and European literature. Therefore, this topic does need further and deeper analysis. First of all, both regionalism and regionalisation are international phenomena that were set against the process of globalisation only in the last two decades of the 20th century. Secondly, the Pacific Ocean became more dominant in geopolitics than the Atlantic Community at the beginning of 21st century. There are many publications regarding local cooperation mechanisms worldwide. Most of them, though, concern political and/or economic integration, and neglect the legal aspects of regional integration. The outcome of this article is nonetheless to present the contemporary legal status

of the South Pacific cooperation, though it is at the stage of regionalisation, while not yet regionalism – fully formalised and structuralised just as it is on the other continents.

Keywords: regionalisation, regionalism, legal status, cooperation, South Pacific, Pacific.

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DOI 10.14746/ppuam.2020.11.06

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European Court of Human Rights Case Law on Genetic Information in the Scope of International Biomedical Law

Knowledge about genetic data – as a biological determinant of the psychophysical characteristics of a human being, and which is linked to the development of human genome mapping programmes – raises questions about the direction of legal policy in the field of international biomedical law and domestic legal systems. These issues are also addressed in the case law of the European Court of Human Rights.[1] Through the application of its dynamic approach to the interpretation of the Convention on Human Rights and Fundamental Freedoms, the Court has begun to outline a new perception of the right to respect for privacy which enables the protection of human genetic data. Bearing this in mind, the aim of this paper is to analyze the European Court of Human Rights' case law on genetic information in the scope of international biomedical standards expressed in both the International Declaration on Human Genetic Data and the Convention on the Protection of Human Rights and Human Dignity in the Field of Application of Biology and Medicine.

International Standards for the Protection of Genetic Data

International standards for the protection of genetic data are reflected in the provisions of the International Declaration on Human Genetic

1 Hereinafter: the European Court of Human Rights or the Court.

Data adopted at UNESCO's General Conference on the 16th of October 2003[2], and the Convention for the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine adopted by on the 4th of April 1997.[3]

The International Declaration on Human Genetic Data regulates "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."[4] By granting a special status to human genetic data, the Declaration emphasises its characteristics, which consist of the following: the ability to define individuals' genetic predispositions, the ability to influence human offspring, a cultural dimension, and a special status since these data may contain information whose significance only becomes apparent as a result of a genetic test. For these reasons, the Declaration calls upon the international community to protect both genetic data and the biological samples from which the said data are derived, and establishes provisions to define the purposes and procedures for its collection, processing, use and storage. In particular, these provisions cover diagnostics, health care, scientific research, forensic medicine and legal proceedings. The Declaration also allows for other purposes of collection, processing, use and storage than those enumerated in its text, establishing a condition of compliance with its provisions and the international human rights system. Those exceptional purposes and procedures relating to the use of human genetic data and proteomic data must comply with ethical standards, and the policy pursued in this respect should take into account the views expressed by

2 The International Declaration on Human Genetic Data, adopted by the General Conference of UNESCO on 16 October 2003, *SHS*/EST/BIO/06/1. Hereinafter: DHGD.

3 Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine adopted on the 4th of April 1997, CETS no.164. Hereinafter: CHRB.

4 Art. 1. DHGD.

society. Ethical committees play an important role in this policy: these institutions – operating at national, regional, local and institutional levels – have been assigned the role of consultants to express their opinions in the process of regulating the handling and use of human genetic, proteomic and biological data in specific projects.

The condition for taking actions involving human genetic data is the consent of the person concerned. This consent must be expressed in an informed, voluntary and direct manner, after the person has been informed of the purpose of the collection, processing, use and storage of the data, the consequences associated with these activities, and the possibility of withdrawing consent at any stage of the procedure. Following the model of the Universal Declaration on the Human Genome and Human Rights[5], the International Declaration on Human Genetic Data also allows for an exception to this principle, involving reasons of major importance to the health of the person concerned, in the absence of the ability to give informed consent. The Declaration states that this interference shall be determined by national law and must be in accordance with the international system for the protection of human rights, while taking into account the overriding nature of the interests of the individual. These are the right to decide whether or not to receive information on test results, and the right to seek professional advice when considering the possibility of undergoing genetic testing. In principle, it is therefore prohibited to deny an individual access to their own data. However, this condition does not apply in the case of an irreversible disconnection from an identifiable source, or circumstances constituting a threat to national health, public order or security.

The Declaration obliges States to take steps to protect the privacy of genetic data by establishing domestic laws that are compatible with the international human rights system. In this context, it formulates a set of directives which encompass:

5 The Universal Declaration on the Human Genome and Human Rights adopted by the General Assembly on the 11th Of November 1997, A/Res/53/152.

- a prohibition on disclosing human genetic data, proteomic data or biological samples linked to an identifiable person to third parties, or rendering these data or samples accessible to them[6],
- the 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 the protection of the privacy of these data and restricting their period of storage to the essential minimum[7],
- the requirement for persons and organizational units responsible for the processing of both data and biological samples to ensure their accuracy, credibility, security and quality.[8]

The framework of international cooperation in the field of the circulation of human genetic data, proteomic data and biological samples is specified in the following requirements:

- the requirement for States to regulate the circulation of human genetic data, proteomic data and biological samples in accordance with domestic and international legislation, and in a manner ensuring fair access to these data[9],
- the requirement for States to make every effort with regard to fostering the international dissemination of scientific knowledge related to human genetic data and proteomic data[10],
- the requirement for scientists to make every effort towards establishing collaboration with regard to human genetic data and proteomic data, subject to the restrictions expressed in this Declaration.[11]

6 Art. 14 (b) DHGD.
7 Art. 14 (c) (d) DHGD.
8 Art. 15. DHGD.
9 Art. 18 (a) DHGD.
10 Art. 14 (b) DHGD.
11 Art. 14 (c) DHGD.

This cooperation is linked to the obligation to share the results of scientific research using human genetic, proteomic and biological data with both citizens and the international community, subject to the restrictions laid down by national legislation and international agreements. Examples of ways of achieving this cooperation[12] are:

- 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 medicines;
- providing support for health services;
- providing research assistance for developing countries;
- other forms of action in keeping with the principles of this Declaration.

Selected provisions of the Convention on the Protection of Human Rights and Human Dignity in the Field of Application of Biology and Medicine[13], which regulates the relationship between human rights and the practical dimension of the functioning of biological and medical sciences[14], are devoted to genetic data. This Convention protects human genetic data by distinguishing health information connected with the right to respect for private life and the right to information. Within the scope of the latter, the Convention provides human genome protection that combines: a prohibition of genetic discrimination, certain restrictions on genetic testing, cer-

12 Art. 19 DHGD.

13 V. CHRB; M. Grzymkowska, *Standardy bioetyczne w prawie europejskim*, Warszawa 2009; A. Krajewska, *Informacja genetyczna a zakres autonomii jednostki w europejskiej przestrzeni prawnej*, Wrocław 2008; O. Nawrot, *Ludzka biogeneza w standardach bioetycznych Rady Europy*, Warszawa 2011, J. Symonides, *Międzynarodowe instrumenty prawne w dziedzinie bioetyki i biotechnologii*, in: *Prawa człowieka wobec rozwoju biotechnologii*, ed. L. Kondratiewa-Bryzik, K. Sękowska-Kozłowska, Warszawa 2013, p. 30.

14 The Convention regulates consent for an intervention in the health field, private life and right to information, human genome, scientific research, organ and tissue removal from living donors for transplantation purposes and the prohibition of financial gain and the disposal of a part of the human body.

tain restrictions on intervention in the human genome, and a prohibition on using techniques of medically assisted procreation for the purpose of sex selection, except in the case of serious hereditary sex-related disease.

Genetic Data Protection in the Scope of the Interpretation of Article 8 of the Convention on Human Rights and Fundamental Freedoms

There are echoes of violations that come from the practical dimension of the biomedical sciences in the individual applications directed to the Court. In considering the allegations raised in them, the Court has interpreted the provisions of the Convention, guided by the dynamics of changes taking place in the modern social structure. Those changes cover: reproductive rights[15], medically assisted procreation[16], surrogate motherhood[17], euthanasia[18], consent to be treated[19],

15 The authors of the research report on *Bioethics and the case-law of the Court* lists the following examples of case-law on reproductive rights: Draon v. France, no. 1513/03, judgment of 6 October 2005; D. v. Ireland, no. 26499/02, decision of 27 June 2006; Tysiąc v. Poland, no. 5410/03, judgment of 20 March 2007.

16 The authors of the research report on *Bioethics and the case-law of the Court* lists the following examples of case-law on medically assisted procreation: Evans v. the United Kingdom, no. 6339/05, judgment of 10 April 2007; Dickson v. the United Kingdom, no. 44362/04, judgment of 4 December 2007; S.H and Others v. Austria, no. 57813/00, judgment of 3 November 2011.

17 The authors of the research report on *Bioethics and the case-law of the Court* lists the following examples of case-law on surrogate motherhood: D. and Others v. Belgium, no. 29176/13, decision of 8 July 2014; Mennesson v. France, no. 65192/11, judgment of 26 June 2014 and Labassee v. France, no. 65941/11, judgment of 26 June 2014; Foulon and Bouvet v. France, no. 9063/14 and 10410/14, judgment of 21 July 2016; Paradiso and Campanelli v. Italy, no. 25358/12, judgment of 27 January 2015.

18 The authors of the research report on *Bioethics and the case-law of the Court* lists the following examples of euthanasia case-law: Koch v Germany, no. 497/09, judgment of 19 July 2012; Gross v. Switzerland, no. 67810/10, judgment of 30 September 2014.

19 The authors of the research report on *Bioethics and the case-law of the Court* lists the following examples of case-law on a consent to be treated: Glass v. the United Kingdom, no. 61827/00, judgment of 9 March 2004; Jalloh v. Germany, no. 54810/00, judgment of 11 July 2006; M.A.K. and R.K. v. the United Kingdom, no. 45901/05 and 40146/06, judgment of 23 March 2010.

transgender[20], storage of fingerprints, biological data and genetic profile[21], as well as biological identity.[22] When examining the selected cases, the Court pays attention to the right to life, the prohibition of torture, the right to liberty and security, the right to a fair trial, the right to respect for private and family life, the prohibition of discrimination and the protection of property, by reinterpreting the meaning of Articles 2, 3, 5, 6, 8, 14 of the Convention and Article 1 of its first Protocol.

Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms[23] guarantees the right to respect for the private spheres of life by protecting individuals from arbitrary interference from the State authorities. The Convention divides the private sphere of life into four categories, by distinguishing: private life, family life, home and correspondence. The article is composed of two paragraphs. The first one guarantees to everyone "the right to respect for his private and family life, his home and his correspondence."[24] The second is regarded as a limitation clause and states that" there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."[25]

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20 The authors of the research report on *Bioethics and the case-law of the Court* lists the following examples of case-law on transgender: Y.Y. v. Turkey, no. 14793/08, judgment of 10 March 2015.

21 The authors of the research report on *Bioethics and the case-law of the Court* lists the following examples of case-law on storage of fingerprints, biological data and genetic profile: S. and Marper v. United Kingdom, no. 30562/04 and 30566/04, judgement of 4 December 2008.

22 The authors of the research report on *Bioethics and the case-law of the Court* lists the following examples of case-law on biological identity: Jäggi v. Switzerland, no. 58757/00, judgment of 13 July 2006.
Phinikaridou v. Cyprus, no. 23890/02, judgment of 20 December 2007; Darmon v. Poland, no. 7802/05, decision of 17 November 2009; Gronmark v. Finland, no. 17038/04, judgment of 6 July 2010; Backlund v. Finland, no. 36498/05, judgment of 6 July 2010.

23 Convention for the Protection of Human Rights and Fundamental Freedoms adopted 4 November 1950, ETS 5, 213 UNTS 222, Hereinafter: ECHR.

24 Art. 8 (1) ECHR.

25 Art. 8 (2) ECHR.

The way in which the distinguished areas are interpreted determines the content of the rights guaranteed under Article 8 of the Convention.[26] The first of the selected categories – private life – escapes the definitional framework. From this reason the Court reconstructs the meaning of a private life, by identifying cases that fall within its scope. This activity involves a dynamic approach to the interpretation of the Convention, which allows for the possibility of extending the scope of protection granted to the sphere of private life. Its framework is subordinated to the idea of the psychophysical integrity of the human person, accompanied by a guarantee of individual autonomy. This idea is implemented in:

- the protection of personal identity: name, origin, gender and sexual orientation
- the prohibition of discrimination[27],
- the prohibition of the arbitrary interference in physical, psychological and moral integrity[28],
- the protection of honour and reputation[29],
- standards of data and information protection[30],
- the right to the environment.[31]

The second of the selected spheres of personal autonomy concerns the family.[32] The relationship between family members in their social, cultural, moral and material status is protected by the Convention.[33] The notion of the family applies to both formally established ties and factual relationships.[34] Family life covers three fields of interpersonal relations.

26 W. Schabas, *The European Convention on Human Rights. A Commentary*, New York 2017, pp. 369–388.

27 L. Garlicki, *Komentarz do art. 8*, in: *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Komentarz do artykułów 1–18*, ed. L. Garlicki, I, Warszawa 2010, pp. 493–499.

28 Ibidem, pp. 499–500.

29 Ibidem, pp. 500–506.

30 Ibidem, pp. 506–507.

31 Ibidem, pp. 508–518.

32 W. Schabas, *The European Convention…*, pp. 388–400.

33 Merger and Cros v. France, no. 68864/01, judgement of 22 December 2004.

34 Marckx v. Belgium, no. 6833/74, judgement of 13 June 1979.

The first one concerns marriage. The second is related to the relationship between parents and children. The third, in turn, includes situations of special subordination, concerning persons deprived of their liberty and foreigners. Besides respect for private and family life, Article 8 of the Convention protects the home and correspondence.[35] The term 'home' is interpreted within the scope of the term *domicile* used in the French version of the Convention.[36] Under this interpretation, Article 8 protects not only the physical place of residence where an individual conducts their private or family life, but also professional and commercial premises. Both natural and legal persons are entitled to exercise the right to respect for their "home", which extends to the protection of correspondence as well. The concept of correspondence covers both electronic and traditional forms of mail. The case law of the European Court of Human Rights illustrates what the term correspondence is intended to cover:

- traditional forms of mail communication[37],
- the technical form of text messages[38],
- forms of sending messages via private devices[39],
- forms of sending messages via public devices[40],
- the sending of messages by a person subject to an extraordinary form of subordination.[41]

The case law of the European Court of Human Rights stipulates the meaning of the selected forms of communication and enumerates the list of restrictions allowed by the Convention that can be imposed by public authorities.

35 W. Schabas, *The European Convention on Human Rights. A Commentary*, New York 2017, pp. 400–401.

36 L. Garlicki, *Komentarz do art. 8*, in: *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Komentarz do artykułów 1–18*, ed. L. Garlicki, I, Warszawa 2010, p. 537.

37 Ibidem, s. 542.

38 Weber and Saravia v. Germany, no. 54934/00, decision of 29 June 2006.

39 Halford v. United Kingdom, no. 20605/92, judgement of 25 June 1997.

40 Ibidem.

41 Golder v. United Kingdom, no. 4451/70, judgement of 21 February 1975.

Analysing the scope of right to respect for private and family life, Marek Antoni Nowicki points out that protection of individuals from arbitrary interference combines both negative and positive dimensions of the obligation.[42] The former concerns the prohibition of actions that might violate human autonomy. The latter obliges States Parties to the Convention to establish the means to protect individuals' private lives. This positive dimension of the obligation is implied by the nature of the distinguished spheres of private life, the individual's position, and the State's practice that shapes its context. Its analysis is determined by the rule of law principle.[43] The status of the Convention as a *living instrument*[44] allows for a dynamic approach to the interpretation of its provisions in judicial practice, which makes extending the meaning of the right to respect for private and family life possible. This interpretation is in compliance with the set of conditions expressed in the Judgment of the Court of 7 December 1976 in the Case of *Handyside v. United Kingdom*.[45] These conditions demand a special protection of the rights guaranteed by the provisions of Articles 8,9,10 and 11 of the Convention, justified by their fundamental role for the functioning of democratic society.[46] With this justification comes the necessity ascribing certain limitations to the forms of interference. These are related to the exceptional status of these actions, which might be used only on a particular occasion. As William Schabas points out: "the definition of the right in the first paragraph of Article 8 is complemented by a second paragraph that restricts or limits the scope of the right."[47] "In its application of Article 8, the Court first proceeds to consider whether there has been an interference with a right within the scope of paragraph 1. It then, as a general rule examines the criteria set out in paragraph 2 in

42 M.A. Nowicki, *Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka*, Warszawa 2017.

43 Ibidem.

44 Tyrer v. United Kingdom, no. 5856/72, judgement of 2 April 1978, § 73.

45 Handyside v. United Kingdom, no. 5493/72, judgement of 7 December 1976.

46 Ibidem.

47 W. Schabas, *The European Convention.…*, p. 367.

order to determine whether the interference is also the violation of the Convention".[48] When examining the selected premises, the Court answers the question of whether interference was *in accordance with law* and *necessary in a democratic society*. The objective of the first clause is to consider whether interference is authorized by a rule recognized in the national legal order, accessible and foreseeable and "subject to mechanisms so that it can be applied to in a manner that is genuine and not arbitrary."[49] The objective of the second clause it to "consider whether the authorities have struck 'a fair balance between the competing interests of the individual and of society as a whole'[50]."[51]

To reconstruct the meaning and scope of the application of genetic data protection it is necessary to pay attention to the element of Article 8 of the Convention which guarantees the respect for private life. The Court analyzed this in the decision in the *Van der Velden v. Netherlands* case of 7 December 2006[52] and the Judgement in the *S. and Marper v. United Kingdom* case from 4 December 2008.[53] In declaring the inadmissibility of the Van der Velden application, the Court held that the collection of biological samples and human genetic data of a convicted person could not be regarded as a form of criminal penalty under Article 7 of the Convention. This view is supported by the observations on the possibility of limiting the right to data protection of a convicted person in the case of crimes of a certain degree of seriousness, when establishing general principles of collecting biological samples in order to determine a genetic profile. The Court was of the opinion that if such interference to be allowed, must be – interpreted within the scope of Article 8 of the Convention – "in accordance with law" and "necessary in a democratic society".

48 Ibidem, p. 367.
49 Ibidem, p. 403.
50 Keegan v. Ireland, no. 16969/90, Judgement of 26 May 1994.
51 W. Schabas, *The European Convention.…*, p. 406.
52 Van der Velden v. Netherlands, no. 29514/05, decision of 7 December 2006.
53 S. and Marper v. United Kingdom, no. 30562/04 and 30566/04, judgement of 4 December 2008.

The Court's declaration expressed in the Van der Velden case is reflected in its case law. When considering *S. and Marper v. United Kingdom*, the Court paid attention to the regulations concerning storing fingerprint samples and DNA profiles.[54] Holding that there had been a violation of Article 8 of the Convention, the Grand Chamber of the Court confirmed that genetic data protection falls within the scope of application of the right to respect for private life. According to the issued judgment, the storage of these data after the end of criminal proceedings by an acquittal or remission violates the right guaranteed in Art. 8 of the Convention.

In 2001 Mr. S. and Mr. Marper were accused of committing crimes. Mr. S. was charged with attempted robbery, while Mr. Marper was charged with harassment of his partner. Both applicants' fingerprints and DNA samples were taken during the criminal proceedings. The first case ended with a judgment of acquittal. In the second one the Crown Prosecution Service served a notice of discontinuance. After the proceedings had ended, both applicants asked for their fingerprints and DNA samples to be destroyed. Both applications were refused, so the applicants applied for a judicial review. On the 22 March 2002 the Administrative Court rejected the application. Its judgement was confirmed by the Court of Appeal and then two years later by the House of Lords. The justification for the refusal comes with the interpretation of Article 64 (1A) of the Police and Criminal Evidence Act of 1984[55], which regulates the storage of biological samples and fingerprints after the criminal procedure is over. The Police and Criminal Evidence Act of 1984 allows the storage

54 There are several comments on the Judgement in the *S. and Marper v. United Kingdom* case in the legal scholarly papers: L. Heffernan, *DNA and fingerprint data retention: S and Marper v UK*, "European Law Review" 2009, no. 34(3), pp. 491–504; J. Kapelańska-Pręgowska, *Informacja genetyczna jako kategoria chronionych danych osobowych. Uwagi na tle orzecznictwa Europejskiego Trybunału Praw Człowieka*, in: *Między wykładnią a tworzeniem prawa. Refleksje na tle orzecznictwa Europejskiego Trybunału Praw Człowieka i międzynarodowych trybunałów karnych*, eds C. Mik, M. Gałka, Toruń 2011; A. Peterson, *S. And Marper v. United Kingdom: the European Court of Human Rights Overturs the UK's Procedure for the Indefinite Retention of Unconvicted Person's Personal Data*, "Tulane Journal of International & Comparative Law" 2010, vol. 18, issue 2, pp. 557–572.

55 Police and Criminal Evidence Act of 1984, 1984 p. 60.

of fingerprints and DNA samples in the database of the investigative bodies for the purpose of prevention, detection, preparatory proceedings and prosecution, even if the aim for which they were obtained has already been achieved and the criminal procedure has been completed. The application of Article 64 (1A) of the Police and Criminal Evidence Act also covered the samples of Mr. S. and Mr. Marper.

The applicants filed complaints under Articles 8 and 14 of the Convention, alleging that the authorities had interfered with their right to respect for private and family life by continuing to retain their fingerprints and DNA profiles in an unjustified way, which could be regarded as a form of discrimination. In its reply to applications 30562/04 and 30566/04, the United Kingdom recalled the public interest that the Police and Criminal Evidence Act of 1984 serves. When examining the applications, however, the Court decided that there had been a violation of Article 8 of the Convention. The Court held that it was not necessary to examine the complaint under Article 14 of the Convention separately. The Court's conclusion was as follows:

> The blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences, as applied in the case of the present applicants, fails to strike a fair balance between the competing public and private interests and that the respondent State has overstepped any acceptable margin of appreciation in this regard. Accordingly, the retention at issue constitutes a disproportionate interference with the applicants' right to respect for private life and cannot be regarded as necessary in a democratic society.[56]

In its assessment, the Court made a distinction between cellular samples containing genetic data and fingerprints. The concept of the protection of genetic information analyzed within the scope of the application of

56 S. and Marper v. United Kingdom, no. 30562/04 and 30566/04, judgement of 4 December 2008.

Article 8 of the Convention leads to an argument devoted to the issue of genetic data. In this regard, in order to determine whether there had been a violation of the right guaranteed in Article 8 of the Convention, the Court emphasized the importance of the individual's concerns about the potential future use of this data. The Court emphasized the role of personal data that is stored in a cellular sample, indicating that its storage constitutes an interference with private life. This must be examined within the scope of the broader perspective, referring not only to the donor of the biological material, but also to persons with a genetic relationship with them. Furthermore, the Court noted that information about a person's ethnicity can be determined from genetic data. For these reasons the Grand Chamber of the Court drew the conclusion that the storage of genetic data needs to meet the requirement of proportionality and be subjected to a time regime restriction.

The conception of genetic data protection was developed in the case law of the European Court of Human Rights in the *Van der Velden v. The Netherlands* and *S. and Marper v. The United Kingdom* cases. In the scope of that interpretation, the aim of Article 8 is to protect both genetic data and biological samples that allow the donor's profile to be known. When examining applications, the Court focuses on both formal and material premises to assess if the conduct of the public authorities interferes the sphere of private life. If interference is identified, the next step is to examine if it is "in accordance with law" and "necessary in a democratic society". The Court assumes that the Convention allows such interference when it finds its justification in the goal of the criminal proceedings or the DNA profile database, noting the necessity of a time regime restriction.

In determining the scope of protection of genetic data, the Court interprets Article 8 of the Convention through a comparative juxtaposition of standards of international human rights law[57], European Union

57 The European Court of Human Rights recalls both regional and universal standards of international law: United Nations Convention on the Rights of the Child of 1989, United Nations

law[58], the national law of Member States[59], and the case law of the Supreme Court of Canada.[60] The first point of the comparison focuses on Article 40 of the United Nations Convention on the Rights of the Child, The Council of Europe Convention of 1981 for the protection of individuals with regard to automatic processing of personal data, Recommendation No. R (87) 15 of the Committee of Ministers regulating the use of personal data in the police sector and Recommendation No. R (92) 1 of the Committee of Ministers on the use of analysis of deoxyribonucleic acid (DNA) within the framework of the criminal justice system. The second draws on Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. The third concerns the regulation of the use of genetic data in criminal proceedings of selected Member States of the Council of Europe. Lastly, the fourth considers the decision in R v. R. C., in which the Supreme Court of Canada ruled that the storage of a minor's genetic data in a DNA database was unduly intrusive and stressed the disproportionate nature of such a measure. In this comparative overview, however, the Court does not refer to the provisions of the International Declaration on Human Genetic Data or to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine. Thus, any attempt to assess the way in which the protection of genetic data is defined in terms of the biomedical stan-

Treaty Series, vol. 1577, p. 3; The Council of Europe Convention of 1981 for the protection of individuals with regard to automatic processing of personal data, ETS no. 108, 28.01.1981; Recommendation no. R (87) 15 of the Committee of Ministers regulating the use of personal data in the police sector and Recommendation no. R (92) 1 of the Committee of Ministers on the use of analysis of deoxyribonucleic acid DNA within the framework of the criminal justice system.

58 Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data provides that the object of national laws on the processing of personal data, Official Journal L 281, 23/11/1995 P. 0031–0050.

59 The European Court of Human Rights lists the following examples of states with a limited DNA taking procedures: Austria, Belgium, Finland, France, Germany, Hungary, Ireland, Italy, Luxembourg, the Netherlands, Norway, Poland, Spain and Sweden.

60 R. *v.* R.C., [2005] 3 S.C.R. 99, 2005 SCC 61

dards encoded in these documents requires a separate analysis. The International Declaration on Human Genetic Data lists forensic medicine and civil, criminal and other legal proceedings as the valid purposes for collecting, processing, using and storing human genetic data.[61] The Declaration links the collection of biological samples "for the purposes of forensic medicine or in civil, criminal and other legal proceedings" to the requirements of domestic law that are consistent with the international human rights law.[62] The declaration also regulates, in an analogous way, the storage of biological samples which are used to obtain genetic data during ongoing proceedings.[63] Human genetic data, proteomic data and biological samples can be made available for forensic medicine and civil proceedings only until the end of the proceedings, unless otherwise provided by domestic law consistent with international human rights law.[64] Although those provisions were not cited in the Marper and S. v. United Kingdom judgment, the Court relies on a comparison between the legal system of the United Kingdom and the examples of legislation in force in the Member States of the Council of Europe in order to demonstrate the extent to which DNA databases in the UK fall short of the standards laid down for the protection of personal data. The Court observes that these regulations introduce restrictions on the collection of genetic data which are lacking in the British legal system. The Court also draws attention to the status of genetic information, and the position it adopts in this respect corresponds with the way genetic data is characterised in the International Declaration on Human Genetic Data, which draws attention to the possibilities of the use of genetic data in the future that are linked to the development of human genome mapping programmes.[65] Indeed, these data serve not only to identify and single out individuals, but also constitute a source of health information that

61 Art. 5 DHGD.
62 Art. 12 DHGD.
63 Art. 17 DHGD.
64 Art. 21 DHGD.
65 Art. 4 DHGD.

remains under the protection of Article 11 of the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine.[66]

The conception of genetic data protection was developed in the case law of the European Court of Human Rights in the *Van der Velden v. The Netherlands* and *S. and Marper v. The United Kingdom* cases. In its scope, the aim of Article 8 is to protect both genetic data and biological samples that allow the donor's profile to be known. When examining applications, the Court focuses on both formal and material premises to assess if the public authorities' conduct interferes the sphere of private life. If interference is identified, the next step is to examine if it is "in accordance with law" and "necessary in a democratic society". The Court assumes that the Convention allows such interference when it finds its justification in the goal of the criminal proceedings or the DNA profile database, noting the necessity of a time regime restriction. Although the Court does not explicitly cite the provisions of International Declaration on Human Genetic Data or the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, its position can be seen to be compatible with with the norms of international biomedical law encoded in these documents. These provisions leave the states of the international community a margin of discretion in regulating the method of taking biological samples, storing genetic data, and destroying biological samples, while ensuring that information about health remains a part of private life. The limits of this freedom are to be determined by international law.

66 Art. 11 CHRB.

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SUMMARY

European Court of Human Rights Case Law on Genetic Information in the Scope of International Biomedical Law

The aim of the study is to analyze the case law of the European Court of Human Rights on genetic information in the scope of international biomedical law, as expressed in the International Declaration on Human Genetic Data and the Convention on the Protection of Human Rights and Human Dignity in the Field of Application of Biology and Medicine. The Court held that the genetic information is protected under the law of the Convention on Human Rights and Fundamental Freedoms. The model of the right to respect for private life is reflected in its shape, as the Court noted in the *Van der Velden v. The Netherlands* and *S. and Marper v. The United Kingdom* cases. It leads to the conclusion that the provision of Article 8 of the Convention provides the protection of genetic information, subject to certain restrictions that are "in accordance with law" and "necessary in a democratic society". Such conclusion is in compliance with art. 12, art. 17 (b) art. 21 (c) of the International Declaration on Human Genetic Data, and art. 11 of the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine.

Keywords: genetic data protection, the right to respect for private life, international biomedical law, European Court of Human Rights case law.

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DOI 10.14746/ppuam.2020.11.07

Isaac Amon

The Timeless Quest for Truth in a World of Doubt: Re-Examining Modes of Proof in the Medieval Era

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories…have had a good deal more to do…in determining the rules by which men should be governed. The law embodies the theory of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a work of mathematics. In order to know what it is, we must know what it has been, and what it tends to become.[1]
>
> Oliver Wendell Holmes, Jr.

Introduction

Man has always sought to locate certainty amidst doubt. Nowhere has this yearning been more fervent than in our longing for immortality and absolute truth. Like Juan Ponce De Leon's fabled voyage for the elixir of eternal youth more than five centuries ago, various methods and techniques were developed and utilized in the pursuit of objective reality, particularly to obtain that truth as seen from the divine perspective. This search for genuine certainty was never greater perhaps than in the Middle Ages, a period of extraordinarily intense religiosity that perme-

1 O.W. Holmes, Jr., *The Common Law*, Boston 1881, p. 1.

ated every aspect of life, from womb to tomb. Everything remained the same and nothing would ever change. Indeed, as one historian rather wryly described it, "[medieval] [g]enerations succeeded one another in a meaningless, timeless blur."[2] Yet, the search for truth remained ever present.

Indeed, throughout human history, various investigative and adjudicative techniques arose to achieve this goal. We often assume that as methods are now, so must they have always been. This is not true, for the law does not exist in an "eternal present." It has been molded by external forces, circumstances, and events. Through a brief historical overview, this article seeks to re-examine modes of trial which predated by centuries the medieval creation of the grand jury and inquisition, among them the compurgation and the ordeal. By illuminating these earlier methods of discerning legal truth, this article shows how the nascent criminal justice system of medieval England (and Europe) progressed from depending upon divine judgments to human assessments of evidence, beginning with the Norman Conquest of England in October 1066.

By placing the coming framework within an historical context, this article shows how the Norman victory – under the leadership of William, Duke of Normandy – nearly a millennium ago irrevocably changed the history of criminal procedure. It then describes in greater detail the compurgation and the ordeal in medieval England, before concluding with the creation of the grand jury by King Henry II at the 1166 Assize of Clarendon, and the formal abolition of the ordeal by Pope Innocent III at the Fourth Lateran Council in 1215. A profound transformation to ascertain legal truth was underway as a new world was born. We still live in its throes today.

2 W. Manchester, *A World Lit Only by Fire: The Medieval Mind and the Renaissance, Portrait of an Age*, New York 1992, p. 23.

Norman Conquest

In England, the progenitor of the common law, history quite often seems to begin with the Norman Conquest in October 1066.[3] In January of that year, Edward the Confessor, King of the Anglo-Saxons, died after having ruled England for nearly twenty-five years. Immediately after his passing, controversy arose as to who should succeed him to the English throne. The local aristocracy, the *Witenagemot* (a council of the most important noblemen), ratified the succession claims of Harold Godwinson, Earl of Wessex, as opposed to those of Harald Hardrada, King of Norway or William, Duke of Normandy. Resolute in their claims to the English throne, these two challengers confronted Godwinson that autumn for supreme mastery of England on the battlefields of Stamford Bridge and Hastings. Although Godwinson decisively routed Hardrada at Stamford Bridge, he would be forced a mere fortnight later to confront the Norman challenger at Hastings.

The fundamental importance of this succession dispute, and the resulting consequences of the successful victory by William, Duke of Normandy over Harold Godwinson that fateful day is not that it marked the first successful invasion of England. *Au contraire*. Germanic tribes from Northern Europe and Viking incursions from Scandinavia had already permanently influenced centuries of developments of English history, culture, language, tradition and law (indeed, two German tribes, the Angles and Saxons, were the origins of the term Anglo-Saxon).[4]

3 For more detailed information on this momentous year, which witnessed the death of Edward the Confessor and the coronation of Harold Godwinson in January, the sighting and imagined ill-omen of Halley's Comet in April, and Godwinson's battles with Harald Hardrada of Norway and William, Duke of Normandy, at the battles of Stamford Bridge and Hastings, in September and October, followed by the triumphal coronation of William "The Conqueror" on Christmas Day, 1066, see D. Howarth, *1066: The Year of the Conquest*, New York, 1978; K. DeVries, *The Norwegian Invasion of England in* 1066, Woodbridge, Suffolk and Rochester, New York 1999; and A. Bridgeford, *1066: The Hidden History in the Bayeux Tapestry*, New York 2005.

4 As one medieval historian described it, "[t]he bonds between England and the Northern sphere of influence went far beyond the political. Anglo-Saxon weekdays were Tir's Day and Woden's Day and Thor's Day, not Mercury's Day and Mars' Day as it was in neighbor-

Over the course of centuries, Viking invaders from Scandinavia had repeatedly invaded Britain, eventually leading to the installation of a Scandinavian monarch, Cnut (also referred to as Canute) in 1016, a half century before the Norman invasion and conquest. Ruler of a self-proclaimed Scandinavian or "North Sea" Empire, Cnut did not exaggerate, for he simultaneously ruled England, Norway, and Denmark. He was a quite competent ruler, reigning for nearly 20 years (r. 1016–1035), a mere half century before the Norman Conquest. Under his leadership, relationships were being created between these countries which might eventually have contributed to the continued dominance of his empire, had fate or chance allowed it to continue. Nonetheless, even on the very eve of the Norman Conquest, England remained firmly rooted within the Scandinavian cultural orbit.[5]

The outcome of Hastings on October 14, 1066 definitively ended any hopes of maintaining a version of this "North Sea" Empire.[6] Thus,

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ing France, a country under a long and heavy Roman influence…The English economy was tied to the vital North Sea trade routes: English goods went in Norse and Danish hulls across the North Sea to Danish and Swedish trading cities…From the perspective of 1066, England belonged more to Scandinavia than to the southern, Franco-Roman world across the stormy Channel." (See C. Holland, *Repulse at Hastings, October 14, 1066: William does not conquer England*, in: *The Collected What If? Eminent Historians Imagining What Might Have Been*, ed. R. Cowley,, New York 2001, pp. 476–77. See that essay as a fascinating and rather provoking account of what would have happened if England had remained as part of Canute's "Northern Empire," instead of being influenced by French customs, laws, and ideas after the victorious Norman conquest).

5 Ibidem.

6 Ibidem, p. 484: "Few battles in all of history have been as decisive as Hastings. The outcome of those bloody hours on October 14, 1066, was to wrench England from the northern axis of Scandinavia and the North Sea around to a profound involvement with the Southern, Latin world. Henceforth the Northern world waned, and the Latin world blossomed into the glory of the High Middle Ages and the Renaissance. Hastings deserves its reputation as the greatest battle in English history, and a major turning point in the history of the world." In addition, it should be noted that Scandinavian laws and customs were based on ancient Germanic customs and traditions, with variations based on time and place. It is quite clear, however, that a process of legal codification – essentially writing and recording local rules, customs and traditions – began in the twelfth century, not too long after Scandinavian influence had waned in England. This process gradually created a uniform and coherent body of laws, as power became centralized throughout the Scandinavian kingdoms. Criminal codes were drafted and revised during the next few centuries, ultimately leading

that encounter represented not just the clash of two men, or even two countries, but a foundational fault-line between the frontiers of two different civilizations, which portended two entirely different futures for generations to come. The Norman Duke was victorious that October day, thus ensuring that the future development of history, culture, and law – including core criminal procedural guarantees – would be permanently and fatefully altered.[7] Nearly a millennium later, the effects of that day remain, and are solemnly intoned before judicial proceedings commence everyday:

> [I]f we enter the most humble [sic] court in any remote and newly-settled country in the American forests, a plain and rustic-looking man will call the equally rustic-looking assembly to order by rapping his baton, the only symbol of his office, on the floor, and calling out, in words mystic and meaningless to him, 'O yes! O yes! O yes!'* He little thinks that he is obeying a behest of William the Conqueror, issued eight hundred years ago, ordaining that his native tongue should be employed in the courts of England.[8]

Following his victory at Hastings, the Norman Duke confronted a mammoth task. William needed to begin the process of successfully integrating Norman laws and customs, based on Roman law, with those of an alien land and people, Anglo-Saxons, where the reach of Rome had

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to closer political and legal integration among the Nordic countries. (See now: K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, 3rd ed., transl. T. Weir, Oxford 1998, pp. 277–280).

