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Foreword

The section devoted to the prominent representatives of the Poznań Faculty of Law and Administration of the present volume of the Adam Mickiewicz University Law Review begins with the publication of the English version of Professor Zbigniew Janowicz's text entitled *Improving Administrative Proceedings*, originally published in *Państwo i Prawo* in 1978.

Professor Janowicz, 1921–2011, was one of the most influential representatives of Polish legal scholarship, a specialist in judicial and administrative proceedings, and the creator and the first head of the Department of Administrative and Administrative Judicial Procedure of the Adam Mickiewicz University Poznań. His achievements encompass both academic work and public service. His academic achievements include studies on general Administrative Proceedings in Poland and its reform, the administrative system of the Polish lands incorporated into the German Reich during the German occupation 1939–1945, the administrative system of the Federal Republic of Germany and West Berlin, and water law. Professor Zbigniew Janowicz's public service is reflected in his legislative contribution to general administrative proceedings and judicial administration control system in Poland, his legislative contribution to the reform of science and higher education, his activity connected with the development of the Supreme Administrative Court as a lecturer, advisor and translator,

and his participation in the work of the Central Commission for the Investigation of German Crimes in Poland.

Professor Janowicz's article was selected by Professor Andrzej Skoczylas, and was translated by Tomasz Żebrowski, Stephen Dersley and Ryszard Reisner, to whom we wish to express our heartfelt thanks.

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Zbigniew Janowicz*

Improving Administrative Proceedings[1]

Abstract: The paper is an English translation of "Uwagi o doskonaleniu postępowania administracyjnego" by Zbigniew Janowicz published originally in *Państwo i Prawo* in 1978. The text is published as a part of a section of the Adam Mickiewicz University devoted to the achievements of the Professors of the Faculty of Law and Administration of the Adam Mickiewicz University, Poznań.
Keywords: code of administrative procedure, administrative proceedings, reform of administrative proceedings.

1. The Code of Administrative Procedure[2] is no doubt one of our most important statutes regulating the mutual and diverse relations between state organs and citizens, and their organisations. What is more, CAP paves the way for making the relations as good as they can be, not only in the domain of law, but also that of politics. It suffices to mention in this context one of the CAP general principles, proclaiming that state administration organs should conduct proceedings in such a manner as to boost citizens' confidence in state organs.

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1 Translated from: Zbigniew Janowicz, "Uwagi o doskonaleniu postępowania administracyjnego", *Państwo i Prawo*, no. 5. 1978: 54–67 by Tomasz Żebrowski and proofread by Stephen Dersley and Ryszard Reissner. Translation and proofreading was financed by the Ministry of Science and Higher Education under 848/2/P-DUN/2018.

2 Hereinafter: CAP.

The CAP, being the work of outstanding representatives of Polish administrative studies and practice,[3] as well as the result, in no mean measure, of a very fruitful public discussion,[4] has been highly and deservedly praised at home and abroad; it is no doubt one of the best codifications of administrative proceedings in Europe. This overall assessment of the CAP as a whole does not entail the approval of all its provisions;[5] even less does it mean (apart from the obvious necessity of taking into account changes following from the local administration reform) giving up an attempt to take a new view of the CAP after 17 years of its application, to consider the usability of its various institutions and further improve its procedures and—more sweepingly—the entire system of our administrative proceedings.

The ongoing discussion correctly proceeds in this direction, encompassing the issues of the judicial protection of citizens' rights (and other parties to administrative proceedings). The discussion has focused on issues such as the full adjustment of CAP provisions to the structure of general-purpose local administration put in place in 1972–1975 (or more precisely, a complete mutual harmonisation of the legislation on people's councils and local state administration organs with appropriate CAP provisions) and the extension of the CAP's range of application. It has also dealt with streamlining proceedings (especially quickening their pace) and further strengthening the position of a party and other participants in proceedings who enjoy the rights of a party (usually related to making our administrative proceedings still more democratic and law-abiding). Finally, discussion has also centred around ensuring remedies to

3 The CAP was drafted, besides the members of the Codification Commission (Especially its Chairman, Stefan Rozmaryn, and both rapporteurs, Emanuel Iserzon and Jerzy Starościak), by many people, who worked on it only indirectly, for instance Tadeusz Bigo, Wacław Brzeziński, Franciszek Longchamps and Marian Zimmermann.

4 For more on this topic view Stefan Rozmaryn, "Projekt kodeksu postępowania administracyjnego – w nowej postaci", *Państwo i Prawo*, no. 4–5. 1960; and Zbigniew Janowicz, *Ogólne postępowanie administracyjne*. Warszawa, and Poznań, 1976, 28 ff.

5 It is a well-known fact that some of them were heatedly disputed when CAP was being drafted and that certain provisions adopted as a result of compromises have not always proven felicitous (e.g. Article 25).

a party also after administrative means are exhausted, i.e. a recourse to courts of law (the introduction of the general judicial review of the legality of administrative decisions). The last-mentioned issue is, as a matter of fact, an important condition for improving our administrative proceedings.

2. The complete harmonisation of the legislation on people's councils and local state administration organs with the CAP is one of the most urgent legislative tasks. It must provide a direct stimulus for starting work in the Sejm on assessing the CAP's strengths and weaknesses and bringing it up to date. The harmonisation involves making mostly obvious amendments to provisions defining organs of a higher tier and supreme organs (Articles 13–14), organs deciding disputes on competence (Article 18) and ones competent to hear complaints (Article 159).[6] Certain reservations arise, however, due to the introduction of single-instance proceedings on the provincial level at Stage II of the reform of local state administration and authority organs.

This option could have been justified to an extent, since commune and district heads (and other same-rank officials) were first-instance organs in most individual cases falling within the purview of state administration, while provincial governors (*wojewodowie*) (and other same-rank officials) dealt in this instance with relatively few cases. The situation changed, however, at Stage III of the reform when provincial governors took over a considerable portion of the powers of district heads.[7]

In the discussions, an unanimous opinion prevails that a party should be able to file an ordinary appeal against a decision issued by a provincial governor in the first instance[8] (besides the right a party enjoys today to avail itself of extraordinary remedies: a demand to institute proceedings de novo and a de-

6 View for instance Janowicz, Ogólne (1976), 80 ff, 84 ff and 211.

7 The current legislation expands these powers.

8 Practically, however, faced with widespread granting of authority (which is only natural), appeals are filed against decisions of over a hundred officials of his/her office. In addition, there is a considerable number of directors of state enterprises and other state institutions who are authorised to act in the name of provincial governors.

mand to set a decision aside as null and void). Proposed legislative solutions vary.

Some views hold that it would be advisable, on account of the tendency to relieve supreme administration organs of having to deal with individual cases, to set up collegial appellate organs in the same instance with the participation of lay members of the public.[9] This solution, however, would have certain serious faults. First of all, it seems inadvisable to exclude even further supreme state administration organs from the course of proceedings through instances, because this would weaken their supervision over provincial-tier organs (and of first-tier organs, too) and the uniformity of decisions, especially as the number of provincial-tier organs has almost tripled. Furthermore, if this solution were adopted, an appeal would be heard all the same (i.e. in spite of setting up 'special' appellate organs) in the milieu of the same office. This could compromise the objectivity of a decision.[10]

Another possible option is to keep the single-instance system in place with respect to a provincial governor's decisions, but at the same time give a party the right to file a complaint directly with a court of law.[11] This solution, too,

9 View for instance Ludwik Bar, and Kazimierz Siarkiewicz, "Doskonalenie postępowania administracyjnego", *Państwo i Prawo*, no. 3. 1977: 11; Jan Jendrośka, "Kodeks postępowania administracyjnego a proces doskonalenia funkcjonowania administracji państwowej", *Państwo i Prawo*, no. 4. 1977: 17.

10 Jerzy Świątkiewicz, however is right to observe that "With … most appeals not alleging a breach of law by appealed decisions, but a breach of the principle of advisability, such an appellate organ, modifying the provincial governor's decisions, would undermine his/her responsibility for policies pursued in the province". Jerzy Świątkiewicz, "O potrzebie i kierunkach nowelizacji k.p.a.", *Państwo i Prawo* no. 6. 1977: 16. Whereas his suggestion to "consider the possibility of adopting the rule that with regard to administrative decisions, and only in this regard, provincial office departments act as state administration organs from the decisions of which appeals lie to the provincial governor", is obviously unacceptable not only because — as Jerzy Świątkiewicz himself writes — "the objectivity of such a verification, with departments reporting to the provincial governor, could prove dubious", but above all for political system reasons. It would require going back in some respects to former relations between the presidium and departments! A similar suggestion (next to the conception of 'setting up an appellate organ on the provincial tier') was made also by Janusz Borkowski, "Redakcyjne spotkanie dyskusyjne. Doświadczenia ze stosowania k.p.a.", *Rada Narodowa, Gospodarka, Administracja*", no. 19. 1977: 22.

11 Cf. also Jendrośka.

contingent on the introduction of the judicial review of administration, would have—next to undeniable advantages—serious faults. Any decision should, prior to being appealed against in a court, move through all administrative instances. This allows for its comprehensive review on its merits (hence, including its advisability). An appellate organ is then in the position to make a decision based on the merits of the case (e.g. a change of the decision, resulting in lowering a benefit). Meanwhile, the competence of the court is limited: it reviews, as we know, whether a decision is legal. In the event it finds that the decision contravenes the law, the court may only set it aside (in whole or in part), but may not reform it.

It would be best, therefore, to restore fully two-instance proceedings, that is, to make a provincial governor's decisions appealable to supreme state administration organs in agreement with the fundamental principle of administrative proceedings, holding that a party and other legitimate participants in proceedings enjoy the right to have their case reviewed and decided on with regard to its merits by a superior organ. The restoration of this principle, which would mean that relevant CAP provisions would stay in force, would only require abrogating the appropriate provision of the People's Council Act (Article 57(2)).

That the question needs to be urgently resolved is also evident in the fact that—as shown by practice—parties cannot now as a rule expect a decision on the merits of the case by supreme state administration organs, even when they demand that a provincial governor's decision be set aside as null and void.[12]

3. The CAP, in the intention of its drafters, was to be only the first stage in the unification of our administrative proceedings. Hence, opting for certain exclusions that were practically unavoidable back in 1960 (in particular the exclusion of tax proceedings, on which the Ministry of Finance strongly insisted), the drafters nevertheless provided in Article 194 for a convenient

12 View Świątkiewicz, *O potrzebie*, 16, 19.

possibility to extend CAP provisions to the proceedings listed there. This possibility has not been used by the Council of Ministers, as we know, even once. This is not to say that administrative proceedings have not been unified to some extent in other ways in the last years. One of them was the extension of CAP provisions to new areas (in particular, service relations). However, the process of decodification was stronger.[13]

Moreover, for a long time, there have been widespread calls for extending the scope of CAP application. However, great care must be exercised in deciding what the scope of such unification is to be and which legislative path is to be followed.

Not all 'excluded proceedings' may, of course, be covered by the CAP; specifically, the so-called separate proceedings that are neither administrative nor judicial procedures that do not lend themselves easily to being subject to CAP provisions. Separate proceedings have only some 'administrative' elements; an example of such proceedings is the work done by employment arbitration and appeal commissions.

Certain difficulties will be encountered by attempts to extend the CAP to cover the other 'excluded proceedings'. In some fields, attempts to apply fully CAP provisions may prove inadvisable or downright impossible, as this would make respective proceedings no longer separate (this applies above all to tax proceedings). However, a flexible extension of CAP provisions to cover these proceedings is made possible in a variety of ways by the delegation included in Article 194(4). On account of some negative experience so far, the proceedings should be integrated into the code itself (thus this should be done by an amending act) by adding a new chapter to it that would contain certain provisions different from general ones ('Special provisions').[14]

13 For more on this question see Janowicz, *Ogólne* (1976), 52 ff.
14 As Jan Jendrośka says. Jendrośka, 29.

Furthermore, some opinions surfaced, suggesting that enforcement proceedings should be incorporated into CAP.[15] It is worth mentioning here that attempts to regulate jointly general administrative proceedings and enforcement proceedings in a single statute were had already been made when the code was being drafted, but to no avail. Later attempts did not succeed either. Provisions on enforcement proceedings could not be drafted to make it possible to incorporate them into the code, or at least bring them closer to proceedings regulated in the code. Finally, the Act of 17 June 1966 on Enforcement Proceedings in Administration largely followed the model set by civil enforcement proceedings. Many institutions were regulated in it almost identically as in the latter proceedings. An argument for such a close similarity involves the fact that administrative enforcement is relied upon to enforce civil-law obligations as well. Similarities between both enforcement proceedings are so substantial that the literature on civil procedure suggested keeping just one common enforcement: judicial enforcement.[16] It must be also kept in mind that the scope of application of the 1966 Enforcement Act does not coincide with that of the CAP: the Act is a complete codification, hence it is universally applicable regardless of the kind of administrative proceedings that produced the decision being enforced. It is for these reasons that the suggestion to incorporate enforcement proceedings into the CAP can hardly be considered feasible now.

The ongoing discussion has also rehashed proposals formulated occasionally in the 1960s to subject matters arising in relations between state enterprises and their superior units and organs to the selected provisions of the CAP.[17] Such proposals are not convincing. These relations are of a special and separate legal nature and it would be difficult to subject them to an administrative regime characteristic of imperious 'external' relations (especially of the typical

15 Among others, in administrative practice. Such opinions are mentioned by Jerzy Świątkiewicz. Świątkiewicz, *O potrzebie*, 12.

16 Edmund Wengerek, *Przeciwegzekucyjne powództwa dłużnika*. Warszawa, 1967, 188 ff. Joining judicial and administrative enforcements is believed to be advisable also by Bar, Siarkiewicz, *Doskonalenie*, 9 but for other reasons.

17 View in particular Bar, Siarkiewicz, *Doskonalenie*, 7; Jendrośka, 26.

'office—citizen' relation). What's more, requisite high flexibility in business matters argues in this case in favour of the search for separate, specific procedural forms.

No lesser objections are raised by the suggestion to incorporate certain provisions into the CAP relating to mutual relations between organs.[18] The CAP, naturally, is not the right place for such provisions. After all, this is a codification of the procedure (except for proceedings in matters of complaints and proposals) that is pending between an organ and a citizen, social organisation, state organisational unit, etc., that is, entities that are 'outside', so to speak, of the administering organ.

The present author does not believe it advisable either, to include provisions on the issuing of certificates into the CAP.[19]Administrative proceedings regulated by the CAP are—except for proceedings in matters of complaints and proposals—jurisdictional proceedings, with their purpose being to determine or establish a legal situation by an individual decision. Provisions on certificates, being generically different, should be collected into a separate piece of legislation (not necessarily of a statutory rank). Furthermore, provisions on certificates would have to apply not only to state administration organs, hence, they would have a much broader scope of application than the CAP and the other administrative provisions.

4. When discussing the question of improvements to administrative proceedings, a proposal was made to introduce 'simplified' proceedings, hitherto unknown, to the CAP. Despite many comments on the proposal, little has been said as to what such simplification constitutes and what matters it should apply to.[20]

18 Bar, Siarkiewicz, *Doskonalenie*, 7; Jendrośka, 26.

19 Jendrośka, 27.

20 Cf. for instance Bar, Siarkiewicz, *Doskonalenie*, 15; Jendrośka, 25, believes that in this case, use should be made of 'the model adopted in some special proceedings,' and refers to Janusz Borkowski, who gives 'the example of proceedings in matters of damage to the property of armed forces'. I do not believe this to be a convincing model Janusz Borkowski, "Questions of Improvements to Administration in the Light of the Resolutions of the 7th

It appears that this issue has been surrounded by a lot of controversy lately. Contrary to some rare views, the CAP proceedings are by no means complex, let alone convoluted.[21] Moreover, in respect of many more difficult types of cases, more complex in terms of facts and law (such as those involving expropriation law and law on the use and conservation of inland waters), relevant statutes and other legislation lays down additional procedural provisions. Nonetheless, CAP provisions and other similar codifications must be sufficiently complex to be able to serve the principal purposes of administrative proceedings. It has been rightly stressed for a long time that:

> The more developed the procedural provisions in a given system of administrative law are, the less leeway and randomness there is in the operation of individual state administration organs or their officials, the more efficient the administration is and the better the protection ensured to the rights and interests of citizens.[22]

It is also obvious (but sometimes forgotten) that not all CAP provisions need to be applied to every case. If a case is simple and clear, there is no need to hear evidence (interview witnesses, consult expert witnesses, carry out an inspection, etc.) and hold a hearing. Incidentally, holding a hearing may present difficulties every now and then, especially for officials on a 'lower tier'. The CAP leaves the need for a hearing in principle to the discretion of an

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Congress of the Party", *Państwo i Prawo*, no. 12. 1976: 71.For what is meant here, as the quoted author explains elsewhere, is a special 'indemnification procedure' where liability is borne by soldiers and civil employees working for the armed forces and where, as a matter of fact, 'intention of the drafters of the provisions is… to have as a rule simplified explanatory proceedings conducted' (Janusz Borkowski, *Postępowanieadministracyjne. Zarys systemu*. Warszawa, 1976, 132).

21 See Bar, Siarkiewicz, *Doskonalenie*, 15 and Siarkiewicz *Potrzeba doskonalenia k.p.a.*, 29.

22 Wacław Dawidowicz in the paper *Rola kodyfikacji postępowania administracyjnego w zabezpieczaniu praworządności socjalistycznej*; Zbigniew Janowicz, Konferencja naukowa poświęcona zagadnieniom postępowania administracyjnego, *Ruch Prawniczy, Socjologiczny i Ekonomiczny* 31, no. 4. 1961: 329.

administration body and treats this form of explanatory proceedings—characteristically enough—as a means of accelerating or simplifying proceedings.

CAP provisions allow for or even prescribe, where there is a need for it, 'simplified' proceedings in the correct sense of this word. Article 10, laying down one of the fundamental principles of our procedure—one of swiftness and simplicity, leaves no doubt:

> § 1. State administration organs shall act thoroughly and quickly on a case, making use of possibly the simplest means to dispose of the case properly.
> § 2. Cases that do not require the collection of evidence, information or explanations shall be disposed of forthwith.

What else do you need here? To complicate swiftness and simplicity? Any further simplification of administrative proceedings (if only, for instance, by 'deformalizing' provisions on summons)[23] would above all leave a party in a much weaker position, thus undermining the fundamental underpinnings of the CAP, given expression in its general principles (in particular the principles of searching for the objective truth and active participation of parties in proceedings). It must be remembered that administrative organs, as seen in the application of 'Code' proceedings (or even better, of some other, less developed proceedings) often conduct proceedings in a simplified manner, ignoring if not breaching certain procedural provisions.[24] Hence, there are reasonable concerns that once simplified administrative proceedings are in place, proceedings will be falsely simplified further still.

It does not seem to be advisable either to introduce a new institution into the CAP, namely a settlement between parties approved by an administrative

23 Provisions on summons are one of the crucial guarantees of procedural due process or its fragment. Parties or other participants in proceedings (e.g. witnesses) must know what they are summoned for so as to have the means to give explanations or depositions and collect necessary documents, etc. (An organ must not catch participants in proceedings unawares).

24 This comment concerns, among other things, the hearing of evidence.

organ replacing a decision.[25] This involves, after all, rare cases in our law, provided for in relevant legislation, concerning individual segments of administration (e.g. Article 35, Law on the use and conservation of inland waters). The CAP would have to refer to such legislation anyway. In turn, it is absolutely out of the question to introduce settlements between organs and parties as to the simplification of proceedings. This apparently attractive proposal entails serious risks: a party unfamiliar with procedural provisions could be misled (deliberately or not) by an administration official. Worse still, it could not be ruled out that sui generis 'extortions' of simplification of proceedings would take place.

Our proceedings could be made more efficient, no doubt—in agreement with the principle of efficiency and simplicity, and the practice hitherto followed by many organs—by shortening certain CAP time limits. In particular, the time limit for dealing with a case in the first instance is certainly too long for today's pace of life and the requirements faced by modern administration. It should be shortened to one month and a stipulation should be made (applicable also to the time limit for dealing with cases in appellate proceedings) that it is a maximum time limit ('An organ […] shall dispose of a case within […] at the latest').

The discussion of 'simplifications' of proceedings brings to mind a reflection of a more general nature. While constructing the system of our general administrative proceedings, we adopted a trial model exactly 50 years ago. It involved the 'formalisation' of proceedings (in the good sense of this word), being modelled on the 1925 Austrian codification. It is in this 'trial' direction that general administrative proceedings evolved on the whole in Europe, especially after World War II. The evolution reached its heights in our 1960 Code and the codifications of some other socialist countries. The Code, thus, ensures a stronger position in proceedings to a party than before, without 'detriment' to the position of organs in administrative proceedings (which by the

25 This proposal has been made by Jendrośka for one, 27.

nature of things entail certain inequality). The intended amendment, in the desire to democratise further 'office–citizen' relations, strengthens the position of a party even more by appropriately improving trial institutions. 'Assaults' on 'formalised' proceedings appear especially strange, since at least until recently no complaints were heard about protracted proceedings, for which specific CAP provisions would be to blame (except for the aforementioned excessive time limit for dealing with cases in the first instance).[26]

5. A lot more can be done to strengthen still further the position of a party and other participants in proceedings who enjoy the rights of a party. First, the conception of a party should be reconsidered. Article 25, resulting from a drafting compromise, may be variously interpreted, sometimes to the detriment of parties. The present author believes that, in agreement with the overall intention of the Code and the general evolutionary tendencies of contemporary administrative procedure (which in this regard have left their strong mark on Yugoslav and Czechoslovak codifications), the trial concept of a party should be unambiguously adopted ('A party to proceedings is any person whose legal interest or responsibility is the object of the proceedings or who demands the intervention of an organ on account of his/her legal interest or responsibility').[27]

It would advisable, too, as the observation of practice attests, to supplement the provisions on the participation of a social organisation, having been granted the rights of a party, in proceedings concerning another person. To increase the chances for such participation, it would be necessary to introduce a duty to notify relevant organisations of the institution of proceedings 'if

26 A completely isolated proposal to consider the possibility of establishing 'non-formalised' proceedings as a rule may, as it seems, be suggested by the recent West-German codification. This, however, has grown out of a quite different legal life and tradition, and distanced itself clearly from the Austrian model of trial administrative proceedings. For the history of this codification view Zbigniew Janowicz, "O kodyfikacji postępowania administracyjnego. Kilka uwag i refleksji na tle porównawczym" in S*tudia z zakresu prawa administracyjnego ku czci Prof. dra M. Zimmermanna*, Warszawa, and Poznań, 1973, 21 ff.

27 A different proposal for defining the concept of a party, based on the 'criteria of procedural law' as well, is made by Jendrośka, 19 ff.

such participation is justified by the constitutional objectives of the organisation, and the interest of the community calls for it' (Article 28). It seems it would be necessary to make a revision of the provision making the admission of an organisation to participate in proceedings dependent on the discretion of the organ conducting the proceedings. Instead, it should be made to admit an organisation to participate in proceedings whenever it demands to be admitted, relying on the reasons given above.[28]

Next, it would be desirable to abolish any restrictions—and this has been demanded for a long time – on the Public Prosecutor General lodging appeals against the decisions of supreme state administration organs (Article 150).