7 M. Bishop, *The Middle Ages*, Boston 1987, p. 58: "October 14, 1066, was one of the decisive days of history…If Harold had won at Hastings…William would have had no choice but to renounce his adventure. There is little likelihood that anyone would have attempted a serious invasion of England during the next millennium – by water, at least. England would have strengthened its bonds with Scandinavia while remaining distrustful of the western Continent – even more distrustful than it is today. The native Anglo-Saxon culture would have developed in unimaginable ways, and William the Conqueror would be dimly known in history only as William the Bastard."

8 J. Abbot, *History of William the Conqueror*, New York 1899, reprint., 2012, p. 134: "(*Oyez! Oyez! Oyez! Norman French for Hearken! hearken! hearken!)

never truly permeated.[9] This gradual amalgamation, which continued after the death of William the Conqueror in 1087, found its greatest expression in his great-grandson, Henry II. One of the greatest medieval monarchs, who reigned for 35 years (r. 1154–1189), he became the singular figure in the formation of the common law throughout the realm.[10]

Accordingly, while the course of history was forever altered that autumn day, disregarding what came before 1066 fails to see the extraordinary longevity of man's search for truth. The medieval inquisition – and its later Spanish and Portuguese manifestations – along with the development of trial by jury principally arose due to the abolition of earlier, seemingly more primitive methods of seeking out the divine truth. Once these techniques (compurgation and ordeals) had been consigned to the dustbin of history, alternative methods were required to discover the truth, which led to the inquisition and cross-examination.[11] Yet, to truly comprehend this enduring search for certainty, we must peer back into the mists of history and examine those earlier methods for obtaining truth, especially before the Norman victory at Hastings.

9 Ibidem, pp. 133–134: "[William] had, in fact, a Herculean task to perform – a double task – viz., to amalgamate two *nations*, and also to fuse and merge two *languages* into one. He was absolutely compelled, by the circumstances under which he was placed, to grapple with both these vast undertakings…It was one of those cases where, being obliged to go far, it is best to go farther; and William resolved on thoroughly *Normanizing*, so to speak, the whole British realm. This enormous undertaking he accomplished fully and permanently; and the institutions of England, the lines of family descent, the routine of judicial and administrative business, and the very language of the realm, retain the Norman characteristics which he ingrafted into them to the present day."

10 M. Bishop, *The Middle Ages*, p. 59: "Then in 1154 Henry II came to the throne. He was the first Angevin king, son of Geoffrey Plantagenet, count of Anjou…Henry's great achievement was to lay the foundations of common law, on which English liberty and even the institution of limited monarchy rest. The common law is based on custom and usage, and is 'common' to the whole kingdom." Interestingly enough, he was also the father of Richard I "The Lionheart" and King John, of Robin Hood fame and infamy, respectively.

11 In the immortal words of John Henry Wigmore, the legendary (and early 20th century) Dean of Northwestern University School of Law, "[cross-examination is] beyond any doubt the greatest legal engine ever invented for the discovery of truth" (5 J. Wigmore, Evidence § 1367, p. 32 (J. Chadbourn rev. 1974)). Quoted in *Lilly v. Virginia*, 527 U.S. 116, 123 (1999); *Nix v. Whiteside*, 374 U.S. 157, 158 ("The very nature of a trial is [the] search for truth.").

Compurgation

"In the Anglo-Saxon period justice was administered mainly in the local popular tribunals of the shire, hundred, and borough, and the most common forms of trial were compurgation and the ordeal of fire or water."[12] The method of compurgation entailed that the accused gathered together a certain number of his neighbors, who knew him personally, to stand by his side in the face of criminal allegations. These individuals, labeled "compurgators," were fundamentally "oaths-helpers who swore, not that the accused was innocent, but that his oath was to be believed."[13]

Most significantly, this method of proof had the formal approbation of the Church. Indeed, "[t]he right of the diocesan bishop to assign purgation in criminal cases had been the subject of the papal decretal *Nos inter alios*, the basis (according to most canonists) of the Church's jurisdiction over secular crime."[14] Once the accused had accumulated a sufficient number of compurgators, he was compelled to formally swear, in front of them, that he was innocent of the charges. The character of the accused was of utmost importance, for that was what the compurgators swore to before God, clergy, and members of their local community.[15]

Canon law (further proof that foreign law influenced the development of English law) dictated the procedures governing the usage of compurgation, and later on, in trials of ordeal. There first had to be "preexisting public fame that the accused had committed a crime. *Without public fame, he could not be put to compurgation*."[16] Most conclusively,

12 C. Gross, *Modes of Trial in the Mediæval Boroughs of England*, "Harvard Law Review" 1902, vol. 15, no. 9, p. 691.

13 R. Hudson, *The Judicial Reforms of the Reign of Henry II*, "Michigan Law Review" 1911, vol. 9, no. 5, p. 387.

14 R.H. Helmholz, *Crime, Compurgation and the Courts of the Medieval Church*, "Law and History Review" 1983, vol. 1, no. 1, p. 13. "The compurgators swore not to the truth of the underlying facts, but to their belief in the trustworthiness of the oath of the accused."

15 Ibidem. Helmholz further notes that "[a]lthough they were not simple 'character witnesses' as is sometimes said by critics of the ecclesiastical tribunals, compurgators were not required to know the underlying facts. It was enough that they could conscientiously swear to their belief in the oath of the accused. His character certainly entered into the picture."

16 Ibidem.

"the suspicion must be held by good and substantial persons before further proceedings could occur."[17] The compurgators had to be "of good repute, free from public crime or *infamia*"[18] or "good and true men (*legales homines*) of the borough."[19] Both parties to the dispute ordinarily needed to be present; absence of one side was taken as an admission of guilt.[20] As one scholar phrased it, "failure in compurgation was equivalent to conviction or confession."[21] Either side could further be deemed to lose the purgation process, "if in reciting word-for-word the customary formula [they] omitted the right word or phrase."[22]

This method of testimonial oath-taking was not only strongly rooted in primitive English law, but "[o]athing resisted strongly the influences of Roman and Scandinavian law, and for several centuries testimony affirmed by an oath existed side-by-side with more advanced judicial methods of weighing evidence, such as trial by jury."[23] It is not surprising that compurgation existed as long as it did, particularly in more primitive societies, where communities were small, individuals lived their lives in the same small part of the world they were born into, and status reigned supreme.[24] In addition to one's social position, religion held uppermost sway, and belief was widespread that "the oathtaker swearing upon a relic would immediately be stricken down senseless or rendered

17 Ibidem, p. 14.

18 Ibidem, p. 17.

19 C. Gross, *Modes of Trial…*, p. 698. As he further observes (on pp. 698–699): "The Customal of Sandwich, speaking of the plea of debt, says that if any of them [compurgators] have been convicted of perjury, have performed public penance, or have conspired against their lord, and have fled hither, or are fugitives for murder or theft, or if a son is produced to swear for the father or a servant for his master, or if a man is an enemy of the defendant, such persons cannot be admitted to prove or acquit upon a challenge."

20 W. Shack. *Collective Oath: Compurgation in Anglo-Saxon England and African states*. "European Journal of Sociology" 1979, vol. 20, no. 1, p. 7.

21 Ibidem, p. 8.

22 Ibidem.

23 Ibidem, p. 2.

24 Ibidem, p. 17. "Justice in Anglo-Saxon England aimed primarily towards maintaining the status system of social positions that obtained between lords, freemen, serfs, and bondsmen, and the application of justice reflected those social ideas concerning rights and privileges that justified the system."

rigid and motionless in the act of swearing falsely…[thus] compurgation became almost an ordeal of itself."[25]

Furthermore, as the notion of individual rights did not yet exist, this method of proof brought "about a temporary modicum of peace between the two sets of disputants, backed by their kinsmen[,]" and "lessened the demands for an immediate wager of armed strength[.]"[26] Most of the accused who underwent this process cleared their names. Indeed, the number has been estimated that as many as three quarters successfully did so, and even if the accused was found guilty, after failing to clear his name via compurgation, the ecclesiastical sanction was that of public penance.[27] Not surprisingly, this method of proof "[failed] to inspire confidence as a fact-finding device[,]"[28] and another method of proof was consequently needed to replace that of compurgation.[29]

The method chosen was that of trial by ordeal, sanctioned by the Church for several centuries, until its abolition by the Fourth Lateran Council in 1215. King Henry II in his famous Assizes or Constitutions of Clarendon in 1166 promulgated the ancestor of today's modern grand jury.[30] "In that year, the Assize of Clarendon" observed Roger D. Groot, "ordained the selection and swearing of twelve lawful men of each hundred; four such men were also to be selected from each vill."[31] Anyone suspected of having committed a crime – thus satisfying the canonical standard of public notice or *infamia* – would be reported by

25 Ibidem, p. 8.
26 Ibidem, p. 6.
27 R.H. Helmholz, *Crime, Compurgation.*…, p. 19.
28 Ibidem.
29 M.H. Kerr, R.D. Forsyth and M.J. Plyley, *Cold Water and Hot Iron: Trial by Ordeal in England*, "The Journal of Interdisciplinary Review" 1992, vol. 22, no. 4, p. 574. "Piety, psychological testing, finality, certainty, punishment, deterrence – all these have been put forward as reasons for the ordeal's use in the English criminal justice system."
30 R.H. Helmholz. *The Early History of the Grand Jury and the Canon Law*, "The University of Chicago Law Review" 1983, vol. 50, no. 2, p. 613.
31 R.D. Groot, *The Jury of Presentment before 1215*, "The American Journal of Legal History" 1982, vol. 26, no. 1, p. 3.

these jurors to the sheriff's court and then to the royal justices, whereupon the accused would then undergo the ordeal.[32]

"Compurgation is thought to have disappeared" one scholar speculated in the late nineteenth century, "in consequence of what has been called the 'implied prohibition' of the Assize of Clarendon, in 1166. But it remained long in the local and in the ecclesiastical courts."[33] Indeed, the Houses of Parliament did not formally abolish "wager of law" until 1833, the very year they abolished slavery throughout the British Empire.[34]

Ordeal

Though known among the Greeks, the ordeal was unknown among the Romans. It was principally "found among the Germanic peoples, in Germany itself as well as in the old Roman Provinces of Gaul, Italy and Britain."[35] At its core, it "was an appeal to the supernatural for aid in deciding questions too difficult for man's wisdom."[36] Consequently (and perhaps not surprisingly), a correlation can be drawn between the increasing conversion rate of pagan tribes to Christianity along with the gradual decline and replacement of compurgation with that of the ordeal.[37] Yet, as one scholar notes, Anglo-Saxon tradition already recognized modes of ordeal:

> The four ordeals known to Anglo-Saxon law were the ordeal of hot iron, the ordeal of hot water, the ordeal of cold water, and the ordeal of the morsel. In the first of these ordeals, the accused was required to carry hot

32 Ibidem. See also: R. Hudson, *Judicial Reforms*…, p. 388, where the author says: "A sworn jury of neighbors is such a simple and obvious method of discovering facts that at first sight it seems scarcely necessary to inquire as to its history."

33 J.B. Thayer, *The Older Modes of Trial*, "Harvard Law Review" 1891, vol. 5, no. 2, p. 59.

34 Ibidem, p. 63. Thayer references (Stat. 3 & 4 Will. IV. c. 42 s. 13).

35 S. Eidelberg, *Trial by Ordeal in Medieval Jewish History: Laws, Customs and Attitudes*, "Proceedings of the American Academy for Jewish Research" 1979, vol. 46/47, p. 106.

36 R. Hudson, *Judicial Reforms*…, p. 387.

37 S. Eidelberg, *Trial by Ordeal.*…, p. 106.

> iron in his hand for nine days. If at the end of three days the hand had festered he was guilty, not innocent. If the ordeal of hot water was used the accused was required to plunge his hand into hot water as far as the wrist or even to the cubit, the former if the ordeal was simple, the latter if threefold. If the accused was thrown into cold water he was adjudged innocent if he sank, guilty if he floated. If the ordeal of the morsel was used a piece of bread of cheese weighing an ounce was given to the accused after having been adjured to stick in his throat if he was guilty.[38]

To this list, the Norman conquerors added judicial combat, or trial by battle.[39] Though foreign to Anglo-Saxon tradition, trial by combat existed for nearly eight centuries. Parliament did not formally abolish it until 1819, the year of Queen Victoria's birth.[40] Though the rituals of compurgation and trial by ordeal appeared drastically different, the essence was not, for both modes of proof depended upon "the [sincere] belief that a just and omnipotent God would not permit an innocent person to be convicted and punished. Rather, He would intervene and proclaim the truth, even by miracles if need be."[41]

Although these methods of discerning truth (particularly ordeals) may appear repugnant to the modern conscience, this is a result of the Enlightenment era.[42] Consequently, in the exceedingly religious milieu

38 R. Hudson, *Judicial Reforms*…, p. 388.

39 Ibidem. See also: J.B. Thayer, *The Older Modes of Trial*, pp. 65–66: "This is often classified as an ordeal, 'God's judgment.'…it survived the ordeal proper for centuries…Although it existed among almost all the Germanic people, the Anglo-Saxons seem not to have had it; but it came into England with the Normans in full strength…There is sufficient evidence that it was, at first, a novel and hated thing in England. In the so-called 'Laws of William the Conqueror,' it figures as being the Frenchman's mode of trial, and not the Englishman's."

40 J.B. Thayer, *The Older Modes of Trial*, p. 70: "And now at last, in June 1819, came the abolition of a long-lived relic of barbarism, which had survived in England when it had vanished everywhere else in Christendom."

41 S. Eidelberg, *Trial by Ordeal*…, p. 105.

42 J.B. Thayer, *Older Modes of Trial*, pp. 63–64: "As the investigations of scholars discover it everywhere among barbarous people, the conclusion seems just that it is indigenous with the human creature in the earlier stages of his development. Like the rest, our ancestors had

of an earlier age, the replacement of compurgation by the ordeal would not necessarily have been considered shocking (just as the continental inquisition and common law trial by jury should not be regarded as radically inapposite in more recent times) as their key objective remained the same. In other words, "[w]hen…we remember that compurgation and the ordeals were for centuries made use of by the English courts[,] we begin to see that what seems obvious has not necessarily existed everywhere and from all time."[43]

A remarkably skeptical account of the divine origins of the ordeal comes down to us from the days of William II (Rufus). A mere few decades after the Norman Conquest of 1066, fifty men were subjected to the ordeal of hot iron, and all apparently escaped unscathed. Whereupon, the son and successor to William the Conqueror, rejected this apparently divine verdict of not guilty and proclaimed that "he would try them again by the judgment of his court, and would not abide by the pretended judgment of God."[44] This monarchical defiance (with double jeopardy implications) continued into the reign of Henry II, who similarly "would not allow an acquittal awarded on the basis of trial by ordeal to prevent the possibility of a second trial."[45] In other words, as the great English legal historians Pollock and Maitland observed, "Henry II had declared [that] when an indicted man came clean from the water, he was none the less to abjure the realm, if his repute among his neighbors was of the worst."[46]

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it…This was found to be a convenient last resort, not only when the accused was old or disabled from fighting in the duel, but when compurgators or witnesses could not be found or were contradictory, or for any reason no decision could otherwise be reached."

43 R. Hudson, *Judicial Reforms*…, p. 388.

44 See *Reeve's History of the English Law*, ed. Finlason, 1869, vol. I, p. 234, as cited in J.A. Sigler, *A History of Double Jeopardy*, "The American Journal of Legal History" 1963, vol. 7, no. 4, p. 286.

45 See *The Laws of King Ethelred III*, 6 transl. in *Ancient Laws and Institutes of England* (Commissioners of the Public Records of the Kingdom, 1840) as referenced in Sigler, *Double Jeopardy*, p. 286, fn. 18.

46 F. Pollock Sir and F.W. Maitland, *The History of English Law: Before the Time of Edward I*. 2nd ed., vol. ii, London 1898. Reprint, Cambridge 1968, p. 599.

One scholarly view, seemingly supported by statistics from the rolls of the ordeals of the late 12th and early 13th centuries, asserts that the exceptionally high rate of passage was indeed due to human manipulation (as William II and Henry II had averred) but its rationale was "an instrument of mercy."[47] Success was thus due not to divine intervention or administrative incompetence,[48] but "the ordeals themselves were engineered to ensure a high rate of success."[49]

> The crimes tried ordeal, the pleas of the crown, were punishable by death or mutilation. One might therefore expect to see a reasonable number of accused convicted by the ordinary form of trial and punished as mandated by law. In the study of nearly 275 presentments (public prosecutions) from the eyres between 1194 and 1208, an accused was put to death or maimed in *only eight recorded cases*. Of these eight cases, four depended on a confession, one on failure as an approver, one on possession of stolen goods, one simply on suspicion (where the accused was too young to go to the ordeal), and just one on failure at the ordeal.[50]

It is therefore not without foundation to claim that the ordeal's true "purpose was to give the accused an opportunity to save his life."[51] As evidence, it was asserted that due to the respective physical sizes of men and women, "a woman was much less likely than a man to pass the

47 M.H. Kerr et. al., *Cold Water and Hot Iron…*, p. 574. "Piety, psychological testing, finality, certainty, punishment, deterrence – all these have been put forward as reasons for the ordeal's use in the English criminal justice system."

48 Shack, *Collective Oath: Compurgation in Anglo-Saxon England and African states*, p. 17. "Historians have struggled to draw inferences based upon scanty records about the interdependency between certain legal ideas and modes of behavior in early times; anthropologists have struggled to reconstruct the past from inquiry into and observations of the present."

49 M.H. Kerr et. al., *Cold Water and Hot Iron…*, p. 580. See also: F. Pollock Sir and F.W. Maitland, *The History of English Law…*, vol. II, p. 599, fn. 2: "Of fifty men sent to the ordeal of iron all had escaped. This certainly looks as if some bishop or clerk had preferred his judgment to the judgment of God, and the king [William II Rufus] did well to be angry."

50 M.H. Kerr et. al., *Cold Water and Hot Iron…*, p. 578.

51 Ibidem, p. 588.

ordeal of cold water."[52] Accordingly, women appear to rarely have been subjected to the ordeal of water, and those who suffered it were less likely to survive.[53] The rolls of the ordeals further confirm that "[o]f a total of eighty-four men recorded as having been ordered to an ordeal in a public prosecution, seventy-nine are known to have gone to the ordeal of cold water…[while]…of seven women sent to trial on presentment, all were sent to the order of hot iron."[54] Even if this scholarly assertion can be disproven or is simply rejected, one certainty remains: "The English church and government of the reigns of Henry II, Richard I, and John would be greatly puzzled if they knew that modern historians have sometimes looked upon the ordeal as a barbarity worse than capital punishment."[55]

However, in November 1215, five months after the Magna Carta was signed by King John at Runnymede, the Fourth Lateran Council convened in Rome under the aegis of Pope Innocent III. It promulgated rules which "gradually reshaped the institutional and spiritual framework of European society."[56] The Lateran Council condemned all dissenting opinions from Catholic orthodoxy as "heresy," ordered those who held those opinions formally excommunicated and "extended [the stigma of heresy] to those who sheltered or defended its adherents, and to magistrates who failed to act against them."[57] Jews were required to out-

52 Ibidem, p. 582.

53 J. Wijaczka, *The Cold Water Ordeal (Swimming) in Witchcraft Accusations and Trials in the Polish-Lithuanian Commonwealth in the Sixteenth-Eighteenth Century*, transl. by Natalia Klopotek, "Odrodzenie i Reformacja w Polsce" 2016, vol. 60, pp. 73–110.

54 M.H. Kerr et. al., *Cold Water and Hot Iron.*…, p. 581.

55 Ibidem, p. 595.

56 R.I. Moore, *The Formation of a Persecuting Society: Authority and Deviance in Western Europe 950–1250*, 2nd ed. Malden, MA, 2007, p. 7.

57 Ibidem. For further information on the rise of heretical Christian movements, see D. Christie-Murray, *A History of Heresy*, 2nd ed. Oxford, 1991, p. 108: "Few heresies could survive against the power of the orthodox, once the Catholic Church flexed its muscles. Even if locally stronger they lacked the organization to oppose the juggernaut hierarchy of Rome backed by the civil power. Formal condemnation put them outside the law…The Inquisition and the use of the civil arm were finally too much for them. By about 1350, the heresies of the twelfth and thirteenth centuries were mostly dead."

wardly distinguish themselves from Christians through garb and were barred from public office, and Jewish converts to Christianity were proscribed from practicing their former rituals, which the inquisition was later created to ferret out, vigorously monitor, and ultimately suppress.[58]

Further, this Council segregated lepers via expulsion or imprisonment, confiscated their property (as also occurred with heretics) and stripped them of all legal rights and remedies. "For all imaginative purposes heretics, Jews and lepers were interchangeable,"[59] for all these groups – enemies of the Christian order – undermined fraternal solidarity and sowed chaos throughout Christendom. And, when "the eighteenth [canon] abolished use of hot water and red-hot iron in trials by ordeal[,]"[60] their operation gradually began to disappear. Nonetheless, it would take centuries for the ordeal to fully vanish from European soil, as demonstrated by several late 17th and early 18th century witchcraft cases in the Polish-Lithuanian Commonwealth.[61]

A new world was dawning and consequently the search for truth and those charged with uncovering it required additional methods to examine individuals. Thus, at this point in time, the continental and common law legal traditions, borne out of similar origins, went down alternative paths – leading to the inquisition and cross-examination – which permanently changed history.[62]

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58 Ibidem. See also: D. Nirenberg, *Communities of Violence: Persecution of Minorities in the Middle Ages*, Princeton, 1996, p. 133.

59 Ibidem, p. 61.

60 J.J. Norwich, *Absolute Monarchs: A History of the Papacy*, New York 2011, p. 179.

61 J. Wijaczka, *The Cold Water Ordeal…*

62 R.D. Groot, *The Jury of Presentment…*, p. 1. "The procedural void thus created was filled on the continent by the confession…reliance on the confession as proof led to torture to obtain it. But in England the void was filled by the jury verdict as proof." See also: L.W. Levy, *Origins of the Fifth Amendment: The Right Against Self-Incrimination*, New York 1968, pp. 272–273: "What accounts for England's singular escape from the fate of the continental nations of Europe? The most likely answer is that the accusatorial system of procedure, based on the inquest, effectively served the needs of the state, making unnecessary the employment of the inquisitorial system. Fortuitous timing seems to have made a great difference…Not only was English law centralized early; the English state itself was centralized earlier than that of any other country, and one of the foremost means of achieving that cen-

Conclusion

Today, the modern world in general, and the criminal justice system in particular, have largely and quite tragically forgotten this legal history. While vestiges of memories remain, their origins recede ever farther, even from the minds of learned votaries of the law, into antiquity. Much scholarship on the Middle Ages has focused on the inquisition and the common law trial by jury, which have frequently been framed as being in direct opposition to one another. Nonetheless, this analysis has often overlooked the exceedingly important rituals of compurgation and the ordeal whose elimination gradually led to the formation of the inquisition and the common law jury. Continued study of our shared historical, cultural, and societal origins will better inform the practitioner and academic as to the long and tortuous road that the search for truth has traveled. And, in this pursuit, it is incumbent upon all those in the legal profession to study its history:

> Everyone should know something of our law…for our law is the protector of society, the safeguard of our rights, and the rule of our daily life… and the student can be assured…in this study 'There be delights, there be recreations and jolly pastimes that will fetch the day about from sun to sun, and rock the tedious year as in a delightful dream.'[63]

tralization was the system of royal justice employing the inquest which became the grand and petty juries…Thus the jury system spread as rapidly and as widely as the justice of the royal courts, and as the rules of that common law which those courts were both making and administering. But the rapidity of the development of the common law caused it to produce a set of fixed principles before the ideas of the civil and canon lawyers had time to exercise an overwhelming influence upon the substance of its rules."

63 J.M. Gest, *The Influence of Biblical Texts upon English Law*, "University of Pennsylvania Law Review and American Law Register" 1910, vol. 59, no. 1, pp. 16–17.

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SUMMARY

The Timeless Quest for Truth in a World of Doubt: Re-Examining Modes of Proof in the Medieval Era

This article presents a brief overview of historical methods of legal proof prior to and soon after the Norman Conquest of England in October 1066. Through an examination of the rituals of compurgation and the ordeal, which were techniques designed to discover truth prior to the establishment of the inquisition in medieval Europe and the common law jury trial in England, the human quest for intellectual conviction has been indelibly with us since the days of antiquity. And, whichever method to ascertain truth is ultimately utilized – compurgation or ordeal, inquisition or cross-examination, trial by judge or by jury – the law's enduring search for certainty amidst a world of doubt owes much to the history and times of William the Conqueror.

Keywords: law, criminal procedure, compurgation, ordeal, truth.

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DOI 10.14746/ppuam.2020.11.08

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The Country of Origin Principle[1] and the Applicable Law for Obligations Related to the Benefit of Information Society Services[2]

The global nature of the Internet and the related ease of establishing international relations is conducive to the search for new conflict-of-law solutions. The need for users to take into account many national legal orders, often divergent legal regulations (e.g. in the scope of the permitted private use of digitized works, competition law rules, consumer protection provisions), which involves the application of traditional conflict rules, promotes radical striving to simplify the rules governing the determination of the applicable law. This applies not only to the way of indicating relevant substantive norms in the field of private law, but also to the scope of application of public law regulations (administrative, criminal or financial law). There's no doubt that for entrepreneurs conducting international operations using computer networks, it would be beneficial to use only one legal system – preferably of the country where their headquarters are located – to assess all elements of their activity. This would greatly facilitate the estimation of risk associated with conducting online sales or providing i.s.s. On the other hand, the unconditional assumption of the right of the state of the seat of entrepreneurs could encourage them to transfer their headquarters to the areas of countries adopting the lowest legal standards for online business (the phenome-

1 Hereinafter: c.o.o.p.
2 Hereinafter: i.s.s.

non referred to in the literature as the race to bottom).[3] When looking for new, universal conflict-of-law solutions for the network, one should also take into account the interests of consumers, persons authorized from intellectual property rights, as well as other entities that may be harmed as a result of actions taken by "online" entrepreneurs.

Taking into account these fundamentally divergent interests, at least in principle, serves the so-called c.o.o.p. (French: principe d'origine, German: Herkunftslandprinzip) introduced by art. 3 of the e-commerce directive.[4] It's a specific internal market clause of an innovative, conflict-of-law nature.

It is assumed that the Public Procurement Law established pursuant to art. 3 d.e.c., is of fundamental importance for the development of international economic turnover carried out using electronic means of communication within the Community. However, there are serious doubts about the method and scope of its application. It undoubtedly covers the norms of public law of the country of establishment of the service provider (e.g. regarding the registration of specific activities). However, the question arises whether it also concerns private law standards (e.g. in the field of competition law). In the case of the Public Procurement Law, it also affected private-law relations, and the question arises as to whether it results from the requirement for Member States[5] to establish a separate conflict-of-law rule.[6] The impact of this rule on the indication of the law applicable to tort obli-

3 E. Łętowska, *Europejskie prawo umów konsumenckich*, Warszawa 2004, p. 254.

4 Directive 2000/31 from 8.6.00. on some legal aspects of the Act on commercial partnerships, in particular electronic commerce, Journal of Laws L 178, 17.7.00 (directive on electronic commerce, hereinafter: d.e.c.). Some other directives introduce, in the areas they regulate, a special type of "criminal law" (cf. Article 16 of the draft Directive on services in the internal market – Proposal for a Directive of the European Parliament and of the Council on the services in the internal market COM (2004) 2 final/3). In this study, the author uses this term in relation to art. 3 of e.c.d.

5 Hereinafter MS.

6 A. Thünken, *Multi-State Advertising Over The Internet and the Private International Law of Unfair Competition*, "International & Comparative Law Quarterly" 2008, vol. 51, issue 4, p. 939.

gations arising in connection with the provision of civil and commercial law should also be determined (in particular, commitments from torts of unfair competition). At this point, it should be noted that, unlike the other MSs, this principle was not regulated in the Polish Act on the provision of electronic services[7], which implemented the provisions of d.e.c. Only the justification of the draft law[8] refers – moreover, incorrectly – to the principle in question. The Polish legislation can be justified only by the fact the entry into force of the Act on the provision of electronic services took place before Poland's accession to the EU. There is no doubt, however, that from 1 May 2004. the obstacle to explicit regulation of the c.o.o.p. 3 in the Polish legal system has been removed. Paradoxically, therefore, it seems that the Polish legislator is currently in a more favorable situation, because, as part of agreeing the content of the discussed principle with the specifics of the Polish legal system, it can take advantage of the experience of other IPs, which earlier introduced it into the internal legal order. No implementation of the c.o.o.p. to the Polish legal system, however, causes significant difficulties in practice, which is also associated with the problem of the direct effectiveness of conflict-of-law rules arising from directives.[9] In the opinion of the author of this work, it is necessary to determine the impact of this principle on the method of indicating the applicable law. To this end, it will first be necessary to discuss the legal nature and origin of the principle, as well as the scope of its application, and then proceed to detailed conflict-of-law considerations.

7 Act of 18.7.02 on the provision of services by electronic means (Journal of Laws of 2002, no. 144, item 1204, as amended; hereinafter: the a.p.s.e.m.).

8 Print no. 409.

9 As for the last issue, see M. Szpunar, *Normy kolizyjne a europejskie prawo wspólnotowe*, paper delivered at the conference "Dostosowanie polskiego prawa prywatnego międzynarodowego do standardów europejskich", Katowice, October 1998. See also M. Szpunar, *Prawo wspólnotowe przed organami krajowymi*, "Rejent" 2004, no. 3–4.

The Legal Nature of the C.O.O.P.

In the light of art. 3 of d.e.c., i.s.s. service[10] is subject to the law of the Public Law in whose territory the seat of the service provider is located (c.o.o.p.). Two elements of this principle are the obligation imposed on the authorities of the country of establishment of the service provider to control its activities and the prohibition of discrimination against services (restrictions on their free movement)[11] directed to the state of "receiving" services. The combination of both these elements, as is commonly accepted, implies the principle of the jurisdiction of the country of residence of the service provider for the assessment of the services provided by it.[12]

The country where the service provider conducts business (has its registered office) is obliged to ensure i.s.s. that they are rendered in accordance with the substantive provisions of that country as well as the relevant provisions of the Community law. For this purpose, the MS must control the service provider's activities effectively and effectively. That is emphasized by the d.e.c preamble, which states that the supervision of the US aims to ensure effective protection of the public interest (par. 18). In turn, according to the official interpretation of art. 3 clause 2

10 This expression in Polish law corresponds to the concept of "electronic services." For the provision of electronic services, see X. Konarski, *Komentarz do ustawy o świadczeniu usług drogą elektroniczną*, Warszawa 2004, p. 13 and next; P. Litwiński in: *Prawo Internetu*, ed. p. Podrecki, Warszawa 2004, p. 167 and next; *Komentarz do ustawy o świadczeniu usług drogą elektroniczną*, Warszawa 2004, p. 13 and next. It's worth noting the wide scope of the definition of the concept adopted in the Polish Act, going beyond the traditionally understood concept of services.

11 According to the text from the website of the Office of the Committee for European Integration (art. 3):

1. Each MS ensures that u.s.i. provided by the service provider established in its territory were in accordance with the national provisions applicable in this P.Cz. and falling within the coordinated field.
2. MS cannot, for reasons falling within the scope of the coordinated field, restrict the free movement of u.s.i. originating in another Roman Catholic church.
3. Par. 1 & 2 shall not apply to the areas specified in the Annex.

12 E. Łętowska states that "after fulfilling the conditions required by the law of the seat of the service provider, the supplier may act legally, and the applicable (material) law to assess his performance is the regime of his seat. C.o.o.p. is conducive to market opening and economic freedom." E. Łętowska, *Europejskie prawo umów konsumenckich*, Warszawa 2004, p. 254.

of d.e.c. made by the European Commission[13], any form of restriction on the free movement of services, except for the exceptions strictly specified in the Annex to the Directive, is prohibited. The EC understands this limitation of all activities to be aimed at prohibiting the provision of a given type of services (e.g. a service enabling the ordering of OTC drugs on websites) or only limiting their availability (e.g. by prohibiting advertising of a given type of services). The *Ratio legis* of this principle lies in the belief that service providers who meet the legal requirements of one MS (where it is located their headquarters) should not be subject to additional bans and restrictions (e.g. in the field of competition law) in the country where their services are "picked up."

The EC attaches great importance to this principle, as evidenced by the fact that despite intense criticism of the draft directive and discussions lasting several months, the final wording of art. 3 clause 1 & 2 has remained essentially unchanged compared to the original EC draft.

The essential thing for the interpretation of c.o.o.p. is the interpretation of the service provider's place of establishment.[14] In accordance with art. 2 point c of the directive, the entrepreneur's seat is located where the service provider conducts business, using a permanent enterprise established for an indefinite period. Therefore, the seat means the place where the entrepreneur actually conducts their business, and not the place of registration or the place specified in the statute of the legal person as its seat. Therefore, it should be recognised that the directive adopts the theory of actual residence, in a variation of the operating centre.[15] As part of the location of the real seat of the entrepreneur, the directive rejects technical criteria, e.g. the location of technical devices, including serv-

13 Hereinafter: EC.

14 See L. Moerel, *The Country-of-Origin Principle in the E-Commerce Directive: The Expected "One Stop Shop"?*, in: *Computer Technology Law Report*, 2001, s. 185; D. Kot, *Dyrektywa Unii Europejskiej o handlu elektronicznym i jej implikacje dla prawa cywilnego*, KPP 2001, no. 1, pp. 52–53.

15 For the theory of headquarters in a variation of the operating center, see more broadly: W. Klyta, *Łącznik siedziby w niemieckim międzynarodowym prawie spółek*, KPP 1998, no. 2, pp. 249, 252.

ers used for data transmission in computer networks. Recognition of the server's location as the seat's indicator would create the danger of providing services using servers located in countries with the most liberal regulations, which do not provide the recipients with due protection. Entrepreneurs positively assess c.o.o.p. because of their fear of applying a foreign law unknown to them being applied in the event of a dispute. On the other hand, as arguments against its adoption, the possibility of transferring the seats of entrepreneurs online to countries with more favorable provisions on business activity is raised.[16] It should be noted, however, that in the event the service provider directs all or most of its activities to the territory of another MS, it exceptionally retains the right to take appropriate legal measures against the service provider (e.g. under competition law). This is determined by the case-law of the TEU[17], to which, moreover, it refers directly to recital 57 of the directive. However, the abovementioned exception applies only if the seat of the service provider is chosen in order to circumvent the legislation that would normally apply, i.e. the country where the service provider directs all or most of its activities. The authors who omit the nuances of private international law[18] in their studies are distinguished (on the level of Community law) by the so-called the principle of the country of reception (French: pays de réception/destination principe).[19] This consists in accepting the jurisdiction of the place where the services are

16 D. Kot, *Dyrektywa Unii Europejskiej…*, p. 53.

17 See ruling from 3.12.74 on Van Binsbergen, C-33/74 [1974] ECR -1299; orz. of 3.2.93 on Veronica, C-148/91 [1993] ECR I-487; orz. from 5.10.94 on TV10 S.A., C-23/93 [1994] ECR I-4795; judgment from 10.9.96 on KE v. Belgium, C-11/95 [1996] ECR I-4115. See D. Kot, in: *Podejmowanie i prowadzenie działalności gospodarczej w Internecie*, in: *Handel elektroniczny. Problemy prawne*, eds J. Barta, R. Markiewicz, Kraków 2004, p. 32.

18 Hereinafter: p.i.l.

19 J. Huet, *Le droit applicable dans les réseaux numériques*, Colloquium at the National Assembly 19–20 Nov 2001, *Internet Law: European And International Approaches. The Implementation Of Internet Laws. How To Resolve Cross-Border Disputes?*, p. 5 and next; M. Fallon, J. Meeusen, *Le commerce électronique, la directive 2000/31/CE et le droit international privé*, "Revue Critique De Droit International Privé" 2002, p. 480 and next; D. Kot, *Dyrektywa Unii Europejskiej…*, p. 53; D. Marino, D. Fontana, *European Parlament and Council Directive on Electronic Commerce*, CTLR 2000, p. 45.

"picked up."[20] Depending on the type of legal relationship, this place is often identified with the place of: habitual residence of the recipient, performance of the contract or damage to the recipient. It is recognized that the use of a place is beneficial for entrepreneurs, and the application of the recipient country principle – for recipients (consumers, victims).[21] The criticism of contemporary conflict-of-law regulations, including the Rome Convention on the law applicable to contractual obligations of 1980[22], as well as the draft Rome II Regulation of 2003[23], raised by business associations is based on the assumption that the applicable law indicated on their basis may be the law of the state of "receiving" services. In the case of torts committed in connection with the provision of the Civil Code, as the law of the state of "receipt" can be understood, for example, as the law of the state of damage caused to the recipient (e.g. usually equated with the law of the state of its habitual residence).

The Treaty Sources of C.O.O.P.

According to the explanations of the EC, the purpose of the directive introduced in the PPA Directive is to guarantee the application of – with respect to i.s.s. – the basic principles of the internal market (French: *marché*

20 The concept of the recipient country is also used in art. 49 TEC, which provision establishes the freedom to provide services (State of the Community […] of the person for whom the services are intended).

21 It can be reasonably argued that the party whose law governs the liability immediately gains a certain advantage over the contractor, which is not in accordance with the principle of maintaining an equal position of the parties in international trade. The national law of one side may be completely unknown or unfavorable to the other. See B. Fuchs, Statut kontraktowy a przepisy wymuszające swoje zastosowanie, Katowice 2003, pp. 39–40.

22 Consolidated version U. WE C027 from 26.1.98 The Polish text of the convention was published in PPHZ (1983), vol. 7, pp. 124 ff and in KPP'94, vol. 2, pp. 300–341 (transl. by W. Popiołek); PSM'84, vol. 4 and 6 (transl. by J. Poczobut). Poland acceded to the convention in April 2005. Its text has not yet been published in the OJ.

23 Especially of the basic conflict-of-law rule based on the link between the place of "direct" damage (Article 3 (1)). Project overview – Fabjańska M., M. Świerczyński, *Ujednolicenie norm kolizyjnych dotyczących zobowiązań pozaumownych*, KPP 2004, no. 3, p. 717 and next (together with the translation of the project).

interieur) within the meaning of art. 14 of TUE, and in particular ensuring compliance by the MS with the principles of the freedom to provide services referred to in art. 49–55 of the Treaty.[24] This principle has its source in one of the four basic freedoms of the EC.[25] With regard to the freedom to provide services, it is assumed that it does not require implementation in the internal regulations of the MS (at least until a derived law regulates the matter), just as other economic liberties do not require this.

Considering the development of the common market, the European Court of Justice[26] has repeatedly confirmed the need to counteract any broadly understood restrictions on the provision of services in the territory of other MSs than the country of establishment of the service provider. Burdening service providers based in the territory of other MSs with additional legal requirements puts them in a state of legal disadvantage compared to national service providers. As it has been repeatedly emphasized in the ECJ rulings, the introduction of specific advertising bans can also be a restriction on the free movement of goods or services. The purpose of d.h.e. is, among other things, the elimination of just such restrictions. However, it is worth noting that the use of services does not mean that this right will be more favorable to the entrepreneur than the right indicated, for example, by means of a market connector (in the case of acts of unfair competition). The C.o.o.p. is not intended to indicate the most favorable right for an entrepreneur. In accordance with art. 52 paragraph 1 of the Treaty, in order to ensure the liberalization of a particular service, the Council shall adopt directives, acting by a qualified majority on a proposal from the Commission and after consulting the Economic and Social Committee and the European Par-

24 See recital 22. More broadly: A. Cruquenaire, Ch. Lazarc, *La clause de marché interieur: clef de voûte de la directive sur le commerce électronique*, in: *Le commerce électronique européen sur les rails ? Analyse et propositions de mise en oeuvre de la directive sur le commerce électronique*, Bruxelles 2001, p. 44; E. Crabit, *La directive sur le commerce*, "Revue du droit de l'Union européenne : revue trimestrielle de droit européen" 2000, 4, p. 753 and next.

25 See more broadly F. Emmert, M. Morawiecki, *Prawo europejskie*, Warszawa–Wrocław 2001, pp. 357–370.

26 Hereinafter: ECJ/CJEU.

liament. On this basis, the freedom to provide services is reflected in the provisions of secondary Community law. One of the examples of introducing a detailed principle of the country of origin on this basis is the regulation adopted in art. 2–2a of the Television Directive "without frontiers"[27], in which the freedom to provide TV services is guaranteed by the application of the principle of the law of the state of the establishment of the broadcaster. According to this principle, each MS is required to ensure that the TV programs in its area meet the conditions in the country of establishment of the broadcaster (art. 2). Other MSs should, in turn, ensure free access to the above-mentioned services and exclude all restrictions on broadcasting foreign TV programs (art. 2a). The content of art. 2–2a of the amended tv.w.f.d. was the prototype of art. 3 of d.e.c.

The doctrine did not prejudge the conflict-of-law nature of the rule resulting from tv.w.f.d.[28] Undoubtedly, the application of the sender's country principle adopted in tv.w.f.d. affects the coordination of public law norms. However, the question is if it also affects the application of the p.i.l. standards. Proponents of this approach argue that since TV broadcasts should comply with the law of the broadcaster's country, this also means taking into account the private law standards of that country.[29] However, this is not a position commonly shared in the literature. It should be noted, however, that there are significant differences between the abovementioned directive and e.c.d. While the c.o.o.p. "mechanism" is well known in Community law (it is provided for in many directives),

27 Council Directive of 3.10.89. on the coordination of certain laws, regulations and administrative provisions of the MS regarding the pursuit of television broadcasting activities (the Television without Frontiers Directive, hereinafter: tv.w.f.d.; 89/552/EC), OJ U. OJ L. 89.298.23 (amended by the EP and Council Directive of 30.6.97 [97/36/EC], OJ L.1997.202.60, which significantly expanded the provisions relating to the c.o.o.p.). See more broadly: A. Cruquenaire, C. Lazarc, *La clause de marché interieur…*, pp. 43, 78–86; C.A. Jones, *Television Without Frontiers*, "Yearbook of European Law" 2000, no. 19, pp. 299–325; B.J. Drijber, *The Revised Television Without Frontiers Directive: Is it Fit for the Next Century?*, "Common Market Law Review" 1999, pp. 87–122.

28 Otherwise A. Thünken, *Multi-State Advertising Over The Internet…*, pp. 939–940.

29 N. Dethloff, *Europäisches Kollisionsrecht des unlauteren Wettbewerbs*, Juristenzeitung 2000, pp. 179–180; See also the considerations by B.J. Drijber regarding misleading advertising in: *The Revised Television Without Frontiers Directive…*, p. 101.

the scope of the principle expressed in e.c.d. prejudges its special, conflict-of-law nature.[30] It should also be noted that tv.w.f.d. does not contain exceptions of a private law nature from the Public Procurement Law.

For a special way of treating c.o.o.p. resulting from e.c.d., note M. Wilderspin and X. Lewis.[31] The authors argue this is related to a very broad definition of the coordinated field (*formulé de manière extrêment large*), to which the discussed principle applies.[32]

The Scope of Application of the C.O.O.P.

The literature indicates that the scope of application of d.e.c. is threefold[33]:

a) the Directive applies only to selected issues of e-commerce (general principles for the provision of services, disclosure of information on the conclusion of contracts in electronic form, liability of intermediaries in the provision of i s.s.)[34];
b) the Directive excludes its application to a certain type of information and services;
c) the Directive binds its scope of application to Directives 98/34 and 98/48[35], which define the terms u.s.i. and distance trading.[36]

30 A. Cruquenaire, C. Lazarc, *La clause de marché interieur…*, p. 44.

31 M. Wilderspin, X. Lewis, *Les relations entre le droit communautaire et les règles de conflits de lois des États membres*, RCDIP 2002, p. 299 and next.

32 In addition, it is worth noting that tv.w.f.d. it largely harmonizes public law substantive provisions of the MS on TV broadcasts, while e.c.d. harmonizes only five basic areas in the field of u.s.i. See L. Moerel, *The Country-of-Origin Principle…*, p. 184; A. Cruquenaire, C. Lazarc, *La clause de marché interieur…*, p. 89.

33 See E. Łętowska, *Europejskie prawo umów konsumenckich*, Warszawa 2004, p. 250. Compare D. Kot, *Dyrektywa Unii Europejskiej…*, p. 42 and next.

34 In particular, the Directive doesn't regulate matters of copyright, "computer piracy" and data protection. See more broadly: D. Kot, *Dyrektywa Unii Europejskiej…*, pp. 48–49.

35 Directive 98/34 / EC of the EP and Council of 22.6.98 laying down procedures for the provision of information in the field of technical standards and regulations (OJ EC L 204 of 21.7.98) as amended by Directive 98/48/EC of the EP and Council of 20.7.98. (OJ EC L 217 of 25.8.98).

36 This requires interpretation of the terms d.h.e., taking into account the definitions adopted in the above directives, which is a significant source of ambiguity as to the scope of its application – E. Łętowska, *Europejskie prawo umów…*, p. 250.

However, c.o.o.p. has a wider range of application than d.e.c.[37] It is not limited to areas regulated by e.c.d., but to all areas of law coordinated under Community law, as long as they relate to the provision of tax and civil liability

The scope of the coordinated field includes all the requirements that must be met to start a given activity (qualifications of the service provider, required licenses, procedures for notifying the relevant state authorities) as well as requirements for the services themselves (codes of conduct, quality requirements, rules for advertising services, as well as liability for the provision of the service).[38] However, the requirements for goods and services as such (e.g. labeling) or physical delivery are excluded from this scope.

C.O.O.P. in Light of D.A.M.S.[39]

In the literature on the subject, the predecessor of d.a.u.m. was Directive 89/552/EEC.[40] The heritage of the latter was consolidated by Directive 2007/65/EC amending it.[41] Recital 7) in the preamble to that amending directive stated that the basic principles of the amended tv.w.f.d. 'Proved their worth' and that is why they should be retained. In turn, recital 33) of this preamble – in accordance with the codified

37 See more broadly: O. Cachard, *La régulation internationale du marché électronique*, L.G.D.J, 2002, p. 104.

38 D. Kot, *Dyrektywa Unii Europejskiej…*, p. 47; O. Cachard, *La régulation internationale.…*, p. 104.

39 Directive 2010/13 / EU of the EP and Council of 10.3.10. on the coordination of certain laws, regulations and admin. IF regarding the provision of audiovisual media services (Directive on audiovisual media services; OJ L 95, 15.4.10, pp. 1–24).

40 Council Directive 89/552 / EEC of 3.10.89. on the coordination of certain laws, regulations and administrative provisions of the Polish Partial Law, concerning the performance of television broadcasting activities (Directive on Television without Frontiers; Official Journal L 298, 17/10/1989 p. 0023–030; no longer in force; hereinafter: tv.w.f.d).

41 Directive 2007/65 / EC of the EP and Council of 11.12.07. amending Council Directive 89/552 / EEC concerning the coordination of certain laws, regulations and admin. IF regarding the performance of television broadcasting activities (Journal of Laws UE L from 18.12.07 332/27).

text – emphasized that c.o.o.p. is of key importance for the directive and should be applied to all audiovisual media services[42] in order to guarantee certainty for legal service providers and the free flow of broadcasts and information.

In tv.w.f.d. c.o.o.p. is expressed in art. 2. After the changes introduced by Directive 97/36/EC, this provision is imposed on each MS. The obligation is to ensure that all TV broadcasts under their jurisdiction comply with the provisions applicable to broadcasts intended for universal reception in the relevant part. This general rule was supplemented by the reservation in recital 14) that all dispatches, and especially those that are directed for collection in another MS, should be in accordance with the law of the country of origin. This wording was formulated in the a.m.s. directive only in the context of the extended scope of application and as a result – a different conceptual grid, and despite the fact that the same c.o.o.p. was the subject of lively debate during the work on the directive.

C.o.o.p. complements the rule that only one MS may be the country of origin in a given situational and legal context. This means that a.m.s. may be subject to the jurisdiction of only one MS at a time. The practical implementation of this principle required determining, on the basis of the provisions of the directive, who the sender is and which country should be considered as the country of origin. Due to multiple doubts, regulations related to the Public Procurement Law were essentially extended in Directive 97/36/EC, which amended Directive 89/552/EEC. This applies to both the introduction of the definition of the term "sender" and the transformation of the content of Article 2, and the extension of criteria for determining the jurisdiction of a given state, adding Art. 2a and details of the derogation procedure. The introduced changes were to answer the problems with the implementation of the Public Procurement Law, which were the subject of the CJEU's case law. The concept of "media service provider" was introduced to Directive a.u.m. instead of the concept of "broadcaster" and the criteria for determining

42 Hereinafter: a.m.s.

the jurisdiction of the MSs were based, on the main criterion of the seat in the MS (establishment) – with changes regarding satellite broadcasts.

The obligation of to ensure legal compliance – including in particular the minimal standards set by the directive – correlates with their obligation to guarantee freedom of reception and the prohibition of restricting retransmission of a.m.s. originating from other MS from reasons that fall within the fields of coordination according to d.a.m.s.[43] Permitted exceptions to this general rule are regulated there separately for linear[44] and non-linear[45] services. In art. 4 d.a.m.s., several significant changes were also made compared to tv.w.f.d. These provisions supplement the regulation on the application of the Public Procurement Law in situations apparently involving the circumvention of the law. The problem is then created when service providers make use of the option to choose their country of residence and, as a result, are subject to the jurisdiction of the country of their choice in accordance with d.a.m.s., but at the same time direct all or most of their services to the area of another MS. The Rules from art. 4 d.a.m.s. are intended to facilitate the resolution of such problems and specify the principles arising from the case-law paving the van Binsbergen case in the context of a.u.m. As a general rule, HF they may impose on suppliers under their jurisdiction the obligation to comply with stricter or more specific rules subject to coordination – provided, of course, that these conditions comply with EU law. This provision expresses the idea of minimal harmonisation and establishing the possibility to create rules that go further but do not unreasonably restrict the treaty freedom to provide services. The regulation contained in art. 4 clause 2–5 d.a.m.s. only applies to broadcasters, so it only applies to the provision of TV instead of on-demand services. In d.h.e. there is no analogous regulation.

43 Art. 3 d.a.m.s.
44 Art. 3 ust. 2 d.a.m.s.
45 Art. 3 ust. 4 d.a.m.s.

The problem could arise, for example, if the service provider is based in one MS, but it offer all of its services only in the territory of another MS, which introduces stricter standards for MSs (e.g. for the protection of minors). In these types of situations, consider the following arguments. First of all: are the requirements met at the minimum level specified by the directive? Secondly, to the extent that the solutions adopted in relation to broadcasters result from an earlier jurisprudence, one may wonder whether excluding them from the scope of regulations on non-linear services would practically mean deliberate exclusion of applications resulting from the jurisprudence applied by analogy. Combined analysis of recitals 40)–42) of the preamble of d.a.m.s. leads to the conclusion that, in accordance with the general principle, the right of the enterprise to choose a registered office in the MS is allowed, where it doesn't offer its goods or services.[46] And in relation to broadcasters, the necessity of cooperation between the countries concerned and the need for a more effective procedure for controlling the measures applied by the country in whose area the service is directed is clearly indicated. However, the question of whether a given broadcast is wholly or mainly directed to the territory of another country is considered generally in the context not of broadcasters, but media service providers. However, there is no further reference to on-demand services. Thirdly, doubts arise in connection with the possibility of applying by analogy those provisions according to which the EC may declare such measures to be incompatible with EU law, which would result in their inability to apply. This solution is considered the most important in the context of the changes introduced by the directive. The view was expressed that in order to make decisions, the EC powers should be recognized in all cases of jurisdiction disputes, and not only in cases involving the circumvention of the law

46 In this context, the following judgments were referred to in this preamble: C-56/96, VT4 Ltd v. Vlaamse Gemeenschap, Rec. 1997, pp. I-3143, par. 22; C-212/97, Centros P. Erhvevs-og Selskabsstyrelsen, Rec. 1999, I-1459; C-11/95, Commission v. Kingdom of Belgium, ECR 1996, pp. I-4115; C-14/96, Paul Denuit, Rec. 1997, pp. I-2785.

of a given MS. Such a solution, although not explicitly provided for in d.a.m.s., turns out to be simply advisable from a practical point of view.

The draft submitted by the EC did not provide for changes to art. 4 clause 2. This means this procedure still applies to linear services. However, as regards art. 2, it is suggested that paragraph 5b should be introduced there, which would stipulate that in the event of an unresolved dispute between the Acts for whose jurisdiction a given case falls under, each of them may ask the EC for a decision, which in turn may then consult the European group of regulators of audiovisual media services.[47] Such a provision may be a partial solution to the above problems.

C.O.O.P. in Light of D.E.C.[48]

In the context of the c.o.o.p., interesting relationships between the provisions of the directives can be seen: d.a.m.s., tv.w.f.d. and d.e.c. The preamble of the latter states that the objectives of its provisions are similar to those of tv.w.f.d., which in turn found some "continuation" in d.a.m.s. That is why d.e.c. can be considered *lex generalis* in relation to d.a.m.s. The provisions of both these directives aim to "ensure a high level of regulation" and, as in the case of broadcasting activities, they strive to fully implement the objectives of the internal market for the information society.[49] So in a sense, solutions from tv.w.f.d. have become a model also for solutions from d.e.c.

Article 3 clause 1 of d.e.c. imposes on the MS the obligation to ensure that the i.s.s. provided by a supplier established in the territory of a given country are in accordance with the law of that country and the regulations included in its coordinated field. The MS cannot – for reasons related to the scope of the coordinated field – restrict the free movement of civil and

47 Article 1 3 of the draft directive amending directive 2010/13/EU.

48 Directive 2000/31/EC of the EP and Council of 8.6.00 on certain legal aspects of the Act on civil law, in particular electronic commerce within the internal market (Directive on electronic commerce; OJ L 178, 17.7.00, pp. 1–16). Next: d.e.c.

49 Recital 4) of the preamble.

legal entities from other MSs.[50] Unlike d.a.m.s., the term "jurisdiction" is not used, but the concept of the service provider's registered office is directly referred to.[51] The criteria that make it possible to determine the state controlling the service provider are also complementary in the preamble, and the provisions of the directive do not contain specific regulations analogous to d.a.m.s. in relation to broadcasters.

The key concept for determining the scope of application of the c.o.o.p. to i.s.s. is the concept of a coordinated field. According to the interpretation of the CJEU on eDate Advertising[52], the mechanism established in mandates ensure that the service provider based in a given country complies with the substantive requirements in force in that country within the coordinated field. At the same time, the same mechanism, according to the same interpretation, prohibits host countries from restricting the free movement of services for reasons that fall within the coordinated field. The term "subject to coordination" is closely related to the concept of coordination adopted in d.e.c., and is defined in its Article 2 lit. h). Pursuant to this provision, the fields subject to coordination were defined in general terms as the requirements laid down in the legal systems of MSs, which apply to the Act on civil law or to entities providing them, irrespective of whether they are general or specific. In accordance with the explanations contained in art. 2 lit. i), the coordinated field includes provisions regarding both the setting up and pursuit of service activities. So they concern u.s.i. in a comprehensive manner, covering both the service provider and the service itself, including potentially all stages of its implementation. In fact, in order to answer the question of whether a particular regulation is covered by the concept of "coordination", it is necessary to analyze the exclusions provided for in d.e.c.

In this context, it suffices to mention art. 3 clause 3, where it is indicated that certain areas of the law were excluded, in accordance with the

50 Art. 3 clause 2 d.e.c.
51 Art. 2 lit. c d.a.m.s.
52 Paragraphs 60 & 61 of the judgment in this case.

annex to the directive. In turn, art. 3 clause 4 provides for the possibility of withdrawing from the Public Procurement Law in the enumerated cases of necessary protection: public order, public health, public safety and consumer protection. In these cases, when a given service violates or actually and seriously threatens to violate these goals, measures may be taken by c.o.o.p. only in relation to a specific service (therefore these exceptions are referred to as casu ad casum, or case by case) and in accordance with the principle of proportionality.[53] The application of such measures is subject to the special procedure provided for in Article 3 clause 4 lit. b). This procedure requires that the country of establishment of the service provider be notified, and that the European Commission[54] be notified, before such steps are taken. In urgent cases, the obligation to notify may be fulfilled as soon as possible after the measures have been taken – together with the notification that this was the case. The EC has the competence to assess whether the measures taken comply with EU law. Based on notifications from the MS side, it was found the application of exceptions from art. 3 clause 4 rarely occurs in practice. In total, there were only 30 notifications in 10 years. In most of these cases, these measures were taken to protect consumers and none of them was officially declared by the EC to be incompatible[55] with EU law. The reasons for such a surprisingly low number of notifications are not fully known. The EC Communication drew attention to some statistics – including notifications under Regulation 2006/2004[56] – included in the Consumer Protection Network. These statistics concerned the failure by service providers to fulfill some of the obligations set out in d.a.m.s., where the decline in notifications pursuant to Art. 3 clause 4

53 See e.g. the judgment of the CJEU on C-108/09, Ker-Optika v ÀNTSZ Dél-dunántúli Regionális Intézete, ECR 2010, pp. I-12213, par. 76.

54 Hereinafter: EC.

55 Commision Staff Working Document *Online Services, including e-commerce, in the Single Market*, p. 21.

56 Regulation (EC) No. 2006/2004 of the EP and Council of 27.10.04 on cooperation between national authorities responsible for enforcing consumer protection legislation (Regulation on cooperation in consumer protection; OJ L 364 of 9.12.04, p. 1, as amended).

lit. b) corresponds to the increase in notifications under the Regulation. This factor, however, is not considered to be a full and satisfactory explanation of such a low number of notifications.

Relationships Between the Provisions of D.A.M.S. and D.E.C. in the Context of A.M.S. on Demand

The relationship between the two directives is laid down in Article 4 clause 8 d.a.m.s. The principle introduced there stipulates that d.e.c. is generally applicable unless d.a.m.s. provides otherwise, and in the event of a collision between them d.a.m.s. takes precedence. This principle has yet to be corrected by the fact that, from the scope of the subject d.e.c., TV broadcasting services which fall under the scope of Directive 89/552/EEC are expressly excluded. This rule in relation to the Public Procurement Law can be interpreted in such a way that in the fields covered by the coordination in d.a.m.s. and in the absence of a different provision, the provisions of this directive apply – also when exceptions to the c.o.o.p. are permissible. The case is different in terms of other requirements that are imposed on service providers and which fall within the term "coordinated field" in the spirit of art. 2 lit. h d.e.c. There – according to the judgment in the eDating Service case – the obligation of the UE member states is to ensure that the service provider does not stay subject to more stringent regulations than those in force in the substantive law of the country of its seat. All exceptions to this rule are permissible only in situations provided for in the art. 3 clause 4 directives.

In d.a.m.s., c.o.o.p. is to oblige MSs to guarantee the greatest possible freedom of reception and retransmission of a.m.s. from other EU member states. In the context of the definition of the term "supplier a.m.s." and the criteria for choosing the jurisdiction of a given MS, it can be seen that in d.a.m.s. these issues have been further detailed, in contrast to the general categories of d.h.e. The term "supplier a.m.s."

was clarified primarily thanks to the criterion of editorial responsibility. This is intended to provide an answer to the question of who provides a specific media service on demand. One also has to agree with the diagnosis that the detailed directions contained in art. 2 clause 2 and 3 are used to precisely determine the seat of the service provider, while d.e.c. only provides guidance on determining the country of such residence. Therefore, the solutions of a.m.s. are much more detailed.

Uniform criteria for both linear and non-linear services have been adopted as to the determination of the service provider and the country of the relevant jurisdiction. It is significant that these criteria have not been changed in the context of the on-demand services referred to in art. 2 clause 4 d.a.u.m. Acceptable exceptions are regulated here. There is a great deal of talk about circumvention when it comes to TV broadcasting. In this discourse, certain solutions were developed, which, however, ultimately did not include on-demand services (see Article 4(2) of d.a.u.m.). The Reasons for not using the PP for non-linear services are the same as those included in d.h.e. The justification for this solution is not fully understood. It is also necessary to take into account the fact that the scope and actual effects of the application of d.a.u.m. they depend primarily on two factors: the field of coordinated fields and the scope of permissible exceptions. What's more, mutual relations between these two aspects of the PPP are extremely important. This means that the possibility of exceptions should be correlated with the scope of the coordinated domains. In favor of such a solution, there is a logical argument that if the principle of freedom of receipt of goods or flow of services is introduced in certain indicated areas, then it is necessary to consider in what types of situations there may be a need to introduce restrictions due to the protection of overriding interests. In the context of coordinated fields, a two-level scope of regulations was introduced – separate for linear and non-linear services. In practice, this means justification – at least to some extent – of the introduction of different exceptions for these two categories of media services. But do

these exceptions have to be identical to those provided in d.e.c.? On the one hand, another aspect of coordinated fields can be seen here. On the other hand, however, the adoption of exceptions from this last directive could only be dictated by the abovementioned relationship between this directive as a general law (*lex generalis*) and d.a.m.s. as a special law (*lex specialis*) in the field of non-linear services. In this respect, solutions from d.a.u.m. could be a supplement to the solutions from d.e.c., but at the same time remaining within the limits set in the latter.

However, such an argument is not entirely convincing, for the following reasons. First, in both directives on the c.o.o.p. are expressed slightly differently. D.a.m.s. insists on the unlimited nature of receiving and using audiovisual services on demand, while d.h.e. it is limited to imposing general restrictions on the provision of services. Secondly, it seems that the legal structure introduced here is based on technological criteria, and non-linear services are regulated in accordance with the model provided for all laws and regulations. The characterization of these services as consisting in the provision of audiovisual broadcasts, as well as the scope of coordinated fields, which is different in both these Directives, can be attributed to the background. Meanwhile, the basics for introducing restrictions should be introduced with analogy to the regulations on the distribution of TV instead of the broadly defined law.

Another extremely important issue in the relationship between the two directives is the legal framework for the potential requirement to obtain authorization to operate a given type. Article 4 1 d.e.c. requires MSs to ensure that undertaking and conducting activity in the scope of providing us with goods and services do not require authorization or measures with a similar effect. Recital 19) in the preamble to d.a.m.s., on the other hand, expresses the assumption that this directive does not affect the liability of and their bodies in the field of organizational activities, including licensing systems and administrative permits. On the other hand, recital 20 of this preamble indicates that no provision of the direc-

tive should oblige or encourage MSs to introduce new concession systems and administrative approvals in relation to a.m.s. in any category.

The formulation of the provisions of both directives reveals some incompatibilities between them. It can be concluded here that d.a.m.s. allows the introduction of, for example, a system of authorizations for the provision of non-linear audiovisual services, which is definitely incompatible with Article 4 clause 1 of d.e.c. However, it can be argued these issues are outside the scope of the subject of d.a.m.s., and the indicated recitals cannot be treated as provisions that would establish exceptions to the general rule expressed in art. 4 clause 1 d.e.c. Due to the relationship between the provisions of both Directives, there is a fundamental difference in the authorization system for the provision of linear and non-linear services. Potential further doubts should be resolved in the light of art. 11 par. 2 of the EU Charter of Fundamental Rights[57], whose provision expresses the principle of respect for the freedom of the media and the acquis in the field of the application of freedom of expression and the admissibility of exceptions thereto.

The Country of Origin Principle and the Applicable Law for Obligations Related to the Benefit of Information Society Services – the Abstract

The article deals with the issue of the titular country of origin principle as one of the crucial institutions of the legal system of the European Union – in this case within the context of information society services, especially of audiovisual media services (also on demand). The principle in question is one of the basic rules which constitute the fundaments for the economic system of the European Union – especially where the context of its internal market is concerned. The article considers the genesis, history and evolution of this principle in order to give a generalized comprehension of why it is currently shaped and programmed to func-

57 Official Journal of the European Union, *C 326*, 26 October 2012.

tion in such a way and not otherwise. The main points of references here are of course various acts of European Union law. Of this material, the most important acts of law are:

- Directive 2000 / 31 from 8th June 2000 on some legal aspects of the Act on commercial partnerships, in particular electronic commerce (Journal of Laws L 178, 17th July 2000, colloquially: directive on electronic commerce);
- Directive of the Council of 3rd October 1989 on the coordination of certain laws, regulations and administrative provisions of the Member States regarding the pursuit of television broadcasting activities (colloquially: Television without Frontiers Directive, 89 / 552 / EC, OJ U. OJ L. 89.298.23, amended by the EP and Council Directive of 30th June 1997 [97 / 36 / EC], OJ L.1997.202.60, which significantly expanded the provisions relating to the principle in question);
- Directive 98 / 34 / EC of the EP and Council of 22nd July 1998 laying down procedures for the provision of information in the field of technical standards and regulations (OJ EC L 204 of 21.7.98) as amended by Directive 98 / 48 / EC of the EP and Council of 20th July 1998. (OJ EC L 217 of 25.8.98);
- Directive 2010 / 13 / EU of the EP and Council of 10th March 2010 on the coordination of certain laws, regulations and administrative issues regarding the provision of audiovisual media services (OJ L 95, 15th April 2010, pp. 1–24, colloquially: Directive on audiovisual media services);
- Consolidated version of the Treaty on the functioning of the European Union (Official Journal of the European Union, C 326/49)
- Regulation (EC) No. 2006 / 2004 of the EP and Council of 27th November 2004 on cooperation between national authorities responsible for enforcing consumer protection legislation (OJ L 364 of 9th December 2004, p. 1, as amended; colloquially: Regulation on cooperation in consumer protection);

– Directive 2007 / 65 / EC of the EP and Council of 11th December 2007. amending Council Directive 89 / 552 / EEC concerning the coordination of certain laws, regulations and admin. issues regarding the performance of television broadcasting activities (Journal of Laws UE L from 18th December 2007, 332 / 27);
– and last but not least EU Charter of Fundamental Rights (Journal of Laws of C 326 from 26th November 2012, pp. 391–407).

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SUMMARY

The Country of Origin Principle and the Applicable Law for Obligations Related to the Benefit of Information Society Services

The article takes all of the abovementioned legacy of European Union Law into consideration while analysing them in depth through the prism of the principle in question and via careful comparisons of each of them as well. Particular attention is paid to the following issues, namely: the legal nature of the principle in question, its treaty sources, its scope of application,

the principle in question in the light of the abovementioned directives – namely the Directive on audiovisual media services and the Directive on electronic commerce; and finally – relationships between provisions of the two aforementioned directives in the context of audiovisual media services on demand. While working on the text, all of the mentioned parts of the main subject turned out to be important enough to put them into separated sections of the text with their own individual headings. In the meantime, several interesting subject-related sentences by the European Court of Justice were also taken into account for a broadened pool of reference. To sum it all up: ultimately, the principle in question and its potential influence on the practical functioning of the European Union's law and economy has been considered thoroughly.

Keywords: country of origin principle, European Union law, information society services, audiovisual media services, services on demand, electronic commerce, UE directives, ECJ judgments, television "without frontiers", amendments.

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DOI 10.14746/ppuam.2020.11.09

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Multilingualism as the Constitutional Principle of the Equality of Languages in European Union Law

Introduction

Multilingualism as a constitutional principle of European Union (EU) law is a relatively rare issue, in terms of considering its essence. Multilingualism can be defined as the coexistence of two or more languages reflecting multi-systems within the state or other international law entities. The coexistence of multilingualism and multi-systems can be seen in countries such as Canada, where there are two legal systems: the continental law system and the Anglo-Saxon law system, as well as two languages: French and English.[1] The introduction of such a solution constitutes a recognition of the equality of English-speaking and French-speaking citizens. In Canada the two languages are qualified as the official languages of the country in which the legislation is being made. As a rule, the European Union reproduces the model of a multilingual legal system, which includes harmonized EU legislation created in as many as 24 languages and implemented in 27 legal systems. The European Union holds that each language version is equally authentic and equal, although in practice the working languages are English, French and German.[2] In the context of multilingualism, the European Union is facing the challenge of high-

1 For the essentials, see <www.canada.ca/en/canadian-heritage/services/official-languages-bilingualism>.

2 S. Lopez, *État et enjeux du multilinguisme dans les institutions européennes*, in: *Langues et contruction européenne*, eds D. Hanf, K. Malacek, E. Muir, Cahiers du Collège d'Europe, Bruxellles 2010, p. 12.

quality legislation. The dimension of multilingualism within the European Union and its institutions changes with many conditions. EU publications in this field began to increase with the subsequent accession of new Member States and thus with the increase in the number of official languages of the European Union and translation combinations.[3] There are also other reasons for a multilingual European Union. Apart from the objective of the coherence and transparency of legal acts, an important point is the citizens' access to EU legislation, which is connected with the concept of multilingualism used by the institutions, understood as the equality of official languages, i.e. the national languages of the Member States. This concept is based on respect for equality between Member States and citizens. This principle, expressed in Regulation 1/58, is the foundation of the European Union's language regime and the concept of creating legislation in accordance with the principle of multilingualism. The key issue is the balance between creating legislation in 24 languages and introducing a single EU language, which would violate the EU's constitutional principle of the equality of languages. The principle of the recognition of all official languages as equal and authentic is closely linked to the principles of democratic legal order and transparency of legislation.

Multilingualism in European Union Law – General Remarks

The Union stands out among other subjects of international law by recognizing all the national languages of the Member States as official languages.[4] The introduction of such a solution generates a budget cost and also implies the need to employ specialists – lawyer linguists, translators,

3 As a consequence of enlargement, the Union needs more and more specialists in lawmaking in various socio-economic fields who have high language and translation qualifications. In order to preserve the consistency and transparency of the acts that constitute the objectives of EU legislation, the European Union translation services have set certain editorial and translation standards.

4 The fact that several countries have recognized the same language as official, and therefore, although there are currently 27 Member States, there are 24 official languages in the Union.

conference translators and proofreaders, and also requires the technical side of the entire logistics and IT facilities, facilitating the work of specialists, i.e. conference booths or IT systems such as MT @ EC.[5]

Meanwhile, observing the situation in the European Union, especially after the enlargements in 2004, 2009 and 2013, it can be concluded that it has lost its balance in this respect.

The principle of equality of languages is seen more as a formality today because in reality English dominates with accretions typical of European Union legislation. In the literature, there are various terms corresponding to the specificity of this language – bruxellish, globish or frenglish – used to distinguish it from standard English.[6] The concept of multilingualism adopted by the institutions and bodies of the European Union supports the recognition of the principle of language equality as formal.

The legislative institutions of the European Union have introduced a legislative structure that is based on two stages. The first stage consists of creating a legal act in one or two languages – mainly in English, while the second stage is translating it into other languages, of which all language versions are equally authentic, in accordance with art. 55 par. 1 of the Treaty on European Union (TEU). The specificity of such translation lies in the respect for specific normative style, which does not give the impression of being translated, but rather edited in this language.[7] This means that people applying or interpreting an act in each of the Member States will perceive it not as a "translation" in a negative sense, but as a text prepared in accordance with the principles for the formulation of legal acts adopted in that state. This concept aimed at improving the quality of legislation is ensured by appropriate institutional

5 M. Buchowska, *Tłumacz w instytucjach Unii Europejskiej – wyzwania współczesnej wieży Babel*, "Rocznik Przekładoznawczy. Studia nad teorią, praktyką i dydaktyką przekładu" 2017, no. 12.