Furthermore, it is believed that provisions on the hearing of evidence are in need of supplementation. The omission of provisions on 'public' (i.e. 'official') and 'private' documents from the CAP, criticised already in the discussions of the draft code back in 1959, provides grounds for treating such documents in administrative proceedings on an equal footing. This is harmful to both parties and the legal order in general. In the absence of special provisions, which grant the status of 'conclusive evidence' to official documents (e.g. Birth, Death & Marriage Registration Act), such documents are subject to the discretion of an organ hearing evidence as are private documents and other types of evidence. Besides, it is hardly feasible to maintain the state of law where official documents in administrative proceedings are treated differently than in judicial or other proceedings.[29]

It would be also desirable to make the duty to hold a hearing in administrative proceedings extend to more cases by introducing a rule to Article 82 stipulating that an organ must hold a hearing if this will accelerate or simplify proceedings. The current provision of Article 82(1) (modelled on, as a matter

28 A. Maksymiuk, *Redakcyjne spotkanie dyskusyjne…*, 23. A. Maksymiuk observes, however, that 'the expansion of the participation of social organisations in administrative proceedings and imposition of the duty to summon their representatives to take part in proceedings will greatly delay the final disposition of cases'.

29 It would be an easy thing to do legislatively: it would be enough to transfer the content of the Code of Civil Procedure, Articles 244–245, to CAP (following Article 75).

of fact, the respective provision of the 1928 Decree), leaving the holding of a hearing in principle to the discretion of an organ ('organ […] may'), is quite rarely used in practice. Meanwhile, a hearing is the most thorough form of explanatory proceedings and is advantageous to parties as well. In addition, it no doubt improves social supervision over proceedings and has of course a certain educational aspect. Besides, it would be necessary to consider the need to re-draft Article 82(2)(1) of the CAP, which gives rise to interpretative doubts.[30]

Certain amendments and improvements need to be made to provisions on the reasons for a decision. Thus, it would be advisable—especially as the practice leaves much to be desired in this respect—to supplement Article 99 by specifying what the findings of fact and law in a decision are (one can avail oneself here of judicial models, in particular the Code of Civil Procedure, Article 328(2)). It is also necessary to amend Article 99(4), which presents considerable interpretation difficulties. Besides, this is an obsolete provision, whose raison d'être was former substantive legislation in connection with the 1928 Decree on Administrative Proceedings, Article 75(3).[31]

Certain suggestions of amendments have been made with respect to appellate proceedings. First of all, owing to the liberal use of—what are after all—the exceptional cassation powers provided for in Article 120(2) by second-instance organs, it is necessary to consider the advisability of redrafting this provision to underscore the duty of second-instance organs to hear and decide a case on its merits. In satisfaction of the demands that have been made for a long time now, it would be also necessary to limit the powers of an appellate organ to reverse a decision to the disadvantage of the appealing party. The power to use *reformationis in peius* should be limited solely to the cases

30 Cf. Wacław Dawidowicz, *Ogólne postępowanie administracyjne, Zarys systemu*. Warszawa, 1962, 157; Emanuel Iserzon, and Jerzy Starościak, eds., *Kodeks postępowania administracyjnego. Komentarz*, 4th ed. Warszawa, 1970, 183.

31 View Rozmaryn, 613 ff.

of 'gross contravention of the law' (or more precisely: 'of the statute or legislation enacted in pursuance thereof').[32]

Many comments have been made on provisions on the reversal or setting aside a decision otherwise than on appeal, which by their nature are the most difficult. It is no doubt reasonable to suggest a certain reorganisation of Chapter 12 while amending the CAP; this should involve, in particular, the separation of provisions on defective decisions from those on non-defective ones.[33] However, there is no doubt that issues related to the setting aside of a decision as null and void come to the fore in this context, considering the experience accumulated so far. Hence, Article 137(1)(1) should be amended so that it also applies clearly to a mistake in venue (lack of territorial jurisdiction—until now, this deficiency has been made up for by extensive interpretation). A consensus was achieved a long time ago that sub-paragraph 2 of this paragraph needed to be amended; attempts were also made put limits on the usually very broad interpretation of this provision. Its new wording could adopt the criterion of 'gross contravention of the law' (or more precisely: 'of the statute or legislation enacted in pursuance thereof') or follow the well-known opinion of the Central Commission for the Systematisation of Administrative Legislation of 1 July 1970.[34] An ideal solution, as shown by fifty years of decisions (the provision in question is a verbatim repetition of Article 101(1)(b) of the 1928 Decree), is unlikely to be found. In this respect, a very positive role could be played by judicial decisions. Amending Article 138(2) & (3) is also necessary so that there is no doubt that in the event of a refusal to set aside a decision as null and void, the body should issue a decision which of course can be appealed (the position of the literature on this issue has been consistent for a long time).[35]

32 The criterion of 'contravention of statute' proposed by Jan Jendrośka seems to be too narrow.

33 Eugeniusz Ochendowski, "Propozycje udoskonalenia niektórych instytucji postępowania administracyjnego", *Państwo i Prawo*, no. 12. 1977: 55.

34 *GiAT*, no. 9. 1970: 3.

35 The paragraphs would be worded as follows: '§ 2. A competent organ shall issue a decision on setting aside or refusing to set aside a decision as null and void on request of a party or

A thought should be also given to other issues connected to the setting aside of a decision as null and void. One of them is the time limits involved (at least in the case of setting aside such a decision to the disadvantage of a party). Related issues are the date from which the set-aside decisions lapse (obviously *ex tunc*)[36] and the duty of the organ in question to revoke the legal effects of such decisions. The parties who suffered a loss due to the setting aside of a decision as null and void should be given the right to claim damages, similarly as in the case of setting aside a decision pursuant to Article 141, also through the courts (provided of course that they availed themselves in good faith of the rights granted to them by the decision).[37] It is believed that the CAP ought to be amended to settle such issues unambiguously.

6. The question of the judicial review of the legality of administrative decisions has long occupied the pages of our juristic journals. The misunderstandings that accumulated around this institution mainly in the 1940s and early 1950s were for the most part cleared up later. Judicial review, or rather its extension (because some judicial review is found in our country, mainly in the field of social insurance) was supported by almost all the authors of the publications that have come out since the work on 'the assessment and updating of the Code of Administrative Procedure' started;[38] hence, it would be a moot point to de-

on its own motion. § 3. Against such a decision a party can appeal, unless the decision has been issued by a supreme state administration organ'.

36 Ochendowski, 56 believes that 'a stance should be taken on the reasons of nullity of administrative acts resulting in the acts not producing any legal effects whatsoever (act that is null and void *ex tunc*) and on the reasons the occurrence of which will nullify only the act itself with the legal result *ex nunc*, i.e. from the moment the decision nullifying the previous administrative act is issued'.

37 View Jendrośka, 23; **Ś**wiątkiewicz, *O potrzebie*, 17 ff. who rightly observes that 'There is […] a concern should the prospect of paying damages make administration supervision organs less willing to set aside defective decisions' which is seen in practice with respect to the nullification of decisions under Article 141. Only the simultaneous introduction of the judicial review of administration would make—in the present author's opinion – such a provision fully effective.

38 Separate articles were devoted to judicial review by Janusz Łętowski, "Kontrola sądowa — dlaczego i jaka?", *Gazeta Prawnicza*, no. 16. 1977; Mirosław Wyrzykowski, "Sądowa

scribe yet again its many and indisputable advantages. Incidentally, work on the statutory regulation of judicial review has been covered by the government programme of law improvement for 1974–1980.

The search for right solutions is greatly assisted today by ample opportunity for comparison with foreign legislation and our past legislative attempts. Above all, Romanian (1967) and Bulgarian (1970) statues,[39] both enacted in the last decade, and our two draft bills on the judicial review of administration of 1958 and 1972 must be mentioned in this context, with a special focus on the former bill whose form is mature – as it has gone through almost all the drafting stages in the Codification Commission.

What follows are a few comments on possible legislative solutions. Today, two basic types of the judicial review of administration are encountered: one where reviewing is performed by separate administrative courts and the other where this is done by common courts of law. In the countries of Western Europe, the separate administrative judiciary dominates; next to administrative courts of general jurisdiction (the Polish Supreme Administrative Tribunal before WWII was one such court), there are diverse special tribunals, e.g. social security tribunals (we have them too, lately – courts of labour and social insurance). Socialist countries, in turn, show a tendency to keep judicial review within the framework of common courts of law. Each of the two types of judicial review has its advantages. In view of our tendency to keep the judiciary uniform, in particular on its highest tier, it seems that it would be most appropriate to entrust the review of the legality of administrative decisions to ordinary courts of law, specifically provincial courts (administrative divisions) and the Supreme Court (Administrative Chamber).

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kontrola legalności decyzji administracyjnych. Europejskie państwa socjalistyczne", *Gazeta Prawnicza*, no. 19. 1977. Earlier above all Ludwik Bar, "Sądowa kontrola decyzji administracyjnych", *Państwo i Prawo*, no. 3. 1973; Jerzy Świątkiewicz, "Sądowa kontrola działalności administracji w PRL", *Państwo i Prawo*, no. 8–9. 1976.

39 The texts of both statutes can be found in Jerzy Starościak, Marek Wierzbowski, eds., *Ustawodawstwo o postępowaniu administracyjnym europejskich krajów socjalistycznych*. Kraków, 1974.

When setting the range of matters subject to judicial review, use is usually made of the method of a general clause limited by a negative enumeration. This method was employed in both our draft bills and the Romanian and Bulgarian statutes. The scope of a negative enumeration, rather limited in the nature of things (otherwise, the use of a general clause would have no sense, would it?), varies of course from system to system. For instance, disciplinary, penal-fiscal and national defence matters are excepted, making the question of the scope of judicial review a stumbling block to be considered in the course of the legislative process.

Besides reviewing the legality of a decision (illegality criteria should of course be made as precise as possible), the court should have power to rule on the so-called 'silence of the authorities'. A complaint about the 'silence of authorities' is the most effective remedy for a delay or the silence of an organ in a given case, known for example, to the Romanian and Bulgarian statutes.

The procedure before the courts would have a single instance: the Supreme Court would hear complaints against the decisions of supreme state administration organs, while provincial courts would rule in principle on the decisions of the other organs. If, however, a case heard by a provincial court posed a legal question giving rise to serious doubts, the court would be able to refer it for a decision to the Supreme Court. The latter would be able to then take over the case altogether and give a ruling on it on its own. A provincial court would have to transfer a case to the Supreme Court for a ruling if it believed that a legal provision issued by a supreme state administration organ, on which the appealed decision has relied, was illegal.[40]

An appeal to a court would only ensue (except for the 'silence of authorities') from a final administrative decision. The right to lodge an appeal would be enjoyed by any person who claimed that the decision infringed his/her

40 This is what Article 8 of the 1958 draft bill said. For more on the draft bill view Zbigniew Janowicz, *Ogólne postępowanie administracyjne*. Warszawa, and Poznań, 1978, 237 ff.

rights and/or imposed a duty on him/her without legal grounds[41] and a public prosecutor if he/she claimed that a decision contravened the law. It would be thinkable to give the right to lodge appeals to a social organisation as well, one that participates in proceedings, having been granted the rights of a party.

A court judgment should have the nature of a cassation. If there is a need for a new decision, the administration body whose decision has been set aside should issue one promptly (in principle within a month of the date of the reception of a certified copy of the judgment). The legal position taken by the court in the opinion to a judgment binds the respective organ. A certified copy of the judgment quashing a decision is sent to the supreme state administration organs; if, however, a decision has been set aside because it was based on a provision contravening the law, the Supreme Court notifies the President of the Council of Ministers of the fact (the mechanism of 'whistle-blowing').

The Supreme Court, besides hearing complaints against the decisions of supreme state administration organs, would hear extraordinary appeals against final sentences and above all, resolve legal questions and explain legal provisions, giving rise to doubts in practice or causing discrepancies in judicial decisions (through 'guidelines on the administration of justice').[42] This last-mentioned function is much needed by decisions taken in our administrative law and decisions applying other branches of law used in administrative jurisdiction. Such resolutions and explanations, entered into the book of legal principles, would of course bind the courts, and indirectly state administration organs as well.

As far as the choice of a legislative form is concerned, two solutions are possible: a separate statute or the introduction of suitable provisions into the administrative proceedings act. The former is adopted by most contemporary jurisdictions (among socialist countries by Yugoslavia and Romania, and both our draft

41 However, the court considers on its own motion whether there are no grounds for setting a decision aside specified in statutes

42 This would no doubt considerably diminish the need for all kinds of interpretative acts such as instructions, circulars, etc.

bills), while the latter by Hungary and Bulgaria. The former seems to be more advisable, because it enables a comprehensive and possibly exhaustive regulation of organisational and procedural matters without referring (at least without too many references) to the law on the structure of common courts and Code of Civil Procedure. Such references involve certain technical difficulties, or worse still, frequent interpretative ones. One must not forget in this context that in the case of the judicial review of administrative decisions we are dealing with matters that are generically different from civil cases. Moreover, this choice of a legislative form is supported by the fact that the scope of the judicial review of administrative decisions may not coincide with the scope of CAP application.

7. Finally, a few general comments. In the course of the current discussion, views are aired, as never before in our juristic literature, suggesting that it would be advisable to extend the CAP to various matters that sometimes go far beyond the 'trial' framework. What clearly looms is a dispute over the conception of codification of general administrative proceedings.[43]

Is the codification to be traditionally limited solely to jurisdictional administrative proceedings, i.e. cover provisions on creating and appealing against external administrative acts, that is decisions, or is it to include provisions on judicial review of such acts and per chance provisions on their enforcement? Perhaps it should also cover certain individual acts concerning relations between state enterprises and their superior units and organs, and possibly even certain acts issued as part of relations between administration bodies. Another question is if it is possible for the codification to cover (possibly in a more distant future) the mode of issuing general acts (for instance, normative ones) by state administration organs.[44] Finally, are we supposed to include provisions on performing other acts in law (e.g. the issuing of certificates) by state ad-

43 Cf. Janowicz, *O kodyfikacji*, 30 ff.
44 Cf. the proposal made by Jendrośka, 29.

ministration organs in the CAP? Or rules governing the giving of opinions and consultations (for instance on legislative matters), etc.[45]

In agreement with the principle of the internal cohesion of law, so rightly emphasised today, a single act should regulate only homogeneous matters or ones that are closely interconnected. Thus, the CAP should be limited to administrative proceedings *sensu stricto*, or the administrative trial, maintaining (at least for the near future) its connection with proceedings in matters of complaints and proposals. After all, the connection has been borne out by some positive tradition. The CAP could also, if reasons of legislative policy argued for such a solution, cover the mode of appealing against administrative decisions to courts.

References

Bar, Ludwik and Siarkiewicz, Kazimierz. "Doskonalenie postępowania administracyjnego." *Państwo i Prawo*, no. 3. 1977.

Bar, Ludwik. "Sądowa kontrola decyzji administracyjnych." *Państwo i Prawo*, no. 3. 1973.

Borkowski, Janusz. *Postępowanie administracyjne. Zarys systemu*. Warszawa, 1976.

Borkowski, Janusz. "Questions of Improvements to Administration in the Light of the Resolutions of the 7th Congress of the Party." *Państwo i Prawo*, no. 12. 1976.

Borkowski, Janusz. "Redakcyjne spotkanie dyskusyjne. Doświadczenia ze stosowania k.p.a." *Rada Narodowa, Gospodarka, Administracja*", no. 19. 1977.

Dawidowicz, Wacław, *Ogólne postępowanie administracyjne, Zarys systemu*. Warszawa, 1962.

Iserzon, Emanuel, and Jerzy Starościak, eds. *Kodeks postępowania administracyjnego. Komentarz*, 4th ed. Warszawa, 1970.

45 Which is suggested by Bar, *Sądowa*, 8.

Janowicz, Zbigniew. “Konferencja naukowa poświęcona zagadnieniom postępowania administracyjnego.” *Ruch Prawniczy, Socjologiczny i Ekonomiczny* 31, no. 4. 1961.

Janowicz, Zbigniew. *Ogólne postępowanie administracyjne*. Warszawa, and Poznań, 1976.

Janowicz, Zbigniew. *Ogólne postępowanie administracyjne*, Warszawa, and Poznań, 1978.

Janowicz, Zbigniew. “O kodyfikacji postępowania administracyjnego. Kilka uwag i refleksji na tle porównawczym.” In: S*tudia z zakresu prawa administracyjnego ku czci Prof. dra M. Zimmermanna*. Warszawa, and Poznań, 1973.

Jendrośka, Jan. “Kodeks postępowania administracyjnego a proces doskonalenia funkcjonowania administracji państwowej.”, *Państwo i Prawo*, no. 4. 1977.

Łętowski, Janusz. “Kontrola sądowa — dlaczego i jaka?.” *Gazeta Prawnicza*, no. 16. 1977.

Ochendowski, Eugeniusz. “Propozycje udoskonalenia niektórych instytucji postępowania administracyjnego.” *Państwo i Prawo*, no. 12. 1977.

Rozmaryn, Stefan. “Projekt kodeksu postępowania administracyjnego – w nowej postaci.” *Państwo i Prawo*, no. 4–5. 1960: 609–629.

Starościak, Jerzy, and Marek Wierzbowski, eds. *Ustawodawstwo o postępowaniu administracyjnym europejskich krajów socjalistycznych*. Kraków, 1974.

Świątkiewicz, Jerzy. “O potrzebie i kierunkach nowelizacji k.p.a.” *Państwo i Prawo*, no. 6. 1977.

Świątkiewicz, Jerzy. “Sądowa kontrola działalności administracji w PRL.” *Państwo i Prawo*, no. 8–9. 1976.

Wengerek, Edmund. *Przeciwegzekucyjne powództwa dłużnika*. Warszawa, 1967.

Wyrzykowski, Mirosław. “Sądowa kontrola legalności decyzji administracyjnych. Europejskie państwa socjalistyczne.” *Gazeta Prawnicza* no. 19. 1977.

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Legal Language as an Instrument for Describing Social Reality. Searching for Innovative Narrations[1]

Abstract: How we function in social reality is determined by various types of cognitive schemas. These concern people, social events and other phenomena. According to the concept offered by various postpositivist currents, including postmodernism, poststructuralism and critical theory, such schemata cannot be objective. The most important element of postmodern considerations is the discovery of the arbitrary nature of modernity. This means rejecting the Enlightenment belief in progress. Innovation, understood as modernity resulting from human reason, is illusory in the postmodern perspective. Innovation consists precisely in a rejection of the myth of the existence of some absolute, objective truths that constitute the social order. The world is textual, made up of many alternative narratives. Definitions, including legal definitions, are socially constructed. They arise from specific social conditions, at a particular stage of development of a particular group. The assumption made by postmodernists is that language, including professional language – such as the language of law or legal language – is neither neutral nor transparent. The innovative power of this language lies in its use of narratives that influence the functioning of social

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groups of varying degrees of complexity. It is therefore necessary, adopting a postmodern interpretation, to look at the text of legal language in a similar way as we look at other texts. That is, to see in the narrativity of this language structural similarities with other texts that constitute social reality.
Keywords: postmodernism, poststructuralism, methods of textual analysis, genealogy, affordance, narrations in the legal language and the language of law.

Introduction

Lawyers are reluctant to adopt a pluralistic view of legal doctrine, fearing a blurring of basic concepts leading to terminological and, in effect, cognitive chaos. Legal doctrine, on the other hand, is meant to serve the purpose of ordering social reality, leading to a better understanding of the particular "cosmos" constituted by legal norms (the language of the law) and interpretative statements created by legal academia and jurisprudence (legal language / lawyers' language).[2] For this reason, the doctrine should be open to change, to adopting new concepts and narratives to accompany the interpretation of increasingly detailed legal acts. For the layman, this "cosmos" is usually only discoverable to a limited extent, which is due both to its hermetic nature, i.e., the difficulty entailed by specialist language, and to the limited interest most "ordinary" citizens take in the increasingly complex and specialized system of legal norms, even as it encroaches on almost every sphere of their lives.[3]

The crises of the last twenty years – the rise of terrorism, turbulence on the financial markets, large-scale population migrations and pandemics, have pro-

2 See Brenda Danet, "Language in the Legal Process", *Law & Society Review* 14, no. 3. 1980: 448 ff.

3 Cf. Paweł Nowak, and Mariusz Rutkowski, "Współczesne zmiany kulturowo-komunikacyjne a język prawa. Uwagi na marginesie propozycji nowego modelu uzasadniania orzeczeń sądowych", *Poznańskie Studia Polonistyczne. Seria Językoznawcza* 28, no. 1. 2021: 87–91. On equality in social communication, Gerd Antos, "Ist der Leie der Dumme? Erosion der Experten-Leie-Dichotomie in der Ära medial inszenierter Betroffenheit" in *Laien, Wissen, Sprache. Theoretische, methodische und domänenspezifische Perspektiven*, ed. T. Hoffmeister, M. Hundt, and S. Naths. Berlin, and Boston, 2021, 26 ff.

vided an impetus for policymakers to create new regulations affecting citizens in many areas previously reserved for the private sphere of life,[4] with the rationality of the legislator often giving way to short-term political objectives. This is worrying from the point of view of the stability of the state and of the entire legal order. The law and how it is interpreted should be independent of specific party interests.[5] The rationality of the legislator is expressed in balancing multiple interests. It is defined in the legal doctrine as the activity of state bodies legislating by following logic, reason and truthful information on a sound basis.[6]

Rationality understood in this way stems from the Enlightenment ideals that guided European legal doctrine up to the 19th century, when a relativisation of the notion of 'reason' in relation to constructing state objectives began to be considered. The 20th century marked the begin of state encroachment upon many spheres of civic activity that had previously remained outside the state's sphere of interest.[7] The basic axiom was to achieve the public good, and the activities of democratic states are centered upon this.[8]

Apolitical knowledge, including legal scholarship, is one of the most important foundations of modernity identified with Enlightenment progress. It is worth noting here that a politics of legal language and the language of

4 More Gustavo Maciel, *Legislative Best Practices During Times of Emergency*. Transparency International. Helpdesk, 1.06.2021. <https://knowledgehub.transparency.org/assets/uploads/kproducts/Helpdesk-2021_Legislative_best_practices-in-times-of-crisis-FINAL.pdf>, access: 02.04.2022. Crisis-driven reforms can even affect key sectors such as health; see, for example, the reform of the hospital system in Poland: <https://legislacja.rcl.gov.pl/projekt/12354951/katalog/12845067#12845067>, access: 02.04.2022.

5 See Adam Sulikowski, Rafał Mańko, and Jakub Łakomy, "Polityczność prawa i ogólnej refleksji nad prawem: wprowadzenie", *Archiwum Filozofii Prawa i Filozofii Społecznej* no. 3. 2018: 6 ff.

6 More Marian Andrzej Liwo, "Nieracjonalność działań prawodawcy jako jedna z przyczyn niepoprawności prawa – wybrane przykłady z prawa administracyjnego, karnego i prawa pracy", *Przegląd Prawa Publicznego* no. 6. 2019: 9.