6 S. Lopez, *État et enjeux du multilinguisme*…, p. 12.

7 A. Flückiger, *Le multilinguisme de l'Union Européenne: un défi pour la qualité de la législation*, in: *Jurilinguisme : entre langues et droits*, Bruxelles 2005, p. 11.

mechanisms that guarantee its effectiveness.[8] There are various methods to ensure the effectiveness of this specificity. First, putting effort into the editorial quality of source texts in English, French or German, before translating. In order to ensure editorial quality, the institution of proofreading and the adaptation of source texts (editing service, under the Directorate-General for Translation) entered into force in 2002.[9] Secondly, in bilingual and trilingual legal systems, the implementation of techniques of co-editing source texts ensures the editorial quality of various language versions. For example, in Switzerland, tests are first edited in German and French, and then translated into Italian. The benefit of the quality of the two basic source versions suggests that editing of this type in the main working languages of the European Union should not be excluded a priori from the process of drafting legal acts. The issue of co-editing is important from the point of view of multilingualism in the European Union. This method is partially used in the process of drafting legal acts. However, it is a precise and desirable method in the structures of the European Union. It consists in editing an act by editors, each in their own language, after prior discussion as to the outline and form. At the time of its creation, editors compare and review the text.[10] This method is difficult to implement in 24 languages, but reducing it to editing in one or two languages basically causes many problems in the implementation and application of EU legal acts. The Commission itself, in accordance with the principle of economy[11], is limited in internal matters to English, French and German.[12] There is a growing tendency to create texts written in English. At the same time, texts in the target of-

8 Ibidem.

9 Ibidem.

10 Ibidem.

11 Translation and multilingualism, Publication Office of the European Union, Luxembourg, 2014, p. 2.

12 Over the past sixty years, the leading role of French has changed completely. In the 1990s, the use of French (40.5% of texts) and English (45% of texts) was similar. According to statistics published by the Commission in 2014 entitled Translation and multilingualism 81% of the documents are in English, 4.5% in French, 2% in German, and 12.5% in other languages.

ficial languages are created equally in 24 languages. The use of English, French and German is distinguished because it serves the internal needs of the European Commission.

The European Union has one of the largest translation services in the world, one of them is the Directorate-General for Translation, which provides translation services to institutions and promotes multilingualism within the European Union. The role of translation institutions is important in the context of the legislative procedure which is directly applicable in the Member States. As a result, the publication of acts, documents and information in all languages enables both citizens and national institutions to access them. It should be mentioned that the legislative process takes place at different levels – EU, national and local, which also enables citizens to participate in this process, so it is necessary to provide them with a choice of language from among the official ones to ensure compliance with the principles of equality.

The Equality of Official European Union Languages as a Constitutional Principle

Multilingualism in the European Union, as well as the concept of understanding all official languages as equal and equally authentic, are links related to international borders and restrictions subject to control. At the outset, the founders of the European Community had to confront the language contexts that are present in everyday work settings, in relations with state authorities, other authorities, private companies and mainly in communicating with citizens.[13] It was recognized that the languages of the founding and then Member States would become official languages. World War II, on the one hand, and the combination of economic forces of formerly hostile countries, on the other, meant that it would be impossible for everyone to impose the

13 *Histoire de la traduction à la Commission européenne*, Office des publications de l'Union européenne, Luxembourg 2010, p. 9.

language of one of the parties.[14] As a consequence, the language situation of the Communities (first, in 1952, the European Coal and Steel Community, then in 1958 also the European Economic Community and European Atomic Energy Community, hereinafter reffered to as Communities) was defined in a special way. In order to ensure the right of every citizen to understand the regulations and solutions adopted by the Community, as well as to respect their linguistic and cultural diversity, a solution was adopted in which French, German, Dutch and Italian became official languages of the Communities. This solution was partly due to the situation in Belgium, where the Dutch-speaking Community proclaimed equal rights with the French-speaking Community, and since Dutch was included in the official languages of the European Coal and Steel Community, Italian also had to be added, given that it accounted for three times more users.[15]

The Treaty of Paris establishing the European Coal and Steel Community (ECSC) was signed in 1951 by Germany, Belgium, France, Italy, Luxembourg and the Netherlands. This treaty was drafted in French and the French language version was the only authentic one. It entered into force in 1952 and for a period of 50 years. With the decision of all members of the Community, Luxembourg became the seat of the institution, with the exception of the Assembly, which met once in Luxembourg and once in Strasbourg. The Protocol annexed to the Paris Treaty prompted delegations to study in detail the issue of the headquarters as well as those relating to the Community language regime, and to submit concrete proposals to the governments of the Member States.

14 Ibidem.
15 Ibidem.

Legal Bases for the Equality of Official Languages – European Communities Language Regime Protocol and Regulation 1/58

The Protocol establishing the European Community of Coal and Steel (hereinafter ECSC) integrated language regime entered into force with the Treaty on July 24, 1952.[16] It was a moment when European history took a supranational direction. In 1951, a commission of lawyers met to analyze the language systems of the various organizations that existed at the time. It was decided that new solutions appropriate to the specificity of the Community should be sought. The element determining the resulting concept was the desire to create a community as a home for their citizens, so that they would feel "at home." It was therefore necessary to introduce the languages spoken in the Member States as widely as possible. In line with this idea, the protocol states that the official languages and procedural languages are: French, German, Italian and Dutch.[17] At that time, the official and procedural languages were treated identically. It was a real recognition of de iure and de facto language equality and a manifestation of true linguistic balance. The protocol also laid down detailed rules concerning the Community language regime: decisions, recommendations and individual opinions, as well as correspondence addressed to enterprises were to be written in the language to which they relate. Correspondence addressed to the Community institutions was to be edited, in accordance with the will of the sender, in one of the official languages of the Community, and the response was to be written in the same language. The Assembly regulated practical matters regarding the use of languages, delegates were able to communicate in one of the four official languages, as they chose. Finally, the Official Journal of the Community had four editions, each edited in one of the four official languages.[18] Analyzing the way the

16 The language protocol « protocole sur le règime linguistique de la CECA » from 24.07.1952.
17 *Histoire de la traduction…*
18 Ibidem.

Communities functioned in the early 1950s in terms of multilingualism, it can be stated that from the beginning the emphasis was on ensuring the good course and transparency of the institutions' work as well as on European citizens having access to their activities, thanks to which a truly democratic, even constitutional principle of citizens' access to legislation was implemented. Therefore, each Community institution was equipped with translation services in response to translation and interpretation needs. The language services of the High Authority were particularly important from the point of view of editing and translating legislative proposals, which were logically divided into the translation and interpreting departments. Their role was to assist other services in writing or orally while respecting the use of one of the official Community languages.[19] In order to assess changes in the Community's language regime, account must be taken of the fact that the High Authority report of 1955 says that the number of pages translated increased significantly (in 1953 it was 38,855, and in 1955 the number of pages was 61,568).[20] The capacity of language services was measured by the number of pages translated per day or per hour. With the increase in documents and after several years of experience with such a language system, it was stated in the report that it was high time to introduce a more rational organization of translators' work.

Until 1957, the ECSC language regime was determined by protocols and reports. At the same time, the Founding States decided to push European integration further. In 1957, the Treaties of Rome, one establishing the European Economic Community and the other establishing the European Atomic Energy Community, were signed by the six founding

19 The division of language services in the 1950s was as follows: All translators, who according to archival documents of the High Authority numbered 35, were divided into language sections. One of the language sections was the English section, although the language was not official, it was the language most commonly used at the international level in the field of heavy industry, science and technology, and above all in the trade of coal and steel. The English section had only 2 people, while the most translators were German 12, French 10, Dutch 6 and Italian. For more detailed information, see *Histoire de la traduction…*

20 Ibidem.

countries of the ECSC. Following the entry into force of the Rome Treaties, the need to regulate the language regime applied by the Communities led to the drafting of a regulation establishing a language regime for the European Economic Community (EEC) and for the European Atomic Energy Community (EAEC), i.e. Regulation 1/58. The numbering itself indicates the priority of the regulation. The provisions contained in the regulation, like the 1952 Protocol, specify that the Council is the institution establishing the language regime of the institution, acting unanimously. On the one hand, political sensitivity, and on the other, the fact that any modification of the current language regime the unanimity of all Council members, and thus all Member States, gave Regulation 1/58 a procedural and constitutional dimension.[21] The language regime introduced by this Regulation explains in part the particular nature of the European Union, which has certain federation features that affect the political system and the development of the organization. In this approach, recognition of the national languages of the Member States as official languages of the European Union was to some extent a response to political needs.[22] Until the regulation was adopted as an act of secondary law, the language regime was determined only by means of reports and reports. This regulation, inspired by the Protocol establishing the ECSC language regime, introduced the same operating rules for the EEC and the EAEC. The first article lists the official languages of the Communities, of which there were four in 1958. It should be noted that this regulation is still in force, and is amended with each subsequent enlargement. Pursuant to the provisions of the regulation, all official languages often have to be used first of all for communication between the institutions of the Union and its citizens, and secondly between the institutions of the Union and its Member States. The originality of the Communities' functioning has made translation necessary

21 D. Hanf, É. Muir, *Droit de l'Union européenne et multilinguisme – Le cas de l'établissement du marché inérieur* in: *Langues et construction européenne,* eds E. Muir, D. Hanf, K. Malacek, Bruxelles 2010, p. 31.

22 Ibidem.

to respect the rights of European citizens. With the entry into force of the Treaties in 1958, a new headquarters of the EAEC and EEC committees was established in Brussels. The language services were again divided into four official language sections, each with 12 translators, and an English language section which, similarly to the ECSC, was for communication with the outside world. It should be noted that today the organization of language services, namely the Directorate General for Translation (DGT) is similar to that of the late 1950s. The current language division, in which DGT has its own separate department, remains in the DGT structure. However, the division does not stop there, because language departments are further divided into departments specializing in specific subjects. One department has about 20 translators.[23] This organizational structure perfectly reflects the functioning of the postulate of language equality in practice. Equality of languages is also related to the institutions of the European Union, referred to in art. 6 of the Regulation stipulating that all Institutions have the right to establish their language regime in internal regulations.

The Equality of Official Languages and Language Regimes and the Practice of the European Union Institutions

Each institution and body of the European Union has its own language regime, defined by internal regulations and practice, based on the principle of equality of official languages of the Union, which is based directly on the principle of authenticity. Article 55 of the consolidated version of the Treaty on European Union reads "This Treaty, drawn up in a single original in the Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish languages, the texts in each of these languages being

23 <www.ec.europa.eu/commission>.

equally authentic, shall be deposited in the archives of the Government of the Italian Republic, which will transmit a certified copy to each of the governments of the other signatory States."[24] The principle of treating texts as authentic is contained in the Vienna Convention on the Law of Treaties of 1969, whose Article 33 contains provisions on the interpretation of authentic texts.[25] Article 33 paragraph 1 states that "when a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail." Considering the issue of the authenticity of the texts, we should remember to avoid the word "language version", which suggests the superiority of one text over another, as discussed in art. 33 par. 2 – a version of the treaty in a language other than one in which the text was established as authentic shall be considered authentic only if the treaty so provides or the parties so agree. The Vienna Convention concerns the authenticity of the texts of the Treaties, but it should be noted that art. 55 of TEU makes the Treaties authentic and the texts of secondary law of the European Union. In connection with this perception of the issue of authenticity and art. 342 TFEU "the rules governing the languages of the institutions of the Union shall, without prejudice to the provisions contained in the Statute of the Court of Justice of the European Union, be determined by the Council, acting unanimously by means of regulations".

The Equality of Official Languages in the Most Important Institutions of the European Union

All European Union institutions are confronted with the problem of multilingualism, but due to their nature they use slightly different solu-

24 Treaty on the European Union (consolidated version) O.J. 326, 26.10.2012.

25 The Vienna Convention on the Law of Treaties (VCLT) was adopted and opened to signature on 23 May 1969, and entered into force on 27 January 1980. It has been ratified by 116 states as of January 2018. See more on official website: www.treaties.un.org.

tions in this respect. The European Parliament is an institution which derives directly from the universal will of citizens. In accordance with the provisions of the Rules of Procedure, Parliament adopted that "all its documents shall be drawn up in the official languages." It also follows from these Rules that all Members have the right to speak in the chosen official language during its meetings, which is a manifestation of the actual equality of languages in the European Union. Only in exceptional cases may the number of languages be limited. In addition, Parliament, as an institution which derives from the universal will of citizens, differs from other EU institutions in that it is obliged to ensure the highest possible level of multilingualism.[26] To this end, the principle of controlled and full multilingualism is applied with the participation of the European Parliament's Directorate-General (DG) for Logistics and Conference Translation. This directorate has a wide range of translation tasks, because in addition to providing interpretation during the plenary sessions of the European Parliament, it carries out its task in many meetings relevant to citizens.[27] The European Commission, as the EU's executive body, operates on the basis of an internal regulation. It does not provide for the concept of working languages, although, in principle, the Commission uses such working languages in its internal work. This is due to the role of the Commission as the Guardian of the Treaties, in which the formal equality of languages is maintained. In practice, the Commission uses English, French and German as procedural languages, but English is definitely dominant, but it creates and adopts decisions in these three languages and plays a leading role in the legislative pro-

26 <www.europarl.europa.eu/about-parliament/pl/organisation-and-rules/multilingualism>.

27 The Directorate-General for Translation operates at meetings of parliamentary committees, parliamentary delegations, joint parliamentary assemblies around the world,[…]meetings of the Committee of the Regions, meetings of the European Commission in Luxembourg, meetings of the Court of Auditors, meetings of the European Ombudsman Citizens' Rights, meetings of the European Data Protection Supervisor, meetings of the Translation Center in Luxembourg. See for more on the official DGT website <www.ec.europa.eu/info/departments/translation>.

cedure. At the level of the language services, i.e. the DG's, there is no official instruction imposing the use of a specific language.

It should be emphasized that the superior use of English is the result of more practical solutions.[28] Preparation of a legislative draft is preceded by a discussion, therefore, even if the officer responsible for the draft is of a different nationality, e.g. Polish, he or she edits it before the draft in English or French, so that the text prepared in such a way can be the basis for subsequent debate within the Commission. This practice aims to guarantee the knowledge of English or French by European Commission officials. Consequently, there is no need to translate the project into other languages. Every few years, the Commission publishes multilingual brochures in which the growing role of English can be seen.[29] The effect of using English is the speed and ease of consultation of the communities concerned and enabling European society to actively participate in the preparation of the draft legislative text.[30]

Faced with the rules and practices of other institutions, the Court of Justice regime and language practice are characterized by the golden mean between pragmatism and multilingualism. Publication of EU acts in all official languages would make little sense if the citizens of the Member States exercising EU rights could not assert them in the same languages before justice. On the other hand, the diversity of legal systems of the Member States of the European Union and the obligation to settle cases within a reasonable time, which are binding at all levels of legal nature, are factors that are hard to ignore in considering multilingualism and the use of languages in judicial matters. The procedural language of the Court of Justice for historical and organizational reasons is French. The rules of the Court's language system are set out

28 For more on this topic, see L. Krämer, *Le régime linguistique de la Commission européenne*, in: *Langues et construction*…, p. 101.

29 For example, the Commission's Directorate-General for the Environment publishes on the website information on any research, reports in the field of the environment. Of 203 titles, 201 are in English, one in French and one available in 7 languages. Ibidem, p. 103.

30 Ibidem.

in Chapter 8 of the Rules of Procedure of the Court of Justice of 2012.[31] The languages of the proceedings before the Court are listed in art. 36 of the Regulations in connection with art. 55 of TFEU. Determining the language of proceedings is based on several principles, which are listed in art. 37 of the Regulations[32], which reflects the practical understanding of the principle of the equality of languages and thus of the Member States and even national minorities. The Court of Justice rules on cases brought before it, which can be typologically divided: 1) infringement proceedings, which are cases brought against EU governments for non-compliance with EU law, brought by the Commission or another Member State, 2) actions for annulment in the event of an EU legal act being found incompatible with EU treaties or fundamental rights, brought by EU governments, the EU Council, the European Commission or the European Parliament, 3) complaints about inaction brought against Parliament, the Council and the Commission, forming a legislative triangle, and finally 4) preliminary rulings, which are a manifestation of the application of the principle of uniform interpretation of law, which may cause problems in the conditions of multilingualism and multi-systems, this is a procedure in which a national court, having doubts as to the interpretation or validity of a given EU legal act, may ask for a preliminary ruling to the Court of Justice. This is a type of mechanism that is important when considering multilingualism because it can be used to determine whether national rules are compatible with

31 Rules of Procedure of the Court of Justice of 2012 <www.eur-lex.europa.eu>.

32 Article 37 of the Rules of Procedure of the Court of Justice of 2012 reads: "1. In direct actions, the language of a case shall be chosen by the applicant, except that: (a) where the defendant is a Member State, the language of the case shall be the official language of that State; where that State has more than one official language, the applicant may choose between them; (b) at the joint request of the parties, the use of another of the languages mentioned in Article 36 for all or part of the proceedings may be authorised; (c) at the request of one of the parties, and after the opposite party and the Advocate General have been heard, the use of another of the languages mentioned in Article 36 may be authorised as the language of the case for all or part of the proceedings by way of derogation from subparagraphs (a) and (b); such a request may not be submitted by one of the institutions of the European Union."

EU law.[33] In accordance with paragraph 3 of art. 37, "In preliminary ruling proceedings, the language of the case shall be the language of the referring court or tribunal" by way of exception, another language may be used. The translation service, which consists of experts with relevant legal education and a thorough knowledge of several official languages of the European Union, is essential for the functioning of the Court. As in the case of the Commission, the Court uses the working language, which in its case is French. There are many factors behind this choice. The first is historic, because in 1952, when there were six Member States and 4 official languages and such a system also concerned inter-judicial communication, concepts specific to a given language or legal system could be difficult for another judge.[34]

For these reasons, the first members of the Court were more likely to say in one language, French, was chosen for historical reasons. Another factor explaining the dominant use of French as a court language is the nature of the proceedings, which must be translated not only into the language of the proceedings, but also into the working language, which allows judges and advocates-general to deliberate at an earlier stage in the light of the edited or translated applications. In addition, competence with the French language is required from most of the institution's staff, starting with the judges and their associates, because it is in French that meeting reports are written, as well as draft judgments – motive designs that serve as a basis for discussing the structure of the judgment. The judges are supported in this matter by French-speaking lawyers, whose role is to read all draft rulings and make suggestions as to the editorial order. The Court of Justice faces many problems, and multilingualism lies at their heart. Case law is published selectively, disregarding those judgments that constitute a specific source of law for the European Union. The proceedings are lengthy, which in the case of questions referred for a preliminary ruling significantly delays the judgment of the

33 <www.europa.eu/european-union/about-eu/institutions-bodies/court-justice_pl>.
34 Ibidem.

national courts. The model of the language regime used by the Court, although it may not be perfect, tries to reconcile the requirements of good administration of justice and the principle of the equality of languages.[35]

Multilingualism in the EU and Citizens

Ensuring access for European citizens to EU legislation is justified by art. 42 of the Charter of Fundamental Rights, which indicates that the right of every citizen of the European Union, but also of every natural or legal person residing or having its registered office in a Member State is access to European Parliament, Council and Commission documents. In 2005, together with the New Framework Strategy on Multilingualism, the Commission defined the main objectives of a multilingualism policy, one of which is to ensure citizens' access to legislation, procedures and information on the European Union in their native language.[36] European Union citizens have the right to address the institutions and receive a reply in each of these languages in accordance with Article 24 of TFEU. To give citizens access to information, all EU legislation is published in all 24 languages except Irish (only regulations that are issued jointly by the Council of the EU and the European Parliament are translated into Irish), while more detailed documents or information are published in the more common EU languages such as English, French, German and Spanish.[37] In accordance with art. 297 TFEU 'legislative acts are published in the Official Journal of the European Union', which is currently available electronically.

In addition to the official languages, around 40 million people in the European Union use over 60 regional and local languages, in-

35 M.A. Gaudissart, *Le régime et la pratique linguistiques de la Cour de justice des Communautés européennes* in: *Langues et construcion*…, p. 157.

36 A New Framework Strategy for Multilingualism, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Brussels, 22.11.2005 COM(2005) 596 final.

37 <www.europa.eu/european-union/about-eu/eu-languages_en>.

cluding Basque, Catalan, Frisian, Lapland, Welsh and Yiddish.[38] Only a language that is recognized in a given country by national legislation as the official language can become an official EU language. On the other hand, the official language in a given candidate country to the European Union does not become an official language of the European Union automatically, because the condition during accession negotiations is that the candidate country declares its willingness to grant such status and translates the *acquis communautaire* into its official language.

As a rule, if a candidate country to the European Union has one official language, granting the status of an official EU language should not be controversial, while the example of consideration in this topic was the adoption of the Croatian language as an EU language during the accession of Croatia in 2013. It was considered to define the language of the new Member State as Serbo-Croatian, because in the event of Serbia's accession to the European Union, it would not be necessary to translate the *acquis communautaire* because of the similarity of these two languages. However, the Croatian language is the official language and the same language was used by the Croatian side in the accession negotiations, which is why it was decided to adopt the Croatian language as an official language of the European Union.[39]

Another case is when there is more than one official language in the candidate country, it is necessary to decide which languages, or all or some, will be given the status of the official language. Until the enlargement in 2004, it was generally recognized that if one of the languages of the candidate country was already an official language of the European Union, or if it received such status, then other languages of that country would not obtain such status. In 2004, when Malta joined the European Union, it submitted an application for the recognition of the Maltese

38 Ibidem.

39 A. Doczekalska, *Zjednoczona w różnorodności – wyzwanie dla europejskiej tożsamości prawnej na przykładzie różnorodności językowej*, "Filozofia Publiczna i Edukacja Demokratyczna" 2013, vol. II, no. 2.

language as an official language of the European Union, since Malta has two official languages, English and Maltese, with English already being the EU language. The example of Malta was followed by Ireland, which applied for recognition of the Irish language as an official EU language, since upon accession in 1973 with Great Britain, the status of the official language was granted to English, which according to art. 8 clause 1 of the Irish Constitution is the second language in Ireland. In connection with Ireland's application, together with Council Regulation No. 920/2005 of 13 June 2005, Irish became an official language of the European Union. A more historical example is Luxembourg, in which three official languages are in force: French, German and, since 1984, also the Luxembourgish language, but the country has not applied for recognition of the Luxembourgish language as an EU language. It is necessary to ask what the Member States are guided by when choosing the official language in the European Union. The factors are probably most often political, but it is the European Council that determines the language system of the institutions of the European Union and decides unanimously, by means of regulations, whether to grant such status, in accordance with art. 342 TFEU and art. 190 of the Treaty establishing the European Atomic Energy Community.

It is important to be aware that in a democratic legal order such as the European Union, it is unimaginable to create norms whose citizens are destinations and users in a language other than their own. It is not a matter of political emphasis on the sovereignty of nation states, but rather the links between citizens and the European Union and the ability of this organization to communicate in the language of each of them.

Conclusion

Multilingualism in the European Union is a constitutional principle of the European democratic legal order. The introduction of the national languages of the Member States as official organizations is unprece-

dented and extremely important for the citizens of this quasi-federation. The European Union, or more precisely the European Communities, introduced the legal basis for multilingualism by creating models of language regimes for each institution. These models from the 1950s have survived in some institutions, for example at the Court of Justice, but in the European Commission a balanced language regime has been completely changed over the past few decades by the dominance of one language not adapted to the continental law system. In terms of citizens' rights, the European Union can boast of a real equality of the languages of its countries in the European Parliament, the institution closest to Europeans. The introduction of a solution that allows institutions to define their language regime in internal regulations gives the opportunity to adapt this regime to the functions they perform. The European Union promotes linguistic diversity and this policy direction facilitates communication between its institutions and citizens. One of the objectives of language policy is citizens' access to EU legislation, which is closely linked to the possibility of exercising their rights before the Court of Justice. The European Communities addresses the issue of multilingualism at the very beginning of its creation. They adopted an optimistic vision of Europe in which every Member State and language is equal. With subsequent accession, it has become more and more difficult to ensure the real equality of languages, but is it a good way to move towards a uniform Brussels language?

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SUMMARY

Multilingualism as the Constitutional Principle Of The Equality Of Languages In European Union Law

Multilingualism is a constitutional principle of European Union law. This principle is manifested in the recognition of the equality of all the official languages and Member States. At the beginning of the 1950s, the European Community addressed linguistic equality issues by providing multilingualism protocols and Regulation 1/58. Access for citi-

zens to legislation in every official language of the European Union is a phenomenon on an international scale. The institutions of the European Union establish their own language regimes and apply various practices adapted to the specifics of the functions they perform. The purpose of this article is to analyze and assess the impact of multilingualism as a constitutional principle of European Law.

Keywords: multilingualism, European Union, equality of languages, EU citizens, constitutional principle, language regime of EU institutions, language practice of EU institutions.

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DOI 10.14746/ppuam.2020.11.10

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Mining the EU Global Strategy of 2016

Introduction

As with many data-driven research experiments, this one was conducted without formulating any research questions prior to the analysis. Those have appeared at a later stage and constituted a departure point for the discussion on the usefulness of text mining techniques for the interpretation of bureaucratic documents as well as allowing for the identification of several issues which have been either overlooked (e.g. highlighting the importance of research) or underestimated (e.g. the concept of sustainability or the role of human rights). Nonetheless, the lexical analysis confirmed many previous findings, such as the ambition to strengthen defence capabilities within the EU as well as the central role of the concept of resilience. Hence, this study claims that text mining techniques can supplement traditional means of interpretation, especially when the volume and granularity of the document(s) result in incoherent interpretations and, as a consequence, hinder the process of its operationalization. Another added value of this study is the introduction of complex systems theory for the interpretation of the EUGS leitmotif, namely the concept of resilience. The textual analysis has shown that the lexical layer of the recent strategy is distinctive for studies that build upon systems theory, regardless of the scientific discipline. This refers to such terms as *resilience*, *sustainability* or *cooperation*, which

are indeed a bridge between the textual and the conceptual levels of understanding the document. Thus, the latter part of this paper introduces complex systems theory to the interpretation of the concept of resilience which, although named as a leitmotif of the strategy of 2016, raises doubts over its factual meaning and, as a consequence, over its usefulness for EU policymakers. Particular emphasis have been put on the interplay between the concepts of resilience and human rights, which are on the agenda of both the EU and the UN.

Methods

This paper proposes the application of an automated lexical analysis using Statistica software (StatSoft v. 13).[1] Lexical analysis is one of the text mining techniques aimed at the extraction of meaningful information from natural language texts. Text mining, which is a response to the problem of large amounts of textual data, has been already recognized as a useful tool for policymakers by the various EU institutions.[2] Although text mining techniques are usually applied to the large amounts of data, they may provide an insightful contribution to the analysis of single documents as well, as this paper aims to prove. Moreover, they allow for drawing evidence-based conclusions while keeping them brief and, thus, may serve as a handy resource for policymakers. Lastly, text mining allows for pointing out the similarities and differences between the relevant documents and emphasizes shifts or trends reflected in the language.

This study is based on a lexical analysis of the EU's security strategies: the EU Security Strategy of 2003 and the EU Global Strategy 2016 (hereafter: EUGS). The lexical analysis included calculating term frequency (measuring how frequently a term occurs in each document sep-

1 TIBCO Statistica, <http://statistica.io/>.

2 The European Commission's Science and Knowledge Service, Competence Centre on Text Mining and Analysis, <https://ec.europa.eu/jrc/en/text-mining-and-analysis>.

arately) as well as inverse term frequency (measuring the importance of the term in a collection of documents; also known as TF-IDF). The latter may often give more meaningful results than a classical term frequency analysis.[3] All the stop words (e.g. a, an, the, on) were excluded from the research. Both texts have been cleaned, e.g. by removing repeated paragraphs and headers. The analysis was conducted before and after applying lemmatization (thus, the results are presented in two separate tables).

Results

Text mining analysis allowed the creation of two separate term-document matrices describing term frequency in each document, and a joint matrix measuring inverse term frequency in both documents. Based on all three matrices, the most significant terms have been selected and presented in Table 1 (the list of terms after applying the lemmatization of words) and Table 2 (the list of terms without applying lemmatization). The terms were selected according to three criteria: 1) high term frequency in at least one of the documents, 2) high TF-IDF score, and 3) significance for the topic of EU defence and security policy. The terms have been listed in alphabetical order. When interpreting the results, it is important to keep in mind that the EU Global Strategy of 2016 contains about three times more words than its predecessor (15,496 compared to 4,197 words). Hence, there are relatively large differences in the overall number of mentions.

3 G. Salton, M.J. MacGill, *Introduction to Modern Information Retrieval*, McGraw-Hill 1983, p. 63; J. Ramos, *Using TF-IDF to Determine Word Relevance in Document Queries*, 1999.

Table 1. List of the 10 most relevant terms (after applying lemmatization of words) showing the differences in the lexical layers between the EU's security strategies of 2003 and 2016. Words were extracted based on the frequency rank and TF-IDF score. Source: the author's own elaboration.

Term	Strategy of 2003			Strategy of 2016		
	Rank	Term Freq.	TF-IDF	Rank	Term Freq.	TF-IDF
cooper (e.g. *cooperation*)	48	8	–	5	74	–
cyber	–	–	–	74	21	2,73
deal	32	12	–	493	3	–
defen (e.g. *defence*)	40	9	–	15	51	–
democra (e.g. *democracy*)	97	5	–	74	21	–
diploma (e.g. diplomacy)	–	–	–	47	27	2,90
econom (e.g. *economy*)	58	7	–	23	42	2,29
object (e.g. *objective*)	57	7	2,04	–	0	–
principle (e.g. *principles*)	–	–	–	46	28	3,00
resili (e.g. *resilience*)	–	–	–	36	35	3,16

Table 2. List of the 22 most relevant terms (without applying lemmatization) showing the differences in the lexical layers between the EU's security strategies of 2003 and 2016. Words were extracted based on the frequency rank and TF-IDF score. Source: the author's own elaboration.

Term	Strategy of 2003			Strategy of 2016		
	Rank	Term Freq.	TF-IDF	Rank	Term Freq.	TF-IDF
can	10	17	–	19	37	–
climate	–	–	–	42	24	2,90
conflict	8	19	–	42	24	–
conflicts	35	9	–	43	23	–
counter-terrorism	–	–	–	133	11	2,36
crisis	29	10	–	153	10	–
crises	371	1	–	61	20	–

Term	Strategy of 2003			Strategy of 2016		
	Rank	Term Freq.	TF-IDF	Rank	Term Freq.	TF-IDF
development	29	10	–	11	55	–
distant	110	4	1,65	–	–	–
energy	74	5	–	18	39	
human rights	221	2	–	38	26	–
Member States	51	6	–	13	44	–
migration	–	–	–	53	22	2,84
must	221	2	–	7	65	–
problems	16	14	2,52	–	0	–
research	–	–	–	133	11	2,36
security	2	31	–	3	128	–
should	8	19	–	121	12	–
sustainable	–	–	–	26	31	3,07
threat	29	10	–	336	5	–
threats	5	24	–	121	12	–
will	15	15	–	1	274	–

Discussion

Tone: 'Yes, We Can' or 'We Must'?

There were few comparative lexical studies touching on the differences between the current and previous EU strategies in the areas of defence and security. Yet even a cursory analysis of both documents highlights striking differences in their lexical layers. The introduction to the strategy of 2003 starts with the statement that "Europe has never been so prosperous, so secure nor so free"[4] and such a conviction – that Europe is doing well – was reflected in the language used in the docu-

4 Council of the European Union, *European Security Strategy: A Secure Europe in a Better World*, Brussels, 2003, p. 2.

ment. One may say the tone was enthusiastic, as the strategy called for being "more active in pursuing our strategic objectives"[5] and concluded that "[t]his is a world of new dangers but also of new opportunities."[6] The most frequently occurring verbs were: *should* (8th most frequently mentioned word), *can* (10th) and *will* (15th). These are used to express recommendation (*should*), underline capacity (*can*), and set an objective[7] or express future action (*will*). Significantly, none of them expresses necessity. The latter, associated with the word *must*, remained almost absent as it was used only twice in the document (221st).

The situation with the EUGS is quite the opposite. While the most frequently used word in the whole document is *will*, the word *must* was ranked 7th (and, simultaneously, the second most common verb). At the same time, the frequency of the verbs *can* and *should* decreased significantly (to 19th and 121st respectively). This striking inversion of proportions confirms that the current strategy is not limited to the identification of possible objectives but underlines the necessity and urgency in addressing threats. The overall tone of the EUGS is far more pessimistic – suffice it to cite the opening sentence: "The purpose, even existence, of our Union is being questioned."[8]

Similarly, the analysis of lexical layers reflects different scale of the challenges that the EU was tackling in 2003 and is facing now. Under the previous strategy, the most frequent terms used to describe challenges were *threats* (5th most frequently occurred in the document) and *problems* (16th). The former implies rather the possibility than the actual existence of dangerous occurrence. The latter clearly refers to the present situations regarded as unwelcome, however remains a relatively soft expression and, most of all, suggests that the difficulties are pos-

5 Ibidem, 11.

6 Ibidem, 14.

7 Interestingly, the term 'objective(s)', while being present in the Strategy of 2003, is absent in the EUGS. Therefore, this term has been indicated as a relevant for the Strategy of 2003 with the TF-IDF score (2,04).

8 Council of the European Union, *European Security Strategy*, 14.

sible to overcome. The EUGS, on the other hand, operates mostly with the terms *conflicts* (23 mentions) and *crises* (20 mentions)[9], while *problems* does not appear even once, and the frequency of *threats* significantly decreased (12 mentions). Hence, the rhetoric of the EUGS is much tougher and corresponds with the urgency emphasized in the previous part of this study. Moreover, the EUGS operates mostly with the plural forms (*crises, conflicts)* while under the strategy of 2003 singular forms of these words clearly prevailed (*crisis, conflict*).

Furthermore, the EUGS emphasizes the global character of challenges and the need for internal cooperation (between the Member States) and external cooperation (notably with the United States, United Nations, and NATO) when tackling them. Under the previous strategy, the issue of cooperation was marginalized and limited to external relations only. Its revival is arguably a consequence of diagnosing the interdependence of internal and external threats, the need for greater coherence between the policies of the EU and Member States[10], as well as the belief that none of the EU countries is able to address current threats alone.[11] Moreover, the principle of cooperation is frequently mentioned in the context of building military capabilities, which constitutes another distinctive feature of the EUGS.

Many scholars and experts have pointed out that the EUGS emphasized building the military capacities of the EU.[12] Indeed, the lexical analysis supports this assessment – the frequency of the word *defence* (or *defend*) increased significantly from 9 (which gave it 40th position on the rank list) to 51 (15th), while the frequency of the word *security* decreased slightly (from 2nd in 2003 to 3rd position in 2016). Furthermore, the document stresses the importance of cooperation in

9 See for instance subsection 3.3 of the EUGS.

10 Council of the European Union, *Shared Vision, Common Action: A Stronger Europe – A Global Strategy for the European Union's Foreign And Security Policy*, Brussels 2016, p. 30.

11 Ibidem, p. 3.

12 J. Legrand, *Does the New EU Global Strategy Deliver on Security and Defence?*, 2016, <http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/570472/EXPO_IDA(2016)570472_EN.pdf.>

the context of building defense capabilities – cooperative effort should contribute to achieving interoperability, effectiveness, the ability to act autonomously and, therefore, to build the credibility of the EU. All in all, *cooperation* (and its inflected forms) is the 5th most frequently used word (74 mentions) and predominantly appears in the context of defense.[13] At the same time, the term was almost absent under the previous strategy (8 mentions). The cooperation framework refers as much to the Member States as to other partners, notably the United States, UN, NATO as well as neighbouring countries.

Regarding internal cooperation, the EUGS proposes an exploration of opportunities for enhanced cooperation with a view to establishing a structured form of cooperation in the future.[14] Although not directly mentioned, this clearly refers to the Permanent Structured Cooperation (PESCO) foreseen in articles 42.6 and 46 TEU.[15] The European Council emphasized on several occasions that "any capabilities developed through PESCO will remain owned and operated by the Member States"[16] and reminded that the cooperation within PESCO has to be consistent with the commitments agreed within NATO and the UN. In December 2017

13 *Member States remain sovereign in their defence decisions: nevertheless, to acquire and maintain many of these capabilities, defence cooperation must become the norm. The EU will systematically encourage defence cooperation and strive to create a solid European defence industry, which is critical for Europe's autonomy of decision and action.* See Council of the European Union, *Shared Vision, Common Action: A Stronger Europe – A Global Strategy for the European Union's Foreign And Security Policy*, p. 11. *Europeans must be able to protect Europe, respond to external crises, and assist in developing our partners' security and defence capacities, carrying out these tasks in cooperation with others.* See ibidem, p. 19. *While defence policy and spending remain national prerogatives, no Member State can afford to do this individually: this requires a concerted and cooperative effort.* See ibidem, p. 20.

14 *Defence cooperation between Member States will be systematically encouraged.* See ibidem, p. 46. *If successful and repeated over time, this might lead to a more structured form of cooperation, making full use of the Lisbon Treaty's potential.* See ibidem, p. 48.

15 Council of the European Union, *European Council Conclusions on Security and Defence*, 22 June 2017, para. 8, <http://www.consilium.europa.eu/en/press/press-releases/2017/06/22/euco-security-defence/>.

16 Council of the European Union, *Council Conclusions on Implementing the EU Global Strategy in the Area of Security and Defence*, 6 March 2017, para. 6, <http://www.consilium.europa.eu/en/press/press-releases/2017/03/06/conclusions-security-defence/>.