7 Cf. Georg Meyer (bearbeitet v. Gerhard Anschütz), *Lehrbuch des deutschen Staatsrechts*. Berlin, 2005, 14.

8 In German "Gemeinwohl". See Karl-Peter Sommermann, "Die Disskussion über die Normierung von Staatszielen", *Der Staat* 32, no. 3. 1993: 431 ff.

law is inevitable in practice. But this is politics understood as an institutional framework and regulatory framework (standards, practices, rules of conduct) that create an order enabling: human coexistence (the hierarchical nature of the state system), a just distribution of wealth, and the resolution of conflicts within the state. Politics thus understood means the political nature of the system within which laws are made and applied. The law itself, though, and how it is interpreted, should be objective. That is, they should be as independent as possible, external to the lawyers interpreting legal norms. This element of objectivity is, as in the case of any expertise, a legitimising element. Professional expertise, which includes interpreting the law, should be based on independent knowledge.[9]

The progressive digitalisation of public administration is becoming an additional instrument for monitoring social activity at almost all levels. This is taking place in parallel with intensive processes of internationalising public governance, processes that have long since moved beyond the traditional, national normative order. The processes of technologicalisation and globalisation are forcing a redefinition of the existing conceptual framework in public law.[10] In this context, classical legal positivism is being replaced by post-positivist trends – poststructuralism, postmodernism, critical theories, and post-colonialism. Social constructivism, which allows for norms to be interpreted in the context of the identity of the actors involved in various social interactions, has also been growing in importance for several decades.[11]

In the context of post-positivist trends, cultural background is important to any understanding of the language of law and the language of legal doctrine. It constitutes an important basis for questioning the objectivity of the researcher. In the literature of the social sciences, in the context of critical theo-

9 Cf. Sulikowski, Mańko, and Łakomy, 7; Natalia Kohtamäki, *Theorising the Legitimacy of EU Regulatory Agencies*. Berlin, 2019, 278–284.

10 See Jerzy Leszczyński, "O niezmienności sposobu uprawiania dogmatyki prawa", *Studia Prawno-Ekonomiczne* 31, no. 81. 2010: 119–122.

11 See Gunther Teubner, "How Law Thinks: Toward a Constructivist Epistemology of Law", *Law & Society Review* 23, no. 5. 1989: 728–732.

ries and constructivist thought, the category of intersubjectivity appears; this is precisely related to interactions resulting from specific cultural identities.[12] Cultural acts are distinguished in legal studies from natural acts or acts in the behavioural sense. They are related to a specific context, and to the reading of codes which are clear to persons who have grown up in a given culture or know it well.[13] Legal language, which is an essential component of legal culture within any legal order, is also becoming such a code.[14]

This article will present the main characteristics of postmodern narrative in relation to the language of law and legal language as tools of social communication. Professional language, as a specific, largely abstract semantic system, constitutes a culturally significant form of narration in the surrounding "multilogue" – a polyphony of various communications. Despite the doctrinal assumptions of its immutability within the framework of its basic assumptions, it is subject to change.[15] Those changes result from social re-evaluations, external influences, technological innovations, and the challenges that individual societies must face.

12 "(…) Constructivists are particularly interested in the prepropositional knowledge that precedes any propositional content. This prepropositional knowledge is often described in terms like 'tacit knowledge' or 'habitus'. This kind of knowledge is not to be found in propositions and laws, but in conventions and rules whose 'necessity' cannot be shown deductively but needs to be established discursively"; Oliver Kessler, "On Logic, Intersubjectivity, and Meanings: Is Reality an Assumption We Just Don't Need?", *Review of International Studies* 38, no. 1. 2012: 255, 258.

13 Cf. Leszek Nowak, "Performatywy a język prawny i etyczny", *Etyka*, no. 3. 1968: 151 ff.

14 See Anna Piszcz, and Halina Sierocka, "The Role of Culture in Legal Languages, Legal Interpretation and Legal Translation", *International Journal for the Semiotics of Law* 33, no. 3. 2020: 534 ff. "(…) All cognition is by its very nature an interpretation, so there is no such thing as cognition that is not relativised to (any concrete) perspective, i.e. providing, as metaphorically put by philosopher Thomas Nagel, 'a view from nowhere'"; Sulikowski, Mańko, and Łakomy, 9. See also Hansjürgen Garstka, "Zum Beitrag der Linguistik zur rechtswissenschaftlichen Forschung", *Rechtstheorie*, no. 10. 1979: 92–102.

15 Leszczyński, 118 ff. See also Matthias Jestaedt, "Wissenschaft im Recht. Rechtsdogmatik im Wissenschaftsvergleich", *JuristenZeitung* 69, no. 1, 2014: 4–10.

Difficulties in Describing the Changing Social Reality

The flexibility of law and the legal doctrine can be seen as a direct answer to the search for the most appropriate solutions (the principle of legal adequacy)[16] in the face of cultural evolution resulting from processes of internationalisation, intensive population displacement, and deterritorialisation (the detachment of social space from specific national borders).[17] Such challenge-appropriate solutions are often considered innovative, as they are meant to be a modern response to the changing needs of a given social group.[18]

A special role in these processes is played by administrative law, which concerns the current functioning of the state. Referring to the French tradition of understanding administrative law – it concerns public utility (Fr. *utilité publique*), i.e. actions in the general interest (Fr. *intérêt* général).[19] It is therefore close to the daily lives of citizens, and affects almost every aspect of their functioning (from birth to death).[20]

In administrative law, the complexity of the concepts employed makes defining them difficult. A starting point can be the term 'public administration' itself, which, in accordance with the ideals of legalism, should be closed within

16 See Sonja Buckel, "Empire oder Rechtspluralismus? Recht im Globalisierungsdiskurs", *Kritische Justiz* 36, no. 2. 2003: 185 f.; Marzena Myślińska, "The Principle of Determinancy of Legal Rules as an Element of Competent Legislation", *Comparative Legilinguistics*, no. 5. 2011: 134.

17 Cf. Jakub Potulski, "Deterritorialization of the World as a Challenge for Contemporary Political Geography", *Journal of Geography, Politics, and Society* 6, no. 2. 2013: 36 ff.

18 "The task of the science of administrative law is (…) the development of concepts which, by describing reality, opens up new future research perspectives."; Irena Lipowicz, "Dylematy siatki pojęciowej w nauce prawa administracyjnego" in *Koncepcja systemu prawa administracyjnego. Zjazd Katedr Prawa Administracyjnego i Postępowania Administracyjnego Zakopane 24–27 września 2006 r.*, ed. J. Zimmermann. Warszawa, 2007, 22. See also Sławomira Wronkowska, and Zygmunt Ziembiński, *Zarys teorii prawa*. Poznań, 2001, 127 ff.

19 More Christine Adams, "In the Public Interest: Charitable Association, the State and the Status of utilité publique in Nineteenth-Century France", *Law and History Review* 25, no. 2. 2007: 287 ff.

20 Cf. Jan Zimmermann, *Prawo administracyjne*. Warszawa, 2020, 20, 45; Elżbieta Ura, *Prawo administracyjne*. Warszawa, 2021, 21; Dirk Ehlers, "Verwaltung und Verwaltungsrecht im demokratischen und sozialen Rechtsstaat" in *Allgemeines Verwatungsrecht*, eds. D. Ehlers, and H. Pünder. Berlin, and Boston, 2016, 7.

a specific legal framework, but in connection with the dynamic development of societies often escapes rigid normative constructions.[21] It is well known that the rapid evolution taking place in various sectors of the economy, as well as in various areas of citizens' lives, is preceding the development of laws regulating those activities. The source of the variety of administrative forms will mainly be, therefore, the multiplicity of tasks performed by administrative bodies, but is also connected with the processes of the Europeanisation of administrative legal norms and public administration institutions executing the law in the Member States (known as the 'European executive order').[22] The multiform character of public administration refers, therefore, both to the subjective sphere – connected with the diversity of tasks ascribed to it, and to the subjective sphere – connected with the diversity of public and nonpublic-law entities performing tasks of public administration at the national and supranational levels.[23]

In accordance with the principle of legalism, and to contain the actions of public administration within a coherent legal framework, the multiform character of administration should be secured within a normative unity. This also fits in with the postulates of linguistic precision in the legal system. These elements constitute a guarantee of citizens' trust in the rule of law and provide a starting point for ensuring the stability of the system (a legible, coherent system of law as a basis for legal certainty).[24] This is not an easy task,

21 See Zbigniew Cieślak, Irena Lipowicz, Zygmunt Niewiadomski, and Grażyna Szpor, *Prawo administracyjne*. Warszawa, 2012, 21–50; Renata Kusiak-Winter, "Wielopostaciowość administracji w prawie administracyjnym", *Opolskie Studia Administracyjno-Prawne* 16, no. 1(3). 2018: 71 f.

22 Cf. Natalia Kohtamäki, "Europejska administracja zintegrowana w służbie wspólnoty" in *Prawo administracyjne w służbie jednostki i wspólnoty*, ed. P. Wilczyński et al. Warszawa, 2022, 107 ff.; Deirdre Curtin, and Morten Egeberg, "Tradition and Innovation: Europe's Accumulated Executive Order" in *Towards a New Executive order in Europe*, ed. D. Curtin, and M. Egeberg. London, and New York, 2015, 5–19.

23 More Kohtamäki, *Theorising*, 34, 42–44.

24 More: Marta Andruszkiewicz, "Problem jasności w języku prawnym – aspekty lingwistyczne i teoretycznoprawne", *Comparative Legilinguistics* 31. 2017: 7, 16; Myślińska, 128–131.

and national legislators cope with it with varying degrees of success. The lower the communicativeness and precision of normative acts, the lower citizens' acceptance of the law.[25]

It should be noted in this context that the legislator does not always provide definitions of how specialised terms are to be understood. Often, interpretation or reinterpretation is needed within the framework of linguistic, historical or systemic interpretation. There is a problem of ambiguity or vagueness of some terms, and how they are understood reflects societal changes. In the case of professional language, terms from the vernacular are borrowed and acquire new meanings within the framework of specialised use. Their meaning and scope of use may be expanded or restricted. Meaning can also be read from the context in which the legislator places them in the standard.[26]

Legal definitions, as a rule, eliminate linguistic ambiguity. But here as well, it is possible to intentionally leave the interpretation open.[27] The lack of the general intelligibility of legal terms – i.e., those formulated by the legislator in normative acts – is a significant problem in social communication. This is because normative acts are addressed to citizens and should be understandable at the level of linguistic competence enjoyed by speakers of the language in question on a daily basis.[28] The deductive line of reasoning based on linguistic interpretation is meant to enable everyone, not just judges or lawyers, to objectively reach correct results if the premises within the deduction are correct.

25 More Cathryn Johnson, Timothy J. Dowd, and Cecilia L. Ridgeway, "Legitimacy as Social Process", *Annual Review of Sociology* 32. 2006: 58–61.

26 "Legal terms are formed as neologisms from the composition of common language words, determined by definitions and, due to their originating nature, have their validity only for technical language."; Karolina Kęsicka, "Unbestimmte Rechtsbegriffe und Äquivalenzfrage: ein Fall für den Übersetzer", *Studia Germanica Gedanensia*, no. 29. 2013: 127; Sławomira Wronkowska, "O cechach języka tekstów prawnych" in *Język polskiej legislacji, czyli zrozumiałość przekazu a stosowanie prawa. Materiały z konferencji zorganizowanej przez Komisję Kultury i Środków Przekazu oraz Komisję Ustawodawczą Senatu RP*. Warszawa, 2007, 21.

27 See Maciej Zieliński, *Wykładnia prawa. Zasady, reguły, wskazówki*. Warszawa, 2012, 200 ff.

28 "It is not, however, about any readability of the message, but about the ability to reconstruct the normative content from the provisions, that is, to reconstruct the scope of application and normative range of the legal norm"; Andruszkiewicz, 11.

Legal deduction is supposed to lead to objectively correct results.[29] However, as in the case of other technical languages, there are certain nuances of meaning that require specific factual knowledge, contextual understanding, or an association of certain relationships between norms in the legal system. Such competences are reserved for the "initiated", i.e., experts in a given field, as is the case in other specialised areas of language.[30]

Language as an Instrument of Cognition and Understanding in a Democratic State

Language is understood as a specific system of signs transmitted between generations. This system shapes the cognition and thinking of both individuals and collectives, determining individual and collective identity. It thus becomes a powerful mechanism of influence. This influence can be interpreted as, firstly, coordinating, and secondly, exerting, influence within different social groups.[31]

Language is used for dialogue, communication, transferring information, for the interactions of all the parties involved. In this context, to which Jürgen Habermas repeatedly refers in his works, language can be understood as an indispensable element in creating and legitimising the modern democratic state; a state based on deliberation.[32] Mutual understanding (Germ. *gemeinsame Verständigung*) is possible through conversation, through communication leading to an agreement resulting from listening to the arguments of the other side (Germ.

29 See Maciej Koszkowski, "Legal Analogy as an Alternative to the Deductive Mode of Legal Reasoning", *Adam Mickiewicz University Law Review* 6. 2016: 13, 16 ff.

30 An incompetent linguistic formulation of provisions may lead to discrepancies with the legislator's original idea. More on the process of decoding norms, Wronkowska, 16, 18.

31 More Jarosław Klebaniuk, "Rola języka w postrzeganiu procesów społecznych", *Nierówności społeczne a wzrost gospodarczy*, no. 24. 2012: 270–276; Joanna Rączaszek-Leonardi, *Zjednoczeni w mowie. Względność językowa w ujęciu dynamicznym*. Warszawa, 2011, 15–19, 37–41.

32 Basically, people coordinate their interventions in the world through communication which is oriented toward the consent of the partners. See Jürgen Habermas, *Theorie des kommunikativen Handelns. Handlungsrationalität und gesellschaftliche Rationalisierung*. Frankfurt am Main, 1981, 388 ff.

Einverständnis).[33] Social relations are based on the development of consensus (Germ. *Konsensbildung*).[34] Within the state, understood as a deliberative liberal democracy in the Habermasian view, interactions take place primarily through non-manipulative instruments. What is important is the discourse and the search for consensual instruments resulting from the convergence of the discussants. A state system understood in this way entails openness. According to Habermas, social solidarity can only be worked out in processes of deliberation, communication and information flow.[35]

Communicating through language allows shared meanings of community-relevant terms, such as 'public interest' or 'common good', to be developed. The legislator ascribes specific meanings resulting from the adopted system of values.[36] Law-making and law enforcement in a democratic state can never be driven by individual considerations, by selfish motives of narrow groups of decision-makers. They must reflect the needs of the community, whose cognition is only possible in processes of communication. Habermas identifies the linguistic changes taken from the social sciences[37] with shaping social reality through discourse.[38]

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33 "We understand a speech act when we know what makes it acceptable." (Germ. „Wir verstehen einen Sprechakt, wenn wir wissen, was ihn akzeptabel macht."), Habermas, *Theorie*, 400. See also Jürgen Habermas, "Aspekty racjonalności działania" in *Wokół teorii krytycznej Jürgena Habermasa*, eds. A.M. Kaniowski, and A. Szahaj. Warszawa, 1987, 123–125.

34 So called communicative intersubjectivity Anna Krzyżówek, *Rozum a porządek polityczny. Wokół sporu o demokracje deliberatywną*. Kraków, 2010, 46 ff.

35 Anchoring cognition in social discourse, see Wojciech Cyrul, "Problem ważności w habermasowskiej teorii uniwersalnej pragmatyki", *Ruch Prawniczy, Ekonomiczny i Socjologiczny*" 67, no. 2. 2005: 209, 215 ff.

36 More Kęsicka, 128–130; Karl Engisch, *Einführung in das juristische Denken*. Stuttgart, 1983,190 ff.

37 More Richard Rorty, "Wittgenstein and the Linguistic Turn", *Austrian Ludwig Wittgenstein Society – New Series* 3. 2013: 4 ff.

38 At the same time, the last few decades have seen a transfer of deliberative mechanisms from the level of national democracies to the level of democratic collective structures. Cf. Jürgen Habermas, "The Crisis of the European Union in the Light of Constitutionalization of International Law", *European Journal of International Law* 23, no. 2. 2012: 339 ff. See also Lotar Rasiński, "Trzy koncepcje dyskursu: Foucault, Laclau, Habermas", *Kultura – Społeczeństwo – Edukacja* 12, no. 2. 2017: 42–44.

On the other hand, we have the system of power: the state and its authority as a system that is crucial from the viewpoint of the lawyer specializing in administrative law. According to the theory of subordination, the public law governing relations in the state consists in the power relations of subordination and superordination. The state is the subject of authority, and law in this context serves to justify specific state powers. The law defines the competences of certain bodies. Within its boundaries, public goals and tasks are implemented, but also within its boundaries the organisation and scope of activity of public administration bodies are regulated.[39]

To quote Immanuel Kant, "(…) the *possession* of *power inevitably* spoils the free use of *reason*" (Germ. "[…] der Besitz der Gewalt das freie Urteil der Vernunft unvermeidlich verdirbt").[40] The relationship between power and knowledge expressed through language has fascinated philosophers, political theorists, and legal scholars for decades. In the 20th century – since the second half of the 1970s – postmodernist, or poststructuralist, concepts have gained popularity; these treat language and the production of power / knowledge as a normative and political problem. Michel Foucault believed that power and knowledge directly derive from each other and constantly influence each other.[41] Language shapes the social reality in which we function: it determines how we understand certain social behaviours, but also the institutions that regulate those behaviours and the norms established by those institutions. The evolution of law – in the national and international contexts (e.g., within global administrative law) – should, according to this interpretation,

39 Cf. Zimmermann, 46–49; Dejan Vitanski, "Hierarchy and Subordination in the Public Administration – Synonyms, Dichotomous Categories or Predestined Two Sides of the Same Medal?", *Knowledge – International Journal* 30, no. 6. 2019: 1393–1399.

40 Immanuel Kant, *Zum ewigen Frieden; ein philosophischer Entwurf*. Leipzig, 1917, VIII, 369. See Gerhard Funke,"Theorie und Praxis" in *Phenomology on Kant, German Idealism, Hermeneutics and Logic*, eds. O.K. Wiegand, R.J. Dostal, L. Embree, J.J. Kockelmans, and J.N. Mohanty Dordrecht, 2000, 252.

41 Cf. Michel Foucault, "The Subject and Power", *Critical Inquiry* 8, no. 4. 1982: 777 ff.

be seen as an expression of the development of knowledge.[42] This knowledge is directly reflected in the system of concepts currently used in the law – concepts that are variable over time and directly dependent on the stage of social development.[43]

Another postmodernist, Richard Ashley, focused on the influence of language on our understanding of the place of the state in an anarchic international order. He postulated a different concept – corresponding to the state of knowledge – of modern state governance, which is equivalent to human governance. This concept also corresponds to theoretical considerations within the science of administrative law.[44] In this context, German theorists have played a leading role, including Eberhard Schmidt-Aßmann, who is the co-author of the concept of steering in German administrative law. Under this concept, the law is a kind of tool for steering. It is supposed to guide citizens to choose the behaviour desired by the state. This understanding is a definitional enrichment of the notion of administrative law. Steering includes much more than the state authority characteristic of public law. A social change in how certain notions are understood influences concrete social phenomena, i.e. a change how the role of the state in relation to citizens is understood changes the specific ruling behaviour of the state.[45]

The idea of steering in the context of modifying the administrative functions of the state has entered the legal language of Polish scientific debate from the concept functioning in the German legal doctrine. This is a good ex-

42 More on the development of these structures, Giacinto della Cananea, "The Genesis and Structure of General Principles of Global Public Law" in *Global Administrative Law and EU Administrative Law. Relationships, Legal Issues and Comparison*, eds. E. Chiti, and B.G. Mattarella. Berlin, and Heidelberg, 2011, 92–108.

43 See Richard Devtak, "Postmodernism" in Burchill, Scott, Andrew Linklater, Richard Devetak, Jack Donnelly, Matthew Paterson, Christian Reus-Smit, and Jacqui True, *Theories of International Relations*. Basingstoke and New York, 2005, 162 ff.

44 Devtak, 162 ff. See also Richard Ashley, "The Poverty of Neorealism", *International Organization* 38, no. 2. 1984: 233–237.

45 See Eberhard Schmidt-Aßmann, *Verwaltungsrechtliche Dogmatik. Eine Zwischenbilanz zu Entwicklung, Reform und künftigen Aufgaben*. Tübingen, 2013, 19 ff.

ample of how various narratives diffuse, leading to innovative thinking about the law. The thinking in one legal culture affects another as certain pattern of understanding social reality are received.[46] On the other hand, the very concept of steering is the result of an interdisciplinary influence on German legal doctrine. This multilevel thinking about the administrative functions of the state draws on the methodologies of economics, management science, political theory and sociology.[47]

The Construction of Meanings – Law as an Instrument of Specific Semantic Narratives

Within the postmodern paradigm in the social sciences, for the construction of meanings it is important to reconstruct a 'genealogy', which is a kind of historical thinking. This historical thinking defines the meanings and functions of the relationship between power and knowledge. Specific interpretations of the past – culturally conditioned – directly influence language, including the language of the norms established by the legislature (i.e., the language of law), as well as legal language, i.e., language about law, and in this way, how those norms are interpreted in the doctrine and jurisprudence.[48] History and the historical experience of certain peoples, from the genealogical perspective proposed by postmodernists, constitute an endlessly repeated game of domination.[49] There is no one big story, but a series of events – resulting from power-knowledge relations. Every item of knowledge is conditioned by a specific historical, cultural, and political context. The same events are presented in dif-

46 Maciej Hadel, "Prawo administracyjne jako nauka o sterowaniu w świetle kryzysu prawa administracyjnego i dylematów badawczych – aktualne tendencje w metodologii badań nad prawem administracyjnym", *Przegląd Prawa Publicznego*, no. 6. 2017: 68–71.

47 Cf. Schmidt-Aßmann, 21 ff.; Jan Izdebski, "Związki nauki prawa administracyjnego z naukami o zarządzaniu", *Roczniki Nauk Prawnych* 25, no. 4. 2015: 182; Lipowicz, 24.

48 See Bronisław Wróblewski, *Język prawny i język prawniczy*. Kraków, 1948, 51–57, 136–142.

49 More Craig Browne, "Postmodernism, Ideology and Rationality", *Revue Internationale de Philosophie* 64, no. 251(1). 2010: 81 ff.

ferent ways using language. This applies most often to the reporting of historical events that are important for national identity. However, this perspective is also present in relation to other phenomena relevant to specific social groups, such as law. There is no universal structure of reference – a single perspective – there are a multitude of different perspectives and references. Hence, doctrinal views, that is, language about law, also derive from specific cultural contexts.[50] For example, in the case of the Polish and German systems of law, due to their proximity of culture and geography, the distances are small, and so the cultural contexts are often similar. This has a direct impact on many specialist terms having very similar meanings in the two systems, both in the language of legal regulations and norms, and in the language of lawyers.[51]

Referring to Jacques Derrida, we can say that, in a dynamically changing world, a world dominated by information from everywhere, we have interpretations of interpretations. And these interpretations, or in other words perspectives, constitute the world by imposing specific meanings.[52] That is, they are not just a simple description of the real world, but they are its constituent objects, they create it. Contemporary reality is narrative in nature. One narrative replaces another. There is no single metanarrative that can replace the multitude of parallel discourses by which events are given the status of reality. Narratives are created by specific semantic expressions, clusters of meanings. They create specific metaphors that become part of collective identities. The political component of such metaphors is important. There are no neutral, fully objectified narratives. This is not possible, because the world is socially constructed.[53]

50 Devtak, 163–167.

51 See Stanisław Bieleń, *Polityka w stosunkach międzynarodowych*. Warszawa, 2010, 24 ff.; Jestaedt, 2.

52 Cf. Jacques Derrida, *Of Grammatology*. Trans. Gayatri Chakravorty Spivak. Baltimore, 1976, 158 ff.

53 Cf. Agnieszka Bógdał-Brzezińska, "Postmodernizm" in *Teorie i podejścia badawcze w nauce o stosunkach międzynarodowych*, eds. R. Zięba, S. Bieleń, and J. Zając. Warszawa, 2015, 222 ff.