Council of the European Union adopted a decision establishing PESCO and determining the list of participating Member States.[17] In the joint declaration, Member States expressed their intention to collaborate on 17 initial projects.[18]

Within the defence cooperation framework, the EUGS emphasizes the role of research and technology (R&T)[19] – something that was entirely absent under the strategy of 2003.[20] Call for the development of R&T in the area of defence was further operationalized in the European Defence Action Plan adopted in 2016.[21] Finally, this was reflected in the Council decision establishing PESCO (14866/17), in which Member States committed *inter alia* to increase "the share of expenditure allocated to defence R&T with a view to nearing the 2% of total defence spending."[22] Thus, it should be not surprising that the European Commission plans to spend €500 million a year on defence R&T, starting from 2021.[23] Nor should it be if the EU launches a fully-fledged European Defence Research Programme 2021–2017 with a budget as high as €3.5 billion.[24]

Emphasis on cooperation between all the stakeholders rather than centralization when building the defense capabilities of the EU corre-

17 Council of the European Union, *Shared Vision, Common Action*, p. 11.

18 Declaration on PESCO projects, available: <http://www.consilium.europa.eu/media/32020/draft-pesco-declaration-clean-10122017.pdf>. For the brief description of the projects see <http://www.consilium.europa.eu/media/32079/pesco-overview-of-first-collaborative-of-projects-for-press.pdf>.

19 *Crucially, EU funding for defence research and technology (…) will prove instrumental in developing the defence capabilities Europe needs. A sustainable, innovative and competitive European defence industry is essential for Europe's strategic autonomy and for a credible CSDP.* See Council of the European Union, *Shared Vision, Common Action: A Stronger Europe – A Global Strategy for the European Union's Foreign And Security Policy*, 2016, p. 46.

20 There was no mention of research in the strategy of 2003, while the term appeared 11 times under the EUGS. Hence, the TF-IDF score for the term is relatively high (2,36).

21 Council of the European Union 2016, op. cit, p. 19.

22 Ibidem. See Annex II, par. 4.

23 J. Mawdsley, *The Emergence of the European Defence Research Programme*, in: *The Emergence of EU Defense Research Policy. Innovation, Technology, and Knowledge Management*, eds N. Karampekios, I. Oikonomou, E. Carayannis, Washington 2018, p. 209.

24 D. Fiott, *EU Defence Research in Development*, "European Union Institute for Security Studies" 2016, no. 1.

sponds closely with the conceptual framework for resilience. Scholars researching complex systems[25] point out that decentralized and non-hierarchical structures are more resilient to potential attacks.[26] The resilience of a network structure increases with the number of connections between the nodes[27] (in the context of the EUGS – between Member States and their neighbourhood) and allows for avoiding situations such as when an attack on the best-connected node (for instance, a cyberattack on the EU institutions) affects the functionality of the whole system.

The inherent complexity of *resilience* and its role in building sustainability

The meaning of the term *resilience*[28] in the EUGS was a subject of numerous discussions – many studies emphasized its ambiguity or vagueness[29] and called for its refinement.[30] Nevertheless, the concept of resil-

25 *As a discipline, complex systems is a new field of science studying how parts of a system and their relationships give rise to the collective behaviors of the system, and how the system interrelates with its environment*. See the definition: Y. Bar-Yam, *General Features of Complex Systems*, in: *Knowledge Management, Organizational Intelligence and Learning, and Complexity*, ed. L.D. Kiel, vol. I, Oxford 2009, p. 354.

26 A. Reka, J. Hawoong, A. Barabasi, *Error and Attack Tolerance of Complex Networks*, "Nature" 2000, no. 409, pp. 378–382.

27 *Consequently, resilience is governed by three topological characteristics, where dense, symmetric and heterogeneous networks are most resilient, and sparse, antisymmetric and heterogeneous networks are least resilient*. See J. Gao, B. Barzel, B. Barabási, *Universal Resilience Patterns in Complex Networks*, "Nature" 2016, no. 530, pp. 307–312.

28 The term "resilience" was coined by the ecologist C.S. Holling as early as in 1973 and was then defined as "a measure of the persistence of systems and of their ability to absorb change and disturbance and still maintain the same relationships between populations or state variables". See Crawford Stanley Holling, *Resilience and Stability of Ecological Systems*, Annual Review of Ecology and Systematics 4, no. 1 (November 1973), p. 14, https://doi.org/10.1146/annurev.es.04.110173.000245. Some scholars underline that the concept of resilience has been developed simultaneously in the fields of ecology, psychology (mainly child development and children's ability to recover from trauma) and epidemiology (ability to sustain health). See M. Welsh, *Resilience and Responsibility: Governing Uncertainty in a Complex World*, "The Geographical Journal" 2014, no. 1, pp. 15–26. The concept of resilience subsequently expanded to the social and economic systems. See Council of the European Union 2016, op. cit., p. 11.

29 A.E. Juncos, *Resilience as the New EU Foreign Policy Paradigm: A Pragmatist Turn?*, "European Security" 2017, no. 1(26), p. 3.

30 C. Altafin, V. Haász, K. Podstawa, *The New Global Strategy for the EU's Foreign and Security Policy at a Time of Human Rights Crises*, "Netherlands Quarterly of Human Rights"

ience is nothing new in EU rhetoric, and its frequency in various EU documents has been increasing rapidly since 2009. According to the EUR-Lex (the most complex database covering EU documents), the term *resilience* was mentioned in 128 documents in 2009. This number increased to 320 in the year preceding the adoption of the EUGS. In the last two years, the growing tendency significantly strengthened (581 documents in 2017) and this increase was arguably prompted by the new strategy. Nevertheless, the EUGS should be interpreted not as a stand-alone document but as a consequence of a long-term trend. Moreover, the concept of resilience was steadily spreading not only into the EU rhetoric – this tendency reflected a global increase in the popularity of this term[31]; the concept has also been previously introduced to the security strategies of various Member States, e.g. France (2013), United Kingdom (2015), Germany (2016).

Any attempt to understand the concept of resilience will, inevitably, lead to systems theory (and, most of all, to complex systems theory). Although the EUGS does not explicitly propose the application of systems theory to security and defense, it refers to states and societies – and both are nothing other than highly sophisticated systems with individuals, communities, political institutions, economies, environmental and energy resources as their components. In other words, both are complex systems. Moreover, various EU documents and instructions refer to the OECD's studies[32], which *expressis verbis* propose a systems approach and introduce "resilience systems analysis" as a tool for policymakers.[33]

A complex systems approach focuses on "how parts of a system and their relationships give rise to the collective behaviors of the system, and how the system interrelates with its environment."[34] It seems that the

2017, no. 2(35), p. 5.

31 According to Google N-gram Viewer, there was a gradual increase in the use of word 'resilience' in the period 1970–1990. Since 1990 the growth has been exponential.

32 See for instance: European Commission, *Operating in Situations of Conflict and Fragility. An EU Staff Handbook*, Brussels/Luxembourg, 2015. See also: Council of the European Union 2016, op. cit., p. 20.

33 OECD, *Guidelines for Resilience Systems Analysis – Facilitation Guide*, 2014, p. 5.

34 Yaneer Bar-Yam, *General Features…*

EUGS is underpinned with a similar logic – it underlines the role of the Member States (parts of the system) and the cooperation between them (the relationships) as a precondition for building a resilient EU (the collective behavior of the system) and emphasizes the nexus between the external and internal threats (how the system interrelates with its environment). If we find the theory of complex systems to be applicable to the EUGS, we can justify, for instance, the multidimensionality of resilience. As Lance H. Gunderson and C.S. Holling propose, the complexity of the challenges to the specific system requires analysis of interactions among three to five sets of variables, each operating at a qualitatively distinct speed.[35] Reducing sets of variables to two, however convenient for the analysis, misses the complexity of interactions and interdependencies between the various variables. Therefore, simplification may lead to an inadequate understanding of the emerging challenges and, as a consequence, to wrongfully designed policies. Thus, the concept of resilience, if we agree on the relevance of the complex systems approach, has to be multidimensional. This conclusion, in consequence, invalidates arguments stressing the ambiguity or vagueness of the concept of resilience.

Furthermore, complex systems theory may shed a new light on the nexus between resilience and sustainability. Although resilience has been named as the leitmotif of the EUGS[36], the lexical analysis reveals that the frequency of the term *sustainable* increased identically (and, respectively, its TF-IDF score). While the previous strategy did not mention it even once, the term appeared 31 times in the EUGS. Moreover, the document suggests a close relationship between resilience and sustainable development, stating that: "[a] resilient society featuring democracy, trust in institutions, and sustainable development lies at the

35 L.H. Gunderson and C.S. Holling, *Panarchy : Understanding Transformations in Human and Natural Systems*, Washington 2002, pp. 69–71.

36 M. Sanders, *Obama's Principled Pragmatism*, Contemporary Pragmatism 8, no. 2 (April 2011), pp. 31–42.

heart of a resilient state."[37] This is neither a coincidence nor a surprise, since the linkages between the two concepts have been the subject of numerous studies[38] touching upon various fields (e.g. environment[39], economy[40], emergency management[41]). The relation between these two concepts has been the subject of numerous theoretical considerations[42], including publications building on the theory of complex systems.[43] What may be beneficial for the EU policymakers from these discussions is the fundamental difference between both concepts – while building sustainability needs to have a specific long-term goal (e.g. Sustainable Development Goals)[44], building resilience cannot have one, as the future threats to the stability of the system are not known. Thus, resilience should focus on training the general ability to withstand and recover from shock. Interestingly, the EUGS dropped the class of *strategic objectives* that was used in the previous strategy and replaced it with the more general class of *goals* with an overarching goal to build a sustainable and resilient Union. Many studies emphasize that sustainability

37 Council of the European Union, *Shared Vision, Common Action: A Stronger Europe – A Global Strategy for the European Union's Foreign And Security Policy*, 2016, p. 8.

38 "Resilience theory emphasizes that change is as normal a condition for social-ecological systems as stability, and a system may exist in multiple stable states. The goal is to enable a system to respond to changing conditions so that there are minimal losses to the system and to its essential functioning. External shocks or emergent stresses pushing the system over a threshold may prompt the changing condition. […] Similar to a resilience approach, sustainability analyses understand the biophysical drivers and constraints on a system's future, but focus on and measure change in terms of human decisions, institutional dynamics, and shared attitudes." See Council of the European Union 2016, p. 46. See also: European Commision, European Defence Action Plan.

39 C. Altafin, V. Haász, K. Podstawa, *The New Global Strategy…*, p. 142.

40 Y. Bar-Yam, *General Features…*

41 Council of the European Union, *European Security Strategy: A secure Europe in a better world*, 2003, p. 2.

42 Ibidem, p. 11.

43 Ibidem, p. 14.

44 Interestingly, the preamble of the Agenda 2030 mentions both concepts together: *We are determined to take the bold and transformative steps which are urgently needed to shift the world onto a sustainable and resilient path.* See UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1, <http://www.refworld.org/docid/57b6e3e44.html>.

requires resilient components such as a resilient environment, a resilient economy and a resilient society.[45] Otherwise, development may be easily undone. As we will show further in this study, those three components receive the lion's share of the EU narrative on resilience.

Case Study: Multidimensionality of Resilience in the EU Rhetoric at the UN Fora

As many scholars have pointed out, under the EUGS the term *resilience* appears in various contexts, which may lead to confusion over its factual meaning. The European Parliament has recently removed some of these doubts by the adoption of a resolution on resilience as a strategic priority of the external action of the EU.[46] The resolution underlines the importance of the OECD's resilience "systems analysis framework" (para. 3) and stresses its multidimensional nature: human, economic, environmental, political, security and societal (para. 4). Although these dimensions remain undefined, they clearly build on the OECD's Guidelines for Resilience System Analysis, which applies, however, slightly different terminology. The OECD distinguishes the following components of system resilience: financial (e.g. banking facilities, employment), human (e.g. knowledge, education, health), natural (e.g. environment, agriculture, minerals), physical (e.g. energy, infrastructure), political (e.g. knowledge of rights and duties, political participation) and social (e.g. formal and informal social interaction). While the OECD's financial and natural components have counterparts in the EU's economic and environmental dimensions, the EU's element of security seems to be broader than the OECD's physical component. The OECD's physical component emphasizes the resilience of the material infrastructure and does not mention the resilience of cyberspace at all. The EU's security dimension, on the other hand, stresses the importance

45 M. Welsh, *Resilience and Responsibility: Governing Uncertainty in a Complex World*, "The Geographical Journal" 2014, no. 1.

46 European Parliament resolution of 1 June 2017 on resilience as a strategic priority of the external action of the EU (2017/2594(RSP)).

of cyber resilience, which encompasses both critical infrastructure management as well as building the resilience of cyberspace (against e.g. cyber espionage or propaganda). In order to investigate, if the EU adheres to the framework outlined above, we examined the

EU's Activity in the United Nations Between July 2014 and December 2019

So far, the adoption of resilience as the strategic priority under the EUGS, was indeed reflected in the EU interventions[47] at the United Nations, but only for a short period of time following the adoption of the strategy (Table 3). The term appeared in the 20 out of 69 EU statements (29%) made between January and June 2017, while in the preceding two years the frequency did not exceed 14%. Nevertheless, since July 2017 a share of interventions mentioning resilience drastically decreased and varied between 8.9% (July-December 2017) and 13.5% (January-June 2019). One explanation is that the period following launching the EUGS was accompanied by general excitement with a new strategy, and thus its leitmotif was perhaps overused. In this light, the subsequent decrease in the second half of 2017 may be the result of the realization that overexploitation may degrade resilience to the point where it becomes merely a buzzword rather than a guiding principle.

The analysis of the EU's rhetoric at the UN leads to the conclusion that the multidimensional nature of resilience needs to be further clarified, particularly in the areas of strengthening the security of critical infrastructure and cyberspace as well as the political fabric of society. The concept of resilience was most frequently referred to in the contexts of environmental challenges (mainly climate change mitigation[48] and

47 Analysis encompassed statements made by the EU, including joint statements. All documents have been extracted from the official website of the Delegation of the European Union to the United Nations in New York.

48 Delegation of the European Union to the United Nations in New York, *EU Statement – United Nations Open-ended Informal Consultative Process on Oceans and Law of the Sea*,

Small Island Developing Countries[49]), humanitarian aid operations,[50] and the protection of vulnerable groups (mainly women[51] and refugees[52] but since 2018 also young people[53]). Recently, more emphasis has been placed on the building of a resilient economy (e.g. low-emissions economy[54], and a resilient labour market[55]). These findings correspond with the lists of the EU priorities for the UN General Assembly, in which resilience rhetoric is present primarily in the contexts of environmental protection, sustainable development and disaster recovery.[56]

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15 May 2017, EUUN17–045EN. EU Intervention: United Nations – PGA expert level meeting on Water, 22 March 2017, EUUN17–024EN.

49 Delegation of the European Union to the United Nations in New York, *EU Statement – United Nations 2nd Committee: Sustainable Development and UN-Habitat*, 15 October 2014, EUUN14–153EN. EU Statement by Commissioner Piebalgs – United Nations 3rd International Conference on Small Island Developing States: Plenary, 1 September 2014, EUUN14–106EN.

50 Delegation of the European Union to the United Nations in New York, *EU Statement – United Nations General Assembly: Famine Response and Prevention*, 14 April 2017, EUUN17–030EN.

51 Delegation of the European Union to the United Nations in New York, *EU Statement – United Nations General Assembly: Global awareness of the tragedies of irregular migrants in the Mediterranean basin, with specific emphasis on Syrian asylum seekers*, 7 April, 2017, EUUN17–029EN.

52 Delegation of the European Union to the United Nations in New York, *EU Statement – United Nations 3rd Committee: Report of the UN High Commissioner for Refugees*, 2 November 2016, EUUN16–184EN.

53 Delegation of the European Union to the United Nations in New York, *EU Statement – United Nations General Assembly: Youth and Migration*, 26 February 2019.

54 Delegation of the European Union to the United Nations in New York, EU Statement – United Nations High-Level Meeting on Climate Change and the Sustainable Development Agenda, 23 March 2017, EUUN17–025EN. EU Commissioner Creţu at the Opening Plenary Session of the UN Habitat Conference, 18 October 2016, EC16–1018.

55 Delegation of the European Union to the United Nations in New York, EU Statement – United Nations 3rd Committee: Social Development, 4 October 2016, EUUN16–118EN.

56 The list for the 71st GA mentions security (peace), the resilience of communities and governments, humanitarian assistance; 70th GA – environmental protection, low carbon and resilient economy; 69th GA – community resilience to disasters and conflicts, 68th GA – resilience of societies and economies, climate resilient low carbon development, community safety and resilience to disasters and conflicts; 67th – no mentions; 66th – resilience of the vulnerable and fragile countries; 65th and 64th – no mentions.

57 Context labels have been assigned manually by the author after thorough review of the statements that mentioned the word *resilience/resilient* at least once. One statement could have been classified into two categories if resilience was mentioned more than once and in various contexts. If terms resilience/resilient were mentioned more than once, but in the same context, such a statement was classified only to one category.

Table 3. Presence of the term 'resilience/resilient' in EU statements and interventions delivered at the UN fora between January 2014 and December 2019. Source: the author's elaboration.

Period	Overall number of statements	Statements with the word resilience /resilient	Statements with the word resilience /resilient (as % of overall)	Context in which the resilience was mentioned (dimension)[57]						
				Economic	Security	Political	Environ-mental	Societal	Humani-tarian	Other
2019 (Jul-Dec)	141	16	11,3	1	4	0	3	3	1	4
2019 (Jan-Jun)	104	14	13,5	2	3	1	3	5	1	3
2018 (Jul-Dec)	121	13	10,7	1	2	0	2	3	3	3
2018 (Jan-Jun)	108	14	13,0	4	4	1	1	6	5	1
2017 (Jul-Dec)	135	12	8,9	1	4	1	1	5	1	1
2017 (Jan-Jun)	69	20	29,0	5	3	4	5	6	7	2
2016 (Jul-Dec)	131	13	9,9	3	2	2	4	2	3	2
2016 (Jan-Jun)	99	14	14,1	3	1	2	6	2	4	2
2015 (Jul-Dec)	108	13	12,0	2	1	0	7	3	2	2
2015 (Jan-Jul)	107	13	12,1	0	2	1	3	3	4	1
2014 (Jul-Dec)	134	21	15,4	0	2	1	8	3	5	3
2014 (Jan-Jun)	91	14	15,4	0	0	3	2	2	8	1
Overall	1348	177	13.1	19	21	15	39	35	42	18

What is significant for the EU's narrative is the importance of the nexus between the environmental, economic and humanitarian dimensions, which apparently constitute core elements of resilience building.[58] Some may say that the EU rhetoric at the UN fora is determined by

58 Delegation of the European Union to the United Nations in New York, *EU Statement – United Nations General Assembly: Famine Response and Prevention*, 14 April 2017, EUUN17–030EN.

the challenges on the UN agenda (such as the Ebola outbreak, climate change and the fulfillment of the SDGs) and that is why other elements are set aside. Nevertheless, the analysis of the EU documents on resilience confirms there is a strong attachment to the abovementioned elements. For instance, the recent European Parliament resolution on resilience as a strategic priority of the external action of the EU clearly prioritizes the humanitarian dimension and the need for empowering vulnerable groups, mainly women.[59] The EU's Action Plan for Resilience in Crisis Prone Countries 2013–2020 is more multidimensional, but remains limited to the humanitarian, environmental and societal perspectives. The broadest approach may be found in the document entitled "A Strategic Approach to Resilience in the EU's external action" adopted by the European Commission in June 2017. So far, this is the only document that put equal emphasis on all the elements, including the political[60] and security dimensions.[61]

The Role of Principles and Values Under the EUGS – Where are Human Rights?

The EUGS frequently, and in various contexts, refers to principles (28 mentions in the EUGS, compared to zero in the previous strategy). The document emphasizes that the principles will guide the EU's external action[62], that in the promotion of shared interests, the EU will adhere to clear principles[63] and that the EU will engage in a practical

59 European Parliament resolution of 1 June 2017 on resilience as a strategic priority of the external action of the EU (2017/2594(RSP)).

60 European Commission, Joint Communication to the European Parliament and the Council: A Strategic Approach to Resilience in the EU's external action, 7 June 2017, JOIN(2017) 21 final, pp. 3, 7.

61 Ibidem, pp. 15–17.

62 Ibidem, 3.

63 J. Legrand, *Does the New EU Global Strategy Deliver on Security and Defence?*, 2016, <http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/570472/EXPO_IDA(2016)570472_EN.pdf>.

and principled way in peacebuilding.[64] Those principles include but arguably are not limited to: accountability, representativeness, responsibility, effectiveness and transparency.[65] Turning towards principles and rules – absent from the previous strategy – confirms that the EU is facing a period of high uncertainty and seeks to minimize potential turbulence. Indeed, in recent years the EU did not necessarily follow formerly established principles, e.g. in the case of Ukraine, the EU had been consistently moving away from democratic conditionality and subsequently abandoned it in November 2013, due to fears that the country would come under the Russian sphere of influence.[66] Taking into consideration rising autocratic tendencies in neighboring countries (e.g. Turkey), as well as in the EU itself (e.g. Poland, Hungary), the EU's reaffirmed commitment to principles, rules, and values is being put to the test.

The concept of "principled pragmatism" requires special attention. This proposed approach to foreign policy aims at striking a balance between realism and idealism, isolationism and interventionism.[67] Although proposed as one of the leitmotifs of the EUGS, principled pragmatism is not an entirely new concept. For instance, Barack Obama adopted it as a guiding principle for US diplomacy.[68] Even before than that, in the early 2000s it emerged at the intersection of international human rights law and business. It was originally defined by John Ruggie as "an unflinching commitment to the principle of strengthening the promotion and protection of human rights as it relates to businesses, coupled with

64 Council of the European Union, *Shared Vision, Common Action: A Stronger Europe - A Global Strategy for the European Union's Foreign And Security Policy*, 2016, p. 11.

65 Ibidem, p. 19.

66 Ibidem, p. 20.

67 *In charting the way between the Scylla of isolationism and the Charybdis of rash interventionism, the EU will engage the world manifesting responsibility towards others and sensitivity to contingency.* See ibidem, p. 46.

68 Ibidem, p. 48. Paul Richard Huard, "Principled Pragmatism: Fredrik Logevall on Obama's Legacy", The National Interest, 23 May 2016, <http://nationalinterest.org/feature/principled-pragmatism-fredrik-logevall-obamas-legacy-16312>. Recent National Security Strategy of the United States of America, adopted in December 2017 and signed by Donald Trump, operates with an equivalent 'principled realism'.

a pragmatic attachment to what works best in creating change where it matters most — in the daily lives of people."[69] The EUGS does not offer its own definition, limiting itself to the vague remark that principle pragmatism "stems as much from a realistic assessment of the strategic environment as from an idealistic aspiration to advance a better world."[70] Thus, principled pragmatism may be interpreted *per analogiam* as the concept that integrates the need for the protection of values (idealistic dimension) and common sense in choosing the means to achieve the goal (realistic dimension).

John Ruggie, as well as the Obama administration (most notably Hilary Clinton), linked principled pragmatism with one specific value, namely human rights.[71] As the lexical analysis has shown, the same is the case with the EUGS – human rights are the single most frequently mentioned value (26 times), followed by democracy (21 mentions), and the rule of law (6 mentions). Interestingly, in the strategy of 2003, the presence of values was marginal – democracy was invoked five times, the rule of law three times and human rights only twice. This remarkable rejuvenation of human rights may indicate the way in which principled pragmatism will be addressed – more emphasis will be put on the protection of human rights than on building democratic institutions.

Some may invoke a historical analogy to the Helsinki Accords of 1975, when the Western World's pursuit of human rights jeopardized the decline of communist regimes in Eastern Europe and the USSR. Americans were conscious that advocating for human rights may bring better long-term results than calling for the free elections or adopting the rule of law. The latter was aimed directly at the destruction of state apparatus, thus the USSR would have been more resistant to engage in

69 UN Economic and Social Council, Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, E/CN.4/2006/97, para. 81.

70 Council of the European Union, *European Council Conclusions on Security and Defence*, para. 8.

71 Council of the European Union, *Council Conclusions on Implementing the EU Global Strategy in the Area of Security and Defence*, para. 6.

any constructive dialogue. Even more interestingly, L. Garment (former U.S. Representative to the United Nations Commission on Human Rights) perceived human rights as a tailor-made diplomatic instrument aimed at non-resilient states. During his hearing before the Commission on Security and Cooperation in Europe in February 1977, he emphasized that: "They are not prepared to yield on them. The strength of their society is thin, the ability to withstand crises, economic crises, food, crises, ultimately human rights crises, is precarious, and therefore they will make a real issue of our right to press for implementation of agreements arrived at in Helsinki."[72]

The difference is that this time human rights appear not as a weapon against non-democratic regimes, but primarily as a remedy for the EU's eroded credibility and effectiveness in approaching its neighborhood. Therefore, placing human rights high on the agenda is a consequence of the adoption of principled pragmatism and resilience as guiding principles for the EUGS. The interdependency of these concepts is being consistently reaffirmed in various EU documents. For instance, the European Parliament resolution on resilience as a strategic priority of the external action of the EU not only emphasizes the role of human rights in building resilience but stresses the need to "focus on results" in this matter.[73] While human rights were mentioned seven times throughout the text of the resolution, the other values (democracy and the rule of law) were invoked only three times in total.

One may ask if the values of democracy and the rule of law are not compatible (or less compatible) with the concepts of either principled pragmatism or resilience? Yet democracy and respect for the rule of law in the EU's neighborhood undeniably serve its geopolitical interests. Democratic regimes are more stable prosperous and – to use

72 Hearings before the Commission on Security and Cooperation in Europe, ninety-fifth Congress, First Session on the Implementation of the Helsinki Accords, vol. I, 23–24 February 1977, p. 12.

73 European Parliament resolution of 1 June 2017 on resilience as a strategic priority of the external action of the EU (2017/2594(RSP)).

EU language – resilient than autocracies. Nevertheless, the promotion of democracy aspires to spark a systemic change at the level of governance, which often meets with resistance from the ruling elites. The review of the European Neighborhood Policy confirms that it also requires a tailor-made approach with each and every country. Thus, democratization is a complex and rather evolutionary process of transformation that encompasses *inter alia* strengthening human rights and the rule of law. Human rights, on the other hand, are aimed primarily at the protection of individuals from arbitrary state actions. They are far better conceptualized and operationalized in dozens of international human rights treaties and other instruments adopted since 1945. Moreover, the EU remains only one among many international actors that advocates for human rights protection. Thus, support for human rights can bring better results in a considerably shorter time, which closely corresponds with the reasons behind the adoption of the concept of resilience. The EU's priority is, after all, the mitigation of fragility – both internal and external – and the crisis rhetoric (best exemplified by the frequency of occurrence of *must*) only confirms that the EU intensely seeks stability for Europe. All the abovementioned factors explain the rejuvenation of human rights narration under the EUGS and, at the same time, provoke questions over the democratic component of resilience.

Conclusions

Comparative analysis of the European Security Strategy of 2003 and the European Union Global Strategy of 2016 unveils significant differences in their lexical layers. Those differences are reflected, to some extent, in the subsequently adopted documents and policies. The EUGS underlines *inter alia* the necessity of developing defense capabilities, building resilience, and the affirmation of principled pragmatism as a guide for the EU's external actions. As the following documents adopted by the European Parliament (e.g. resolution on resilience as a strategic priority of

the external action of the EU[74]) and European Commission (e.g. European Defence Action Plan[75]) indicate, those are not merely empty rhetoric, but substantive commitments that are being consistently implemented.

Nevertheless, not all of the commitments established under the EUGS are equally translated nto action. On one spectrum, there is the area of defence, where the EU's strong commitment is best demonstrated by the proposed budget allocation of €3.5 billion for the period 2021–2027. Furthermore, the establishment of PESCO remains in accordance with the affirmation of the cooperation framework highlighted under the EUGS. Somewhere in the middle, there is the concept of resilience, which is indeed frequently mentioned in numerous EU documents, but the recent increase may very well be a continuation of a long-term fascination with this concept and not the result of its inclusion in the EUGS. Indeed, the analysis of the EU interventions at the UN fora indicates that the concept of resilience was present in the EU rhetoric in the period preceding its adoption (2014–2015). Although there was a sharp increase in the frequency of mentions of this term in the first half of 2017, the following months have witnessed a significant drop. This may suggest that the EU still needs better operationalization of this concept. On the other end of the spectrum, there is principled pragmatism which itself rarely appears in the EU documents and rhetoric. As C. Altafin, V. Haász, and K. Podstawa noticed, although human rights are present in the textual layer of the EUGS, their role in the European grand Strategy is not clear.[76]

The textual analysis of the EUGS allowed the extraction of the most frequent terms that together create a net of interlinked concepts (e.g. resilience, human rights) and phrases (e.g. cooperation, the prevalence of plural nouns when describing threats and problems). The theory of complex systems explains many of the relations between them and may even be more useful in the further operationalization of concepts such

74 Ibidem.

75 Y. Bar-Yam, *General Features…*

76 Council of the European Union, *Shared Vision, Common Action: A Stronger Europe – A Global Strategy for the European Union's Foreign And Security Policy*, 2016, p. 46.

as resilience or principled pragmatism. Nevertheless, the complexity of the EUGS will arguably pose problems for policymakers and EU diplomacy, as we saw with the example of EU interventions at UN fora.

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SUMMARY

Mining the EU Global Strategy of 2016

This study proposes to apply an automated lexical analysis to the European Security Strategy of 2003, entitled "A Secure Europe in a Better World", and the European Union Global Strategy of 2016, entitled "Shared Vision, Common Acton: A Stronger Europe". The findings are not limited to supporting the predominant interpretations of scholars and experts, but aim at exploring the usefulness of text mining techniques in the interpretation of EU documents. Furthermore, the conclusions drawn from the lexical analysis are discussed in the light of complex systems theory, which may be beneficial for the proper understanding of the concept of resilience (mainly its multidimensional nature)

and its subsequent operationalization. The last part of the paper includes an in-depth analysis of the EU rhetoric on the UN fora (period: 2014–2019) regarding the concept of resilience, in particular its linkages with human rights.

Keywords: European Union, United Nations, resilience, systems theory, human rights, text mining, security.

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DOI 10.14746/ppuam.2020.11.11

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Defense Law as the Foundation of the State Defense System in the Republic of Poland

Introduction

The protection of its independence and integrity of its territory is the primary task of every state. This is very clearly indicated in Art. 5 of the Constitution of the Republic of Poland. This is because independence is the supreme value, and the task of ensuring the integrity of a state's borders underlines the importance of a territory as one of the main attributes defining the state (alongside population and sovereign political power).[1] In implementing the task of safeguarding the independence and integrity of the territory, a key role is played by an efficiently functioning state defense system, in which both the Polish Armed Forces and non-military authorities perform their functions.

The system of state defense is sometimes described in security science literature as a collection of interrelated elements – people, organizations and equipment – acting to ensure state security.[2] Another definition of the state defense system is a coordinated internal set of elements of governance (political-administrative) and executive elements (military and non-military), deliberately separated from the structures of the state, of an organizational and supportive nature.[3]

1 The Constitution of the Republic of Poland of 2nd April, 1997, Journal of Laws of 1997, no. 78, item 483.

2 B. Balcerowicz, *Obronność państwa średniego*, Bellona, Warszawa 1997, p. 13.

3 W. Kitler, *Bezpieczeństwo narodowe RP: podstawowe kategorie, uwarunkowania, system*, Warszawa 2011, p. 255.

On the other hand, the set of legal norms regulating the sphere of state defense is referred to as defense law and this is what I focus on in this article.

The aim of the publication is to analyze defense law as a part of the legal system of the Republic of Poland in the context of its importance for the defense of the country. I formulated the main research problem in the form of the following question:

1. Does the defense law of the Republic of Poland require reform and in what direction should changes in this field of law be directed?

Also, I formulated three specific questions:

1. What is the importance of national defense in ensuring national security?
2. What is the place of defense law in the legal system of the Republic of Poland?
3. What is the subject matter of defense law?

Due to the fact that defense law issues are interdisciplinary in nature, in my research I used both a critical analysis of literature on legal sciences and security sciences. In addition, I relied on an analysis of source materials - primarily acts of universally binding law (the Constitution, statutes, regulations) and acts of local law, as well as acts of internally binding law (instructions, orders, resolutions, decisions, guidelines, and the agreements of various state authorities). I also took into account the defense planning documents.

The Importance of National Defense and of the State Defense System

The concept of national defense is inextricably linked to national security. The relationship between those two terms is pointed out by Ryszard

Jakubczak, who emphasizes that if national security is the highest need and value of a nation and the main objective of a state, then national defense is its implementation structure, i.e. the main organization and function that protects national values and defends them against both military and non-military threats, as well as external and internal ones.[4]

In the "Dictionary of basic terms in the field of state security" prepared by the Strategic and Defence Faculty of the National Defence Academy in 1993, there is a brief definition of national defense as a sum of the forces and means (institutions) of a society (a nation) and their actions related to counteracting threats to national interest.[5] However, a similar publication prepared by the same department of the NDA, but published in 2008, contains a much broader definition, since the term "national defense" is defined there as an activity aimed at adequately preparing and using the forces and means that are at the disposal of the state to counteract all kinds of external and internal threats to the national interest. It should be emphasized that the authors of this definition of national defense considered as external threats the threat resulting in an increased probability of loss or limitation of sovereignty or territorial integrity, where the source of this threat is another state. On the other hand, internal threats are threats that result in the likelihood of a decrease in the ability of authorities to maintain law and order in the state.[6]

On the other hand, Józef Marczak suggests that the understanding of the traditional term "national defense" should be extended to include national protection and defense. In his opinion, such a formulation includes all the civil and military actions that guarantee the survival of national interests in the face of military and non-military threats. Moreover, it draws attention to the inseparability of the preparation of armed forces

4 R. Jakubczak, *Pojęcie oraz zakres bezpieczeństwa narodowego i obrony narodowej*, in: *Obrona narodowa w tworzeniu bezpieczeństwa III RP*, eds. R. Jakubczak, Bellona, Warszawa 2003, pp. 62–63.

5 Wydział Strategiczno-Obronny Akademii Obrony Narodowej, *Słownik podstawowych terminów z zakresu bezpieczeństwa państwa*, Warszawa 1993, p. 15.

6 Wydział Strategiczno-Obronny Akademii Obrony Narodowej, *Słownik terminów z zakresu bezpieczeństwa narodowego*, Warszawa 2008, pp. 7, 179.

and civil defense organizations for both national defense (in the meaning of defense against aggression) and national protection (in the meaning of prevention of non-military threats). J. Marczak believes that national protection and defense creates the basis for the effectiveness and credibility of foreign policy in creating external conditions for national security.[7]

Waldemar Kitler, on the other hand, points out that the subject of national defense is not only the state as a subject of international relations, but also the nation defined as a society inhabiting a given state. In presenting his first definition of national defense, W. Kitler described this term as the sum of all civil and military actions aimed to ensure the security of a country and a society, i.e. actions that determine the sustainability of the state (as an institution of international relations) and the society in the face of challenges and threats hindering vital national interests. National defense is a sphere of national security, and thus constitutes an internally coordinated set of elements performing governance functions (political and administrative) and executive functions (military and non-military – civilian).[8] However, in the course of further research on the issue of national defense, W. Kitler verified his definition of this concept. The change concerned, among other things, the abandonment of the division into military and non-military defense in favor of a functional approach (separation of a superior subsystem of national defense management and an executive subsystem) and the abandonment of the assumption that the aim of national defense is to prevent and counteract all threats to national interests in favor of protection and defense of vital national security interests.[9] Thus, W Kitler's new definition of national defense is the following: "national defense is an internally coordinated set of elements of the superior management subsystem and detailed functional executive sub-

7 J. Marczak, *Powszechna ochrona i obrona narodowa*, in: *Podstawy bezpieczeństwa narodowego Polski w erze globalizacji*, eds R. Jakubczak, J. Marczak, K. Gąsiorek, W. Jakubczak, Warszawa 2008, pp. 163–164.