Every community for which language is the constitutive bond (including a national community) is a phenomenon that must be explained in various contexts. How is it created? How are the concrete norms that shape the functioning of the state and its citizens created? How are they modified? The relations of power / authority / subordination / legitimate coercion attributed to the state are crucial here. They influence the creation of dominant narratives. According to Derrida, the world is textual. It is created as a text. Interpretation constitutes the social world. A necessary element in the process of understanding the world is deconstruction.[54] This allows the relationship between opposing concepts, which are never neutral towards each other, to be identified. One always stands in a privileged position, has a positive / complementary element, hierarchically placing this concept higher than the opposite concept. This is especially characteristic with abstract concepts, socially constructed within specific cultural references. An example: state sovereignty vs the anarchy of the international system. Such conceptual juxtapositions are dependent on each other. This is typical in the language of law.[55]

The textuality of the world provokes the necessity of performing a so-called 'double reading' in order to better understand the social phenomena that surround us. The first reading constitutes stability, confirms the status quo and repeats the dominant interpretations. The second reading is an attempt to deconstruct the existing world. The text – and more broadly, the discourse – are never coherent, fully unified. According to Derrida, they always contain hidden tensions and contradictions.[56] This is characteristic of different social groups, regardless of their national, ethnic, or religious background. The double reading is complementary in nature. Deconstruction does not mean criticism for criticism's sake – disputing the leading narrative for the sake of conflict itself. Rather, it is about displacing possible tensions in social discourse in favour of

54 See Jenny Edkins, "Postsructuralism" in *International Relations Theory for the Twenty-First Century. An Introduction*, ed. M. Griffths. London, and New York, 2007, 94.

55 Devtak, 168–170.

56 More Joseph Margolis, *Interpretation Radical but Not Unruly*. Berkeley, 1995, 157 ff.

creating a more coherent world of dialogue. The effect is to gain a better understanding of the complex social reality, which, in the era of globalization and dynamic social changes, is constantly bringing about new "texts" that require reinterpretation to adequately describe what is around us.[57]

Affordance as a Key Element in the Process of Cognition

Social context is crucial in processes of cognition. It results from specific cultural references that are derived from tradition and historical experience. This is particularly evident in the case of abstract concepts, which are usually the most challenging for translators of professional texts, including normative acts.[58] Language in the context of professional terminology – legal and juridical language – can be understood as a tool designed for specific tasks. A rational legislator adjusts certain legislative intentions to the intended uses; that is, to the public perception of the established norms. The specific uses of legal language can be referred to the term 'affordance' (Germ. *Affordanz* / *Anbietung*), introduced by James Gibson as part of the environmental concept.[59] The word denotes the totality of options for action available in a given environment, which can be counted or measured, and which do not depend on the characteristics of specific individuals. In relation to legal language, this means that the needs and capabilities of the user of the language determine how it is used.[60]

57 Bógdał-Brzezińska, 225 ff.; Boaventura de Sousa Santos, "Law: A Map of Misreading. Toward a Postmodern Conception of Law", *Journal of Law and Society* 14, no. 3. 1987: 282 ff.

58 More Valentina V. Stepanova, "Translation Strategies of Legal Texts", *Procedia – Social and Behavioral Sciences*, no. 237. 2017: 1331 ff.

59 Cf. James J. Gibson, *The Ecological Approach to Visual Perception*. New York and London, 2015, 39 ff., 137 ff. Klaus Schwarzfischer, "Epistemische Affordanzen bei der Gestalt-Wahrnehmung sowie bei emotionaler Mimik und Gestik", *Gestalt Theory* 43, no. 2. 2021: 181–185.

60 More Mireille Hildebrandt, "Law as an Affordance: The Devil is the Vanishing Point(s)", *Critical Analysis of Law* 4, no. 1. 2017: 117 ff.

Research conducted by psychologists confirms that abstract expressions, which include legal concepts, evoke positive connotations. They do not refer to concrete events and rarely evoke concrete semantic images based on individual experience. Abstract concepts have a lower emotional tinge. Hence, individualistic cultures express emotions in more abstract terms than collectivistic cultures based on strong interdependencies, where emotions are described in more concrete terms.[61]

Abstract expressions usually have a permanent character; they give the impression of invariability, of the constancy of certain features or phenomena. Verb concretisation gives expressions a changeable and dynamic character. Action verbs condition the concreteness of a description. Stative verbs – by their abstractness – evoke specific contextual reactions, impressions, memories, experiences. The use of abstract and concrete categories is conditioned by the situation, i.e., cognition is embedded in a specific social context.[62]

Language should be understood as an instrument for shaping, but also maintaining, certain beliefs, including stereotypes. Language directly, although often unconsciously, affects social reactions and the psychological processes of the addressee of a message. Psychologists have investigated what determines that a message is shaped in one, and not another, way.[63] Choices of words are not usually accidental. It turns out that certain linguistic procedures can be applied – not only in everyday communication, but also in shaping the legal order, the system of universally binding legal norms that influence citizens' behaviour. The choice of certain compositional possibilities in the construction of legal norms can give information on why a given message was formulated and what the goals of the legislator were.[64]

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61 Krystyna Adamska, "Język jako narzędzie poznania i komunikacji", *Acta Universitatis Lodziensis. Folia Psychologica* 17. 2013: 27 et seq.

62 Adamska, 26 ff.

63 Klebaniuk, 270–275.

64 Uwe Diercks, "Die Sprache der Juristen. Die Sprache des Rechts", *Zeitschrift für Rechtspolitik* 45, no. 6. 2012: 184.

It is important to remember that a linguistic message influences its addressees in three ways: cognitively, motivationally, and behaviourally. Language, therefore, is not only a system of signs, but also a specific tool used in specific contexts, in which some language users have an institutional influence over others (courts, public administration).

Closing Remarks

According to those cognitive scientists who refer to the thought of the philosopher of language Ludwig Wittgenstein, it is difficult in the modern world to introduce closed categories of meaning by means of language. Categorising is dynamic and cognitively conditioned.[65] This means that language is not understood as a phenomenon through which reality is reflected in a one-to-one ratio. It is a form of creating reality, understanding and comprehending it, as well as dealing with it through continuous categorising, which always bears the mark of subjectivity. This applies to both the vernacular and professional languages, including the language of norms and that used by lawyers when interpreting the law.[66]

Strong evidence of this is an analysis carried out by legal theorists in relation to law-making processes in various countries, e.g., in relation to countries in transition, where the legislator's inability to adequately express its intentions in language becomes apparent, and the language of norms is imprecise. The legislator expresses its intentions in too general a manner, leaving too much room for interpretation. Or the language maybe inadequate to the task. Ultimately, it fails to meet the important requirement of communicativeness. Post-positivist trends, including above all postmodernism, have noticed that

65 Language as an instrument of "language games" (Germ. *Sprachspiele*). Language games, i.e., models, means of rational reconstruction of the functions of language or of the relations between language and reality. More Elena Tatievskaya, "Wittgenstein über Sprachspiele", *Archiv Für Begriffsgeschichte* 50. 2008: 203 ff.

66 See Hubert Schwyzer, "Thought and Reality: The Methaphysics of Kant and Wittgenstein", *Philosophical Quarterly* 23, no. 92. 1973: 204 ff.

the weaknesses of the language used in the law reflect the legislator's way of thinking, outlook, skills, i.e., the environment in which the sender of the linguistic message functions.[67]

Law today should be understood much more broadly than merely as the "law in books" in the context of rulemaking and its expert interpretation. Law takes the form of a dynamic multi-level system – known as 'law in action'.[68] Many patterns of specific regulatory solutions (e.g., in sectors such as energy or telecommunications) are based on common narratives adopted by supranational bodies, and clearly influence the process of building national narratives. Thus, documents of a declarative, legally non-binding nature shape the process of how binding laws are made and applied. This is of direct importance for "non-professional" recipients of the law. The increasingly complex law-making processes, understood as the creation of complex narratives responding to current challenges (various threats to stability, e.g., on financial markets), make the ideal of the law being understood by citizens extremely difficult to achieve.[69]

Innovation has become a key word in the social sciences in the last twenty years: innovation understood primarily as technological solutions changing the world around us. Innovation, however, is much more than a technologisation of the reality in which a citizen functions.[70] It also includes changes how we think about and understand the rules that construct that reality. The postmodernist description of the textuality of the world and the multiplicity of narrations, which impose on us a need for important social phenomena to be understood both by a rational legislator and by all addressees of legal

67 See, Wronkowska, 22 ff.

68 Cf. Kamil Zeidler, "O fikcji powszechnej znajomości prawa i nadziei na społeczną znajomość zasad prawa", *Gdańskie Studia Prawnicze* 31. 2014: 720.

69 Zeidler, 721 ff. See also Natalia Kohtamäki, *Prawo hybrydowe w porządku normatywnym unii Europejskiej*. Pułtusk, and Warszawa, 2019, 114–122.

70 More Wolfgang Hoffmann-Riem, *Innovation und Recht – Recht und Innovation. Recht im Ensemble seiner Kontexte*. Tübingen, 2016, 80–103. See especially the classification of innovation dimensions on p. 94.

norms, is particularly timely today.[71] In the context of the changes occurring in our understanding the functions of the state in the context of cross-border threats and the growing network of connections among administrative bodies, it turns out that narrativity is becoming a natural feature of both the rules themselves and how they are to be interpreted. This applies to interpretations proposed in the legal doctrine and the jurisprudence of national and international courts.

References

Adams, Christine. "In the Public Interest: Charitable Association, the State and the Status of utilité publique in Nineteenth-Century France." *Law and History Review* 25, no. 2. 2007: 283–321.

Adamska, Krystyna. "Język jako narzędzie poznania i komunikacji." *Acta Universitatis Lodziensis. Folia Psychologica* 17. 2013: 21–37.

Andruszkiewicz, Marta. "Problem jasności w języku prawnym – aspekty lingwistyczne i teoretycznoprawne." *Comparative Legilinguistics* 31. 2017: 7–25.

Antos, Gerd. "Ist der Leie der Dumme? Erosion der Experten-Leie-Dichotomie in der Ära medial inszenierter Betroffenheit."In: *Laien, Wissen, Sprache. Theoretische, methodische und domänenspezifische Perspektiven*, edited by Toke Hoffmeister, Markus Hundt, and Saskia Naths. Berlin, and Boston 2021: 25–48.

Ashley, Richard. "The Poverty of Neorealism." *International Organization* 38, no. 2. 1984: 225–286.

Bieleń, Stanisław. *Polityka w stosunkach międzynarodowych*. Warszawa, 2010.

Bógdał-Brzezińska, Agnieszka. "Postmodernizm." n *Teorie i podejścia badawcze w nauce o stosunkach międzynarodowych*, edited by Ryszard Zięba, Stanisław Bieleń, and Justyna Zając. Warszawa, 2015: 217–239.

71 Cf. in the context of the theory of law, Paweł Skuczyński, "Narracyjność języka prawniczego w procesie tworzenia prawa", *Archiwum filozofii prawa i filozofii społecznej*, no. 1. 2020: 66, 71 ff.

Browne, Craig. "Postmodernism, Ideology and Rationality." *Revue Internationale de Philosophie* 64, no. 251(1). 2010: 79–99.

Buckel, Sonja. "Empire oder Rechtspluralismus? Recht im Globalisierungsdiskurs." *Kritische Justiz* 36, no. 2. 2003: 177–191.

Cieślak, Zbigniew, Irena Lipowicz, Zygmunt Niewiadomski, and Grażyna Szpor. *Prawo administracyjne*. Warszawa, 2012.

Curtin, Deirdre, and Morten Egeberg. "Tradition and Innovation: Europe's Accumulated Executive Order." In *Towards a New Executive order in Europe*, edited by Deirdre Curtin, and Morten Egeberg. London, and New York, 2015: 5–19.

Cyrul, Wojciech. "Problem ważności w habermasowskiej teorii uniwersalnej pragmatyki." *Ruch Prawniczy, Ekonomiczny i Socjologiczny*" 67, no. 2. 2005: 209–221.

Danet, Brenda. "Language in the Legal Process." *Law & Society Review* 14, no. 3. 1980: 445–564.

della Cananea, Giacinto. "The Genesis and Structure of General Principles of Global Public Law." In *Global Administrative Law and EU Administrative Law. Relationships, Legal Issues and Comparison*, edited by Edoardo Chiti, and Bernardo Giorgio Mattarella. Berlin, and Heidelberg, 2011: 92–108.

Derrida, Jacques. *Of Grammatology*. Trans. Gayatri Chakravorty Spivak. Baltimore, 1976.

Devtak, Richard. "Postmodernism." In Burchill, Scott, Andrew Linklater, Richard Devetak, Jack Donnelly, Matthew Paterson, Christian Reus-Smit, and Jacqui True, *Theories of International Relations*. Basingstoke, and New York, 2005: 161–187.

Diercks, Uwe. "Die Sprache der Juristen. Die Sprache des Rechts." *Zeitschrift für Rechtspolitik* 45, no. 6. 2012: 184–185.

Edkins, Jenny. "Postsructuralism." In *International Relations Theory for the Twenty-First Century. An Introduction*, edited by Martin Griffths. London, and New York, 2007: 88–98.

Ehlers, Dirk. “Verwaltung und Verwaltungsrecht im demokratischen und sozialen Rechtsstaat.” In *Allgemeines Verwatungsrecht*, edited by Dirk Ehlers, and Hermann Pünder. Berlin, and Boston, 2016: 1–53.

Engisch, Karl. *Einführung in das juristische Denken*. Stuttgart, 1983.

Foucault, Michel. “The Subject and Power.” *Critical Inquiry* 8, no. 4. 1982: 777–795.

Funke, Gerhard. “Theorie und Praxis.” In *Phenomology on Kant, German Idealism, Hermeneutics and Logic*, edited by Olav K. Wiegand, Robert J. Dostal, Lester Embree, Johseph J. Kockelmans, and Jitendra N. Mohanty. Dordrecht, 2000: 249–266.

Garstka, Hansjürgen. “Zum Beitrag der Linguistik zur rechtswissenschaftlichen Forschung.” *Rechtstheorie*, no. 10. 1979: 92–102.

Gibson, James J. *The Ecological Approach to Visual Perception*. New York, and London, 2015.

Habermas, Jürgen. “Aspekty racjonalności działania.” In *Wokół teorii krytycznej Jürgena Habermasa*, edited by Andrzej M. Kaniowski, and Andrzej Szahaj. Warszawa, 1987: 113–157.

Habermas, Jürgen. “The Crisis of the European Union in the Light of Constitutionalization of International Law.” *European Journal of International Law* 23, no. 2. 2012: 335–348.

Habermas, Jürgen. *Theorie des kommunikativen Handelns. Handlungsrationalität und gesellschaftliche Rationalisierung*. Frankfurt am Main, 1981.

Hadel, Maciej. “Prawo administracyjne jako nauka o sterowaniu w świetle kryzysu prawa administracyjnego i dylematów badawczych – aktualne tendencje w metodologii badań nad prawem administracyjnym”, *Przegląd Prawa Publicznego*, no. 6. 2017: 65–72.

Hildebrandt, Mireille. “Law as an Affordance: The Devil is the Vanishing Point(s)”, *Critical Analysis of Law* 4, no. 1. 2017: 116–128.

Hoffmann-Riem, Wolfgang. *Innovation und Recht – Recht und Innovation. Recht im Ensemble seiner Kontexte*. Tübingen, 2016.

Izdebski, Jan. "Związki nauki prawa administracyjnego z naukami o zarządzaniu." *Roczniki Nauk Prawnych* 25, no. 4. 2015: 177–186.

Jestaedt, Matthias. "Wissenschaft im Recht. Rechtsdogmatik im Wissenschaftsvergleich." *JuristenZeitung* 69, no. 1, 2014: 1–12.

Johnson, Cathryn, Timothy J. Dowd, and Cecilia L. Ridgeway. "Legitimacy as Social Process." *Annual Review of Sociology* 32. 2006: 53–78.

Kant, Immanuel. *Zum ewigen Frieden; ein philosophischer Entwurf*. Leipzig, 1917.

Kessler, Oliver. "On Logic, Intersubjectivity, and Meanings: Is Reality an Assumption We Just Don't Need?." *Review of International Studies* 38, no. 1. 2012: 253–265.

Kęsicka, Karolina. "Unbestimmte Rechtsbegriffe und Äquivalenzfrage: ein Fall für den Übersetzer." *Studia Germanica Gedanensia*, no. 29. 2013: 124–137.

Klebaniuk, Jarosław. "Rola języka w postrzeganiu procesów społecznych." *Nierówności społeczne a wzrost gospodarczy*, no. 24. 2012: 268–279.

Kohtamäki, Natalia. "Europejska administracja zintegrowana w służbie wspólnoty." In *Prawo administracyjne w służbie jednostki i wspólnoty*, edited by Przemysław Wilczyński et al. Warszawa, 2022: 107–120.

Kohtamäki, Natalia. *Prawo hybrydowe w porządku normatywnym unii Europejskiej*. Pułtusk, and Warszawa, 2019.

Kohtamäki, Natalia. *Theorising the Legitimacy of EU Regulatory Agencies*. Berlin, 2019.

Koszkowski, Maciej. "Legal Analogy as an Alternative to the Deductive Mode of Legal Reasoning." *Adam Mickiewicz University Law Review* 6. 2016: 13–25.

Krzyżówek, Anna. *Rozum a porządek polityczny. Wokół sporu o demokracje deliberatywną*. Kraków, 2010.

Kusiak-Winter, Renata. "Wielopostaciowość administracji w prawie administracyjnym." *Opolskie Studia Administracyjno-Prawne* 16, no. 1(3). 2018: 71–81.

Leszczyński, Jerzy. “O niezmienności sposobu uprawiania dogmatyki prawa.” *Studia Prawno-Ekonomiczne* 31, no. 81. 2010: 115–129.

Lipowicz, Irena. “Dylematy siatki pojęciowej w nauce prawa administracyjnego.” In *Koncepcja systemu prawa administracyjnego Zjazd Katedr Prawa Administracyjnego i Postępowania Administracyjnego Zakopane 24–27 września 2006 r.*, edited by Jan Zimmermann. Warszawa, 2007: 21–42.

Liwo, Marian Andrzej. “Nieracjonalność działań prawodawcy jako jedna z przyczyn niepoprawności prawa – wybrane przykłady z prawa administracyjnego, karnego i prawa pracy.” *Przegląd Prawa Publicznego* no. 6. 2019: 9–20.

Gustavo Maciel, *Legislative Best Practices During Times of Emergency*. Transparency International. Helpdesk, 1.06.2021. <https://knowledgehub.transparency.org/assets/uploads/kproducts/Helpdesk-2021_Legislative_best_practices-in-times-of-crisis-FINAL.pdf>, access: 02.04.2022.

Margolis, Joseph. *Interpretation Radical but Not Unruly*. Berkeley, 1995.

Meyer, Georg (bearbeitet v. Gerhard Anschütz). *Lehrbuch des deutschen Staatsrechts*. Berlin, 2005.

Myślińska, Marzena. “The Principle of Determinancy of Legal Rules as an Element of Competent Legislation.” *Comparative Legilinguistics*, no. 5. 2011: 125–141.

Nowak, Leszek. “Performatywy a język prawny i etyczny.” *Etyka*, no. 3. 1968: 147–158.

Nowak, Paweł, and Mariusz Rutkowski. “Współczesne zmiany kulturowo-komunikacyjne a język prawa. Uwagi na marginesie propozycji nowego modelu uzasadniania orzeczeń sądowych.” *Poznańskie Studia Polonistyczne. Seria Językoznawcza* 28, no. 1. 2021: 87–100.

Piszcz, Anna, and Halina Sierocka. “The Role of Culture in Legal Languages, Legal Interpretation and Legal Translation.” *International Journal for the Semiotics of Law* 33, no. 3. 2020: 533–542.

Potulski, Jakub. “Deterritorialization of the World as a Challenge for Contemporary Political Geography.” *Journal of Geography, Politics, and Society* 6, no. 2. 2013: 34–43.

Rasiński, Lotar. "Trzy koncepcje dyskursu: Foucault, Laclau, Habermas." *Kultura – Społeczeństwo – Edukacja* 12, no. 2. 2017: 37–54.

Rączaszek-Leonardi, Joanna. *Zjednoczeni w mowie. Względność językowa w ujęciu dynamicznym*. Warszawa, 2011.

Rorty, Richard. "Wittgenstein and the Linguistic Turn." *Austrian Ludwig Wittgenstein Society – New Series* 3. 2013: 3–19.

Santos, Boaventura de Sousa. "Law: A Map of Misreading. Toward a Postmodern Conception of Law." *Journal of Law and Society* 14, no. 3. 1987: 279–302.

Schmidt-Aßmann, Eberhard. *Verwaltungsrechtliche Dogmatik. Eine Zwischenbilanz zu Entwicklung, Reform und künftigen Aufgaben*. Tübingen, 2013.

Schwarzfischer, Klaus. "Epistemische Affordanzen bei der Gestalt-Wahrnehmung sowie bei emotionaler Mimik und Gestik." *Gestalt Theory* 43, no. 2. 2021: 179–198.

Schwyzer, Hubert. "Thought and Reality: The Methaphysics of Kant and Wittgenstein." *Philosophical Quarterly* 23, no. 92. 1973: 193–206.

Skuczyński, Paweł. "Narracyjność języka prawniczego w procesie tworzenia prawa." *Archiwum filozofii prawa i filozofii społecznej*, no. 1. 2020: 66–83.

Sommermann, Karl-Peter. "Die Disskussion über die Normierung von Staatszielen." *Der Staat* 32, no. 3. 1993: 430–447.

Stepanova, Valentina V. "Translation Strategies of Legal Texts." *Procedia – Social and Behavioral Sciences*, no. 237. 2017: 1329–1336.

Sulikowski, Adam, Rafał Mańko, and Jakub Łakomy. "Polityczność prawa i ogólnej refleksji nad prawem: wprowadzenie." *Archiwum Filozofii Prawa i Filozofii Społecznej* no. 3. 2018: 5–10.

Tatievskaya, Elena. "Wittgenstein über Sprachspiele." *Archiv Für Begriffsgeschichte* 50. 2008: 203–230.

Teubner, Gunther. "How Law Thinks: Toward a Constructivist Epistemology of Law." *Law & Society Review* 23, no. 5. 1989: 727–758.

Ura, Elżbieta. *Prawo administracyjne*. Warszawa, 2021.

Wronkowska, Sławomira. “O cechach języka tekstów prawnych.” In *Język polskiej legislacji, czyli zrozumiałość przekazu a stosowanie prawa. Materiały z konferencji zorganizowanej przez Komisję Kultury i Środków Przekazu oraz Komisję Ustawodawczą Senatu RP*. Warszawa, 2007: 15–25.

Wronkowska, Sławomira, and Zygmunt Ziembiński. *Zarys teorii prawa*. Poznań, 2001.

Wróblewski, Bronisław. *Język prawny i język prawniczy*. Kraków, 1948.

Vitanski, Dejan. “Hierarchy and Subordination in the Public Administration – Synonyms, Dichotomous Categories or Predestined Two Sides of the Same Medal?.” *Knowledge – International Journal* 30, no. 6. 2019: 1393–1399.

Zeidler, Kamil. “O fikcji powszechnej znajomości prawa i nadziei na społeczną znajomość zasad prawa.” *Gdańskie Studia Prawnicze* 31. 2014: 719–729.

Zieliński, Maciej. *Wykładnia prawa. Zasady, reguły, wskazówki*. Warszawa, 2012.

Zimmermann, Jan. *Prawo administracyjne*. Warszawa, 2020.

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Remarks on Language and International Law

Abstract: The main assumption behind this study is that the relationship between language and international law is particularly interesting due to the complexity and special nature of this relationship when compared to national law. The author focuses on some selected issues connected with the fact that from the legal point of view the multiplicity of languages in international law is an important factor affecting its interpretation. Due to this, apart from the issue of the dominant position of the English language in international law, the major focus of the study is on the specific problems associated with the interpretation of international treaties. The study suggests that there are certain intrinsic tensions and contradictions involved in the relationship between language and international law. The dominant position of English language in international law is at odds with the principle of sovereign equality laid down in the UN Charter, which entails equal opportunities for all nations to participate in the global legal discourse. Moreover, the interpretation of plurilingual treaties involves significant problems when it comes to the interpretation of authentic texts made in various languages, which need to be reconciled. In turn, the tensions between the meaning of terms used in international legal norms and their corresponding meaning in national legislation are addressed through the use of the autonomous method of interpretation. Moreover, considering the growing importance of the legitimacy of international law, the role of the language of

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international law in this context is also considered. The problems related to the problems of language in the context of international law outlined in this study confirm the need for further continuous and in-depth research in this field. **Keywords:** international law, language, interpretation of international law, autonomous interpretation.

General Remarks

It may appear obvious to observe that law is determined by language. It is true, however, that in whatever way law is perceived, it is primarily a linguistic phenomenon. Language can be said to be both a medium for the existence of the law and the form in which law is communicated. Given the primary significance of language for the existence and operation of law, it is no wonder that the relations between language and the law are often the subject of scholarly analysis. Indeed, the issue of the operation of law through language and the influence of law on language is the subject of a discipline called jurilinguistics. This encompasses, among other things, critical analysis of the relations that can be established between language and the law.[1]

The relationship between language and international law is particularly interesting, mostly because of the complexity of the links between these two phenomena and the specificity of this relationship as compared to national law. International law is supposed to regulate behaviour of the multilanguage international community, including primarily sovereign states as well as other actors, such as international organisations, non-governmental organisations, individuals, etc. This community is based on, inter alia, the principle of the sovereign equality expressed in Article 2(1) of the UN Charter which refers to states as sovereign members of the international community. This principle

1 Juan Jiménez-Salcedo, and Javier Moreno-Rivero, "On Jurilinguistics: the principles and applications of research on language and law", *Revista de Llengua i Dret / Journal of Language and Law*, no. 68. 2017: 3.

implies, *inter alia*, that, as C. Tomuschat observed, "all nations should have equal opportunities to participate in the global discourse on legal issues."[2]

Nowadays, according to some calculations by experts, more than 6,000 languages exist in the world.[3] International treaties are drafted in languages of state-parties and some language texts acquire the statues of authentic texts. There is no specific language of international law *per se*. From this perspective, the dominant position of the English language at the world level and in international law appears to be striking.[4] It seems to be at odds with the aforementioned principle of the sovereign equality underlying the position of the primary subjects of international law, namely states.

It is worth mentioning in this context that international law is itself considered as a new language for conducting international relations.[5] It may facilitate communication by providing commonly understood terms, institutions, etc. For example, it can be claimed that the language of international criminal law has provided assistance in categorizing the brutal atrocities committed during the Russian invasion on Ukraine of 2022, through such concepts as international crimes, war crimes, crimes against humanity or genocide. This is a very important aspect connected with the relationship between international law and language, and it is also closely related to the legitimacy of international law and the often-asserted claim that that international law is suffering from a legitimacy crisis.[6] The role of the language of international law should therefore also be considered in this context.

Considering the scope of issues connected with the relationship between language and international law, this study can by no means be regarded as ex-

2 Christian Tomuschat, "The (Hegemonic?) Role of the English Language", *Nordic Journal of International Law* 86. 2017: 198.

3 Tomuschat, 197.

4 Tomuschat, 197.

5 See for example Dino Kritsiotis, "The Power of International Law as Language", *California Western Law Review* 34, no. 2. 1998: 398.

6 Mattias Kumm, "The Legitimacy of International Law: A Constitutionalist Framework of Analysis", *The European Journal of International Law* 15, no. 5. 2004: 907.

haustive. Instead, it focuses on some selected aspects connected with the fact that from the legal point of view the multiplicity of languages in international law is an important factor affecting its interpretation. Therefore, apart from the aforementioned issue of the dominant position of the English language in international law, the major focus of this study is on the specific problems associated with the interpretation of international treaties, given the fact that they are drafted in various languages, and some of these languages are authenticated. Another aspect of the language perspective of international law is suggested by the use by some international courts of the method of autonomous interpretation, which consists in assigning some concepts contained in international instruments a special meaning that is independent of the meaning that these concepts have in domestic law.[7] Some tensions between the language of international law and national law come to light through the application of this method, therefore it merits broader consideration. Moreover, the importance of the language of international law will be considered in the context of the debate on the legitimacy of international law. The latter topic is attracting increasing interest in the academic literature on international law and merits consideration in the context of the language of international law. The research methods used in this study are mainly the analytical method based on critical evaluation of existing legal texts and other documents and available information, as well as the method of linguistic analysis of legal texts referred to in the text.

The Dominant Position of the English Language in International Law

As the history of international law demonstrates, despite the existence of various national languages, some languages managed to acquire a preferred position in the realm of the "law of nations." For example, Latin was favoured in

7 John G. Merrills, *The Development of International Law by the European Court of Human Rights*. Manchester, 1995, 71.

international discourse and in international law until the middle of the 17th century. It is worth mentioning that the two peace treaties signed in October 1648 in the Westphalian cities of Osnabrück and Münster, which ended the Thirty Years War, were still drafted in Latin. Their translation into German was only made a few months later, assisted by private initiative.[8] Latin was replaced by French only in the second half of the 17th century, and the domination of French was not even undermined by the defeat of Napoleon by an international alliance. The prevailing influence of both Latin and French as European languages reflected to a large extent the position of international law as 'European' international law.[9]

It was only in the course of the 20th century that the monopoly of French was gradually undermined by English. In fact, the domination of English as the language of international law and international relations became particularly apparent after the end of the Second World War. The reasons for this development need to be seen from a wider perspective. The changes regarding the dominant position of Latin, and later French and English, reflected the changes in the balance of powers in Europe and in the world.[10] The domination of English was referred to by R. Phillipson as "linguistic imperialism."[11] This term clearly refers to British imperial politics, which managed to spread the English language all over the world. However, as some authors rightly observed, the dominant position of the English language after the Second World War was rather the effect of the process of globalisation encompassing the economy and other areas, and benefiting such countries as the United States.[12]

Irrespective of reasons which make it possible for a particular national language to become dominant, this domination, as it was already mentioned, is at odds with the principle of sovereign equality. A state whose national lan-

8 Tomuschat, 197.
9 Tomuschat, 197.
10 Tomuschat, 198–199.
11 Robert Phillipson, *Linguistic imperialism*. Oxford, 1992, 1.
12 Maria Dolecka, "Pozycja języka angielskiego w świecie", *Białostockie Archiwum Językowe*, no. 2. 2002: 53–54.

guage acquired the status of a dominant language in the international sphere evidently acquires a privileged position. C. Tomuschat is certainly right to note that: "A state that succeeds in elevating its national language to the status of preferred means of communication in international relations ensures for itself a massive advantage. It can make its voice heard without any difficulties of a semantic nature."[13]

Moreover, it is important to note that the choice of language in the case of international law cannot be said to be neutral with regard to its consequences. This is because it determines to a large extent the way in which international law is made, interpreted, and applied.[14] The legal traditions behind the dominant language exerted their influence over the interpretation and application of law when the law was drafted in this particular language. With perhaps some exaggeration, some authors warn that using English in the international sphere threatens to make it into an instrument of political hegemony.[15] Due to this, it is advised, for example, that international lawyers have at least a passive knowledge of other traditional European languages in order to avoid a "déformation linguistique."[16]

One of the consequences of the domination of English is that negotiations concerning international legal texts tend to be conducted in English. As a result, practical difficulties arise for those persons participating in negotiations for whom English is not their native language. They become disadvantaged at the stage when detailed, technical negotiations over the wording to be used in legal texts are under way. As J. Mowbray observed, when under pressure, it can be difficult for such persons, that is, non-native-speaking delegations, "to keep up with fast-moving negotiations and rapidly changing draft texts,

13 Tomuschat, 199.

14 Justina Uriburu, *Between Elitist Conversations and Local Clusters: How Should we Address English-centrism in International Law?*. Opinio Juris, 2.11.2020. <http://opiniojuris.org/2020/11/02/between-elitist-conversations-and-local-clusters-how-should-we-address-english-centrism-in-international-law/>, access: 28.04.2022.

15 Tomuschat, 196.

16 Tomuschat, 196.

a fact which offers a significant strategic advantage to English speakers."[17] In fact, a knowledge of English has become the *conditio sine qua non* of working as an international lawyer in international organisations, being a judge in international courts, or being capable of academic communication on the topic of international law. It is well known that publications in English tend to be more influential within the international legal canon than those published in languages which are less known, and native speakers of English certainly have a considerable advantage when it comes to having their views heard.[18]

On the other hand, as was already mentioned, no specific language of international law has been developed and international law as a legal system is bound to rely on the national language of a particular state or states. It is worth noticing in this context that, in general, attempts at creating an artificial, neutral language that could become a medium for international communication failed. By way of the main example, Esperanto, created by Ludwik Zamenhof, which managed to become the most popular artificial language, is nowadays almost completely forgotten.[19] In view of these developments it is difficult to consider an alternative to this particular language domination. Moreover, the domination of English in international law has to be perceived not in only in the area of international law and inter-state diplomacy. The English language is nowadays the modern *lingua franca*, the primary and global language enabling communication between various countries and nations. In the legal area this phenomenon has the advantage of facilitating communication among lawyers, and in particular international lawyers.

It is important to keep in mind all these pros and cons of the dominant position of the English language in international law and international practice. This awareness is of particular importance when it comes to the interpretation of international

17 Jacqueline Mowbray, *The future of international law: shaped by English*. *Völkerrechtsblog*, 18.06.2014, <https://voelkerrechtsblog.org/the-future-of-international-law-shaped-by-english>, access: 28.04.2022.

18 Mowbray.

19 Dolecka, 52.

law, which is considered in the further part of this work. As J. Mowbray rightly pointed out "if we truly want international law to function as a 'universal' system of global governance, equally applicable to and representative of all, then we need to be attentive to the *costs* of predominantly using one language in the international sphere, and to the important question of who pays those costs."[20]

The Interpretation of Treaties Drafted in Various Languages

The Vienna Convention of 1969,[21] which codified the customary norms already in force in the field of the law of treaties, adopted a special solution – a general rule of interpretation binding on the parties. According to Article 31(1) VCLT, "a treaty shall be interpreted in good faith in accordance with the normal meaning given to the terms of the treaty in their context and in the light of its object and purpose." This general rule is considered to be a compromise between different approaches to interpretation. It tends towards a textual approach, but takes into account the teleological approach and allows for some elements of the intentional approach.[22] As explained by the International Law Commission,[23] Article 31(1) VCLT contains three rules: "the first – interpretation in good faith – results directly from the principle of *pacta sunt servanda*. The second rule constitutes the heart of the textural approach: it is assumed that the parties had the intent resulting from the ordinary meaning of the expressions they use. The third rule is a rule of both common sense and good faith: the ordinary meaning of an expression cannot be determined in abstract terms, but has to be grounded in the context of the treaty and in the light of its object and purpose."[24]

20 Mowbray.
21 Hereinafter: VCLT.
22 Maria Frankowska, *Prawo traktatów*. Warszawa, 2007, 123.
23 Hereinafter: ILC.
24 Cited by Anna Wyrozumska, *Umowy międzynarodowe. Teoria i praktyka*. Warszawa, 2006, 335.

The specific feature of international agreements is that they are made in various languages. Bilateral agreements are usually drafted in the languages of both parties, and both languages are usually authenticated. The situation is different in case of multilateral agreements, which are often drafted in more than two authenticated languages. As was observed by the International Law Commission in 1966: "The phenomenon of treaties drawn up in two or more languages has become extremely common and, with the advent of the United Nations, general multilateral treaties drawn up, or finally expressed, in five different languages have become quite numerous."[25] This phenomenon of drafting treaties in various language versions was certainly enhanced by the increase in languages admitted or officially recognised by international organisations. Moreover, there is the growing requirement of states to use their own language in international relations.[26]

The advance of plurilingual treaties in the sphere international law has caused significant problems as regards the interpretation of such treaties. The term "authentication" used in the VCTL refers to the procedure by the text of a treaty is established as authentic and definitive. According to article 10 of the Vienna Convention, the text of a treaty is established as authentic and definitive: "(a) by such procedure as may be provided for in the text or agreed upon by the States participating in its drawing up; or (b) failing such procedure, by the signature, signature ad referendum or initialling by the representatives of those States of the text of the treaty or of the Final Act of a conference incorporating the text." The significance of the act of authentication is that states cannot unilaterally change the provisions of an authenticated treaty. If states which negotiated a given treaty do not agree on specific procedures for authentication, a treaty will usually be authenticated by signature, signature ad referendum or the initiating by the representatives of those states.

25 International Law Commission, "Draft Articles on the Law of Treaties with commentaries 1966", *Yearbook of the International Law Commission* 2. 1966: 224.

26 Claude Schenker, *Practice Guide to International Treaties*. Bern, 2015, 16.

If a treaty was made in more than one language, the status of the different language versions for the purpose of interpretation may vary. Some language versions of a treaty may have the status of authentic texts while some may be recognized only as "official texts." An "official text" can be defined as a text which has been signed by the negotiating States but not accepted as authoritative.[27] The authenticated texts of a treaty should not be confused with official or unofficial translations of a treaty. Such translations do not have the status of authenticated texts and are not binding in the international sphere. However, as A. Wyrozumska observed, such official translations may have some legal significance in the internal law of a state party to a treaty, as national law protects the rights of the individual derived from the officially published translation of a treaty even if it is incorrect.[28]

According to the Vienna Convention, authentic texts, in principle, are treated as equivalent for the purpose of interpretation. However, the relevant regulation in the VCTL is of a dispositive nature. Article 33 section 1 of VCTL provides 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." The majority of treaties nowadays contain an express provision determining the status of the different language versions.[29] For example, article 111 of the United Nations Charter stipulates that its "Chinese, French, Russian, English, and Spanish texts are equally authentic." The same provision is usually contained in a number of other treaties adopted under the auspices of the United Nations. In the case of regional treaties, the number of authentic texts is usually smaller. For example, American Convention on Human Rights was made in four authentic texts: Spanish, English, Portuguese and French, whereas the European Convention on Human Rights of 1950 provides that the English and French texts are equally authentic.

27 International Law Commission, 224.
28 Wyrozumska, 362.
29 Wyrozumska, 362.

The important consequence of the establishment of the authentic versions of a treaty is the presumption following from article 33 section 3 of VCLT, namely that the terms of the treaty are presumed to have the same meaning in each authentic text. The additional important rule of interpretation contained in the VCLT refers to the situation in which a comparison of the authentic texts discloses a difference of meaning which cannot be removed by the application of rules of interpretation contained in articles 31 and 32. In such a case, the provision of article 33 section 4 of VCLT provides that the meaning should be adopted which "best reconciles the texts, having regard to the object and purpose of the treaty." As the ICL remarked, in case of the interpretation of plurilingual treaties, the unity of the treaty and of each of its terms is of fundamental significance. This unity is achieved by linking the principle of the equal authority of authentic texts with the aforementioned presumption that the terms used in a text of a treaty are intended to have the same meaning in each text.[30] As may be expected, in practice discrepancies between various language texts appear quite often. As ICL remarked "the different genius of the languages, the absence of a complete *consensus ad idem*, or lack of sufficient time to co-ordinate the texts may result in minor or even major discrepancies in the meaning of the texts. In that event the plurality of the texts may be a serious additional source of ambiguity or obscurity in the terms of the treaty."[31] However, the presumptions provided in article 33.4 of VCLT implies taking every effort in order to find a common meaning for the texts before preferring one over another. As the ILC remarked: "The plurilingual form of the treaty does not justify the interpreter in simply preferring one text to another and discarding the normal means of resolving an ambiguity or obscurity on the basis of the objects and purposes of the treaty, *travaux preparatoires*, the surrounding circumstances, subsequent practice, etc. On the contrary, the equality of the texts means that every reasonable effort should first be made to

30 International Law Commission, 225.
31 International Law Commission, 225.

reconcile the texts and to ascertain the intention of the parties by recourse to the normal means of interpretation."[32]

The provisions on interpretation of the VCTL assume the principle of the harmonisation of various authentic texts. Moreover, since according to the VCTL, in the event of a divergence between authentic texts, the meaning which as far as possible reconciles the different texts shall be adopted, the provisions of the Convention give effect, as was remarked by the ICL, to the principle of the equality of texts.[33]

In connection with this, an important issue arises, namely whether there is some general rule that restrictive interpretation should be adopted in the event of divergence between authentic texts, as some jurists appeared to claim based on the remark by the Permanent Court Of International Justice in the *Greece v. Britain* case, i.e. the so called the Mavrommatis Palestine Concessions. The Court had to interpret, *inter alia*, the notion "public control" and "control public" used in the English and French authentic versions of the Palestine Mandate. The Court stated that:

"The Court is of opinion that, where two versions possessing equal authority exist one of which appears to have a wider bearing than the other, it is bound to adopt the more limited interpretation which can be made to harmonise with both versions and which, as far as it goes, is doubtless in accordance with the common intention of the Parties. In the present case this conclusion is indicated with especial force because the question concerns an instrument laying down the obligations of Great Britain in her capacity as Mandatory for Palestine and because the original draft of this instrument was probably made in English."[34]

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32 International Law Commission, 225.

33 International Law Commission, 225.

34 *The Mavrommatis Palestine Concessions*, Judgement No. 2 of 30 August 1924, par. 41. <http://www.worldcourts.com/pcij/eng/decisions/1924.08.30_mavrommatis.htm>, access: 11.09.2022.

However, according to the ICL, the Court "does not appear necessarily to have intended by the first sentence of this passage to lay down as a general rule that the more limited interpretation which can be made to harmonize with both texts is the one which must always be adopted. Restrictive interpretation was appropriate in that case. But the question whether in case of ambiguity a restrictive interpretation ought to be adopted is a more general one the answer to which hinges on the nature of the treaty and the particular context in which the ambiguous term occurs."[35] In addition, international law scholars are of the opinion that in the Mavrommatis Palestine Concessions case the Court did not adopt the "mechanical restrictive interpretation" rule but instead it made reference to "the object and purpose of the treaty.[36]

In the Mavrommatis Palestine Concessions case the Permanent International Court of Justice gave priority to the English language version of the treaty. In this context it is important to remember that if a treaty was negotiated in one language and subsequently other language versions were also adopted as authentic, the negotiated version is considered to better reflect the intentions of the parties. As A. Wyrozumska obverved, in the Mavrommatis Palestine Concessions case the Permanent Court of Justice relied on the English text because it was the language in which the treaty had been negotiated. Although it is true that, according to article 33 section 4 of the VCTL, the various authentic texts of the treaties have to be harmonised, however, as A. Wyrozumska rightly pointed out, treating the text in a negotiated language as a primary text finds its justification in the reference to this text as an element of preparatory works, which is a supplementary means of interpretation.[37]

The need to reconcile various language versions of the authentic texts of a multilingual treaty poses a significant challenge in the process of interpreting international legal norms. However, a no less important challenge may occur if certain concepts contained in international norms have to be interpreted dif-

35 *The Mavrommatis Palestine Concessions*.
36 Wyrozumska, 362.
37 Wyrozumska, 362.

ferently from the equivalent concepts contained in national legislation. Such challenge is connected with the reference to the so-called autonomous interpretation by some international courts.

Autonomous Interpretation

International courts such as the European Court of Human Rights[38] and the Court of Justice of the European Union have developed reasoning in their case law according to which the concepts contained in the multilateral instruments under their jurisdiction possess an autonomous meaning. This meaning cannot be established simply by deducing it from the relevant meanings in domestic legislation. On the other hand, an international lawyer, especially in case of doubt, will be looking for clues primarily in the law of those countries where the controversial concept has acquired a specific legal connotation.[39] In a wider perspective it is claimed that autonomous interpretation transcends the uniform application of unified rules, since it is based on specific systematic and teleological elements.[40]

For the purpose of this study it will be useful to analyse the significance of the autonomous interpretation of an international treaty, taking as an example the interpretation of the European Convention on Human Rights[41] by ECtHR. The Strasbourg Court has developed its own methods and techniques of interpretation tailored specifically for the needs of the interpretation of one particular instrument, namely the ECHR, which provides the basis for the protection of human rights under international law in Europe. The method of autonomous interpretation as developed by the Strasbourg Court consists in essence in assigning some concepts used in the ECHR a special meaning under this Convention that is independent of the meaning that these concepts have in the domestic

38 Hereinafter: ECtHR.

39 Tomuschat, 199.

40 Martin Gebauer, "Uniform Law, General Principles and Autonomous Interpretation", *Uniform Law Review* 5, iss. 4. 2000: 683.

41 Hereinafter: ECHR.

law of individual Contracting States.[42] In its rulings, the ECtHR has repeatedly mentioned the 'principle of autonomy' when referring to the determination of the autonomous meanings of specific terms employed in the Convention.[43] Through the application of this method some tensions between the language of international law and national law are brought to light and therefore it merits broader consideration. This may look peculiar, as when the Court determines the standards of human rights protection for individual Contracting States it employs terms that are used in the domestic law of these countries. Concepts such as *a court*, *a witness*, *a punishable offence*, *a charge* and *civil* do not possess any traditional meanings in international law, as they were incorporated from the legal language of domestic legal systems.[44] This suggests that the determination of the meaning of these terms should be made through reference to domestic legal systems. However, in order to ensure that the same standards of protection of the rights provided for in the Convention are binding for all Contracting States, these concepts should be understood uniformly, on the basis of the Convention, irrespective of the legal system to which they refer.

It should be emphasised that the application of the Convention allowing as many interpretations of its terms as there are states would weaken both the integrity of its goals and the principle of equality of obligations of all states.[45] Therefore the conflict between autonomous and national meanings appears to be an inextricable aspect of the use of autonomous interpretation by the ECtHR. Autonomous interpretation is considered to be necessary to ensure uniform standards of protection under the Convention. However, on the other

42 Merrills, 71.

43 *König v. Germany*, Application No. 6232/73, § 88, Judgement of 26 June 1978.

44 Rudolf Bernhardt, "Thoughts on Interpretation of Human-Rights Treaties" in *Protecting Human Rights: the European Dimension. Studies in Honour of Gerard J. Wiarda*, eds. F. Matscher, and H. Petzold. Köln, Berlin, Bonn, and München, 1990, 66–67.

45 François Ost, "The Original Canons of Interpretation of the European Court of Human Rights" in *The European Comenius for the Protection of Human Ranges: International Protection Versus National Restrictions*, ed. M. Delmas-Marty. Dordrecht, Boston, and London, 1992, 305.

hand, the Court cannot completely disregard the meanings that these legal concepts have in the systems of domestic law from which they derive.