8 W. Kitler, *Obrona narodowa w wybranych państwach demokratycznych*, Warszawa 2001, pp. 6 and 155.

9 W. Kitler, *Obrona narodowa III RP: pojęcie, organizacja, system*, Warszawa 2002, p. 15.

systems, defined by interaction and substance relations, serving to protect and defend the vital interests of national security." According to W. Kitler, the supreme subsystem of national defense management is a collection of supreme authorities and public administration bodies, within which decision-making and information functions are performed in relation to the system and its environment. However, the functional executive subsystems include three key subsystems, i.e. diplomatic defense, economic and economic infrastructure defense, military defense, as well as other subsystems, i.e. civil protection, health protection, constitutional order protection, security and public order, state border protection, information protection, education for security, and defense in the field of national culture.[10]

Bolesław Balcerowicz, in his reflections on national defense and the influence of mutual allied obligations on it, supports the aforementioned definition presented in the Dictionary prepared by the Strategic Defense Department of the AON. He also indicates that the concept of national defense now also extends to cover such spheres of activities of the state that are not connected only with narrowly-defined military defense activities. Bolesław Balcerowicz also mentions three dimensions in which national defense should be considered:

- the activity dimension – counteracting threats to state security and their consequences;
- the structural dimension – armed forces, non-military defense cells, and leadership bodies;
- the functional dimension – tasks for each of its elements.[11]

The definition of the state defense system in the literature on the subject (both by B. Balcerowicz and by W. Kitler) and its importance are presented in the introduction to the article. It should be mentioned, however, that apart from the state defense system, there are also a number of other

10 Ibidem, p. 343.

11 B. Balcerowicz, *Sojusz a obrona narodowa*, Warszawa 1999, p. 13.

specific systems related to national security. These include the security and law enforcement system, the anti-terrorist system, the cyber defense system, the critical infrastructure protection system, the border protection system, the constitutional order protection system, the classified information protection system, the civil protection and civil defense system, and the crisis management system. Of course, this is not a closed catalogue, but the number of systems clearly shows how complicated the sphere of national security is. Moreover, each of the systems mentioned above intertwines with the elements of the state defense system and complements it to a certain extent. However, different state services and institutions (both military and civilian) are responsible for the implementation of tasks in a given system. This underlines the important role of defense law as the foundation of national defense and the system of state defense.

Defense Law in the Legal System

Defense law is a separate part of national security law that regulates an extremely important aspect of national defense. Its special position is emphasized especially by the provisions of the Constitution of the Republic of Poland. The relevant legal regulations can be found, *inter alia*, among the main principles of the system of government (chapter I), the freedoms, rights and obligations of man and citizen (chapter II), the tasks of the legislative and executive authorities (chapters IV, V, and VI), and matters related to states of emergency (chapter XI). Although, as can be seen, these regulations are located in different parts of the Constitution, they are strongly interrelated and should be considered together, as indicated by verdicts of the Constitutional Tribunal, as well as the views of the doctrine of legal sciences and security sciences.[12]

Also Art. 1 of the Act on the universal defense duty indicates that "the defense of the Fatherland is a matter and duty of all citizens of the

12 W. Wołpiuk, *Siły Zbrojne w regulacjach Konstytucji RP*, Warszawa 1998, p. 15.

Republic of Poland", while Art. 2 emphasizes that defense of the Republic of Poland, preparation of the population and national property for a war and performance of other tasks within the universal defense duty is the responsibility of all authorities and government administration bodies and other state institutions and bodies, local government bodies, businesses, and other organizational units, social organizations, as well as each citizen to the extent specified in specific statutes.[13]

However, defense law, like national security law, is not a separate branch of law. The defense law system consists of legal acts from various branches and fields of law related to national defense (first of all, constitutional, administrative and criminal law provisions, but also, to varying degrees, provisions of other branches of law). This is a very large number of acts of universally binding law (starting with constitutional regulations, through statutes and regulations) and numerous acts of local law (issued by authorized entities and binding in the territory of a given local government community). In addition, decisions of the President of the Republic of Poland, decrees (of the President, the Prime Minister, and ministers), resolutions of the Council of Ministers, decisions of the Minister of National Defence, guidelines and agreements of the Minister of National Defence, and some legal acts of other central state bodies, should be taken into account.[14]

The defense law system, therefore, consists of several hundred legal acts of various importance, which makes any discussions of this subject very complicated.

Subject Matter of Defense Law

Several attempts to systematize the defense law have been made in the literature on the subject, and scientists from the Institute of Law and

13 Ustawa z dnia 21 listopada 1967 r. o powszechnym obowiązku obrony Rzeczypospolitej Polskiej, Journal of Laws of 1967, no. 44, item 220.

14 M.A. Kamiński, *Military Law in the Republic of Poland*, "Safety & Defense" vol. 5, no 2, 2019.

Defence Administration of the Academy of War Arts are particularly active in this field.

An analysis of the content of the multi-author monograph entitled "Defence law of the Republic of Poland – outline of a lecture" leads to the conclusion that the scope of national law directly regulating the subject of national defense includes legal regulations concerning, among other things, the following:

- organization of the national defense;
- defensive planning;
- the tasks and competences of the supreme and central state a thorities in the field of defense (including the lower chamber of the parliament, the President of the Republic of Poland, the Prime Minister, the Minister of National Defence, other ministers, courts and tribunals, and the central government administration bodies and the offices serving them);
- the tasks and competences of local public administration bodies in the field of defense (including the province governor, the marshal, and the provincial board, the district head and the district board, the mayor and the president of a city);
- the tasks and organization of the Armed Forces of the Republic of Poland as a subject of defense law and the broad matter of military law;
- the normative basis for the introduction, validity, and abolition of martial law;
- civil defense;
- defense services.[15]

On the other hand, in the monograph titled "Organization of the national security of the Republic of Poland. System of government, legal-

15 *Prawo obronne Rzeczypospolitej Polskiej w zarysie*, eds M. Czuryk, W. Kitler, Warszawa 2014.

organizational, and systemic aspects", W. Kitler suggested the following typology of defense law:

1. constitutional law containing norms regulating and influencing the field of defense;
2. law directly regulating defense issues, including:
   b. the general organization of national defense;
   c. the defense competencies of state authorities;
   d. establishing missions in the various fields of national defense (including law directly dedicated to defense in the fields of economy, transport, health, communications, civil protection, and others);
   e. acts of local law concerning defense issues;
   f. the sources of the internally binding law;
3. law supporting national defense – according to the subject matter of the regulations, including customs, banking, aviation, energy, environmental, construction, and tax law, as well as according to the method of regulation: civil, labor, criminal, and administrative law.[16]

It should also be noted that, in addition to national regulations, defense law also includes a number of regulations in the field of international law that regulate military security, such as the extensive field of international humanitarian law on armed conflicts concerning the right to use armed forces and restrictions on the use of military force, as well as the protection of civilians.

An important element that influences defense law is defense planning. Key documents in this area include the National Security Strategy of the Republic of Poland, the Political and Strategic Defence Directive of the Republic of Poland, the Main directions of the development of the Polish Armed Forces and their preparations for defense of the

16 W. Kitler, *Organizacja bezpieczeństwa narodowego RP. Aspekty ustrojowe, prawno-administracyjne i systemowe*, Toruń 2018, pp. 134–145.

state, the Guidelines of the Council of Ministers for programming of defense preparations, the Defensive Response Plan of the Republic of Poland, the Operational Plan of the Polish Armed Forces, the Guidelines of the Ministry of Defence on defense planning and programming in the ministry competent for national defense.

The Need for Reform of Defense Law

The systematization of defense law and the indication of its subject matter is hampered by the fact that there is no single law in Poland that regulates the fundamental issues of national defense and act as a kind of a signpost in this field. Certainly, it cannot be said to be the Act on the universal duty to defend the Republic of Poland, which in Polish legislation is a rare example of a legal act that has been in force for over fifty years. This Act was passed by the parliament of the People's Republic of Poland on 21 November 1967. Since then not only profound political changes have taken place – the transition from a totalitarian state to a democratic state ruled by law – but also the function and character of the Armed Forces have changed, as well as the very perception of national defense (where today, besides the military aspects, great emphasis is placed on the tasks of non-military defense). Over the last five decades, the Act on universal defense duty has been amended as many as 113 times in total. Thirteen announcements have been issued concerning the publication of a consolidated text of the Act, 900 implementing acts have been issued[17], and the Constitutional Tribunal has issued three opinions on the compliance of the provisions of the Act with the Constitution. Over the course of fifty years, this legal act was repeatedly supplemented with successive tasks and powers of various state bodies in the field of defense and with competences of the commanders of the Armed Forces and of individual military formations. Also, on some occasions,

17 It should be stressed, however, that a large part are decisions made by the President of the Republic of Poland concerning appointments to the rank of a general.

some provisions were transferred to other new laws (e.g. legal regulations concerning the Military Police and the Minister of National Defence). As a result, the Act on the universal defense duty is currently, on the one hand, an extremely extensive legal act and, on the other hand, some of its provisions have exactly the same content as they did in the period of the People's Republic of Poland (e.g. the regulations concerning civil defense have been practically unchanged since 1979). Consequently, the Act is an archaic legal act that is not suitable for the current situation, and is a chaotic combination of various aspects of defense law and military law.[18]

For many years, there have been calls for a completely new national defense law to be drafted from scratch. In 2010, there were even proposals for the assumptions of a draft defense bill, preceded by a great deal of discussion, but then no specific legislative works in this area were started.

In 2018, W. Kitler suggested dividing defense law into four parts: a defense law act, a Polish Armed Forces act, an act on the universal duty to defend the Republic of Poland, and a military service act.[19] Such an interesting and innovative approach to the subject could in practice lead to a separation of defense law as a separate branch of law. With the adoption of the act, defense law could also be applied to issues regulated in laws and implementing acts belonging to other branches and fields of law (for example criminal law). Thus, defense law would certainly gain its identity in the system of national law.

It is important that the new defense law will cover soldiers' actions in operations outside the country. Soldiers are not only subject to local law but above all to Polish defense law.[20]

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18 M.A. Kamiński, *Ujednolicenie prawa w zakresie systemowych rozwiązań ochrony ludności i obrony cywilnej, Współczesna obrona cywilna wyzwania, ryzyko, zagrożenia*, eds. J. Gawęcka, J. Wojtycza, Piotrków Trybunalski, pp. 67–69.

19 W. Kitler, *Organizacja bezpieczeństwa narodowego RP…*, pp. 132–133.

20 B. Pacek, *Polish new „Rules of Engagement" – soldiers' legal security*, in: *Zasady użycia siły zbrojnych – wybrane materiały*, ed. B. Janusz-Pawletta, Warszawa 2011.

Another reasonable solution could be to adopt an act on national defense that would mainly regulate the tasks and powers of the state and local authorities in the field of national defense. Such legal regulations are successfully operating in many European countries. For example, in 2015, the parliament of the Republic of Estonia adopted the National Defence Act, which unified three other security laws and became a key national defense law. At the same time, the law introduced a new command system in accordance with the principle that all public authority institutions will perform the same functions in times of peace, crisis, and war.[21]

In the discussion on the systematization of defense law in Poland, one must also remember about the need to properly regulate the issue of civil defense. Here, too, there has been a debate for many years on the exclusion of civil protection issues from the Act on the universal defense duty and on the adoption of a new legal act treating civil protection issues in a comprehensive manner (adapted to the European standards in this field). Unfortunately, despite widespread agreement on the justification for such solutions, it has not yet been possible to carry out the legislative process effectively. Several attempts have been made, but none of them have been successful.

Conclusions

National defense and the state defense system are key issues in the field of national security. However, the basic condition for the smooth functioning of the state defense system is to build its permanent legal basis, which is referred to as defense law. Without this element, it is impossible to create a good organization and achieve effective cooperation between the various bodies (military and non-military).

However, defense law does not constitute a separate branch of law in the Polish legal system. This is because defense law consists of le-

21 More: M.A. Kamiński, *Obrona Narodowa Republiki Estonii*, Toruń 2018, pp. 131–141.

gal acts falling within the scope of constitutional law, administrative law, and criminal law, as well as other branches of law to varying degrees. Additionally, defense law comprises a very large number of acts of universally and internally binding law, which makes it very difficult effectively discuss this matter. The literature on the subject suggests dividing the subject matter of defense law into laws that directly regulate the subject of national defense and the laws that support it.

Undoubtedly, defense law is also in need of decisive reform, since the current legal solutions are often archaic and completely inappropriate for the current situation (especially the 1967 Act on universal defense duty). In addition, the very large number of amendments has introduced enormous legislative chaos.

One of the options for reform suggested in the security science literature is to divide the subject matter of defense law into four parts: a defense law act, an act on the Polish Armed Forces, an act on the universal duty to defend the Republic of Poland, and an act on military service. Another option could be to adopt an act on national defense that would mainly regulate the tasks and powers of the state and local authorities in the field of national defense (e.g. similar to the Estonian National Defence Act).

Such actions would certainly lead to a better organization of defense law and also could result in the formation of defense law as a separate branch of law.

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SUMMARY

Defense Law as the Foundation of the State Defense System in the Republic of Poland

The article presents an analysis of defense law in the legal system of the Republic of Poland in the context of its importance for the defense of the state. The author discusses the role of the state defense system in ensuring national security and presents defense law as a foundation for effective organization of this system. Moreover, the author analyzes the subject matter of defense law and points out the difficulties in its proper organization. The key issues discussed in the article are the need for defense law reforms and indication of the proposals as to the direction in which changes in this field of law should go.

Keywords: defense law, defense law in Poland, national defense, state defense system, defense law reform.

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DOI 10.14746/ppuam.2020.11.12

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Administrative Decisions in the Era of Artificial Intelligence

Introduction

In the era of developing public administration, the next stage is coming closer, so that paper administration, which was only helped by the computer, is moving forward. Editorial programs, judgement search engines, and programs preparing decisions within a certain scheme, are tools that are already used by many public administration employees. Alongside the tools that help in the decision-making process in the broader sense, the use of programmes that require only the signature of an authorized person and for it to be sent to the party is increasingly growing. So they are programmes that issue decisions in a quasi-automatic way. In addition, technological capabilities allow the preparation of such software which will prepare a decision based on a request made by a party, without the additional participation of an official. The automated decision-making process is another challenge that Polish public administration faces, due to the rapid increase in computing power, the development of machine learning by computer programs, and the ability to process huge amounts of unstructured data.

Some perceive the automation of decision-making processes as an advantage, a chance for a fairer, faster and more accurate operation of the administration, both public and private. On the other hand, the others indicate that automatic decision-making programs are as defective and unreliable as human beings, because it is human beings, with all their prejudices, incomplete knowledge, views and horizons who de-

sign these solutions. The question arises of what factors/conditions, from a legal point of view, are crucial for automatic decision-making to be implemented in administrative proceedings? Moreover, it is interesting what values of administrative law in the broad sense should be taken into account in the process of designing algorithms that serve the citizen in contacts with public administration. Investigation in order to provide answers would have to be very broad if a comprehensive and holistic solution to the problem is to be found, but in this article the study will be narrowed down. The research for the above questions will be reduced to an analysis of the provisions on administrative procedure in the broader sense, and a review of the doctrine's perspectives in this area, supplemented by the views of other fields of science.

The Traditional Model of Administrative Proceedings

Public administration, in exercising its competences, operates under strictly legal forms in which it is particularly important to issue administrative acts. This activity is the result of administrative proceedings, which are considered to be a sequence of procedural activities undertaken by public administration bodies, in the functional meaning, in order to resolve an individual case in the form of an administrative decision, as defined by the law.[1] The doctrinal definition of administrative proceedings correlates with the subject matter of the Code, which was defined in Article 1 of the Polish Code of Administrative Procedure and includes, *inter alia*, proceedings before public administration bodies in individual cases, which are within the competence of those bodies and are either resolved by administrative decisions or by a silent settlement. With the exception of certain autonomous exceptions, the administrative procedure carried out by a public administration body shall be governed by strict rules, which

1 B. Adamiak, *Zagadnienia ogólne procesowego prawa administracyjnego*, in: *System Prawa Administracyjnego*, vol. IX: *Prawo procesowe administracyjne*, Warszawa 2010, p. 6.

derive mainly from the Polish Code of Administrative Procedure.[2] In some situations, the legislator has decided that, due to the specific subject matter of the regulation, it is necessary to introduce different, complementary rules of conduct in cases which result in an administrative decision. Examples include proceedings in construction, social assistance and tax matters, which nevertheless make greater or lesser reference to the provisions of the Polish Code of Administrative Procedure.

The procedure regulated by Polish law specifies the actions that may be taken by a public administration body in order to exercise its competence under the Polish substantive law and, which is important from the individual's point of view, to protect them against excessive interference by the public administration. It should be borne in mind that the administrative procedure is aimed at implementing the norms of substantive administrative law and is closely related to them.[3] The addressees of the provisions are, on the one hand, public administration bodies, or entities which carry out administrative authority but are not necessarily part of the public administration structure, and on the other hand, there are entities interested in a specific decision due to their right or obligation. Moreover, other entities may participate in the proceedings, such as an expert or a witness, but their role is incidental and temporary. Thus, we have clearly defined subjects of administrative proceedings.

If a public authority is to act in the context of an administrative procedure, it must determine whether three basic premises are met, which are:

1) an entity which is an addressee of a substantive law norm, called an administered entity;
2) the competence, defined by law, of an entity performing the function of a public administration body, which is an administrative entity;

2 The Code of Administrative Procedure, Journal of Laws of 2020, item. 256, further: Code of AP.

3 R. Hauser, *Rola przepisów procesowych w realizacji norm materialnego prawa administracyjnego*, in: *Rola materialnego prawa administracyjnego a ochrona praw jednostki*, in ed. Z. Leoński, Poznań 1998, pp. 23–24.

3) the possibility of settling the matter by means of an administrative decision or by silent settlement.

Preliminary verification of the requirements being met permits further actions to be taken, starting from the formal initiation of proceedings and ending with a legal decision.

The legal and factual acts undertaken by an authority shall constitute administrative proceedings of jurisdiction.[4] In the simplified model, the general administrative proceedings can be described as a general administrative procedure with two modes – general proceedings and extraordinary proceedings.[5] Within general proceedings, we distinguish proceedings before the body of first instance and, if an appeal against the decision is lodged, proceedings before the body of the second instance. On the other hand, the subject of extraordinary proceedings is the verification of the decision issued by the body of first or second instance.

There are three stages in general and extraordinary administrative proceedings: an initial stage, an explanatory stage, and a settlement stage. Material, technical and process activities are undertaken at all stages. Technical activities are understood to include, among other things, the physical acceptance of an application or other paper-based letter, acknowledgement of receipt or submission of the letter, the sending of the letter or, for example, visual inspection or measurement during a direct examination carried out using the senses. Procedural actions may concern the assessment of the application submitted in formal terms, e.g. with regard to the origin of the party or other entitled entity, the timeliness of the submission of the letter or statement for the minutes, or the payment of a fee, if provided for by law. These side actions, as a whole, are aimed at creating an administrative act. Important steps include establishing the facts, which often take the form of official

4 J. Zimmermann, *Polska jurysdykcja administracyjna*, Warszawa 1996, p. 6.

5 B. Adamiak, *Koncepcja nadzwyczajnych trybów postępowania administracyjnego*, "Acta Universitatis Wratislaviensis" 1985, no. 648, Prawo CXII, p. 91 and further.

documents in the course of administrative proceedings, determining the substantive rules relating to the administrative matter in question and activities relating to the subsumption of the evidence gathered in the light of the legal status of the case. An administrative act, resulting from a logical conclusion based on facts and legal norms, is a process of thought. For the major part, the public administration applies on the basis of such legal norms which leave no room for any margin of manoeuvre in a given actual state. In other words, the State, acting through public plenipotentiaries, is limited in the way it chooses to act and is obliged to issue a related administrative act.

The opposite to this group of administrative acts are decisions taken in a discretionary manner. The study of administrative law indicates that a public authority, acting within the framework of administrative discretion, has the possibility to choose the legal consequences of an act based on a specific legal norm.[6] The blanket provision provides a fully developed hypothesis, while the disposition takes the form of a disjunction, which makes it possible to determine the content of the decision by the authority.[7] This power is the final stage in the law's implementation in the course of administrative proceedings, after subsuming, in which the authority makes the choice of legal effects.[8]

The problem of the decision-making autonomy granted to public administration bodies is also related to the issue of vague, value-adding concepts, which, according to some, meet the broad concept of administrative discretion.[9] In contrast, Jaśkowska submits that vague concepts, including estimates, that are present in the norm are subject to interpretation of the law, and are therefore involved at a different stage of application of the law in the process of taking a decision.[10] The de-

6 J. Zimmerman, *Prawo administracyjne*, Warszawa 2008, p. 304.

7 A. Błaś, *Prawo administracyjne*, ed. J. Boć, Wrocław 2010, pp. 332–336.

8 J. Zimmerman, *Prawo administracyjne*, Warszawa 2020, pp. 304–307.

9 T. Bąkowski, *Administracyjnoprawna sytuacja jednostki w świetle zasady pomocniczości*, Kraków 2007, pp. 159–161.

10 M. Jaśkowska, *Pojęcie uznania administracyjnego*, in: *System Prawa Administracyjnego*, vol. I: *Instytucje prawa administracyjnego*, Warszawa 2009, p. 254.

limitation of administrative recognition from related decisions based on vague normative concepts is important, as the scope of the control of free administrative acts is different since, in principle, it is limited in nature and it is assumed that the courts examine only the question of their legality and not the grounds of equity.[11] At the same time, it should be stressed that the administrative courts, in their extensive rulings, have a significant influence on the understanding of the general clauses, their delimitation and the relationship of administrative discretion in relation to standards containing vague concepts.[12]

Administrative acts, whether binding or casual, are issued on the basis of and within the legal limits, which is a consequence of the constitutional principle of the rule of law, as defined in Article 7 of the Constitution of the Republic of Poland, subsequently repeated in Article 6 of the Code of Administrative Procedure. As Zimmermann argues, the principle of legality is a rudimentary general principle of administrative procedure under the rule of law, taking priority over other rules of procedure.[13] It is the sources of universally binding law that define the boundaries of the public administration's activity, both in the sphere of non-governmental administration and, most importantly, also in the sphere of the government's activity. The question arises here of whether the transformations of public administration, especially of a technical nature, and the computerisation of administrative proceedings can be considered as such, have a sufficient legal basis, and whether the established law does not create a kind of barrier in further improvement or evolution of the Polish public administration. Since the principle of prompt and simple administrative procedure, expressed in Article 12 of the Code of Administrative Procedure, is one of the general principles of adminis-

11 Ibidem, p. 288.

12 T. Bąkowski, *Udział sądów administracyjnych w kształtowaniu pojęć i konstrukcji prawa administracyjnego*, in: *Orzecznictwo w systemie prawa. II Konferencja Naukowa Wydziału Prawa i Administracji Uniwersytetu Gdańskiego i Wolters Kluwer Polsk*a, eds T. Bąkowski, K. Grajewski, J. Warylewski, Warszawa 2008, p. 188.

13 J. Zimmermann, *Glosa do wyroku SN z dnia 23 lipca 1992 r., sygn. akt III ARN 40/92*, "Państwo i Prawo" 1993, no. 8.

trative procedure, it would seem that new technical solutions, especially the current progress in the sphere of machine learning and automatic data processing, will be a remedy for the weaknesses of modern public administration. Particularly as the principle of efficiency, also called the principle of effectiveness, appears in the Preamble to the Polish Constitution. However, it should be stressed that it does not take priority over the principle of legalism, nor does it imply an agreement to restrict the rights of an individual in its name.[14] Nevertheless, it is important to note that justice delayed is justice denied[15], and therefore in accordance with the law, a State decision delivered within a reasonable short period of time is an affirmation of the rule of law and an implementation of this principle of efficiency.

Areas of the Computerisation and Automation of Public Administration

Searching for answers to the problems of the Polish public administration, such as poor efficiency or excessive bureaucracy, in the process of computerization seems to be a natural and rational action. For many of us, a visit to a bank is a distant memory, the Internet is the basic form of communication in our business, and on-line shopping is no longer just a fashion, but a necessity. Still, to ensure that effective IT evolution, or a revolution, takes place in the Polish public administration, and especially in the area of administrative proceedings, it is worth determining whether it will take place on the basis and within the boundaries of the law.

The computerisation of administrative proceedings has been going on for a long time, however, the solutions adopted theoretically facilitate access to and from the authority by means of electronic communication with the complementary elements of identification in a virtual reality.

14 Wyrok Trybunału Konstytucyjnego z 25 września 2014 r., SK 4/12, OTK-A 2014, No. 8, pos. 95.

15 A. Redelbach, *Sądy a ochrona praw człowieka*, Toruń 1999, p. 279.

Progressive digitalization supports technical operations, accelerates and facilitates certain activities. However, it does not cover the most important stage, namely the resolution itself, and the lack of widespread use of electronic identification effectively limits further use of this technology.

The evolutionary changes made to the computerisation of administrative procedure by its limited scope to the technical sphere do not significantly affect the process of remote settlement. As Sibiga argues, the solutions adopted are not consistent and are not fully coordinated by the governmental entities involved in the legislative process.[16] Maybe that is why the computerisation of public administration affects only technical regulations, and the electronic procedure has not gone beyond the text editor. Nevertheless, certain technical and legal solutions may be considered to be crucial in the sphere of computerisation of public administration and support for its operation, and in particular for resolving individual cases by automatic processes.

The digitalization of procedures and the introduction of IT tools has led to some kind of quasi-automated decision making. An example is the decision setting the real estate tax for natural persons issued pursuant to Article 21 § 1(2) of the Tax Ordinance Act[17] in conjunction with Article 6 § 7 of the Local Tax and Charges Act.[18] Every year between January and March, thousands of such tax decisions are issued by the executive bodies in all Polish municipalities. They use computer programs which, on the basis of the taxpayers' records, including data on the subjects of taxation, rates and tax base, determine the amount of real estate tax. In general, the only variable for most natural persons in a given year is the tax rate, so the decision is based on the data available. It is not possible to issue several or several thousand decisions at once in a short period of time using the full model of tax case resolution. In fact,

16 G. Sibiga, *Stosowanie technik informatycznych w postępowaniu administracyjnym ogólnym*, Warszawa 2019, pp. 79 and 236.

17 Ustawa z 29 sierpnia 1997 Ordynacja podatkowa, Journal of Laws of 2019, item 900.

18 The Local Tax and Charges Act, Journal of Laws of 1991, no. 9, item 31, which is Journal of Laws of 2019, item 1170.

when printed, the decisions are signed by the office holder of the body or a person authorized by him/her. The correctness is verified at the initial stage when the updated rates are checked. There is no time nor technical possibility for each decision to be checked before it is signed by an authorised entity. The same applies if an additional charge is imposed as a result of a parking fee not being paid. New technological solutions make it possible to control the payment of charges by means of the camera system fixed to the cars that take pictures of the licence plates, to decode from the pictures of the licence plate number, to compare it with the database of the vehicles' licence plates for which the parking charge was paid, and then to prepare a document calling for an additional charge for the parking fee not being paid.[19] According to an official of the Municipal Roads Administration in Warsaw, "…the role of a man is to put a call in the envelope and seal it, and then dispatch it…"[20] Such an action – issuing a decision or a call by the programme – is not fully reflected in the law, so in order to maintain the formalism of the Code of Administrative Procedure an official signs a decision or other letter. Therefore, already today a computer program basically replaces human beings and makes a decision on their behalf, while the signature is a legal fiction, which, due to the formalism of tax or other proceedings, must be observed.

The automation of activities looming on the horizon, or more precisely *Automated decision making – ADM* means making a decision/resolution without any human involvement. Instead of the human being and the evidence-based "thinking" process, unaggregated data is taken by a computer program equipped with an appropriate algorithm. Artificial intelligence is responsible for a given final result of the data analysis based on certain rules. These rules can be economic indicators, medical

19 More about e-audits see P. Pieńkosz, *E-kontrole jako narzędzie rozwoju stref płatnego parkowania w miastach na prawach powiatu. Szanse i problemy*, "Monitor Prawniczy" 2019, no. 24.

20 *Rusza e-kontrola w Warszawie. Coraz łatwiej o mandat za parkowanie*, <https://spidersweb.pl/autoblog/strefa-platnego-parkowania-warszawa-e-kontrola/>.

quantifiers, or the law, which is itself a rule of conduct, and therefore an algorithm. It is crucial, that a computer program prepares the final solution on the basis of the output data, without human intervention. The technical possibilities of using ADM have expanded considerably, even by leaps and bounds, and thus seem to be created for use by public authorities in repetitive activities.

The progress in machine learning and the possibility of using large and diverse sets of variable data – Big Data – allows for a wide use of artificial intelligence in decision-making processes. Most often, within the ADM framework a distinction is made between processes that are relatively simple in nature, processes that are more complex in nature, and processes that require abstract thinking. Wiewiórowski and Sibiga, on the other hand, suggested dividing the automation systems into three types: automation based on simple algorithms, specialist automation, and the automation of discretionary decisions.[21] The most interesting for the Polish administrative law are solutions developed within complex algorithms and those including abstract elements. It should be remembered, however, that administrative law is not a binary code that can be easily and simply algorithmized[22], but a law that serves the collective and individual needs of citizens resulting from the coexistence of people in communities[23], with all the axiological, cultural and social baggage that will or will not be possible to convert into a binary code, and thus to automate administrative processes.

The use of simple algorithms in administrative proceedings seems the easiest to implement. The issuing of certificates, the provision of material aid in a situation where it is sufficient to check whether the applicant meets the conditions for obtaining social benefit, for example,

21 G. Sibiga, W. Wiewiórowski, *Automatyzacja rozstrzygnięć i innych czynności w sprawach indywidualnych załatwianych przez organ administracji publicznej*, in: *Informatyzacja postępowania sądowego i administracji publicznej*, ed. J. Gołaczyński, Warszawa 2010, p. 231.

22 W. Bateman, *Algorithmic Decision-Making and Legality: Public Law Dimensions*, "Australian Law Journal".

23 J. Boć, *Pojęcie administracji*, in: *Prawo administracyjne*…, p. 15.

does not require any significant legislative changes. In this case, it is more a matter of mental changes among administrative decision-makers and the preparation of small technical solutions only. The so-called 500+ Programme may serve as a good example of a quick transformation into an automatic process, without the use of the human factor. By means of e-banking and other electronic channels, about 25% of applications for support were submitted in 2016, while in 2018 almost 50% of on-line applications for support were submitted.[24] The Programme itself, implemented on the basis of the Act on State aid in raising children[25] in the binding wording, allows, apart from a few special situations, to grant support to a parent or legal guardian of a child – see Article 4(2) of the said Act. Unfortunately, the on-line application alone did not result in a decision in the form of an electronic document. In the majority of cases, the public administration body had to issue and deliver an administrative decision in the traditional form – i.e. on paper, delivered by post with a receipt confirmation. This was a consequence of the legal solutions adopted, in which the entitled person could submit an application electronically, but unfortunately the administrative authority was not authorised to issue a decision in an electronic form. It is possible to receive an electronic decision if an application is made by means of an electronic application mailbox of a public administration body, which follows from art. 391 § 1 point 1 of the Code of Administrative Procedure, but only few entitled persons decide to do so. In contrast, the 500+ Act provides a possibility, among other things, to submit applications using the ICT system of domestic banks providing services by electronic means that meet the requirements set by the minister competent for family affairs, after agreement with the minister competent for computerisation – Article 13 section 5 of the 500+ Act. In

24 <https://www.gov.pl/web/rodzina/2-mln-wnioskow-rodzina-500-plus>; <https://wiadomosci.dziennik.pl/polityka/artykuly/584513,wnioski-online-500-plus-300-plus-polacy-rodzina-dane.html>.

25 Ustawa o pomocy państwa w wychowywaniu dzieci from 11 of February, Journal of Laws of 2019, item 2407.

this model, verification takes place by means of authentication of the applicant using the credentials used by the national bank for verification by electronic means of the account holder. This solution does not meet the requirements of submitting an application through the ePUAP or signing the decision with a qualified electronic signature. The 2019 amendment improved the hybrid solution, because in the light of the current Article 13a of the above-mentioned Act, a decision is not required at all, and granting a benefit is a material and technical act.

The analysis of the settlement in the 500+ cases allows some conclusions to be drawn concerning the computerisation and automation of the public administration. Undoubtedly, the actions taken have not been fully correlated with the whole system of the law in force, especially with the central administrative office, and the adopted solutions of the possibility to submit applications via ICT banking systems are a kind of a system latch, which has been designed for this project. The large-scale use of non-public systems for identification in matters related to public services shows that the adoption of simple, friendly solutions, such as authentication in banking systems, is a direction for further actions in the field of computerization of public administration. On the other hand, it can be considered that a simple decision-making process, where in mos cases the benefit is granted, would allow the use of simple algorithms which would identify the applicant and grant the benefit to the entitled persons automatically, without human intervention. In a situation where the number of applications is counted in millions, and the same number of applications are accepted, the use of decision-making algorithms has significantly accelerated proceedings, streamlined the payment of benefits and reduced the personnel costs of public administration.

To sum up, the assumption that the granting of benefits is currently of a material and technical nature only confirms the thesis on the possibility of using artificial intelligence in decision-making processes carried out by public administration. Similarly, the formal recognition of these quasi-automatic processes carried out within the context of an additional

charge for parking or the setting of a property tax for individuals as acceptable would fully improve the efficiency of the measures taken and reduce the costs of operating the system in this respect, while the whole procedure would be *lega artis*.

The application of ADM in administrative processes of a complex nature is clearly a challenge, but not impossible. Since autonomous vehicles are able to adapt their speed to the circumstances of highly variable road conditions, such as traffic density, weather conditions or traffic reorganisation, the more complex decision-making processes will be solvable by means of artificial intelligence. Undoubtedly, as in the case of simple algorithms, it will help to use machine learning. It is such use of algorithms that draws on the experience of the past and, at the same time, by analysing it, improves its operations. The program should take into account the indications of the programmer-teacher, previous learning, and the analysis of the results of their work generated by themselves. Learning programmes are repeatedly tested in laboratories, or in the real world, before they are widely used. The idea is to detect behavioural patterns, trends in previous decisions, and at the same time, to adapt to changes taking place in the environment they work in. The processing of large knowledge resources allows the programme to learn effectively which actions should be taken in a particular case.

The public administration has a huge amount of data in its resources. Millions of decisions issued by first and second instance authorities and decisions by administrative courts have existed for years in electronic form. The huge database allows for the analysis of the line of jurisprudence, as well as the correctness of decisions, in terms their features and language, and, most importantly, apart from justifications for decisions or rulings, analysis of the sentences of decisions in many administrative cases. We already use the results of artificial intelligence, including machine learning, when using legal programs to support the decision making process or when searching the portal with administrative court de-

cisions. This huge database and today's machine learning capabilities even encourage this direction of legal informatics development.

Initially, the artificial intelligence law programs could be used to support the decision-making process while testing solutions. After this period, in certain areas the decision-making processes of officials could be gradually replaced by legal algorithms and automatic decisions. In repetitive activities, e.g. analysing agreements in terms of legal risks and securing the interests of the parties, it is also worthwhile to use computer programs that have already proved to be better than professional lawyers. As an example of AI's superiority over human beings, a study can be cited, in which lawyers checked five contracts in 92 minutes and reached an 85% accuracy factor, and a computer program analysed the same contracts for 23 seconds at 94% efficiency.[26] This means that from a technical point of view, we are able to prepare applications that would replace or significantly eliminate the human factor from the decision-making process.

The cited examination of contracts for the protection of client interests and legality differs from the administrative decision-making process, but these differences seem to be quite relative. Both of them concern the decoding of a legal norm in a specific factual situation. The commensurability of activities in the civil and public spheres is not such a significant difference that artificial intelligence solutions in the administrative process should be rejected. In the case of the public administration, the axiology of administrative law, so important in the process of decoding norms of substantive law, will be fundamental. Administrative decisions based on value-added rules, or those based on administrative recognition, remain a challenge for many. Converting them or preserving the axiology of administrative law in automatic decision-making processes will be a challenge, but it will be possible in the near future.

Artificial intelligence based on existing decisions and rulings could search how an authority or a court understands a given concept that is not

26 <https://cacm.acm.org/news/233886-ai-removes-the-drudgery-from-legal-due-diligence/fulltext>.

defined in binary terms. General clauses, references to non-legal norms or undefined concepts require an operative interpretation in a specific case.[27] At this point the problem of subjectivity in human interpretation arises, as well as its impact on the effects of the interpretation undertaken.[28] The decisions taken by a person acting as a judge or a public administration body are also influenced by his/her mental state, health and even the state of satiety.[29] Moreover, the bias of the algorithms is clearly mentioned among the problems associated with using artificial intelligence. If the input data – the administrative decisions already included in the databases – have a subjective element, the touch of the digital wand will not change the decisions made so that they will be automatically fair, unbiased, objective and lawful. In short, if the input is biased, the output – the expected decisions will also be biased.[30] In the machine learning, the data is everything[31], so poor quality (decisions and judgements) will result in faulty results of automatic processes. Therefore, when designing the algorithm, it is necessary to take into account these risks and choose modelling methods that take into account equality issues, such as the FairKM model proposed by Deepak Padmanabhan.[32] The adoption of automated decision-making systems to replace the human factor eliminates the risk of prejudice and bias.[33] At the same time, the data should be selected or

27 M. Jaśkowska, *Pojęcie uznania administracyjnego*, p. 301.

28 Z. Duniewska, *Wybrane aspekty wykładni prawa administracyjnego (racje i właściwość)*, in: *Koncepcja systemu prawa administracyjnego*, ed. J. Zimmermann, Warszawa 2007, p. 667.