The reasons for the Court's application of autonomous interpretation were given in the judgment of *Engel and Others v. the Netherlands*, in which the term 'criminal charge' was assigned an autonomous meaning. The case concerned the penalties imposed on five Dutch soldiers for offences against military discipline. In the justification of the ruling in this case, the Court stated: "If the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the author of a 'mixed' offence on the disciplinary rather than on the criminal plane, the operation of the fundamental clauses of Articles 6 and 7 (art. 6, art. 7) would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the purpose and object of the Convention. The Court therefore has jurisdiction, under Article 6 (art. 6) and even without reference to Articles 17 and 18 (art. 17, art. 18), to satisfy itself that the 'disciplinary' does not improperly encroach upon the 'criminal'. In short, the 'autonomy' of the concept of 'criminal' operates, as it were, one way only."[46]

In this case, the reasons for applying autonomous interpretation were the Court's fear that allowing the Contracting States to interpret the words used in the Convention could lead to interpretations which are unfavourable to human rights. The ruling in the *Engel* case provides a good an example of an application of autonomous interpretation which in effect strengthens the guarantees of the protection of human rights contained in the Convention; this is done by restricting the freedom of States to interpret the meaning of the terms used in the Convention.

Autonomous interpretation is underpinned by the assumption that the object and purpose of the Convention can be more fully realized if it is recog-

46 *Engel and Others v. the Netherlands*, Application Nos. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, § 81, Judgement of 8 June 1976.

nized that it has independent existence and autonomous content.[47] Autonomous interpretation emphasizes the importance of the Convention's own normative system, the individual concepts of which do not have to be identified with similar concepts of other legal orders.[48]

The autonomous interpretation applied by the Court has primarily concerned a number of terms contained in Article 6 of the ECHR, on the right to a fair trial. Thus, the autonomous interpretation applied, for example, to the term "charged with a criminal offence"[49] or the phrase "civil rights and obligations." The autonomous interpretation of the latter phrase led to the inclusion of all proceedings which have decisive outcomes for private rights and obligations.[50] As a result, it became apparent that it is possible to apply Article 6 not only to courts, but also to administrative cases or those involving social security and welfare.[51] Autonomous meanings were also assigned to other terms, such as 'witness'[52] and 'criminal', which appear in Article 6 of the Convention. The term 'criminal' was extended to prison discipline, thus enabling prisoners to receive protection under Article 6 of the Convention.[53]

Autonomous interpretation was also applied to other provisions of the Convention including terms that appear in Article 5, such as 'court',[54] and 'lawful',[55]

47 Cezary Mik, *Koncepcja normatywna prawa europejskiego praw człowieka*. Toruń, 1994, 235.

48 Walter Ganshof van der Meersch, "Le caractère "autonome" des termes et "la marge d'appreciation" des gouvernements dans l'interprétation de de la convention des Droits de l'Homme" in *Protecting Human Rights: the European Dimension. Studies in honour of Gerard J. Wiarda*, eds. F. Matscher, and H. Petzold. Köln, Berlin, Bonn, and München, 1990, 203–204.

49 See *Demicoli v. Malta*, Application No. 13057/87, § 3, Judgement of 27 August 1991.

50 See, for example, the judgments in: *Ringeisen v. Austria*, Application No. 2614/65, § 45, Judgement of 16 July 1971; *König v. Germany*, § 88.

51 Mik, 235.

52 *Bönisch v. Austria*, Application No. 8658/79, § 30, Judgement of 6 May 1985.

53 *Campbell and Fell v. the United Kingdom*, Applications Nos. 7819/77 and 7878/77, §§ 68–71, Judgement of 28 June 1984.

54 See, for example, the Separate Opinion of Judge Evrigenis in *Engel and Others v. the Netherlands*.

55 *Ashingdane v. the United Kingdom*, Application No. 8225/78, §§ 46–49, Judgement of 28 May 1985.

and to the phrase "a judge or other officer authorised by law to exercise judicial power."[56] In Article 7, the term 'punishment' was assigned an autonomous interpretation.[57] In Article 8 of the Convention, the term 'home' was also extended to rooms used for economic purposes. Similarly, the term 'family life' in this provision may be understood as covering some professional or economic activity, as this understanding is said to be in line with the essential object and purpose of Article 8 ECHR.[58] When using the autonomous method in the process of interpreting the concept of 'possessions' in Article 1 of Protocol I, the Court recognized that in an autonomous sense it is not limited to the ownership of physical goods, but also includes certain rights and interests constituting assets, which may be considered as proprietary rights and, consequently, 'possessions'.[59]

Autonomous interpretation has found application not only to the terms used in the substantive-legal parts of the Convention – it was also used to interpret reservations and interpretative declarations made pursuant to Article 64 of the Convention.[60] Autonomous interpretation can also be detected in the provisions of the Convention which are of a procedural nature. In the *Cruz Varas and Others v. Sweden*, the method of autonomous interpretation was employed to justify deducing temporary measures from the procedural provisions of the Convention, although such measures are not mentioned *expressis verbis* in the provisions.[61] In some judgments, autonomous interpretation has even

56 *Sheisser v. Switzerland*, Application No. 7710/76/34, §§ 25–31, Judgement of 4 December 1979.

57 See the judgment in *Jamil v. France*, Application No. 15917/89, § 30, Judgement of 8 June 1995.

58 *Niemetz v. Germany*, Application No. 13710/88, § 31, Judgement of 16 December 1992.

59 *Gasus Dosier-und Fördertechnik GmbH v. the Netherlands*, Application No. 15375/89, § 53, Judgment of 23 January 1995.

60 See the judgments in: *Frydlender v. France*, Application No. 30979/96, § 31, Judgement of 26 June 2000; *Pellegrin v. France*, Application No. 28541/95, § 63, Judgement of 8 December 1999.

61 See the dissenting opinion of judges Cremony, Vilhjálmsson, Walsh, Macdonald, Bernhardt, de Meyer, Martens, Foighel and Morenilla in the ruling of *Cruz Varas and Others v. Sweden*, Application No. 15576/89, Judgement of 20 March 1991.

been applied to concepts that do not appear in the Convention, such as 'civil service' and 'civil servants'.[62]

It is noteworthy that the autonomous method of interpretation has potentially a wide scope of application and as G. Letsas argues, all concepts in the ECHR are autonomous. According to this author, who bases his analysis on Ronald Dworkin's philosophy, the autonomous nature of concepts used in the Convention should be perceived in two senses. First, according to Letsas, people do not share the same linguistic criteria on how to identify their meaning. Secondly, the correct meaning may radically transcend the way the ECHR concepts are classified and understood within the national legal order. Therefore, Letsas argues that judges have to construct substantive theories that aim at capturing the nature or purpose of the right involved and of the ECHR more generally.[63]

Since the use of the method of autonomous interpretation entails a departure from the interpretative directive pursuant to Article 31(1) VCLT, which provides that terms should be interpreted in accordance with their ordinary meaning, the question that arises is whether autonomous interpretation can be reconciled with provisions of the Vienna Convention on interpretation.

The answer to this question may be the view that the basis for applying the autonomous method can be found in Article 5 VCLT, since this provision extends the application of the Vienna Convention to treaties adopted within the frameworks of international organizations, stipulating, however, that this application is to take place "without prejudice to any relevant rules of an organization." Due to the fact that the Convention was adopted within the framework of the Council of Europe, it can be assumed that the interpretation of this Convention may depart from the ordinary meaning of the words in favour of autonomous

62 See the judgments in: *Pellegrin v. France*, § 63; *Frydlender v. France*, §§ 31–32.

63 George Letsas, "The Truth in Autonomous Concepts: How to Interpret the ECHR", *European Journal of International Law* 15, no. 2. 2004: 279.

meaning.[64] Moreover, it is worth drawing attention to the interpretative directive contained in Article 31(4) VCLT, according to which a "special meaning shall be given to a term if it is established that the parties so intended." Thus, abstracting from arguments which appeal to Article 5 VCLT, an autonomous interpretation could therefore be justified in the light of Article 34(4) VCLT. It should, however, be associated with the application of a subjectivist approach, i.e. determining what the actual intent of the parties was with regard to the meaning of particular terms. A review of Court judgments in which the autonomous method was used indicates that the Court associates the use of this method rather with teleological interpretation, which seeks to ensure the compliance of the interpreted concepts with the object and purpose of the Convention. The "object and purpose" of the Convention is to guarantee human rights so that they correspond with changing social conditions, rather than to guarantee rights as they were understood at the time when the Convention was signed and ratified.

Autonomous interpretation can be assessed positively for at least two reasons. Firstly, it is a method of interpretation which is conducive to the protection of the rights of the individual. It allows interpretation that broadens the standards of the ECHR and through it the scope of protection resulting from its provisions is extended. Secondly, the importance of autonomous interpretation also consists in the fact that it harmonizes the standards of basic rights in the diverse Contracting States that are party to the ECHR,[65] thanks to which the objectives of the Convention set out in its Preamble are implemented, including, above all, "a common understanding and observance of the Human Rights."

64 Franz Matscher, "Methods of Interpretation of the Convention" in *The European System for the Protection of Human Rights*, eds. R. St. J. Macdonald, F. Matscher, and H. Petzold. Dordrecht, Boston, and London, 1993, 71.

65 Matscher, 73. See also Merrills, 72.

The Language of International Law and Its Legitimacy

The language of international law also appears to have important significance when it comes to the legitimisation of international law. It is not possible to explore in this study all the aspects of the legitimisation of international law through its language. However, it is necessary to make certain observations on this topic. It is noteworthy that the issue of the legitimacy of international law has become an increasingly important topic. This is to a large extent the result of the transition of international law during the past decades from the consensual legal order centred on interstate relations with sovereignty as one of its pivotal values into a developed and complex normative framework which encompasses new subject areas which until recently appeared to be alien to international law, such as human rights, international criminal law or the international protection of the environment. Moreover, as Mattias Kumm observed, obligations of international law "are no longer firmly grounded in the specific consent of states and its interpretation and enforcement is no longer primarily left to states. Contemporary international law has expanded its scope, loosened its link to state consent and strengthened compulsory adjudication and enforcement mechanisms."[66] As a consequence the legitimacy of international law is increasingly questioned also from a domestic perspective, based on such values as democracy and constitutional self-government.[67] These changes have led to the dispute in which the suitability of the conventional basis of legitimacy of international law was put into question.[68] Moreover, due to the increasingly direct impact on individuals of international legal norms in areas previously covered by national law, a legitimacy gap has appeared, making the legitimiza-

66 Kumm, 907.

67 Kumm, 907.

68 Javier Alexis Galán Ávila, *International Law and Legitimacy: A Critical Assessment*, European University Institute, Department of Law. Florence, 2016, 5. <https://cadmus.eui.eu/bitstream/handle/1814/39005/GalanAvila_2016.pdf?sequence=1&isAllowed=y>, access: 10.09.2022.

tion of international law a pressing concern.[69] In this context, the issue of the language of international law appears to be of considerable importance.

On the one hand, as it was already mentioned, there is no specific language of international law and therefore the "law of nations" is bound to rely on the particular languages of particular states. However, bearing in mind the aforementioned various aspects of the dominant position of the English language, one should also be aware that the importance of the language of international law in the context of the legitimacy debate is also connected with international law being itself considered as a new language for conducting international relations. Therefore it may facilitate communication by providing commonly understood terms, institutions, etc. The communications of States are extremely important in the international sphere, and states routinely employ what has come to be known as the "language of international law" in their communications. As it is suggested by some international law scholars, by employing this language "States claim international legitimacy for their actions, allege international legitimacy in the conduct of other States, and shape the course of evolution of the norms that determine legitimacy of future conduct."[70] Moreover, as D. Kritsiotis observed, "as a so-called language for international relations, international law introduces states to a new communicative medium which professes to be: more peaceful in its outlook on solving problems; more economical as far as human and financial resources are concerned; more secure in terms of the answers and solutions it provides; and, finally, more inclusive of the participants that make up the international system."[71] However, as international law norms are becoming more and more often applicable directly in relation to individuals, the language of these norms, their understandability also for non-state actors including individuals, is also becoming an issue

69 Galán Ávila, 5.

70 Deepak Raju, and Zubin Dash, "Balancing The Language Of International Law And The Language Of Domestic Legitimacy – How Well Does India Fare?", *Indian Journal of International Law* 57. 2017: 63.

71 Kritsiotis, 398.

of growing importance. Therefore, the communicative aspect of international law needs to be perceived not only in the context of interstate relations but also from the wider perspective of the international community in which various non-state subjects refer to international law. Thus, the linguistic aspect of international law as a universal tool for communication in the international community plays a very important role as a factor contributing to enhancing the legitimacy of international law as such.

The dominant position of English in international law nowadays, as the *lingua franca* of modern times, can be perceived in this situation not necessarily as a disadvantage but, taking into account the lack of alternative, as a factor facilitating the communicative aspect of international law due to the huge popularity and universality of this language.

Conclusions

As this study demonstrates, the relationship between language and international law is complex and it entails certain specific problems which do not exist in the case of national legal systems. Moreover, there are certain intrinsic contradictions and tensions involved in the relationship between language and international law. The dominant position of English language in international law, which appears to some extent inevitable, due to the lack of an alternative, appears to be difficult to reconcile with the principle of sovereign equality laid down in the UN Charter, which implies equal opportunities for all nations to participate in the global, legal discourse.

International law is essentially the legal system for countries with different languages. Having no specific language other than national languages, international law is bound to find its form through the national languages of respective countries. However, it is practically impossible for international law to operate in all national languages and for all the texts in these languages to be recognized as authentic texts. Therefore, the authentic texts of multilateral

treaties are usually limited to only a few national languages. This, in turn, creates significant problems when it comes to the interpretation of authentic texts made in various languages which need to be reconciled as required under the VCTL rules of interpretation.

The tensions between the meaning of terms used in international legal norms and their corresponding meaning in national legislation are connected with the use of the autonomous method of interpretation. The application of this method is justified in case of the interpretation of international norms in particular, as it strengthens the human rights standards and assists in harmonizing standards of human rights in the diverse legal systems of state parties to the ECHR.

As was also demonstrated in the above analysis, the language of international law is also important in the context of the legitimisation of international law. It is particularly crucial that the communicative aspect of international law should be considered beyond the context of interstate relations, from the wider perspective of the whole international community. Thus the linguistic aspect of international law as a universal tool for communication in the international community can be perceived in terms of its very important role as a factor contributing to enhancing the legitimacy of international law.

The analysis and considerations conducted in this study can be classified as falling, at least to some extent, in the area of interest of jurilinguistics, which focuses on issues concerning relations that can be established between language and the law. The problems connected with the relationship of language and law in the context of international law, outlined above, confirm the need for further continuous and in-depth research in this field. The importance of this research is underlined not only by the close relationship of these issues with the interpretation of norms of international law, but also, in the long run, with the legitimacy and effectiveness of the entire system of international law.

References

Bernhardt, Rudolf. "Thoughts on Interpretation of Human-Rights Treaties." In *Protecting Human Rights: the European Dimension. Studies in Honour of Gerard J. Wiarda*, edited by Franz Matscher, and Herbert Petzold. Köln, Berlin, Bonn, and München, 1990.

Dolecka, Maria. "Pozycja języka angielskiego w świecie." *Białostockie Archiwum Językowe*, no. 2. 2002: 41–54.

Frankowska, Maria. *Prawo traktatów*. Warszawa, 2007.

Galán Ávila, Javier Alexis. *International Law and Legitimacy: A Critical Assessment*, European University Institute, Department of Law. Florence, 2016. <https://cadmus.eui.eu/bitstream/handle/1814/39005/GalanAvila_2016.pdf?sequence=1&isAllowed=y>, access: 10.09.2022.

Ganshof van der Meersch, Walter. "Le caractère "autonome" des termes et "la marge d'appreciation" des gouvernements dans l'interprétation de de la convention des Droits de l'Homme." In *Protecting Human Rights: the European Dimension. Studies in honour of Gerard J. Wiarda*, edited by Franz Matscher, and Herbert Petzold. Köln, Berlin, Bonn, and München, 1990.

Gebauer, Martin. "Uniform Law, General Principles and Autonomous Interpretation." *Uniform Law Review* 5, iss. 4. 2000: 683–704.

International Law Commission. "Draft Articles on the Law of Treaties with commentaries 1966." *Yearbook of the International Law Commission* 2. 1966.

Jiménez-Salcedo, Juan, and Javier Moreno-Rivero. "On Jurilinguistics: the principles and applications of research on language and law." *Revista de Llengua i Dret / Journal of Language and Law*, no. 68. 2017: 1–4.

Kritsiotis, Dino. "The Power of International Law as Language." *California Western Law Review* 34, no. 2. 1998: 397–410.

Kumm, Mattias. "The Legitimacy of International Law: A Constitutionalist Framework of Analysis." *The European Journal of International Law* 15, no. 5. 2004: 907–931.

Letsas, George. “The Truth in Autonomous Concepts: How to Interpret the ECHR.” *European Journal of International Law* 15, no. 2. 2004: 279–305.

Matscher, Franz. “Methods of Interpretation of the Convention.” In *The European System for the Protection of Human Rights*, edited by Ronald St. J. Macdonald, Franz Matscher, and Herbert Petzold. Dordrecht, Boston, and London, 1993.

Merrills, John G. *The Development of International Law by the European Court of Human Rights*. Manchester, 1995.

Mik, Cezary. *Koncepcja normatywna prawa europejskiego praw człowieka*. Toruń, 1994.

Mowbray, Jacqueline. *The future of international law: shaped by English*. *Völkerrechtsblog*, 18.06.2014, <https://voelkerrechtsblog.org/the-future-of-international-law-shaped-by-english>, access: 28.04.2022.

Ost, François. “The Original Canons of Interpretation of the European Court of Human Rights.” In *The European Comenius for the Protection of Human Ranges: International Protection Versus National Restrictions*, edited by Mireille Delmas-Marty. Dordrecht, Boston, and London, 1992: 283–316.

Phillipson, Robert. *Linguistic imperialism*. Oxford, 1992.

Raju, Deepak, and Zubin Dash. “Balancing The Language Of International Law And The Language Of Domestic Legitimacy – How Well Does India Fare?.” *Indian Journal of International Law* 57. 2017: 63–85.

Schenker, Claude. *Practice Guide to International Treaties*. Bern, 2015.

Tomuschat, Christian. “The (Hegemonic?) Role of the English Language.” *Nordic Journal of International Law* 86. 2017: 196–227.

Uriburu, Justina. *Between Elitist Conversations and Local Clusters: How Should we Address English-centrism in International Law?*. Opinio Juris, 2.11.2020. <http://opiniojuris.org/2020/11/02/between-elitist-conversations-and-local-clusters-how-should-we-address-english-centrism-in-international-law/>, access: 28.04.2022.

Wyrozumska, Anna. *Umowy międzynarodowe. Teoria i praktyka*. Warszawa, 2006.

Ashingdane v. the United Kingdom, Application No. 8225/78, Judgement of 28 May 1985.

Bönisch v. Austria, Application No. 8658/79, Judgement of 6 May 1985.

Campbell and Fell v. the United Kingdom, Applications Nos. 7819/77 and 7878/77, Judgement of 28 June 1984.

Cruz Varas and Others v. Sweden, Application No. 15576/89, Judgement of 20 March 1991.

Demicoli v. Malta, Application No. 13057/87, Judgement of 27 August 1991.

Engel and Others v. the Netherlands, Application Nos. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, Judgement of 8 June 1976.

Frydlender v. France, Application No. 30979/96, Judgement of 26 June 2000.

Gasus Dosier-und Fördertechnik GmbH v. the Netherlands, Application No. 15375/89, Judgment of 23 January 1995.

Jamil v. France, Application No. 15917/89, Judgement of 8 June 1995.

König v. Germany, Application No. 6232/73, Judgement of 26 June 1978.

Niemetz v. Germany, Application No. 13710/88, Judgement of 16 December 1992.

Pellegrin v. France, Application No. 28541/95, Judgement of 8 December 1999.

Ringeisen v. Austria, Application No. 2614/65, Judgement of 16 July 1971.

Sheisser v. Switzerland, Application No. 7710/76/34, Judgement of 4 December 1979.

The Mavrommatis Palestine Concessions, Judgement No. 2 of 30 August 1924.

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African Legal Instruments as Regional Tools of Harmonization of International Environmental Law

Abstract: Environmental degradation in the world in general, and in Africa in particular, is occurring on a scale of increasing concern. The challenge for public policy is to change the relationship between people and their environment in order to reverse this trend. To this end, in an internal and an international context characterized by, on the one hand, the establishment of democracy and the rule of law and, on the other, by the globalization of environmental law following the Rio Conference (1992) in particular, the rule of law has naturally emerged as the key tool for these transformations. The aim of this article is to identify and analyze the African legal instruments and the actions of transformation in the relationship between the regional legal framework and international environment law, with the goal of the sustainability of natural resources and sustainable living environment as the key environmental issues in a fragile region. Africa is in the processes of decision making and adopting environmental protection methods as it embarks on a normative production process, with the aim of producing a law combining international standards and local norms and practices. The contemporary issues of environmental protection in Africa are analyzed in an interdisciplinary approach.
Keywords: Africa, legal instruments, regional tools, harmonization, international environmental law.

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Introduction

Environmental law is, without a doubt, a relatively young field of law.[1] Its main foundations were, in fact, laid during the 1990s, following the United Nations Conference on Environment and Development, held in Rio de Janeiro in 1992.[2] No doubt there existed many rules aimed at protecting the environment. However, in reality, these were only isolated and disparate texts, devoted to this or that sector of the environment, which were adopted in response to the appearance of specific environmental problems.

The word environment, although it is the subject of several definitions – not only doctrinal but also legal – contained in many national and international legal instruments, has yet to be the subject of a universal general definition. A large part of the doctrine has addressed the legal definitions, trying to analyze and identify their strengths and their shortcomings.

But case law has also played a major role in defining the environment. It was only during the 1990s, following global and regional awareness of the dangers of environmental degradation and the need to provide effective protection at all levels – national, regional and international, that this right has really been affirmed, in particular with the appearance of general texts aimed at ensuring global protection of the environment and sectoral texts devoted to entire areas of the environment, such as forests, water and climate.

However, this law has undergone, in less than two decades, a particularly remarkable development which today makes it a truly autonomous branch of

1 International law is the law of nations, also called public international law. It governs relations between international legal subjects (mainly states and international organizations). It is also referred to as interstate law, since it is primarily concerned with the rights and obligations of states. And international environmental law is that part of international law that deals with the conservation and management of the environment and the control of environmental pollution. See Elmene Bray, *Environmental law: Study guide for LCP 407-P (2003–2004)*. University of South Africa, Pretoria, 43, 47.

2 Environmental law brings together the legal rules aimed at protecting and establishing better management of the environment. This legal field is in full expansion. Therefore, environmental law is based on the need to protect land and sea resources which are essential for the survival of the future generation. Indeed, it evolves according to the development of technology and society. It applies to the biophysical and human environment.

law, with specific objectives and methods, and characterized by its vitality, flexibility and multidisciplinary nature, as well as its voluntarism. Indeed, in order to curb the serious environmental problems with which it finds itself confronted, the international community has, over the past two decades, introduced a real legal mechanism intended to fight against the various degradations of the environment and to promote genuine sustainable development throughout the world.