29 S. Danzigera, J. Levavb, L. Avnaim-Pessoa, *Extraneous factors in judicial decisions*, <http://www.pnas.org/cgi/doi/10.1073/pnas.1018033108>.

30 M. Finck, *Automated Decision-Making and Administrative Law*, <https://ssrn.com/abstract=3433684, 2019>.

31 L. Jason Anastasopoulos, A.B. Whitford, *Machine Learning for Public Administration Research, with Application to Organizational Reputation*, "J. Pub. Admin. Res. & Theory" 2018, no. 16.

32 S.S. Abraham, P. Deepak, S. Sundaram, *Fairness in Clustering with Multiple Sensitive Attributes*, 2020, <http://arxiv.org/abs/1910.05113>.

33 T. Zarsky, *The trouble with algorithmic decisions: an analytic road map to examine efficiency and fairness in automated and opaque decision making*, "Science, Technology & Human Values" 2016, no. 41(1).

pre-processed in such a way that poor or biased quality does not result in the duplication of errors by persons acting as authorities.

Studies on the use of algorithms clearly indicate that, in addition to fairness, the algorithms that are developed must take into account the transparency of the decision-making process. As in the case of a classic decision, where we are able to trace the stages of the administrative process and to some extent reproduce the thought process of the person preparing the administrative decision, it is expected that it will also be possible to repeat this action against automated processes. Therefore, already at the stage of designing a program used in automatic processes, it is necessary to create such procedures which will make it possible to explain, in a transparent way, on the basis of which patterns the program has acquired experience. In our Polish case, the starting point will be the law established in accordance with the rule of law and the existing set of decisions and rulings issued in *lega artis.* Transparency is an important factor in the assessment and acceptance of automatic decision-making[34], as it inspires confidence in the entity using AI and thus in artificial intelligence itself. Lack of acceptance of AI actions, based on automatic processes, will result in a loss of trust in public administration, which will then undermine the actions of public authorities and delegitimize the sense of the state itself. It should be noted that ADM cannot be a black box in which an enigmatic algorithm prepares ready-to-use solutions for people who have to comply with it. After all, as O'Neill writes, the transcription of words into records, which are then stored in algorithms that are understood by a narrow elite[35], carries the danger of exclusion, bias and prejudice. The transposition of the law into digital, verbatim, will not allow for an explanation of what has skewed the scales for this and no other decision. The risk of non-transparency in automated pro-

34 L. Floridi, J. Cowls, M. Beltrametti, R. Chatila, P. Chazerand, V. Dignum, B. Schafer, *AI-4People—An ethical framework for a good AI society: opportunities, risks, principles, and recommendations*, "Mind Mach" 2018, no. 28(4).

35 C. O'Neil, *Weapons of math destruction: how big data increases inequality and threatens democracy*, Broadway Books, New York 2016, p. 25.

cesses is enormous and will not only be a violation of the principle of persuasion expressed in art. 11 of the Code of Civil Procedure, but it will also constitute a breach of the entire social system and the essence of humanity. Therefore, when preparing activities using ML and ADM, it is necessary to use data resources and such algorithms that will allow it to be completely eliminated. The transparency of automatic processes also results in the legitimacy of administration and state activities. After all, a fair administrative decision issued quickly, in accordance with the law and understandable both linguistically and from the point of view of the motives of the State will increase public trust in the state.[36]

Conclusions

Already existing IT capabilities and the development of computing power have triggered a leap in the capabilities of artificial intelligence based on machine learning. These elements allow for the extensive development of programs that will be able to replace humans in decision making. Automated decision-making processes save time, issue decisions in accordance with the law, and thus assist the public administration in its tasks. Undoubtedly, administrative proceedings based on procedural decision-making rules are the first group where ADM is possible. This requires a simple adaptation of the provisions mainly concerning the identification of parties in a friendly, generalised manner, so that the benefits of electronic communication are actually visible, as is the case with electronic banking.

The greater challenge is to make administrative decisions that are based on valuation rules, general clauses and administrative recognition. Theoretically, machine learning can break this barrier, but introducing automatic solutions in this area requires some testing and checking if the algorithms are able to work not only objectively and legally, but also

36 C. Coglianese, D. Lehr, *Transparency and algorithmic governance*, "Administrative Law Review" 2019, <https://ssrn.com/abstract=3293008>.

in accordance with the values presented by the public administration, such as transparency, equality, justice and others. Past experience shows that algorithms are as subjective as the designers who create them. That is why it is important to put the above-mentioned explanations on an equal footing – the point is that everyone should be able to say why a public administration body made this decision and not another. In other words, an artificial intelligence making automatic decisions on behalf of the State cannot be a black box that generates a decision, but must be a tool that supports the execution of public tasks for the citizens.

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SUMMARY

Administrative Decisions in the Age of Artificial Intelligence

The rapid development of cybernetics allows the use of artificial intelligence in many areas of social and economic life. The State can also harness algorithms and machine learning for its actions. Automatic decision making should be one of the stages in the development and improvement of public administration. While it is easy to implement these solutions in the case of related decisions, decisions made under administrative discretion, general clauses or valuation standards pose a challenge. The correct transformation of paper-based public administration into automatic public administration requires a change in decision makers' thinking, the introduction of new solutions, and building trust in artificial intelligence. Therefore, new solutions have to be built in accordance with the principles of transparency, accountability, equality, goodness and justice. Artificial intelligence making automatic decisions on behalf of the State must be a tool to support the execution of public tasks concerning citizens which is based on trust towards AI and public administration.

Keywords: public administration, artificial intelligence, administrative decision, automatic decision making.

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DOI 10.14746/ppuam.2020.11.13

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The Settlement of the Bidding Contest for a Public Task Implemented by Non-Governmental Organisations and Public Benefit Entities Without the Possibility of Initiating an Appeal Procedure

Introduction

The direct inspiration to address the lack of legal grounds for initiating the appeal procedure related to the settlement of open bidding contests for the implementation of public tasks are the statements of representatives of non-governmental organisations and other public benefit entities referred to in Article 3(3) of the Act of 24 April 2003 on Public Benefit Activity and Volunteer Work[1] (hereinafter: APBAVW).

In the opinion of these entities, the prevailing perspective is that of disproportion in cooperation of public benefit entities with public administration bodies in the performance of public tasks. What is meant here is, in particular, the lack of legal remedies, especially the impossibility of being able to appeal against the announced result of the contest.

The Act on Public Benefit Activity and Volunteer Work introduces the concept of public benefit activity defined as socially useful activity, performed by authorised entities which the legislator has recognised as legal persons or organisational units without legal personality, which are granted legal capacity by a separate act, including foundations and

1 Consolidated text: Journal of Laws of 2019, item 688.

associations, not being entities of the public finance sector and not operating on a for-profit basis (Art. 3(2) APBAVW). In addition, public benefit activity may be performed, *inter alia*, by: (1) legal persons and organisational units operating on the basis of the provisions governing the relationship between the State and the Catholic Church and other churches in the Republic of Poland; (2) associations of local government units; (3) social cooperatives; and (4) public limited companies and limited liability companies (Art. 3(3) APBAVW).

Undoubtedly, the enactment of the APBAVW is a major achievement in the systemic regulation of the relationships between public administration and non-governmental organisations and public benefit entities, because for the first time in Polish legislation the principles of cooperation between these entities and the procedure of commissioning public tasks have been fundamentally regulated. The entities authorised to perform statutory public tasks within the meaning of the APBAVW are entities authorised to perform public benefit activities. According to the Voivodship Administrative Court in Kielce, in its judgment of 24 May 2016, "in order to apply for being recognised as a public benefit entity, it should be e.g. a non-governmental organisation, and not the other way round."[2] This is also confirmed by A. Pakuła, who believes that all the entities indicated by the legislator are defined as entities entitled to perform public benefit activities, which is a broader concept than that of non-governmental organisations.[3] Therefore, with a view to ensuring the maximum transparency of the study, the author uses the term "public benefit organisations" (hereinafter: PBO) for entities performing public tasks.

The study will comprise the following assertions:

1) The public administration body is the decisive entity for cooperation with the PBO;

2 Judgment of the Voivodship Administrative Court in Kielce of 24 May 2016, case ref. I SA/Ke 239/16, Legalis no. 1476147.

3 A. Pakuła, *W kwestii prywatyzacji organizacyjnych form realizacji zadań publicznych w trybie ustawy o działalności pożytku publicznego i wolontariacie na przykładzie pomocy społecznej*, in: J. Blicharz, *Prawne aspekty prywatyzacji*, Warszawa 2012, p. 129.

2) The open contest procedure is not based on the provisions of the Act of 14 June 1960 on the Code of Administrative Procedure[4] (hereinafter: CAP);
3) In the course of the contest procedure there is no provision which would constitute a substantive law basis for issuing administrative decisions or taking other actions referred to in art. 3(2)(4) of the Act of 30 August 2002 on the Administrative Court Procedure[5] (hereinafter: AACP) by a public administration body or an appointed contest committee;
4) The settlement of a contest is not an administrative decision.

The Programme of Cooperation with Public Benefit Organisations

Article 5(1) and (2) APBAVW provides that public administrations bodies shall perform their activities in the sphere of the public tasks referred to in Article 4 APBAVW in cooperation with the PBOs. This cooperation may take financial and non-financial forms. With regard to the current deliberations, financial forms play an important role. The essence of these is that they require the announcement of an open contest (Article 11(2) APBAVW), the procedure of which is subject to further debate.

One of the financial forms is support for public tasks (Article 11(1)(1) APBAVW) and another is delegation (Article 11(1)(2) APBAVW). The delegation of tasks is a form of cooperation in which 100% of the funds (subsidies) for the implementation of the task is transferred (Article 4(1) APBAVW), while support is the transfer of part of the funds (subsidies) to co-finance the task (Article 4(2) APBAVW). According to the jurisprudence of administrative courts, the purpose of the bidding contest is not to "grant support" but to select the entity which will per-

4 Consolidated text: Journal of Laws of 2020, item 256.
5 Consolidated text: Journal of Laws of 2019, item 2325.

form the public task specified in the announcement.[6] The views of the judiciary are also shared by J. Kopyra, who claims that it is the implementation of specific public tasks that is financed and co-financed, and not the entities that perform the tasks.[7] J. Blicharz also considers subsidising the implementation of the task, and not subsidising the organisation, to be the only possible way to transfer funds from the local government budget.[8]

Prior to the announcement of the contest, the *sine qua non* condition is the adoption by the commune council, district council or voivodship assembly, respectively, of a programme of cooperation with the PBOs. What is important is that the draft programme is subject to obligatory consultations, because, as indicated in Art. 5(2)(3) and (4) APBAVW, cooperation of local government with the PBOs is to take the form of, *inter alia*, consultation of draft normative acts in the area of the organisation's statutory activity and in the area of public tasks, including the resolution on the cooperation programme. The judgment of the Voivodship Administrative Court in Wrocław of 11 June 2013 states that "regardless of whether or not in the course of the consultation referred to in Art. 5a APBAVW, the indicated organisations and entities express their opinions, whether or not the submitted opinions are binding, the provision – "a decision-making body of a local government unit shall adopt [the programme] after consultation" – has the power of a condition without which the activity of the commune's decision-making body is not only defective but, in the absence of circumstances justifying the impossibility to seek consultation, it is invalid."[9] In turn, A. Olejnic-

6 Ruling of the Voivodship Administrative Court in Szczecin of 31 August 2015, I SA/Sz 866/15, Lex no. 1787241, Ruling of the Supreme Administrative Court in Warsaw of 14 December 2016, I OSK 2546/16, Lex no. 2205576, Ruling of the Voivodship Administrative Court in Kraków of 16 May 2017, III SA/Kr 292/17, Lex no. 2285423.

7 J. Kopyra, *Ustawa o działalności pożytku publicznego i o wolontariacie. Komentarz*, Warszawa 2005, p. 371 ff.

8 J. Blicharz, *Komentarz do art. 13 ustawy o działalności pożytku publicznego i o wolontariacie*, in: J. Blicharz, *Ustawa o działalności pożytku i o wolontariacie*, Lex no. 2012.

9 Judgment of the Voivodship Administrative Court in Wrocław of 11 June 2013, case ref. III SA/Wr 124/13, Lex no. 1330073.

zak points out that the failure of a local government unit (hereinafter: LGU) to carry out consultations prior to the adoption of the cooperation programme, or carrying them out in a manner inconsistent with the rules, means that its adoption is defective, by depriving the PBOs of the right to influence the shape of the rules in force, in particular with respect to the support and delegation of public tasks.[10]

It should be noted that PBOs only take part in the process of adopting normative acts without the possibility to decide on the scope of tasks and the amount of funds allocated for their implementation. The decisive entity is the public administration body, as it has the authority to finally announce the result of the bidding contest and to control the execution of the tasks. A PBO may only seek to expand cooperation activities by presenting to the public partner the benefits of cooperation and more effective and economical implementation of the tasks assigned to the public administration body.

The cooperation programme is a document that should provide comprehensive information on the planned directions and scope of cooperation. It may take the form of an annual or multiannual programme. An annual programme shall be adopted by the decision-making body of the LGU by 30 November[11] of the year preceding the financial year. The indicated deadline is an instructional one, but it does not mean that the decision-making bodies may evade the adoption of an appropriate resolution. It means, however, that the failure to observe the specified deadline, although it undoubtedly constitutes an infringement of the law, does not give grounds for declaring the resolution invalid and does not deprive the decision-making body of its competence to adopt such a resolution. Thus, the adoption of a resolution on the programme after

10 A. Olejniczak, *Skutki braku konsultacji programu współpracy z organizacjami pozarządowymi i pożytku publicznego*, 2016, Legalis, accessed on 21 May 2020.

11 The deadline of 30 November is related to the requirement of Art. 238(1) of the Public Finance Act of 27 August 2009 (hereinafter: PFA) obliging the executive body of a local government unit to draw up and submit a draft budget resolution by 15 November of the year preceding the financial year.

the lapse of the statutory deadline, although it is an infringement of the law, does not constitute, in the light of the interpretation principles of purposefulness, a material infringement giving rise to declaring such a resolution invalid, due to its subject matter and nature, as well as the effects of considering the deadline to fall under substantive law.[12]

The cooperation programme, as a rule, is strategic in nature and should contain norms setting out the directions of action by the LGU and PBO. This is confirmed by the judgment of the Voivodship Administrative Court in Wrocław of 7 July 2011, in which it was stated that "a programme of cooperation with non-governmental organisations should include legal norms of a programmatic nature, in the form of norms setting out tasks."[13] The programme is designed to be a stimulator of joint action for the best possible satisfaction of social needs.

The Open Bidding Contest Procedure, Tender Content and its Examination

Art. 13 APBAVW provides that a public administration body intending to commission a public task shall announce an open contest. Most often it results from the initiative of a public administration body, however, according to the content of Art. 12 APBAVW, the PBOs also have the right to apply for the implementation of the task. Then the administration body is obliged to consider the advisability of the task within one month, and above all to take into account the following: (1) the extent to which the tender corresponds to the priorities of the public tasks; (2) ensuring high quality of task execution; (3) the resources available for specific tasks; (4) types of specific tasks; and (5) the advantages of

12 Judgment of the Supreme Administrative Court of 24 November 2011, case ref. II OSK 2107/11, Legalis no. 480582.

13 Judgment of the Voivodship Administrative Court in Wrocław of 7 July 2011, case ref. III SA/Wr 243/11, Lex no. 1154645.

the public task being performed by the bidder.[14] Subsequently, the public authority is obliged to inform the entity of its decision. This decision only provides information about the position of the administrative body, and it does not have the features of an administrative act[15] within the meaning of CAP. This view is sustained by N. Kowal[16], who believes that it is not possible to immediately commission the implementation of the public task to the entity that took the initiative. The initiative cannot replace an open bidding contest procedure.[17]

The deadline for the submission of tenders may not be shorter than 21 days from the last announcement (Article 13(1) APBAVW), which is undoubtedly intended to enable equal access and proper preparation of the tender by PBOs interested in carrying out the tasks.[18] The announcement of the contest contains a set of guidelines to be followed when applying for public tasks. In accordance with Article 13(2) APBAVW, the announcement shall contain information on: (1) the type of the task; (2) the amount of public funds allocated to the task; (3) the rules for subsidising; (4) the deadlines and conditions for the implementation of the task; (5) the deadline for the submission of tenders; (6) the time limit, procedure and criteria used for the selection of tenders; and (7)

14 Art. 12(2)(1) APBAVW and P. Kledzik, *Działalność organizacji pozarządowych na rzecz realizacji celów publicznych*, Warszawa 2013, p. 158.

15 H. Izdebski, *Ustawa o działalności pożytku publicznego i o wolontariacie. Komentarz*, Warszawa 2003, p. 56; N. Kowal, *Tworzenie i rejestracja pożytku publicznego. Komentarz*, Kraków 2005, p. 47.

16 N. Kowal argues that such a position is supported by the fact that the administrative body informs only those concerned about the result of the contest, without delivering a copy of the relevant document, without giving a legal basis or justification and without providing guidance on the remedies available, the presence of the said elements being, pursuant to Article 107 CAP, a necessary feature of each administrative decision. This view shall be shared indirectly, since the direct reason for the exclusion of the form of an administrative decision seems to be the fact that the decision referred to in Article 12 APBAVW does not possess the attributes inherent in an administrative act.

17 P. Staszczyk, *Ustawa o działalności pożytku publicznego i o wolontariacie. Komentarz*, Warszawa 2013, p. 48.

18 N. Kowal, *Komentarz do ustawy o działalności pożytku publicznego i o wolontariacie*, in: *Tworzenie i rejestracja organizacji pożytku publicznego*, Zakamycze 2005, Legalis, accessed on 21 May 2020.

the public tasks of the same type, as performed by the public administration body in the year of the open bidding contest and in the previous year, and the related costs, with particular regard to the amount of subsidies awarded to non-governmental organisations and entities referred to in Article 3(3) APBAVW.

The criteria for the evaluation of tenders should be established in such a way as not to exclude any category of PBOs. Moreover, as indicated in the judgment of the Voivodship Administrative Court of 8 May 2013, "the criteria of the contest should be known to all bidders in accordance with the principle of openness of public authority and the necessity to respect the constitutional principle of equal treatment. The rationale behind the substantive assessment to be made by the executive body in a particular case should therefore be specified so that they are not considered arbitrary or discriminatory as a result of unequal treatment."[19]

The elements which should constitute the components of tenders for the performance of a public task are listed in Article 14(1) APBAVW, which stipulates that the tender should include, in particular: (1) the detailed material scope of the public task proposed for implementation; (2) the time and place where the task is to be implemented; (3) the calculation of the expected costs of the public task; (4) information on the previous activities of the bidder in the scope of the task; (5) information about the material and human resources available to ensure the performance of the task, including the amount of funds obtained for the performance of the task from other sources; and (6) declaration of intent to perform the task against payment or free of charge.

Regardless of the above-mentioned calculation, the implementing provisions, in accordance with the authorisation contained in Article 19 APBAVW, comprise a framework model for the public task tender.[20] The model has been included in the legal act, so it should be remem-

19 Judgment of the Voivodship Administrative Court in Wrocław of 8 May 2013, case ref. III SA/Wr 125/13, Lex no. 1330074.

20 Regulation of the Chairman of the Public Benefit Committee of 24 October 2018 (Journal of Laws of 2018, item 2055).

bered that it is an integral part thereof. Voluntary preparation of the tender disqualifies the right to proceed to the substantive assessment stage. *Prima facie* the tender form seems to be understandable and easy to fill in, but in practice it can be complicated for PBOs. This view is also shared by R. Skiba.[21]

All tenders submitted to the contest are subject to assessment. It is usually made up of two stages: (1) formal assessment and (2) substantive assessment. The criteria for formal assessment[22] shall be indicated in the contest announcement or in an annex thereto. If the formal criteria are not met, the tender is not subject to further evaluation. For example, the supervisory resolution of the Lubuskie Voivodship Governor indicated that if a tender is rejected due to formal defects, this makes it impossible to carry out further evaluation within the scope specified in Article 15(1) APBAVW.[23] In addition, this provision provides that tenders are to be examined by a public authority in the light of the criteria set out in items 1–6 of that article, and not by a contest committee.[24] It should be considered whether, where formal deficiencies in the tenders have been found before the expiry of the time limit set for the submission of tenders, the PBOs, after having been notified, could effectively remedy the deficiencies identified.

It is noteworthy that in the case of administrative proceedings governed by the provisions of the CAP, or administrative court proceedings governed by the provisions of the AACP, submission of a plea containing formal deficiencies that can be remedied results in the obligation of the public administration body or the court to issue a summons to remedy these deficiencies within the prescribed time limit, under the pain of respectively: leaving the application without examination, or its rejec-

21 R. Skiba, *Jak współpracować z administracją publiczną*, Warszawa 2004, p. 15.

22 Elements of the formal assessment criteria include i.a. the date of tender submission, completeness of the required attachments, submission of tenders in the appropriate form.

23 Supervisory resolution of the Lubuskie Voivodship Governor of 5 February 2015, case ref. NK-I.4131.20.2015 (Official Journal of the Lubuskie Voivodship of 2015, item 268).

24 Supervisory resolution of the Lubuskie Voivodship Governor of 18 February 2015, case ref. PN-II.4131.78.2015, Legalis no. 1180688.

tion. Therefore, in case of an open bidding contest procedure, it would be appropriate to allow the PBOs to remedy the formal deficiencies until the deadline for the submission of tenders. It is worth noting at this point the ruling of the Supreme Administrative Court in Warsaw of 30 November 2011, in which the court pointed out that the APBAVW does not contain a provision which could constitute a substantive law basis for the administrative decisions, or other actions specified in Article 3(2)(4) AACP, being taken in the course of the contest procedure by the public administration body announcing the contest or the contest committee appointed by it.[25] In addition, the ruling concludes that the administrative court has no jurisdiction to hear complaints against letters notifying of tender rejection and thus cannot review "procedural errors" made in the course of the open bidding contest.

It should be pointed out that, in Article 15(1) APBAVW, the legislator did not use the phrase "in particular" or any other equivalent phrase when listing the assessment criteria. This means that the public administration bodies announcing a contest may set the criteria themselves, provided that they are not contrary to the law. Undoubtedly, there are no grounds for the examination of a tender submitted by a PBO which does not meet the requirements specified in the act and the regulation.

According to J. Blicharz, any tender is also invalid if it does not meet any of the conditions set out both in the announcement and in the regulation on the model of tenders.[26] When the tenders are examined with regard to the possibility of public task implementation by a PBO, consideration is given to the presented calculation of the costs of public task implementation, also in relation to the material scope of the task, the proposed quality of task implementation, and the qualifications of the persons who are going to be involved by the PBO in task implementation. In the case of support for the performance of a public task, the planned share of the PBO's

25 Ruling of the Supreme Administrative Court in Warsaw of 30 November 2011, case ref. II GSK 2022/11, Lex no. 1151678.

26 J. Blicharz, *Komentarz do art. 18a ustawy o działalności pożytku publicznego i wolontariacie*, in: *Ustawa o działalności pożytku publicznego i wolontariacie*, Lex 2012.

own resources and those originating from other sources as well as in-kind and personal contributions shall be taken into account.

The substantive assessment pursuant to Article 15(2a) to (2f) APBAVW, as emphasised previously, is carried out by the contest committee appointed by the head of the commune or mayor. Pursuant to Article 15(2b) to (2d) APBAVW, the committee is composed of representatives of the executive body of the commune and representatives of the PBO. Persons having expertise in the field covering the scope of the public tasks concerned may also participate in the work of the committee, but only as advisors. The members of the committee are exempt from participation in the procedure if there are premises included in Art. 24 CAP aimed at ensuring impartial assessment. The obligation to set up a contest committee probably serves the following purposes: (1) to encourage transparency in the conduct of the open bidding contest; and (2) to increase the objectivity of settlements, though the regulations contained in Article 15(2a) to (2f) APBAVW in fact do not guarantee this. The contest committees do not select the winner of the contest but only give an opinion on the submitted tenders.

The rules for the selection of the members of the contest committees and the timespan of their work are unclear. The Act does not indicate whether committees will be appointed on an *ad hoc* basis each time to conduct an individual contest procedure, or whether they will operate for a longer period of time, even for a specified term, in connection with the introduction of rules for excluding their members. In addition, there is no guarantee that the assessment of submitted tenders by persons appointed by competitors to the PBOs taking part in the contest will be impartial. Moreover, the Act does not specify who decides on the result of the contest; as a rule, the public administration body announcing the contest is competent in this respect.[27]

27 p. Kledzik, *Działalność organizacji pozarządowych na rzecz realizacji celów publicznych*, Warszawa 2013, p. 168.

The Announcement of the Results of the Contest Without the Possibility of Appeal

There are several arguments in favour of the view that the announcement of the results of a contest does not have the attributes of an administrative decision and therefore no appeal may be lodged. First of all, the announcement of the results of the contests is just ordinary information announced by analogy to announcing the contest on the website of the contest announcing body, in the Public Information Bulletin and in the seat of the body, in the place designated for this purpose. In accordance with Article 15(2h) APBAVW, the announcement shall contain at least the following information: (1) the name of the bidder; (2) the name of the public task; and (3) the amount of public funds allocated. Secondly, the Act does not require a justification for the choice of a tender or its rejection. While Article 15(2i) APBAVW allows a statement of reasons to be requested, this provision does not specify the group of entities that may request it. The legislator, using the word "any", suggests that it may be not only the PBO concerned, but also another natural or legal person who does not have to demonstrate its legal interest.[28] Moreover, it proves that this right is held by any entity subject to Article 37 of the Constitution of the Republic of Poland to which legal capacity is granted by law[29]; however, it seems that this provision should only apply to entities located outside the public administration. Nevertheless, one may wonder whether this scope is not too broad and whether it should not be limited to include only those participating in the contest.

As regards the announcement of the results of the contest, it should be noted that the expression "in particular" used in Article 15(2h) APBAVW indicates that, although the scope of information to be made available to the public as set out in that provision is obligatory, this catalogue is not closed and the authority may, at its discretion, extend

28 J. Kosowski, *Współpraca jednostek samorządu terytorialnego z organizacjami pozarządowymi*, Warszawa 2012, p. 128.

29 Cf. K. Gruszecki, *Prawo ochrony środowiska. Komentarz*, Warszawa 2008, p. 50.

it, e.g. to include information on the rules and procedure for requesting justification for the selection or rejection of a tender. It seems to be possible, due to the above-mentioned fact, that the stipulated content of the announcement of the contest results is not exhaustive.

Therefore, as far as the current legal situation is concerned, there are no arguments to indicate that the announcement has the attributes of an administrative decision, including the possibility of using a remedy or other provisions aimed at PBO protection. Even if the results of an open contest are announced in an ordinance of mayor or head of the commune, the ordinance is not subject to appeal at the Voivodship Administrative Court.[30] The authority shall rule by way of an administrative decision only in the situation referred to in Article 152(3) of the Public Finance Act, if it finds that the subsidy has been misused in part or in whole, or has been collected in an excessive amount, and is to be returned to the State budget. No possibility of appeal, and thus of renewed examination by common courts, administrative courts, extrajudicial bodies or a public entity aiming at concluding a contract, brings us close to the issue of hybrid solutions.

The conviction that the only option is a complaint seems to be an extremely weak tool. The basis for regulation within the scope of the discussed legal institution is Art. 63 of the Constitution of the Republic of Poland, under which everyone shall have the right to submit petitions, proposals and complaints in the public interest, in their own interest or in the interest of another person with their consent to public authorities in connection with implementation of their prescribed tasks within the field of public administration. This right applies to the possibility of filing specific requests with public authorities, as well as organisations and institutions. Importantly, this right is not limited to citizens only. According to the constitutional regulation, the institution of complaint can be used by anyone. Apart from public administration bodies, the Polish Constitution included in the regulation of Art. 63 also social organisa-

30 Ruling of the Voivodship Administrative Court of 28 September 2018, case ref. IVS A/Wr 418/18, Legalis no. 1824952.

tions and institutions, thus providing the citizens with influence on the activities of the entities that perform specific public tasks for the state or local government authorities. However, the Constitution of the Republic of Poland does not regulate the procedure of examining petitions, complaints and proposals, referring in this respect to the ordinary act.

The constitutional regulation on the procedure for examination of petitions, complaints and proposals was expanded in the regulations of the CAP and the Ordinance of the Council of Ministers of 8 January 2002 on the organisation of the receipt and examination of complaints and proposals, issued on the basis of the authorisation contained in the Code.[31] According to Art. 221 in connection with Art. 2 CAP, the right to submit petitions, complaints and proposals to the state bodies, LGU bodies, bodies of local government organisational units and social organisations and institutions, guaranteed to everyone in the Constitution of the Republic of Poland, is implemented under the principles set forth in the CAP. In other words, Article 221 CAP in § 2 and 3 quotes the provisions of the Constitution. The complaint is undoubtedly an expression of the complainant's dissatisfaction.[32] A complaint within the meaning of Article 227 CAP should be distinguished from a complaint within the meaning of the provisions of the AACP. According to the position established in the jurisprudence of administrative courts, a complaint which is the subject of the regulation of Section VIII of the CAP is a de-formalised means of defending and protecting the interests of an individual, which do not give rise to a request to initiate administrative proceedings or cannot constitute a basis for a legal action or for a request to initiate court proceedings. Complaints of this kind are dealt with in an independent single-instance simplified procedure, ending with a material and technical act of notifying the complainant of the way in which the case has been dealt with. This mode does not provide

31 Journal of Laws of 2002, no. 5, item 46.

32 M. Wierzbowski, A. Wiktorowska, in: M. Wierzbowski, M. Szubiakowski, A. Wiktorowska, *Postępowanie administracyjne – ogólne, podatkowe, egzekucyjne i przed sądami*, Warszawa 2004, p. 244.

for the possibility to act in any further instances, i.e. to initiate an appeal procedure or administrative court proceedings.[33]

Moreover, it is assumed in the jurisprudence that it is inadmissible to lodge a complaint with the administrative court if it is lodged pursuant to Art. 229 CAP, i.e. if the competence to examine it lies with the commune councils, district councils or voivodship assemblies. The complaint shall be dealt with by issuing an appropriate resolution by the competent council. Resolutions of the LGU bodies could be appealed to the administrative court, however, the courts are of the opinion that considering a complaint as admissible would cause the unjustified inequality of entities, for those whose complaint has not been resolved in the form of a resolution would not be entitled to a complaint to the court against the action informing about the manner of resolution. Moreover, the inadmissibility of a complaint to an administrative court in such cases is justified by the fact that resolutions of the decision-making bodies of local government units in the cases of complaints under Section VIII of the CAP are not public administration cases.[34]

Conclusions

Summarising the deliberations on the procedure of open bidding for performance of a public task and the lack of premises for the application of appeal procedures, it should be emphasized that PBOs have no grounds for procedural activity. It seems that extending the rules in administrative and administrative court proceedings could have a positive impact. *De lege lata* the circumstances may limit the pace of development of

33 Judgment of the Supreme Administrative Court of 1 December 1998, III SA 1636/97, Lex no. 3713; Ruling of the Voivodship Administrative Court in Warsaw of 7 December 2004, II SAB/Wa 193/04.

34 Ruling of the Supreme Administrative Court of 12 April 2001, I SA 2668/00, Lex no. 54426; Ruling of the Voivodship Administrative Court in Gorzów Wielkopolski of 16 February 2010, II SA/Go 37/10, Lex no. 621902; Ruling of the Voivodship Administrative Court in Kraków of 22 February 2019, III SA/Kr 67/19, Lex no. 2624879; Judgment of the Supreme Administrative Court of 28 April 2010, case ref. I OSK 209/10.

civil society and thus hamper the process of development and implementation of public tasks. Therefore, as a *de lege ferenda* conclusion, it can be argued that PBOs should be given additional powers.

Finally, it is worth pointing out that the procedure of an open contest is in itself a positive and well-founded phenomenon. Apart from creating competition between PBOs, it is crucial to create an atmosphere of openness and transparency in decision-making processes in public matters. Undoubtedly, the evaluation of a project should be based on free, fair and impartial assessment, and not on an arbitrary one, as its limits are set by the principles of equal access and the transparency of evaluation criteria. The result of such an assessment should include a justification with a particular explanation of the circumstances which gave rise to the final settlement, e.g. on the number of points awarded within the assessment. At each stage of the case, the beneficiary should be given a precise indication of the results of that stage and information with a detailed, clear, reliable and transparent analysis of the evaluations. The information communicated by the public administration body must include the reasons for the evaluation or for disregarding the objection at the next stage, together with their justification. Only then can the administrative court address the allegations of a complaint, get to know the position of the project evaluator, and determine whether such an assessment is lawful.[35] Certainly, verification of the results of the assessment to ensure that it does not contravene the above-mentioned rules should be allowed. Furthermore, it should be noted that the procedure for conducting the contest does not provide for any renewed assessment of the tenders submitted. It is therefore unacceptable to contest the evaluation of tenders which, if accepted, will lead to the conclusion of a public task contract.[36]

The construction used in this way is alien to the idea of the democratic state of law, because it deprives the PBOs of any protection. On

35 Judgment of the Voivodship Administrative Court in Warsaw of 17 November 2017, V SA/Wa 1782/17.

36 Judgment of the Voivodship Administrative Court in Bydgoszcz of 24 August 2016, II SA/Bd 597/16, Lex no. 2152064.

the one hand, it gives the PBOs right to participate in the creation of public tasks, while on the other, it deprives them of any remedy whatsoever.

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SUMMARY

The Settlement of the Bidding Contest for a Public Task Implemented by Non-Governmental Organisations and Public Benefit Entities Without the Possibility of Initiating an Appeal Procedure

The paper focuses on the financial cooperation of public administration bodies with public benefit organisations (PBOs) in the form of delegation or commissioning statutory public tasks. As a result of cooperation, a contract is concluded, which is preceded by an open bidding contest procedure. Nevertheless, there is no provision in the contest procedure which would constitute a substantive law basis for issuing an administrative decision or taking other actions referred to in art. 3(2)(4) of the Act of 30 August 2002 on the Administrative Court Procedure by a public administration body or an appointed contest committee.

Keywords: public benefit organisations, bidding contest, appeal

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DOI 10.14746/ppuam.2020.11.14

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The Disciplinary and Criminal Liability of Judges in Poland. A Criminalistics Study of Cases of Disciplinary and Criminal Liability of Judges in the Years 2010–2018

Introduction

The article presents basics findings about the disciplinary and criminal liability of the judges of common courts in Poland.[1] These findings are presented from a criminalistics perspective. Inspiration for the paper was the recent public debate in Poland on the state of the judiciary and the reform in 2019 regarding the disciplinary liability of judges.[2]

1 Common courts in Poland are district courts, regional courts and courts of appeal. See art. 1 § 1 of Act of 27 July 2001 Law on the System of Common Courts. Journal of Laws of 2020, item 365. Hereinafter: LSCC.

2 This debate concerned a change in the model of the disciplinary liability of judges. By the Act of December 8, 2017 on the Supreme Court, among others, a disciplinary chamber was established. The establishment of this chamber aroused controversy in many legal circles and was considered by the Court of Justice of the European Union (see case C-791/19 – Commission v. Poland (Régime disciplinaire des juges)). It also contributed to the adoption of a resolution by the combined chambers of the Supreme Court, i.e. the Civil, Criminal, Labor and Social Insurance Chamber on January 23, 2020, file ref. BSA I-4110–1 / 20 <http://www.sn.pl/sites/orzecznictwo/orzeczenia2/bsa%20i-4110–1-20.pdf>, stating that decisions issued under the participation of the judges of the Disciplinary Chamber established in the Supreme Court pursuant to the Act of December 8, 2017 on the Supreme Court (Journal of Laws of 2018, item 5, as amended), regardless of the date of issuance of these judgments, are subject to the sanction of nullity of the proceedings. In connection with this ruling, by the resolution of April 10, 2019 (reference number II DSI 54/18), the Disciplinary Chamber of the Supreme Court in full court indicated that the participation in the court of a person who was appointed by the President of the Republic of Poland to hold the office of a Supreme Court judge […] does not infringe upon the provisions of art. 6 sec. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Jour-

The article provides data on the following issues: the basics of the disciplinary and criminal liability of judges, the number of disciplinary cases of judges in the years 2010–2018 and the number of criminal cases of judges in the years 2001–2017, categories of the disciplinary violations and crimes committed, decisions taken in cases involving disciplinary violations, and the imposed penalties. The article is based on an examination of Supreme Court verdicts issued in disciplinary cases of judges and data provided by the Ministry of Justice.[3]

A recent public debate in Poland concerns the disciplinary liability of judges and mistakes made by courts in the judgments issued. It would be worth conducting such a debate regarding the professional liability of other legal professions, i.e. prosecutors, lawyers, legal advisers, notaries and bailiffs. It is hoped that this article will initiate further discussion about these issues among scientists, practitioners and the general public. In the preparation of the article the research on the disciplinary liability of lawyers carried out in other countries of the European Union, and the results of this research, were taken into consideration.[4]

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nal of Laws of 1993, No. 61, item 284), the right to have a case heard by an independent and impartial court established by law, as a result of which such a person is not an unauthorized person, and the composition adjudication of the court in which such a person sits is not a court properly filled, <http://www.sn.pl/orzecznictwo/SitePages/Najnowsze_orzeczenia.aspx?ItemSID=1218–301f4741–66aa-4980-b9fa-873e90506a11&ListName=Zagadnienia_prawne>. This compilation is a study from a criminalistics point of view, and therefore the discussion of the above-mentioned political debate was intentionally omitted from it.