Basically, the evolution of the framework law approach to the environment in Africa can be seen in the main perspectives of the main conferences held in Stockholm in 1972[3] and in Rio de Janeiro in 1992.[4] However, it can be agreed that the environmental framework laws in Africa are the result both of the influence of the so-called Rio process and of the principles adopted during this process, in 1992. Thus, the dynamics of the laws and environmental frameworks in Africa stems from the execution of policies dictated by concern for sustainable development. The sustainable development paradigm has had an effect on the quantity of laws formulated and on the quality of provisions found in existing laws.

3 The Conference on the Human Environment held in Stockholm in June 1972 was certainly the first significant attempt to develop a global framework for environmental protection. See the *Report of the United Nations Conference on the Human Environment*. Stockholm, 5–16 June 1972. UN Doc. A/CONF.48/14/Rev1. For contemporary assessments of the outcomes, see Alexandre Kiss, and Jean-Didier Sicault, "La Conférence des Nations Unies sur l'Environnement (Stockholm, 5–16 June 1972)", *Annuaire Français de Droit International* 18. 1972: 603; Louis B. Sohn, "The Stockholm Declaration on the Human Environment", *Harvard International Law Journal* 14, no. 3. 1973: 423. For two contemporary accounts of key figures, see Wade Rowland, *The Plot to Save the World. The Life and Times of the Stockholm Conference on the Human Environment*. Toronto, 1973; Maurice Strong, "One Year after Stockholm: An Ecological Approach to Management", *Foreign Affairs* 51, no. 4. 1973: 690.

4 In 1992, the United Nations convened a second global meeting, known as the United Nations Conference on Environment and Development (UNCED), which was held in Rio de Janeiro from June 3 to 14, 1992. Two texts adopted during the UNCED have a general scope: the Declaration on Environment and Development and a program of action called Agenda 21. The Declaration reaffirms the Stockholm Declaration of 1972 to which it seeks to add, but its approach and philosophy are very different. Its central concept is sustainable development, which integrates development and environmental protection.

Indeed, the Rio process had the merit of putting back on the agenda the need for better management of the environment, and insisted on the compatibility of such measures with the development objectives of developing countries. It also indicated avenues to guide the action of States, including in the legislative field. And among these avenues, we can cite the Rio principles. Indeed, after the Rio de Janeiro conference, the emphasis placed on the principles adopted and the ecological effects of projects on the environment led to the adoption of provisions that reflect such principles, including for example the principle of prevention, highlighted by the procedure for Environmental Impact Assessment[5] and the principle of public participation.[6]

In the most recent environmental framework laws, EIA provisions typically entail the need to consider a number of proposed projects, as well as location imposition and the zoning of such projects; to examine both procedures for public participation and impact studies, and to determine the list of projects that are covered by this procedure.

Unlike other areas, when it comes to environmental protection globalization is intensifying, because the environment is everyone's business and knows no borders. Environmental pollution has a cross-border character. Actions against climate change, the protection of the seas against pollution and other similar problems are transnational. As Tadeusz Gadkowski writes, an analysis of contemporary treaties on the environment allows us to formulate the thesis that the creation and functioning of numerous institutions of cooperation, such as international organizations, is an expression of the trend towards the development of an international framework.[7] The contemporary doctrine

5 Hereinafter: EIA.

6 Under the EU's EIA Directive (2011/92/EU as amended by 2014/52/EU), major building or development projects in the EU must first be assessed for their impact on the environment. This is done before the project can start.

7 See Andrzej Gadkowski, and Tadeusz Gadkowski, "Nowe instytucje współpracy w ramach systemu Organizacji Narodów Zjednoczonych na przykładzie międzynarodowego prawa ochrony środowiska" in *System Narodów Zjednoczonych z polskiej perspektywy*, eds. E. Cała-Wacinkiewicz, J. Menkes, J. Nowakowska-Małusecka, A. Przyborowska-Klimc-

of international law combines issues of the common heritage of humanity with the concept of human rights. Thus, if the bottom of the seas, oceans and other areas remain beyond the borders of the jurisdiction of the States, because are considered as the common heritage of humanity, the obligation of their protection falls on the entire international community. According to Mr. Kamto, the environment restores the dialogue of sciences by bringing together various fields of knowledge to meet a single challenge: that of the survival of humanity.[8] Also the right of States to dispose of wealth and natural resources must also include their obligation to preserve them for present and future generations.

Africa is home to the second largest forest massif on the planet, after the Amazon Basin. Renowned for the richness of its biodiversity, it is characterized by the plurality of its uses and functions. The global and local economic importance of the forest, as well as its scientific and ecological potential, justify the interest granted to it by international society, concerned by the extent of the threats to which it is exposed, and by the weakness of the reaction of forest countries. Because in Africa the forest cover is receding at an alarming rate.

In Africa, the legal framework of the environment in general, and that of the forest in particular, dates from the colonial era, under the administrations of the colonial powers. Initially, it was a question of organizing the harvesting of wood by colonial companies, with the aim of satisfying the consumption of the metropolises. Forest law was then strongly characterised by its economic purpose, which only tempered the variants in the politics of the powers of the time. After their independence, the new States adopted legislation that

zak, and W. Sz. Staszewski. Warszawa, 2017, s. 251; see Genowefa Grabowska, *Europejskie prawo środowiska*. Warszawa, 2001, 59–80.

8 Maurice Kamto, "Le droit camerounais de l'environnement entre l'être et le non-être", Rapport introductif au Colloque international organisé les 29 et 30 avril 1992 à Yaounde par le Centre d'Étude de Recherche et de documentation en Droit international et de l'Environnement (CERDIE) sur le thème: "Droit et politiques publiques de l'Environnement au Cameroun". // Introductory report to the international colloquium organized on April 29 and 30, 1992 in Yaounde by the Centre d'Étude de Recherche et de documentation en Droit international et de l'Environnement (CERDIE) on the topic: "Droit et politiques publiques de l'Environnement au Cameroun".

reproduced colonial patterns, insisting on the industrial exploitation of wood, a strict framework for local uses, and the protection of wildlife.

The Reception of International Environmental Law at the African Regional Level

In general, environmental law is only the formalized expression of a new policy put in place, whose normative production has only significantly taken off in recent decades, which continues even today. It was under the decisive pressure of international public opinion, organized into various associative defence structures, that concerns related to the environment emerged. Faced with the ecological problems of the present time, international environmental law may not be a miracle cure, but it is absolutely unimaginable today that the biosphere can be protected without this law.[9]

To make the environment a legal element requiring protection is to recognize its essential place in contemporary society. Indeed, the pressure of ecological threats has led humanity to a general awareness. This awareness has led to the development and adoption of various environmental declarations, conventions, protocols and guidelines. Nowadays, international treaties increasingly refer to the need to preserve the environment in general and other particular domains.

9 See Alexandre Kiss, and Jean-Pierre Beurier, *Droit international de l'environnement*. Paris, 2000; see also Malgosia Fitzmaurice, and Jill Marshall, "The human right to a clean environment – phantom or reality? The European Court of Human Rights and English Courts perspective on balancing rights in environmental cases", *Nordic Journal of International Law* 76, no. 2–3. 2007: 113; Lyle Glowka, Françoise Burhenne-Guilmin, Hugh Synge, Jeffrey A. McNeely, and Lothar Gündling, *A Guide to the Convention on Biological Diversity*. Gland, and Cambridge 1994; Environmental Law Institute, *Addressing the Environmental Consequences of War: A Background Report*. Washington, DC, 1998; Mayda Jamo, "Droit et écogestion", *Revue internationale des sciences sociales*, no.109. 1986: 423; Sophie Lavallée, "Droit international de l'environnement" in *Juris Classeur Québec – Droit de l'environnement*. Lexis Nexis, 2013, 23; Jean Untermaier, "Le droit de l'environnement. Réflexions pour un premier bilan", *Armée de l'environnement*. 1980: 10.

In this logic, the International Court of Justice[10] in 1996 consecrates the environment as "a collective value conditioning life and health."[11] Indeed, it is important to point out that the International Court of Justice has already expressly recognized that different norms may all apply together to cover different aspects of a complex situation. Thus, the Court has referred to the need to take into account the prevention of environmental harm in assessing the necessity and proportionality of an armed action taken in self-defence or, more specifically, to the possibility that human rights norms and the norms of international humanitarian law (by analogy, also environmental norms) may apply together.[12]

Since environmental law is a relatively new field, it is largely found in written texts, even if certain general principles of law are relevant and even if customary international law is sometimes found in environmental law.[13]

10 Hereinafter: I.C.J.

11 Advisory Opinion Concerning the Legality of the Use of Nuclear Weapons by a State in Armed Conflict (Request for Advisory Opinion Submitted by the World Health Organization), International Court of Justice, 8 July 1996, available at: <https://www.refworld.org/cases,ICJ,3ae6b6d18.html>, access: 12.10.2022. Although the statute of the International Court of Justice refers to judicial decisions as a subsidiary source of determination of rules of law, the judgments and advisory opinions of the World Tribunal and the Court of Arbitration or other international tribunals are quite important and are often seen as the affirmation or revelation of customary international rules. The judgment of the Court of Arbitration of March 11, 1941 in the Trail smelter case is considered to have laid the foundations of international environmental law, at least with regard to transboundary pollution. The announced rule was confirmed by a more general principle prohibiting harm to another State, set out in the Corfu Canal case (*United Kingdom v. Albania*), I.C.J. 4, 1949, and reference was made to it. In the Lake Lanoux arbitration (*Spain v. France*) in 1956, 12 U.N.R.I.A. 281 (1957) in the context of transboundary water pollution.
Today, this rule is undoubtedly part of positive international law. Legal cases relating to environmental issues may arise as a result of judgments of the International Court of Justice, the European Court of Justice, the European and Inter-American Courts of Human Rights, decisions of the Dispute Resolution Procedure of the World Trade Organization, awards of international arbitration courts and judgments of the International Tribunal for the Law of the Sea. And also see *United States v. Canada* (1941) 3 Reports of International Arbitral Awards 1905.

12 Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] I.C.J Rep 226, para 30, 28; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] I.C.J. Rep 136, para 106.

13 The rules of customary international law arise where there is a general recognition among states that settled practices (usus) and norms of behaviour are obligatory. A practice must

Governments protect the environment based on their various constitutional and legal powers to promote general welfare, regulate commerce and manage public lands, air, forest and water.[14] National authorities can accept additional responsibilities to protect the environment by entering into bilateral and multilateral treaties containing specific obligations. Litigation enforces laws and rules through civil, administrative or criminal lawsuits.

If a constitution entitles a specific environmental standard, the clause must be interpreted and applied. Problems may arise as to the appropriate remedy, which the constitution usually does not specify. In addition to determining obligations for companies subject to the rules, legal provisions may authorize individuals to sue an administrative body that abuses its freedom of action or that does not respect its jurisdiction. Faced with the pressure of ecological perils which risk making life even more difficult in Africa and on the entire planet, States can no longer continue to postpone the inclusion of environmental problems at the heart of development policies. The constitutional recognition of the right to a healthy environment for every citizen and the legal arsenal in terms of the environment attest that environmental concerns are seriously taken into account in Africa.

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constitute 'constant and uniform usag in order to qualify as custom. In international environmental law, customary rules generally play a subordinate role to the law contained in conventions, because their existence is difficult to establish. The principle of opinion juris sive necessitatis is also relevant. This principle dictates that state practice can only be taken as evidence of a rule of customary international law if the reason the states engages in the practice is that they believe they are under a legal obligation to do so.

14 A universally accepted legal definition of the environment may help to delimit the scope of the subject, to determine the application of legal rules, and to establish the degree of liability when damage occurs. In a broad sense, the environment can include all the natural, social and cultural conditions that influence the life of an individual or a community. Therefore, problems such as traffic jams, crime and noise can be considered as environmental problems. Geographically speaking, the environment can refer to a limited region or encompass the entire planet, including the atmosphere and the stratosphere.

The Foundations of the Harmonization of International Environmental Law in Africa: the Maputo Convention of 2003 and the Bamako Convention of 1991

The first initiative for a regional convention for the protection of nature and natural resources of the African continent was taken by the colonial powers, which adopted in 1900 the Convention on the preservation of wild animals, birds and fish in Africa.[15] This Convention aimed to prevent the uncontrolled slaughter of animals living in the wild and to ensure the conservation of certain species. It never entered into force because most of its signatories did not ratify it.

Thus, following this unsuccessful attempt to establish a treaty in this field, an international congress on the protection of nature was held in Paris in 1931 to prepare the organization of an international conference with a view to the adoption of a new text. On November 8, 1933, the Convention on the Conservation of Fauna and Flora in their Natural State was thus adopted. Entering into force on January 14, 1936, this Convention was the first legally binding instrument to provide for the creation of protected areas in Africa, such as national parks or nature reserves.

After the Second World War, a conference was convened in Bukavu[16] with the aim of revising the 1933 Convention in the light of the experiences gained. One of the main recommendations of this conference was to draw up another

15 The first international agreement to conserve African wildlife was signed in London on 19 May 1900 and was called the Convention for the Preservation of Wild Animals, Birds and Fish in Africa. It was signed by the colonial powers then governing much of Africa – France, Germany, Great Britain, Italy, Portugal and Spain – and its objective was 'to prevent the uncontrolled massacre and to ensure the conservation of diverse wild animal species in their African possessions which are useful to man or inoffensive'. The teeming herds of African wild animals were already starting to diminish, and the primary goal of the Convention was to preserve a good supply of game for trophy hunters, ivory traders and skin dealers.

16 SeeAenza Konaté, *L'Organisation de l'Unité Africaine et la protection juridique de l'environnement*. Thesis, Dissertation, Université de Limoges, 1998, 73–74; Mohamed Ali Mekouar, "La Convention africaine: petite histoire d'une grande renovation" *Environmental Policy and Law* 34, no. 1. 2004: 43–50; Mohamed Ali Mekouar, *Le droit à l'environnement dans la Charte africaine des droits de l'homme et des peuples*. Etude juridique en ligne de la FAO, no. 16.

convention which would lay down the essential elements of a general policy for the protection of nature in Africa, taking into account the primary interests of the African populations. In 1957, a group of experts met to study how to implement these recommendations. However, these efforts were interrupted by the process of the decolonization of the African continent.

As African countries became independent, the need for a new treaty on nature conservation was first expressed in the Arusha Manifesto of 1961, and two years later in 1963 the African Charter for the Protection and Conservation of Nature was adopted. Then, in 1964, the United Nations Economic Commission for Africa and UNESCO recommended that the London Convention of 1933 be revised and that the Organization of African Unity[17] request the assistance of the International Union for Conservation of Nature[18] to prepare a draft text in collaboration with FAO and UNESCO. The OAU entrusted the IUCN with this and, after several meetings of experts and the examination of a draft text by the member states of the OAU, the Convention on the conservation of nature and natural resources was adopted in Algiers by the OAU on September 15, 1968.[19]

The Algiers Convention has been signed by 45 African States and ratified by 32 of them. It has encouraged newly independent African states to make progress in the conservation of natural resources. However, the Convention did not establish the institutional structures that would have facilitated its effective implementation. Nor did it create the mechanisms to ensure that the Parties

17 Hereinafter: OAU.

18 Hereinafter: IUCN.

19 See Francoise Burhenne-Guilmin, "Revision of the 1968 African Convention for the Conservation of Nature and Natural Resources: A Summary of the Background and Process", *UICN Environmental Law Programme Newsletter*, 1/2003. It must be mentioned that the African continent played a pioneer role in the environment protection domain. The excellent illustration remains the Convention on Nature and Natural Resources of 1968 which was signed in Alger. In addition, the headquarters of the United Nations Environmental Programme is located in Nairobi/Kenya (African country) since 1972. It was also in Africa, in the Democratic Republic of Congo (the former Zaïre), that the 1975 initiative of the World Charter on Nature was launched and approved by the United Nations General Assembly on October 28, 1982, see Maurice Kamto, *Droit de l'environnement en Afrique*. Vanves, 1996: 13.

comply with and apply it. Nevertheless, the decade following its adoption was a fruitful phase in the development of international environmental law, with the adoption of several multilateral environmental agreements. For all these reasons, to which must be added the rapid progress of scientific knowledge in the field of the environment and subsequent developments in the law, it became necessary to revise the Algiers Convention.

The governments of Nigeria and Cameroon requested the OAU to review and update the Algiers Convention. In 1981,[20] at the request of the OAU, the IUCN submitted a draft revision of the Convention. Meetings and consultations took place until 1986, but the revision process was unsuccessful. In 1986, the government of Burkina Faso asked the OAU to resume the revision process. In 1999, the OAU requested the collaboration of IUCN, the United Nations Environment Program[21] and the United Nations Economic Commission for Africa for the preparation of a new text which would be adapted to the current state of international environmental law as well as contemporary scientific and political concepts and approaches. In 2000, an inter-agency process was initiated. The following year, a draft revision was drawn up.

A consultation of African Ministers of the Environment and Foreign Affairs then took place, and its results were considered during a meeting of governmental experts organized by the OAU in Nairobi in 2002. On this occasion, the project was discussed, commented and amended. The revised draft was then forwarded by the OAU to the African Ministerial Conference on the

20 See Fatsah Ouguergouz,*The African Charter on Human and Peoples' Rights: A comprehensive agenda for human dignity and sustainable democracy in Africa*. The Hague and London, 2003. The African Charter on Human and Peoples' Rights of 1981, gives recognition to environmental rights. Article 24 of the Charter lays down that: 'All peoples shall have the right to a general satisfactory environment favorable to their development.' Despite the significance of the Charter as the first international instrument to recognize the right to the environment and to proclaim it as a collective right, its formulation has been the subject of criticism; see Loretta A. Feris, and Dire Tladi, "Environmental rights" in *Socioeconomic rights in South Africa*, eds. D. Brand, and C. Heyns. Pretoria, 2005, 256. See also Morne Van der Linde "African responses to environmental protection", *Comparative and International Law Journal of Southern Africa* 35, no. 1. 2002: 99.

21 Hereinafter: UNEP.

Environment[22] in 2002. AMCEN recommended that the revision process be completed as soon as possible.

Therefore, the revised African Convention on the Conservation of Nature and Natural Resources was adopted a year later in Maputo, on July 11, 2003, by the Heads of State and Government at the second Summit of the African Union. The development of the Maputo Convention has benefited from strong technical support and assistance from UNEP – represented by its Program on Law and Institutional Development in Africa represented through its Environmental Law Program – and the African Union.

In addition, the Bamako Convention was adopted on January 30, 1991 in Bamako, Mali on the prohibition of the import of hazardous wastes and the control of their transboundary movements in Africa, inspired by the African Convention on the of nature and natural resources adopted by African Heads of State and Government in Algiers (1968). It also incorporates the Cairo guidelines and principles concerning the environmentally sound management of hazardous waste adopted by the UNEP Governing Council in its decision 14/30 of 17 June 1987. It is an adaptation of the Basel Convention (22 March 1989) by African countries in order to protect the human health of African populations and the environment against the harmful effects which may result from the production and transport of hazardous wastes. The Convention, which entered into force on April 22,1998, bans the import of hazardous waste produced outside Africa. This convention was negotiated because African countries felt that the provisions in the Basel Convention was not stringent enough and that it failed to address adequately three important problems: how to control shipments of mixed waste; how to address inadequate disposal by the importing state; and how to address the issue of bribery and forgery. The Bamako Convention requires parties to ban under their laws the importation of hazardous waste generated outside Africa. It requires parties to adopt laws making it illegal to dump hazardous waste into their territorial waters, exclusive economic zones and the continental shelf. Me-

22 Hereinafter: AMCEN.

kete and Ojwang note that this Convention addressed the criticism of the Basel Convention, when at its second Conference of the Parties, held in March 1994, it was decided that an immediate prohibition be imposed on all transboundary movements of hazardous wastes from the Organization for Economic Cooperation and Development[23] countries, destined for final disposal in non-OECD countries. The Organization of African Unity (now the AU) does not favor the importation of hazardous wastes into Africa, and it has called upon all member States to prohibit such transfers of wastes.[24]

Conclusion

Impactful changes in global climate have helped to raise the consciousness of States on the significance of environmental issues for over thirty years. In the past, countries focused their energies on relentless industrial development with little or no attention to its impact on the environment. Scientific evidence has shown that unbridled development leads to the loss of environmental capital, sometimes an irreversible phenomenon. As a result, many treaties and a flurry of legislation have come into both the regional and international arena. A wide variety of non-legislative instruments dealing with the threat of environmental degradation resulting from economic growth have been put into effect. Environmental law is the area of law that aims to defend and promote the environment. It is based on a principle of solidarity in the name of protecting the common good represented by the environment in the broad sense, for current and future generations. It is therefore above all a right of protection. Essentially of conventional origin, international environmental law is therefore voluntary and depends fundamentally on the consent of States, expressed on

23 Hereinafter: OECD.

24 Bekele Tekle Mekete, and Jackton Boma Ojwang, "The right to a healthy environment: Possible juridical bases", *South African Journal of Environmental Law and Policy* 3, no. 2. 1996: 155–176; see also Carl Bruch, and Wole Coker, "Breathing Life into Fundamental Principles: Constitutional Environmental Law in Africa", *Innovation* 6, no. 2. 1999: 1.

a case-by-case basis for each text or once and for all when it is the result of deliberation, or of an act issued by an authorized international body. In addition, the growing multiplicity of attacks on the natural environment corresponds to a splitting of standards into a multitude, which generates competition and overlaps that are likely to complicate the task of those responsible for implementing them. The sources of environmental law are dispersed in a set of treaties whose applicability is subject to the general rules of public international law and the sanctions are based on mechanisms that are themselves scattered between the internal order and the external order. The variety of standards is matched by the variety of legal sources, a situation that is not very favourable to integrated, easy and automatic application.

The principle of the relative effect of treaties conditions their binding nature both on the number of their ratifications and on the existence of any reservations accepted by the Parties. In addition, the draft texts contains various ambiguities which make their interpretation and their application delicate. Finally the standards which they set out are accompanied by various exceptions which reduce their scope of application and therefore their effective scope. Indeed, the law and the international environmental agencies today suffer from a lack of effectiveness and efficiency, which is detrimental to the achievement of its general objectives of conservation and sustainable management.

These two notions are fundamental for environmental law and their simple definition hides complex issues. Effectiveness is the quality of a legal rule applied by its recipients, while efficiency refers to the ability of a rule, through its application, to fulfil the purposes that motivated its enactment. An effective standard is therefore not necessarily effective, but effectiveness is a condition of effectiveness. Indeed, a legal rule can be drawn up by duly taking into account the various elements that will allow it to be effective, but only its practical application will show whether it really makes it possible to achieve the goals that prompted its adoption.

Experience and scientific expertise prove that prevention must be the golden rule of the environment, both for ecological and economic reasons. It is often im-

possible to remedy environmental damage: the extinction of a species of fauna or flora, erosion and the dumping of persistent contaminants into the sea create insoluble, even irreversible situations. Even when the damage can be remedied, the cost of rehabilitation is often prohibitive. In many cases, it is impossible to prevent all the risks of damage. In such cases, it may be considered useful to take measures to make the risk "as minimal as practicable" in order to allow necessary activities while at the same time protecting the environment and the rights of others. The principle of prevention is complex given the number and diversity of the legal instruments in which it is embedded. It should be seen as a general objective giving rise to a multitude of legal mechanisms, including the prior assessment of environmental damage, the licenses and authorizations which define the conditions under which one must act, and the remedies resulting from the violation of these conditions.