3 See Ł. Piebiak, *Odpowiedź na interpelację nr 25389 w sprawie postępowań karnych wobec sędziów*, <http://www.sejm.gov.pl/sejm8.nsf/InterpelacjaTresc.xsp?key=B4SHUE>.

4 See CEPEJ Report on *European judicial systems –Edition 2014 (2012 data): efficiency and quality of justice*, <http://www.just.ro/wp-content/uploads/2015/09/editia-2014-en.pdf>, p. 354. Cf. E. Gruodytė, *The disciplinary liability of Lithuanian Lawyers: a comparative approach*, "Baltic Journal of Law & Politics" 2014, no. 2, pp. 1–36; A. Tsaoussi, E. Zervogianni, *Judges as satisficers: a law and economics perspective on judicial liability*, "European Journal of Law and Economics" 2010, no 29, pp. 333–357; Minimum Judicial Standards V, Disciplinary proceedings and liability of judges, ENCJ Report 2014–2015, <https://www.encj.eu/images/stories/pdf/GA/Hague/encj_report_minimum_standards_v_adopted_ga_june_2015.pdf>; N. Acquaviva, F. Castagnet, M. Evanghelou, *A comparative analysis of Disciplinary Systems for European judges and prosecutors, For the 7th edition of the THEMIS Competition – 2012*, <http://www.ejtn.eu/Documents/Themis%202012/THEMIS%202012%20ERFURT%20DOCUMENT/Written%20paper%20France%203.pdf >.

The Basic Issues Associated with the Disciplinary and Criminal Liability of Judges

The framework for the functioning of judges in Poland is determined by the Constitution of the Republic of Poland, which indicates that judges, when exercising their office, are independent and subject only to the Constitution and statutes.[5] However, under the terms regulated by the Constitution and statutes, judges are subject to disciplinary and criminal liability.

The legal grounds for the disciplinary liability of judges are regulated by the Act of 27 July 2001 Law on the System of Common Courts (LSCC). The principles of this liability are governed by the provisions of Art. 107–133a LSCC.

In the current legal situation, the judge is disciplinarily responsible for official (disciplinary) offenses, including:

1) an obvious and blatant insult to the law
2) acts or omissions that may prevent or significantly impede the functioning of the judicial authority
3) actions questioning the existence of a judge's service relationship, the effectiveness of the appointment of a judge, or the empowerment of the constitutional body of the Republic of Poland
4) public activities incompatible with the principles of the independence of courts and judges
5) a breach of the dignity of the office.

These grounds for the disciplinary liability of judges have been applicable since February 14, 2020, when the legislator amended art. 107 § 1 LSCC. Until February 13, 2020, judges were disciplinarily responsible for misconduct, including an obvious and blatant offense against the law and the dignity of the office. The scope of the acts subject to this responsibility was therefore narrower.[6]

5 See art 178 § 1 Constitution of the Republic of Poland of April 2, 1997 (Journal of Law of 1997, no. 07, item 15). Hereinafter: Constitution.

6 The amendment of 20 December 2019 – the Act amending the Act – Law on the System of Common Courts, the Act on the Supreme Court and some other acts (Journal of Law

The LSCC Act also specifies the scope of duties of judges, non-compliance with which also provides grounds for disciplinary liability. These obligations are: the obligation to improve professional qualifications, the obligation of patronage over the conduct of trainee judges, the obligation to perform activities in relation to the duties entrusted to the disciplinary court judge, the obligation to maintain professional secrecy, a prohibition on taking additional employment except for teaching or academic positions, and a prohibition on occupying positions specified in the Act, the obligation to submit a property declaration, the obligation to submit a declaration of membership in associations, performing functions in foundation bodies, membership in a political party, the obligation to follow the official route in matters related to the office held, the obligation to notify about a pending court case in which the judge acts as a party or a participant, and the obligation to reside in the city being the seat of the court.[7] The judge should obtain the consent of the president of the superior court or of the court of residence to employment in the didactic or scientific position, and for residing outside the place of service. Failure to obtain this consent also provides grounds for disciplinary liability.

The grounds for the material liability of judges for disciplinary offenses are also specified in the Code of Ethics for Judges, as set out in the resolution of the National Council of the Judiciary. The Code of Ethics for Judges is also applied to retired judges and court assessors. These rules set standards for the conduct of a judge during and outside the service. The rules of ethics impose on the judge, among other things, the obligation to take actions without undue delay, to maintain an appropriate attitude towards the parties to the proceedings, to maintain neutrality towards the parties in the course of the proceedings, to take care of proper organi-

of 2020, item 190). Cf. W. Kozielewicz, *Odpowiedzialność dyscyplinarna sędziów*, in: *Odpowiedzialność dyscyplinarna sędziów, prokuratorów, radców prawnych i notariuszy*, ed. W. Kozielewicz, Warszawa 2016, pp. 128–192; J. Sawiński, *Commentary on Article 107 LSCC*, in: *Law on the System of Common Courts. Commentary*, ed. A. Górski, Lex 2013.

7 The principles of disciplinary liability of judges are similarly shaped in other European Union countries, for example in Lithuania. See E. Gruodytė, *The disciplinary liability of Lithuanian Lawyers…*, p. 21.

zation of work, to refrain from relations and behaviour in the course of performing their duties and outside of them which could undermine the prestige of the office of the judge and reduce confidence in the judge, and to demonstrate integrity in their own financial matters and prudence in social life.[8] In addition, a judge cannot belong to a political party or trade union, or conduct public activities incompatible with the principles of the independence of the courts and the independence of judges.[9]

The judge is also disciplinarily responsible for their conduct before taking up the position, if they have failed to fulfill their duty as a state office at the time or proved to be unworthy of the office of a judge.[10] The court assessor's disciplinary liability is based on the same principle as the disciplinary liability of judges.[11]

A retired judge is also obliged to maintain the dignity of a judge. A retired judge is disciplinarily liable for a breach of the dignity of a judge after retirement and a breach of the dignity of a judge's office during their service.[12]

Disciplinary proceedings are two-instance. The disciplinary court of the first instance is the court of appeal in the district of which the judge performs their duties. The Supreme Court is the second instance disciplinary court.[13] Exceptionally, after the amendment of the LSCC from April 3, 2018, the Supreme Court acts as the first instance court in disciplinary offenses that exhaust the features of intentional offenses prosecuted by public prosecution or intentional fiscal offenses, or cases in which the judge was accused of committing an offense involving questioning the existence of a judge's service relationship, the effectiveness of the appointment of

8 See Resolution no. 25/2017 of The National Council of the Judiciary of January 13, 2017 regarding the publication of a consolidated text of the Set of Professional Ethics Rules for Judges and Court Assessors, <https://krs.pl/pl/o-radzie/zbior-zasad-etyki-zawodowej-sedziow/591-uchwala-nr-25–2017-krajowej-rady-sadownictwa-z-dnia-13-stycznia-2017-r.html>.

9 See art. 178 § 3 of the Constitution.

10 See art. 107 § 1 LSCC.

11 See art. 107a LSCC.

12 See art. 104 § 1 and 2 LSCC.

13 See art. 110 LSCC.

a judge, or the empowerment of the constitutional body of the Republic of Poland.[14] Prosecutors before the disciplinary court are the Disciplinary Spokesman for the Judges of the Common Courts and the Deputy Disciplinary Spokesman for the Judges of the Common Courts, as well as the deputy disciplinary spokesperson operating at the courts of appeal and the deputy disciplinary spokesperson operating at the regional courts. The Disciplinary Spokesman for the Judges of the Common Courts and two Deputy Disciplinary Spokesmen for the Judges of the Common Courts are appointed by the Minister of Justice for a four-year term.[15]

During the disciplinary proceedings, the accused may appoint a defence counsel from among judges, prosecutors, attorneys or legal counsels.[16]

The disciplinary liability of a judge is independent of any criminal liability. Disciplinary proceedings are conducted regardless of criminal proceedings, also in the event of the simultaneous and subject-related identity of these proceedings.[17] A judge may not be held criminally responsible or deprived of liberty without the prior consent of the relevant disciplinary court. The permission to prosecute a judge is issued by the Supreme Court and is expressed in the form of a resolution.[18] The disciplinary court issues a resolution allowing a judge to be held criminally liable if there is a sufficiently justified suspicion that they have committed a crime.[19] Without the consent of the Supreme Court, the judge is liable only to disciplinary action. The judge may, however, agree to be held criminally responsible for road safety offenses (e.g. causing a threat to road safety, driving a vehicle under the influence of alcohol or speeding). In this case, the ability to hold a judge to disciplinary liability is excluded.[20]

14 See art. 110 § 1 item 1 letter b LSCC.

15 See art. 112 § 1 and 3 LSCC.

16 See art. 113 § 1 LSCC.

17 See Supreme Court resolution of September 28, 2006, reference number I KZP 8/06.

18 See art. 80 § 1 and 119 LSCC and art. 181 of the Constitution.

19 See art. 80 § 2c LSCC.

20 See art. 81 LSCC. Cf. W. Kozielewicz, *Odpowiedzialność dyscyplinarna sędziego za wykroczenie*, in: *Państwo prawa i prawo karne. Księga jubileuszowa Profesora Andrzeja Zolla*,

The Number of Disciplinary Violations

According to the European Commission for the Efficiency of Justice[21] Report, the number of disciplinary proceedings initiated per 100 judges in 2012 in Poland is lower than average, and Poland takes the 25th place in this report. Poland achieved a result of 0.5 point in this respect. The same as Romania and only 0.1 point more than Estonia, Hungary, Serbia, Montenegro and Bulgaria. The highest ratio was achieved by the UK – England and Wales, Norway, Republic of Moldova, Iceland and Lithuania (from 55.3 points to 7.8).[22] The above indicates that the number of disciplinary proceedings in Poland is lower than in other European Union countries. The number of disciplinary cases of judges decided by the Supreme Court in the period from 2001 to 2019 is presented in Table 1.

As can be seen in Table 1, the number of cases decided by the Supreme Court in individual years varies between 9 and 59, with the average number of cases considered annually by the Supreme Court being 35. Taking into consideration the statistical data presented by CEPEJ and concerning other countries, this is not a significant number. However, it is certainly desirable for the number of disciplinary cases for judges, and hence the number of disciplinary offenses, to be kept at a minimum. At the same time, in most cases during the period considered, the accused were guilty of disciplinary offenses. Data on this subject are presented in Table 2.

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ed. P. Kardas, vol. 2, Lex.

21 Hereinafter: CEPEJ. It is worth noting that the aim of the CEPEJ is the improvement of the efficiency and functioning of justice in the member States, and the implementation of the instruments adopted by the Council of Europe to this end. To carry out these tasks, the CEPEJ prepares benchmarks, collects and analyses data, defines instruments of measure and means of evaluation, adopts documents (reports, advice, guidelines, action plans, etc.), develops contacts with qualified personalities, non-governmental organizations, research institutes and information centres, organizes hearings, promotes networks of legal professionals. Its tasks, among others, are to analyse the results of the judicial systems and to identify the difficulties they meet. The result of these works are annual reports on the functioning of the justice system in individual countries of the European Union. *Vid. About the European Commission for the efficiency of justice (CEPEJ)*, <https://www.coe.int/en/web/cepej/about-cepej>.

22 See CEPEJ Report on *European judicial systems –Edition 2014 (2012 data): efficiency and quality of justice*, <http://www.just.ro/wp-content/uploads/2015/09/editia-2014-en.pdf, p. 354>.

Table 1. The number of disciplinary cases of judges decided by the Supreme Court in the period from 2001 to 2019

No.	Year	Number of cases
1.	2002	11
2.	2003	47
3.	2004	28
4.	2005	36
5.	2006	47
6.	2007	59
7.	2008	49
8.	2009	55
9.	2010	30
10.	2011	28
11.	2012	20
12.	2013	24
13.	2014	44
14.	2015	47
15.	2016	39
16.	2017	31
17.	2018	4
18.	2019	15

The data in Table 2 demonstrate that the courts of first instance usually recognized the merits of the accusation against the judge. Occasionally, however, the judge was acquitted of committing the offense of which they were accused. Incidentally, acquittals by the second instance court (the Supreme Court) were also imposed.

Table 2. The number of convictions in the period 2010–2019

No.	Year	First instance				Total	Second instance (Supreme Court)
		Convictions*	Acquittals*	Discontinuance of the proceedings	No data		Acquittals*
1.	2010	27	3	3	0	33	3
2.	2011	25	3	8	0	36	2
3.	2012	20	6	1	0	27	0
4.	2013	24	5	1	0	30	1
5.	2014	39	10	5	0	54	6
6.	2015	45	15	4	0	64	3
7.	2016	35	7	2	0	44	3
8.	2017	27	3	4	0	34	1
9.	2018	5	0	0	0	5	0
10.	2019	11	5	1	3	20	0
Total		258	57	29	3	–	23

*Regarding the acts specified in the case.

Categories of Disciplinary Violations

Disciplinary offenses most often concerned district court judges; less often regional court judges. The cases where the judge of the appeal court acted as the accused occurred occasionally. This structure of the perpetrators should be unsurprising, as most courts in Poland are district courts.[23] In most of the examined cases, the accused were judges still in office. The cases of prosecution of retired judges have occurred infre-

23 There are 318 district courts, 45 regional courts, and 11 appeal courts in Poland. See *Lista sądów powszechnych*, <https://dane.gov.pl/dataset/985,lista-sadow-powszechnych/resource/3873/table?page=3&per_page=20&q=&sort=>.

quently.[24] Table 3 presents the characteristics of the accused persons in the examined cases.

Table 3. The characteristics of the accused persons in the examined cases

No.	Year	Judges*				Total	Retired judges**	No data
		District court	Regional court	Court of appeal	No data			
1.	2010	25	6	0	0	31	1	0
2.	2011	20	9	0	0	29	2	0
3.	2012	12	7	1	0	20	2	0
4.	2013	19	6	0	0	25	1	0
5.	2014	34	10	0	0	44	3	0
6.	2015	34	12	2	0	48	4	0
7.	2016	31	8	0	0	39	5	0
8.	2017	24	7	2	0	33	5	0
9.	2018	3	1	0	0	4	1	0
10.	2019	8	3	1	3	14	3	3
Total		210	69	6	3	–	27	3

* The number of judges accused in the examined cases is not equal to the number of cases, as it happened that in one case there were two or three accused.

** The number of retired judges covers district, regional, and appeal court judges.

As Table 3 shows, most of the defendants in the examined cases were judges of district courts. Nevertheless, the number of accused regional court judges accounted for almost 1/3 of the number of accused district court judges. The above indicates that the disciplinary offenses apply equally to the district and regional courts.

The analysis of the types of disciplinary offenses of the accused judges in the examined cases suggests that the most frequently alleged offense

24 The institution of the court assessor did not function in the audited period, therefore no accusations were recorded among this group.

was causing proceedings to be excessive in length and preparing justifications for rulings issued that exceeded the deadline. Exceeding the deadline usually meant a few or several additional weeks. There were, however, cases of dozens of weeks of delay.[25] The results of the conducted research also indicate that in most cases the accusation of conducting excessively lengthy proceedings concerned judges of district courts. Disciplinary offenses related to the excessive length of proceedings were qualified by the disciplinary court as an obvious and blatant offense against the law. A detailed list of the types of offenses alleged against the accused persons is presented in Table 4.

Table 4. The types of offenses alleged against the accused persons

No.	Type of offense	Number of cases*										Total
		2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	
1.	Obvious and blatant offense against the law	15	21	10	15	29	34	24	15	1	7	171
2.	Compromising the office's dignity	14	9	11	10	16	17	21	16	3	6	123
3.	Other disciplinary offenses	1	1	0	1	1	1	1	1	0	0	7
4.	No data	1	0	0	1	0	0	0	0	0	3	2
Total		31	31	21	27	46	51	46	32	4	16	–

* The number of alleged offenses is not always consistent with the number of examined cases, because it often happened that the accused was charged with more than one act, and it also happened that one act fulfilled the features of two disciplinary offenses.

25 For example, in case reference number SNO 10/16, the excessive length of the proceedings conducted by the accused concerned 1060 cases, while in case reference number SNO 31/12 the lengthy drafting of the justification of the rulings took 191 days, 159 days, 132 days, etc.

As can be seen from the data contained in Table 4, most acts committed by the accused, although not in all years, are acts of obvious and blatant offense against the law. As indicated above, most of these acts concern slowness in action and causing an excessive length of proceedings or drafting justifications of rulings issued after the statutory deadline. In this group of acts, however, there were cases of other infringements of law. For example, in case reference number SNO 41/11, the chairman of the court department was accused of forming a non-compliant adjudication panel. These cases also include cases of failure by the accused to obtain the required consent of the president of the court for additional professional activity[26] or faulty proceedings in pending cases.[27]

Part of the cases in which the judges were accused of breaching the dignity of the profession of a judge were those in which the accused was charged with committing a crime. As indicated above, committing a crime by a judge entails not only criminal liability, but also, regardless of this, disciplinary action. However, most of these acts concerned torts that did not qualify for crime but did not reflect well on the seriousness of the judge's profession. The behaviour of these judges' is illustrated by examples 1–9.

Example 1

The judge was accused of breaching the dignity of the judge's profession, manifested in improper behaviour in neighbourly relations, in particular the use of profanity to a neighbour, repeatedly interfering with the neighbour's property, parking a car with its back to the neighbouring property and emitting exhaust gases, and smoking at the entrance.[28]

Example 2

The judge was charged with the obligation to pay maintenance to her husband to avoid property execution.[29]

26 For example, in case reference number SNO 23/14, SNO 16/15, SNO 31/16.
27 For example, in case SNO 21/16, SNO 65/15, SNO 59/15, SNO 45/15.
28 See SNO 34/15.
29 See SNO 9/15, SNO 66/15.

Example 3

The judge was accused of exceeding the legal speed limit by 49 km/h and dismissing a police officer in an arrogant and rude way.[30]

Example 4

The judge was accused of urging the parties to the proceedings to withdraw their complaint about its length.[31]

Example 5

The judge was accused of failing to follow the instructions of a security guard when entering the stadium to participate in a football match, concerning the prohibition on people under the influence of alcohol entering the stadium, and of using vulgar phrases.[32]

Example 6

The judge was accused of inappropriate behaviour towards the inspector assessing his achievements during proceedings regarding promotion to a higher court.[33]

Example 7

The judge was accused of driving a car under the influence of alcohol.[34]

Example 8

The judge was accused of forging the signature on an invoice, in the place of the person authorized to collect it.[35]

30 See SNO 60/14.
31 See SNO 28/13.
32 See SNO 29/12.
33 See SNO 31/11.
34 See SNO 24/14.
35 See SNO 34/14.

Example 9

The judge was accused of confirming a falsehood in a hearing report, by indicating that at the hearing on a given day a verdict was passed, while it was not.[36]

The above examples show that this group of offenses concerns both the relations of the judge with other judges, including superiors and colleagues, but also concerns parties to the trial, as well as relations established by the judges with persons from their non-professional environment. This structure of offenses is compatible with the judge's code of ethics, which indicate that both in professional and private life, the judge should behave in a dignified manner, as befits a judge.

Decisions Taken in Cases of Disciplinary Violations and Penalties Imposed

In the Polish legal system disciplinary penalties are:

1) a warning
2) a reprimand
3) a reduction of basic salary by 5%–50% for a period of six months to two years
4) a financial penalty
5) removal from the function held
6) transfer to another place of service
7) dismissal of the judge from the office.[37]

36 See SNO 7/16.

37 Art. 109 § 1 LSCC. In principle, these penalties coincide with those used in other European legal systems. *Vid*. N. Acquaviva, F. Castagnet, M. Evanghelou, *A comparative analysis of Disciplinary Systems…*, p. 14.

For disciplinary offenses specified in items 2–4[38], the penalty that is imposed is a transfer to another place of service or dismissal of the judge from the office. In cases of less significance, the penalty that may be imposed is the reduction of basic salary, a financial penalty, or removal from the function held. These principles of imposing penalties in relation to the identified acts have been in force since February 14, 2020.[39]

The penalty of transferal to another place of service consists of changing the official place of the judge to that in:

1) a district court in another appeal area – in the case of a district court judge,
2) a regional court in another appeal area – in the case of a regional court judge,
3) another court of appeal – in the case of a court of appeal judge.

The location of the court is specified in the disciplinary court judgment. In exceptional cases, it is possible to transfer a judge to another place of service in the district of the same appeal in which the court, being the place of the previous adjudication of the judge, is located.[40] A judge who has been adjudicated the penalty of dismissal from the office cannot apply for this office again[41]. The disciplinary court may waive the imposition of a penalty in the event of disciplinary misconduct or a minor offense.[42]

A final conviction of a disciplinary court is to be made public. The disciplinary court may refrain from making the judgment public if it is unnecessary to achieve the purposes of disciplinary proceedings or

38 Which are acts or omissions that may prevent or significantly impede the functioning of the judicial authority; actions questioning the existence of a judge's service relationship, the effectiveness of the appointment of a judge, or the empowerment of the constitutional body of the Republic of Poland; public activities incompatible with the principles of the independence of courts and judges.

39 See art. 109 § 1a LSCC.

40 See art. 109 § 3a–3c LSCC.

41 See art. 109 § 4 LSCC.

42 See art. 109 § 5 LSCC.

to protect legitimate private interests. A final acquittal of a disciplinary court shall be made public at the request of the accused judge. The judgment of the disciplinary court is made public by it being posted on the Supreme Court website.[43]

The disciplinary court may impose the following penalties on a retired judge:

1) a warning,
2) a reprimand,
3) a reduction of salary by 5% – 50% for a period of six months to two years,
4) suspension of the salary increase referred to in art. 100 § 3, for a period of one to three years,
5) deprivation of the right to retirement with the right to emolument.[44]

Almost all these types of penalties were imposed in the examined cases by the disciplinary court. The most frequently imposed penalties were warnings and reprimands; however, the dismissals of a judge from the office were also often ordered.[45] Tables 5–7 present a list of penalties imposed on the accused by the first and second instance courts.

43 See art. 109a LSCC.

44 See art. 104 § 3 LSCC.

45 These findings are partly consistent with the results regarding disciplinary proceedings of judges carried out in Lithuania. Lithuania, as indicated above, is at the forefront of European countries with the highest number of disciplinary proceedings against judges. At the same time, and this is worth emphasizing, in that country, there is a relatively small number of cases where a judge is removed from office. In the years 2003–2012, this penalty was applied by the Lithuanian disciplinary court only once, in relation to a judge who in his public speeches used improper language, expressed contempt for other members of society, and aimed to discredit his colleagues and the authority of the court. See E. Gruodytė, *The disciplinary liability of Lithuanian Lawyers…*, p. 26.

Table 5. Types of penalties imposed – rulings of the first instance disciplinary court

No.	Type of penalty	Number of cases										Total
		2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	
1.	Warning	9	7	2	8	16	17	17	7	1	1	85
2.	Reprimand	9	6	10	7	11	10	5	6	1	1	66
3.	Reduction of salary	0	0	0	1	2	2	1	3	1	2	12
4.	Financial penalty	0	0	0	0	0	0	0	0	0	0	
5.	Removal from the position held	1	1	0	1	0	1	0	1	0	0	5
6.	Transfer to another place of work	1	4	2	3	3	2	5	4	1	0	25
7.	Dismissal of a judge from the office / Deprivation of the right to retirement	0	1	1	3	4	1	4	3	1	2	20
8.	Waiver of punishment	7	6	5	1	3	12	3	3	0	5	41
9.	No data	0	0	0	0	0	0	0	0	0	3	3
Total*		27	25	20	24	39	45	35	27	5	14	–

* The total number of cases is not always consistent with the number of cases in a given year or the number of acts committed, and depends on the content of the sentence of rulings issued in individual cases. The court usually imposed a total penalty for two or more disciplinary offenses.

Table 6. Types of judgments – the Supreme Court's ruling as a court of the second instance

No.	Type of judgment	Number of cases										Total
		2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	
1.	Upholding the previous ruling	19	16	10	9	27	26	25	19	2	5	158
2.	Change and acquittal	3	2	0	1	6	3	3	1	0	0	19
3	Change and conviction	1	0	0	1	0	0	0	0	0	1	3
4.	Change and a milder type of penalty	1	0	1	3	3	0	3	1	1	0	13
5.	Change and a more severe type of penalty	3	4	4	4	1	5	5	5	1	2	34
6.	Change and waiver of the penalty	0	1	0	0	1	0	0	0	0	1	3
7.	Setting aside the judgment and discontinuation of the proceedings	1	5	2	2	2	6	3	0	0	1	21
8.	Setting aside the judgment and remanding the case	4	5	4	4	13	11	4	7	0	2	54
9.	No data	0	0	0	0	0	0	0	0	0	3	2
Total*		32	33	21	24	53	51	43	33	4	15	–

* The total number of cases is not always consistent with the number of cases in a given year or the number of acts committed and depends on the content of the sentence of rulings issued in individual cases.

The data contained in Tables 5 and 6 show that the Supreme Court usually upheld the rulings of the first instance disciplinary court. Changes to the decisions of the court of the first instance usually concerned a more severe penalty. Occasionally, there were cases of setting aside the judgment and discontinuing the proceedings, changing the judgment and waiving the penalty. Approximately one-third of the first-instance court rulings were set aside, and the case remanded. These situations are perfectly illustrated by examples 10–16 below.

Example 10

The judge, who also served as an inspector, was accused during disciplinary proceedings of committing the act of distorting of the content of the report from a hearing. In the first instance, the disciplinary court issued a warning. The Supreme Court changed the judgment under appeal and ordered the accused to be removed from the function of inspector. The Supreme Court decided that a person acting as an inspector should constitute an impeccable model of conduct for other judges. The accused, in the court's assessment, was not such a model.[46]

Example 11

The judge was blamed for announcing in the presence of the parties a decision to adjourn the hearing and a decision to appoint an expert, whereas after the persons attending had left the room, he ordered the clerk to change the content of the report from the hearing. The record regarding the adjournment of the hearing and the appointment of an expert were removed from the report. In their place, the decision to close the case and to declare the ruling was entered. This act was at the same time an offense. The disciplinary court of the first instance ordered the judge to be transferred to another place of service. The Supreme Court changed this judgment by imposing a penalty on the removal of the judge from office. The Supreme Court pointed out that the seriousness of the offense committed

46 SNO 23/17.

was very high. With his behaviour, the accused undermined the claim that he was qualified to hold the office of a judge. The only possible disciplinary penalty for this offense is the penalty of dismissing a judge from the office.[47]

Example 12

A retired judge was accused of driving a car under the influence of alcohol. The court of the first instance found the judge guilty of this act and ordered a suspension of salary increase for a period of 3 years. The Supreme Court ruled that the first instance court had imposed a grossly mild punishment. The conduct of the accused indicated a disregard for the legal order. Which, in turn, implies that he had thereby lost his qualification for the office of a judge, regardless of his previous service. Therefore, the judge deserved the most severe punishment.[48]

Example 13

The judge was accused of unknowingly taking a purse from a room at the headquarters of the District Chamber of Legal Advisers. After realizing the mistake, the judge did not return the purse to the owner but abandoned it at an unspecified place. The judge denied the whole incident. This behaviour made it impossible to find the purse. The court of the first instance imposed a reprimand on the judge. The Supreme Court held that the judge's behaviour could not be reconciled with the impeccable character required of a judge. The judge should be guided by the principles of honesty, a sense of honour and good manners. The conduct of the accused violated these principles. An adequate penalty for the offense would be transfer to another place of service.[49]

Example 14

The judge was accused of allowing the parties to settle when the circumstances of the case showed that the act was unlawful and intended

47 SNO 56/12.
48 SNO 36/12.
49 SNO 30/12.

to circumvent the law. By his behaviour, the judge created the danger of hindering the pursuit of claims by creditor entities. For this offense, the first instance court ordered the judge to be removed from office. The Supreme Court found that the sentence imposed was grossly severe. The Supreme Court had in mind the behaviour of the accused after committing the offense aimed at setting aside the effects of the offense and her earlier service. In the opinion of the Supreme Court, an adequate penalty was the transfer to another place of service.[50]

Example 15

The judge was accused of taking the incorrect procedural decision, without legal and factual grounds, of excluding the case for a separate examination of the main thread of the case. This decision led to lengthy proceedings. The disciplinary court of the first instance found that there had been a violation of the rules of procedure and imposed a warning. The Supreme Court, as a court of the second instance, recognized that the disciplinary court's decision had entered the sphere of the judge's independence. A judge who would be concerned by the threat of disciplinary responsibility when issuing a judgment could not be independent. The Supreme Court found that the accused's decision was of a procedural nature and involved a decision-making process. In the court's view, the judge could not be held to have committed an act of offense against the law, and therefore acquitted the accused.[51]

Example 16

The judge was found guilty, by the disciplinary court of the first instance, of having violated the dignity of her profession by obstructing her ex-husband's contact with their child. In this way, the judge did not respect the court's judgment establishing the rules of contact between the father and the minor. The accused was punished with a reprimand. In the opin-

50 SNO 6/13.
51 SNO 40/13.

ion of the Supreme Court, this penalty was grossly severe. The Supreme Court took into consideration in favour of the accused her reputation for impeccable service and family situation, and imposed a warning.[52]

The examples described above show that the Supreme Court corrected cases both of too mild treatment of the accused by the court of the first instance and situations of too harsh assessment of the behaviour of the accused.

Offenses Committed by Judges

According to data provided by the Ministry of Justice, from October 1, 2001 to September 2018, the Minister of Justice was notified of the issuance of 107 resolutions of the Supreme Court authorizing the prosecution of judges.[53] The list of acts the judges were accused of is provided in Table 7.

Table 7. List of crimes alleged against judges in the years 2001–2018

No.	Type of crime		Article number
1.	Offenses against life and health	Causing a violation of body organ functioning or causing a health disorder lasting up to 7 days and over 7 days	art. 157 § 1 and 2 PC1*
2.	Offenses against security in communication	Causing a traffic accident, including fatal or serious damage to health	art. 177 § 1 and 2 PC
		Driving under the influence of alcohol or drugs	art. 178a § 1 and 2 PC
3.	Offenses against freedom	Violent or unlawful threat against a person	art. 191 § 1 PC

52 SNO 39/13.

53 See Ł. Piebiak, *Odpowiedź na interpelację nr 25389…*

No.	Type of crime		Article number
4.	Offenses against sexual freedom and decency	Rape and leading another person to undergo another sexual activity	art. 197 § 1 and 2 PC
		Abusing of dependency relationship or using of critical position and causing another person to have sexual intercourse or other sexual activity	art. 199 § 1 PC
		Sexual intercourse with a minor under the age of 15 years	art. 200 § 1 PC
		Incest	art. 201 PC
5.	Offenses against family and care	Physical or psychological harassment of the closest person or another person being in a constant or transient relationship with the perpetrator	art. 207 § 1 PC
6.	Offenses against honour and bodily integrity	Defamation of another person by means of mass communication	art. 212 § 2 PC
7.	Offenses against the activity of state institutions and local government	Violation of bodily integrity of a public official	art. 222 § 1 PC
		Insulting a public official	art. 226 § 1 PC
		Dependence of the performance of official activity on the receipt of financial or personal benefits, including for conduct that constitutes a violation of the law	art. 228 § 1 and 3 PC
		Execution of official duties subject to receipt of financial or personal benefits	art. 228 § 4 PC
		Acceptance of a financial advantage of considerable value in connection with performing a public function	art. 228 § 5 PC

No.	Type of crime		Article number
7.	Offenses against the activity of state institutions and local government	Mediation in settling the matter in exchange for financial or personal benefit	art. 230 § 1 PC
		Abuse of rights in connection with the performance of a public function	art. 231 § 1 PC
		Making false testimonies in court proceedings or other proceedings conducted pursuant to the Act	art. 233 § 1 and 6 PC
		False accusation of another person of committing a criminal act or disciplinary offense	art. 234 PC
		False crime notification	art. 238 PC
9.	Offenses against elections and referendum	Infringement during the election	art. 248 PC
10.	Offenses against public order	Participation in an organized criminal group	art. 258 § 1 PC
11.	Offenses against the credibility of documents	Counterfeit or forged document and using it as an authentic one	art. 270 § 1 PC
		Certification of an untruth in a document by a public official	art. 271 § 1 PC
		Phishing a false statement by deceitfully misleading a public official	art. 272 PC
12.	Offenses against property	Theft and usurpation	art. 278 § 1 and 284 § 1 PC

*Act of June 6, 1997 Penal Code (Journal of Law of 2019, item 1950).

As is evident from the data contained in Table 7, judges were accused of committing crimes related to the office (e.g. paid protection) as well as those from the sphere of personal life (e.g. crimes against sexual freedom). It should be noted that Table 7 contains only data on the offenses in relation to which preparatory proceedings were pending against judges. The Ministry of Justice did not disclose data on convictions for individual offenses.

In March 2016, an Internal Affairs Department was created in the Internal Prosecutor's Office. The purpose of this department is to conduct preparatory proceedings in cases of the most serious crimes committed by judges, among others. In this department, seven indictments were brought against judges. By 2018, one of these proceedings in court had been discontinued in connection with the reconciliation of the parties.[54]

Conclusions

1. During the period analysed, the largest number of disciplinary cases per year heard by the disciplinary court was in the year 2007, while the smallest number of cases was in the year 2018. Poland is a country in which the number of disciplinary proceedings initiated is in the European average.

2. If there is an indictment against the accused, disciplinary proceedings usually end with the conviction of the accused in the first instance. The second instance court usually upholds the contested ruling, although in one third of the cases the case is referred back to the court.

3. The most common penalty imposed on the accused is a warning or a reprimand. These are the mildest penalties. The disciplinary court does not, however, avoid imposing the most severe penalties, i.e. transfer to another place of service or dismissal of a judge from office.

4. The most frequently occurring disciplinary offenses of judges were an obvious and blatant disregard for the law related to a failure to comply with the provisions on the speed and efficiency of proceedings as well as deadlines for preparing justifications for sentences.

54 See Ł. Piebiak, *Odpowiedź na interpelację nr 25389…*

5. The Supreme Court altered the penalties of a warning or a reprimand, respectively, to the transfer to another place of service or removal of a judge from the office, as well as the penalty of the removal of a judge from the office to transfer to another place of service. In this case, the gravity of the offense and its significance from the point of view of the good of the justice were taken into consideration, as well as the judge's previous service.

6. From October 1, 2001 to September 2018, 107 resolutions of the Supreme Court authorizing the prosecution of a judge occurred. The judges were accused of committing crimes both regarding the sphere of their profession (e.g. corruption) and closely related to their private lives (e.g. rape or driving a car in a state of intoxication).

7. Considering the results of the research, it would be worth conducting similar research in relation to other legal professions as well as undertaking a broader substantive discussion in this respect.

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SUMMARY

The Disciplinary and Criminal Liability of Judges in Poland. A Criminalistics Study of Cases of Disciplinary and Criminal Liability of Judges in the Years 2010–2018

The article presents basic findings about the disciplinary and criminal liability of common courts judges in Poland. These findings are presented from a criminalistics perspective. The article provides data on the following issues: the basics of the disciplinary and criminal liability of judges, the number of disciplinary cases of judges in the years 2010–2018 and the number of criminal cases of judges in the years 2001–2017, categories of the disciplinary violations and crimes committed, decisions taken in cases of disciplinary violations, and imposed penalties. The article is based on an examination of Supreme Court verdicts issued in disciplinary cases of judges and data provided by the Ministry of Justice

Keywords: disciplinary liability, criminal liability, judges, legal ethics.
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DOI 10.14746/ppuam.2020.11.15