A reasonable conclusion to be drawn from the issues discussed above is that whilst treaties, protocols and environmental summits are very important in making issues of environmental protection the first priority of regional and international discourse, the real battle lies in being able to take actions and implement measures that will bring the fruits of those discussions to reality. This requires, to a large extent, the co-operation of state actors and the concerted efforts of regional and international institutions through a willing implementation of environmental commitments and the judicial enforcement of treaty obligations.

References

Bray, Elmene. *Environmental law: Study guide for LCP 407-P (2003–2004)*. University of South Africa. Pretoria.

Bruch, Carl, and Wole Coker. "Breathing Life into Fundamental Principles: Constitutional Environmental Law in Africa." *Innovation* 6, no. 2. 1999.

Burhenne-Guilmin, Francoise. "Revision of the 1968 African Convention for the Conservation of Nature and Natural Resources: A Summary of the Background and Process." *UICN Environmental Law Programme Newsletter*, 1/2003.

Environmental Law Institute. *Addressing the Environmental Consequences of War: A Background Report*. Washington, DC, 1998.

Feris, Loretta A., and Dire Tladi. "Environmental rights." In *Socioeconomic rights in South Africa*, edited by Danie Brand, and Christof Heyns. Pretoria, 2005.

Fitzmaurice, Malgosia, and Jill Marshall. "The human right to a clean environment – phantom or reality? The European Court of Human Rights and English Courts perspective on balancing rights in environmental cases." *Nordic Journal of International Law* 76, no. 2–3. 2007: 103–151.

Gadkowski, Andrzej, and Tadeusz Gadkowski. "Nowe instytucje współpracy w ramach systemu Organizacji Narodów Zjednoczonych na przykładzie międzynarodowego prawa ochrony środowiska." In *System Narodów Zjednoczonych z polskiej perspektywy*, edited by Ewelina Cała-Wacinkiewicz, Jerzy Menkes, Joanna Nowakowska-Małusecka, Anna Przyborowska-Klimczak, and Wojciech Sz. Staszewski. Warszawa, 2017: 249–268.

Glowka, Lyle, Françoise Burhenne-Guilmin, Hugh Synge, Jeffrey A. McNeely, and Lothar Gündling. *A Guide to the Convention on Biological Diversity*. Gland, and Cambridge 1994.

Grabowska, Genowefa. *Europejskie prawo środowiska*. Warszawa, 2001.

Jamo, Mayda. "Droit et écogestion." *Revue internationale des sciences sociales*, no.109. 1986, 423.

Kamto, Maurice**.** "Le droit camerounais de l'environnement entre l'être et le non-être." Rapport introductif au Colloque international organisé les 29 et 30 avril 1992 à Yaounde par le Centre d'Étude de Recherche et de documentation en Droit international et de l'Environnement (CERDIE) sur le thème: "Droit et politiques publiques de l'Environnement au Cameroun". // Introductory report to the international colloquium organized on April 29 and 30, 1992 in Yaounde by the Centre d'Étude de Recherche et de documentation en Droit international et de l'Environnement (CERDIE) on the topic: "Droit et politiques publiques de l'Environnement au Cameroun".

Kamto, Maurice. *Droit de l'environnement en Afrique*. Vanves, 1996.

Kiss, Alexandre, and Jean-Didier Sicault. "La Conférence des Nations Unies sur l'Environnement (Stockholm, 5–16 June 1972)."*Annuaire Français de Droit International* 18. 1972: 603–628.

Kiss, Alexandre, and Jean-Pierre Beurier. *Droit international de l'environnement*. Paris, 2000.

Konaté, Aenza. *L'Organisation de l'Unité Africaine et la protection juridique de l'environnement*. Thesis, Dissertation, Université de Limoges, 1998.

Lavallée, Sophie. "Droit international de l'environnement." In *Juris Classeur Québec – Droit de l'environnement*. Lexis Nexis, 2013.

Mekete, Bekele Tekle, and Jackton Boma Ojwang. "The right to a healthy environment: Possible juridical bases." *South African Journal of Environmental Law and Policy* 3, no. 2. 1996: 155–176.

Mekouar, Mohamed Ali. "La Convention africaine: petite histoire d'une grande renovation." *Environmental Policy and Law* 34, no. 1. 2004: 43–50.

Mekouar, Mohamed Ali. *Le droit à l'environnement dans la Charte africaine des droits de l'homme et des peuples*. Etude juridique en ligne de la FAO, No. 16.

Ouguergouz, Fatsah. *The African Charter on Human and Peoples' Rights: A comprehensive agenda for human dignity and sustainable democracy in Africa*. The Hague and London, 2003.

Rowland, Wade. *The Plot to Save the World. The Life and Times of the Stockholm Conference on the Human Environment*. Toronto, 1973.

Sohn, Louis B. "The Stockholm Declaration on the Human Environment." *Harvard International Law Journal* 14, no. 3. 1973: 423–515.

Strong, Maurice. "One Year after Stockholm: An Ecological Approach to Management." *Foreign Affairs* 51, no. 4. 1973: 690.

Untermaier, Jean. "Le droit de l'environnement. Réflexions pour un premier bilan." *Armée de l'environnement*. 1980.

Van der Linde, Morne. "African responses to environmental protection." *Comparative and International Law Journal of Southern Africa* 35, no. 1. 2002: 99–113.

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Limitations to the Implied Powers of International Organizations

Abstract: The aim of this article is to present the main aspects of limitations to the implied powers of international organizations. The author discusses the most important case law and the position on this topic presented, in particular, by the International Court of Justice. He points to the most salient categories in the catalogue of the limits of implied powers of international organizations.

Keywords: international organizations, implied powers, implication of powers, International Court of Justice, Court of Justice of the European Union.

Introduction

Previous editions of the Adam Mickiewicz University Law Review contained my articles on the doctrine of implied powers of international organizations and on the basis for the implication of such powers.[1] In both articles, a conclusion was formulated that the case law of the international courts and tribunals formed, and still forms, the intellectual basis for the analysis of issues concerning the implied powers of international organizations in contemporary inter-

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1 Andrzej Gadkowski, "The doctrine of implied powers of international organizations in the case law of international tribunals", *Adam Mickiewicz University Law Review* 6. 2016: 45–59; Andrzej Gadkowski, "The basis for the implication of powers of international organizations", *Adam Mickiewicz University Law Review* 11. 2020: 69–82.

national law. This article is the continuation of considerations on the topic of implied powers of international organizations, with a particular focus on the category of the limitation of such powers.

When addressing this topic, one should remember that the case law of the international courts and tribunals, especially that of the International Court of Justice[2] and the Court of Justice of the European Union,[3] which shaped the concept of the implied powers of international organizations, is not uniform. The positions of both courts underwent a noticeable evolution towards a more cautious approach regarding the implication of powers of international organizations in external relations. Quite clearly, however, the concept of implied powers has never allowed the scope of the powers of international organizations to be broadened indefinitely. As this concept aims at ensuring the effective performance of statutory functions by international organizations, it should be considered primarily in the light of this normative assertion. Every international organization requires its own powers in order to fulfil its functions. These powers, however, are limited. The limitations are imposed by the legal nature of international organizations. Indeed, no international organization has general jurisdiction over its members. As a consequence, only some powers may be conferred on this organization through implication, such as supplementary powers. This was directly confirmed by the ICJ in the 1962 Certain expenses advisory opinion. In this opinion the Court emphasised that even if an organization's statute provides a very broad definition of this organization's purposes, "neither they nor the powers conferred to effectuate them are unlimited."[4] The question thus arises as to what the limits of implied powers are. The catalogue of these limits is not easy to determine because the concept of implied powers was based on a teleological interpretation of the constituent instruments of international organizations. This teleological interpretation, al-

2 Hereinafter: ICJ.

3 Hereinafter: CJEU.

4 Certain expenses of the United Nations (Article 17, paragraph 2 of the UN Charter), Advisory Opinion of 20 July 1962, ICJ Reports 1962, 168.

though allowed under Article 31(1) of the 1969 Vienna Convention of the Law of Treaties, also has its limits, namely the objects and purposes of the treaty.[5] The wording of the objects and purposes of international organizations in their constituent instruments is often rather ambiguous; hence their scope of interpretation is easily exceeded. This, in turn, could result in adopting the principle of 'the ends justify the means', which clearly does not substantiate the doctrine of the implied powers of international organizations. Due to the obvious difficulty of creating a catalogue of the limits of implied powers, only the most salient categories will be presented: firstly, necessity or essentiality; secondly, existence of express powers of the international organization; and thirdly, compliance of the implied powers of the international organization with fundamental rules and the principles of international law.

When discussing the catalogue of the limits of the implied powers of international organizations, one should keep in mind the necessity of maintaining of the principle of distribution of functions within an international organization in the process of implication. This issue will be addressed in detail below.

Necessity or Essentiality

Every scientific discussion on the factors which define and limit the scope of implied powers in the law of international organizations must include essentiality and necessity.[6] While these factors are of great interest, they are also, however, extremely difficult to define. The difficulties arise from the fact that identifying what is necessary or essential for performing the tasks and functions of international organizations, or exercising their explicit powers, is inherently subjective. It remains crucial, however, because, if we accept necessity or essentiality as a *sine qua non* condition for implying powers, then their absence in a given situation may be an argument for denying an organization

5 1969 Vienna Convention of the Law of Treaties, 1153 UNTS 331.

6 Andrzej Gadkowski, *Treaty-making powers of international organizations*. Poznań, 2018, 135 et seq.

its implied powers. Chief Justice Marshall stated in the commonly quoted McCulloch case that "the word 'necessary' […] has not a fixed character peculiar to itself. It admits of all degrees of comparison."[7] One must bear in mind that in constitutional law, an organ has much greater freedom of choice of the means of executing expressly granted powers than is the case in the law of international organizations, where the powers of an organization and its organs derive from the will of sovereign states. State sovereignty in itself constitutes a limitation of implied powers, as subsequent sections of this study will show. One may therefore advance the theory that the definition of what is necessary or essential must remain within certain boundaries, and these boundaries depend on the specificity of the law of each international organization.[8] The criteria of necessity and essentiality were frequently referred to by the ICJ in the most famous cases. By way of example, the author will cite several of the most typical statements here. In the 1949 Reparation for injuries case, the Court speaks of powers arising by "necessary implication as being essential to the performance of its duties [duties of the organization]."[9] In another part of this advisory opinion, the Court speaks of powers "necessitated by the discharge of functions."[10] In the 1962 Certain expenses case, the Court talks of powers that are "appropriate for the fulfilment of one of the States' purposes of the United Nations."[11] Neither of these advisory opinions contains definitions of necessity or essentiality. In the dissenting opinions of some judges and also in the literature, one may find the personal views of commentators. E. Lauterpacht, on the basis of the 1954 Effect of awards case, states that "[e]ssential means

7 Samuel Willard Crompton, *Mc Culloch v. Maryland. Implied Powers of the Federal Government*. New York, 2007, 12.

8 Krzysztof Skubiszewski, "Implied powers of International Organizations" in *International Law at a Time of Perplexity. Essays in Honour of Shabatai Rosenne*, ed. Y. Dimstein. Dordrecht, 1989, 861.

9 Reparation for injuries suffered in the service of the United Nations, Advisory Opinion, ICJ Reports 1949, 182–183.

10 Reparation for injuries, 180.

11 Certain expenses case, 168.

something more than important, but less than indispensably requisite."[12] Regarding necessity, Judge Gros, in his dissenting opinion in the 1971 Namibia case, states that "[t]o say that a power is necessary, that it logically results from a certain situation, is to admit the non-existence of any legal justification. Necessity knows no law, it is said; and intent to invoke necessity is to step outside the law."[13] Judge Hackworth, who limited the basis of implication to powers expressly granted, stated in his dissenting opinion in the Reparation for injuries case that "Implied powers flow from a grant of expressed powers, and are limited to those that are 'necessary' to the exercise of powers expressly granted. No necessity for the exercise of the powers here in question has been shown to exist."[14]

Apart from the evident problems in the practice of implying powers, caused by the different ways of understanding necessity and essentiality, one must bear in mind that both these terms constitute an important element of functional necessity. Thus the point made by V. Engström, whereby "[a]t the heart of the implied powers argument lies the finding of a functional necessity."[15] In the strict sense of the term, functional necessity means that for the effective functioning of an international organization it is possible to imply its powers from its statutory purposes and functions without the need for any other arguments. Naturally, this broad understanding of functional necessity is related to the doctrine of functionalism in the law of international organizations. This broad understanding of functional necessity has also met with widespread criticism in the literature. The criticism was prompted for the most part by the fact that a broad definition of the concept of functional necessity places very few

12 Elihu Lauterpacht, "The Development of the Law of International Organizations by the Decisions of International Tribunals", *Recueil des Cours de l'Académie de droit international de la Haye* 152/IV.1976: 431.

13 Legal consequences for States of the continued presence of South Africa in Namibia, ICJ Reports 1971, 339, para. 32.

14 Reparation for injuries, 198.

15 Viljam Engström, *Constructing the powers of international organizations*. The Hague, 2012, 90.

limitations on the implied powers of international organizations, as well as the fact that such powers may only be implied from the powers explicitly granted in the constituent instruments.[16]

Thus, in practice, those who take a more restrictive approach to increasing the powers of international organizations through the implication of powers from statutory objects and purposes will apply a narrower interpretation of necessity and essentiality. By the same token, those who are open to the idea of functional necessity will use these terms in a much broader sense.

The Existence of Express Powers

In the catalogue of the limits of implied powers of international organizations, an important place is given to the existence of express powers. It is clear that the implied powers of international organizations do not stand in opposition to their express powers flowing from their constituent instruments. As a rule, implied powers, as additional and subsidiary to express powers, in practice serve to supplement express powers, especially in the context of *effet utile*. As such, they are necessary or essential not only for the fulfilment of the tasks and purposes of the organization, or for the performance of its functions, but also for the exercise of the powers explicitly granted to it. As emphasised by Judge Hackworth in his dissenting opinion in the 1954 Effect of awards case, "[t]he doctrine of implied powers is designed to implement, within reasonable limitations, and not to supplant or vary, expressed powers."[17] The relationship between implied powers and express powers should therefore be considered from the perspective of functional necessity, as discussed earlier. The key question that arises regarding the limitation of implied powers is the extent to which, if at all, the existing powers in a given area limit the possible implica-

16 James D. Fry, *Legal Resolutions of Nuclear Non-Proliferation Disputes*. Cambridge, 2013, 69.

17 Effects of awards of compensation made by the United Nations Administrative Tribunals, ICJ Reports 1954, 80.

tion of powers in this area.[18] In other words: does the existence of explicit powers limit the implication and the exercise implied powers? In addressing these questions, one must bear in mind that implied powers are additional and subsidiary to explicit powers, which are the original powers granted by the member states of an international organization in its constituent instrument.

These issues were raised in the above-mentioned case law of the ICJ and on an individual basis in the dissenting opinions of some judges. In particular, the Certain expenses case provides a rich source of information in this regard. In this case the ICJ, in defining the powers of the General Assembly, stated that "[t]he provisions of the Charter which distribute functions and powers to the Security Council and to the General Assembly give no support to the view that such distribution excludes from the powers of the General Assembly the power to provide for the financing of measures designed to maintain peace and security."[19] In his analysis of this view in a context relevant to the this discussion, White stresses that the ICJ not so much emphasised the implication of powers necessary for ensuring the effectiveness of express powers but the lack of any provisions in the UN Charter prohibiting the exercise of such powers.[20] Judge Moreno Quintana expressed an interesting view in his dissenting opinion. He concluded that "[t]he implied powers which may derive from the Charter so that the Organization may achieve all its purposes are not to be invoked when explicit powers provide expressly for the eventualities under consideration."[21]

Also A. Campbell reached an interesting conclusion on express powers as a limitation to the implication of powers of international organizations. He stated that "[i]t would appear, therefore, that the exercise of powers would have to be such as would not substantially encroach on, detract from, or nullify

18 A. I. L. Campbell, "The Limits of the Powers of International Organizations", *International and Comparative Law Quarterly* 32, iss. 2. 1983: 524 et seq.

19 Certain expenses case, 164.

20 Nigel D. White, *The Law of International Organizations*. Manchester, 2005, 86–87.

21 Certain expenses case, 245.

other powers."[22] On the other hand, the relationship between express powers and the powers implied from them should be approached with more flexibility, insofar as in a situation where the exercise of the explicitly enumerated powers of an international organization encounters serious difficulties, no party may prohibit this organization from using implied powers provided that, as a result of being unable to use any powers, it would not be able to perform its functions. According to views presented in the literature, any prohibition of this kind would be too restrictive.[23]

It is clear that implied powers are subsidiary to express powers and that these powers are necessary or essential for the exercise of powers explicitly granted. In its traditional form, therefore, the concept of implied powers is not entirely new or independent of the existing express powers. Some commentators describe this relationship as follows: "if there is no explicit power, there can be no implied power."[24] In this context, special attention should be drawn to article 352 of the TFEU (formerly article 308 of the TEC). This article served in practice, together with the principle of parallelism, as the second mechanism for implying the powers of the EC, particularly in its external relations. The new wording of this article, whose content invokes the principle of subsidiarity, is undoubtedly related to the application of a principle laid down in article 5(1) of the TEU, stipulating that the limits of Union competences are governed by the principle of conferral. Article 352 of the TFEU provides the flexibility clause as a subsidiary enabling clause or "lacuna filling clause."[25] It constitutes, however, no subsidiary norm of *Kompetenz-Kompetenz*, which may create new goals for the EU and add competences that are lacking.[26] The

22 Campbell, 528.

23 Henry G. Schermers, Niels M. Blokker, *International Institutional Law*. Fifth edition. Leiden, 2011, 185, para. 233A.

24 Schermers, Blokker, 187, para. 235.

25 Gadkowski, *Treaty-making*, 138.

26 Carl Lebeck, "Implied Powers Beyond Functional Integration? The Flexibility Clause in Revised EU Treaties", *Journal of Transnational Law and Policy* 17, no. 2. 2008: 317 et seq.; Ivo E. Schwarz, "Article 235 and the Law Making Powers in the European Community", *International and Comparative Law Quarterly* 27, no. 3. 1978: 614 et seq.

essence of the flexibility clause is completed by two Declarations concerning Article 352. Declaration No 41 specifies the EU objectives referred to in Article 352(1), and Declaration No 42 emphasises that, in accordance with the settled case law of the CJEU, article 352 of the TFEU constitutes an integral part of an institutional system based on the principle of conferral. It follows that article 352 cannot serve as a basis for extending the scope of EU powers beyond the general framework created by the provisions of the Treaties as a whole. Thus the flexibility clause may not be used as a basis for the adoption of provisions whose effect would be to amend the Treaties.

Article 352 of the TFEU allows the creation of new independent powers, but only those indispensable for the EU's attainment of treaty objectives. It also underlines the differences between the powers of the EU and its objectives. Its importance lies in the fact that these differences are not always clear, especially in reference to the doctrine of implied powers.[27]

Compliance of Implied Powers with Fundamental Rules and the Principles of International Law

As emphasized above, the implied powers of international organizations are created and used in order to supplement the organizations' express powers. The basis for implied powers is formed by the statutory objects and functions of international organizations, as well as their express powers. Even if some statutes include an extended version of the flexibility clause, such as Article 352 of the TFEU, it does not mean that the organization has *carte blanche* to imply its powers without limitations. In principle, the creators of the powers of international organizations are states, and these powers include not only powers expressly provided for in the statute. States also indirectly decide the scope of implied powers by specifying in the constituent instrument the basis on which, and to what extent, such powers may be implied. One of the significant limita-

27 Engström, 87 et seq.

tions to implied powers is thus the will of states flowing from their sovereignty. States may confer a specific scope of their own powers onto an international organization on the basis of an international agreement; however, they are able to do so mainly due to their status as sovereign subjects of international law. Even the statutes of international organizations that are supranational in character, for example the EU, underline the fact that the principle of conferral governs the limits of the organizations' competences. Implying the powers of an international organization and, subsequently, exercising them in practice may result in significant consequences, not only *pro foro interno* but also *pro foro externo*. Clearly, the internal sphere of international organizations offers more freedom in implying additional powers. This implication of new powers may, to a greater extent, have its basis in the purposes and functions of these international organizations and the new powers need not be closely connected with existing powers. In external relations, however, such an extensive implication of new powers, an implication that would threaten the rights and obligations of member states, would amount to a conflict with the fundamental objectives of the international organization as an entity consisting of sovereign states. This may be the reason behind the ICJ's cautious approach to such an extensive implication of new powers of international organizations on the basis of their statutory purposes and functions.[28] At the same time, it must be emphasised that the purposes and functions of an international organization *per se* in no way limit member states in exercising their sovereign rights. Nevertheless, this potential danger may arise from those powers of the organizations that are used in practice. At this point, however, it should be noted that powers that limit the exercise of state sovereignty cannot be presumed and that all the powers of an international organization, regardless of their nature, must be considered in the context of state sovereignty. For instance, if an international organization exercises its treaty-making powers in relations with third states or other inter-

28 Gerald Fitzmaurice, "The Law and Procedure of the International Court of Justice 1951–1954: General Principles and Sources of Law", *British Yearbook of International Law* 30. 1953: 62.

national organizations, these agreements thus draw certain legal consequences that are independent of whether the organization uses its express or implied treaty-making powers. These consequences follow primarily from the *pacta sunt servanda* principle, according to which every treaty in force is binding upon those party to it and must be performed by them in good faith. In this context, it would be difficult to accept a situation where an international organization violates the fundamental rules and principles of international law when implying powers. These rules and principles are, after all, binding not only on states but also for international organizations, as subjects of international law with their own international legal personality. As norms of *ius cogens*, they form the foundations of the entire international order.

Authors studying this issue usually cite the ICJ's view expressed in the 1971 *Namibia* case.[29] Although the ICJ held in this advisory opinion that, under Security Council resolution 276 (1970), member states are under obligation to abstain from entering into treaty relations with South Africa in all cases in which the Government of South Africa purports to act on behalf of or concerning Namibia, it considered that exceptions to this rule are certain general conventions such as those of a humanitarian character, the non-performance of which may adversely affect the people of Namibia.[30] The Court thus concluded that "[i]t will be for the competent international organs to take specific measures in this respect."[31] If interpreted broadly, the ICJ's view could lead to the conclusion that the fundamental principles of international law, such as the obligation to respect human rights and the obligation to implement the provisions of international agreements in good faith, among others, impose natural limits on the implied powers of international organizations.

29 T. D. Gill, "Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter", *Nordic Journal of International Law* 26. 1995: 71.

30 Legal consequences, 55, para. 122.

31 Legal consequences, 55, para. 122.

One must also bear in mind the highly significant role the interpretation of international agreements plays in the process of the implication of powers. The constituent instruments of international organizations usually, though by no means always, take the form of international agreements. The special character of these agreements derives from the fact that they create a new international legal person and grant a specific tranche of their own powers to it. As statutes of international organizations, these agreements are subject to strict rules of interpretation. Teleological interpretation is of particular importance for the implication of the powers of international organizations and refers to the purposes and functions of these organizations. Much like the notion of a principle of international law, the two terms have not been clearly defined, which does not help in specifying the limits of the implication of the powers of international organizations.

The Implication of Powers of International Organizations and the Principle of Distribution of Functions within an International Organization

In the process of the implication of powers of international organizations, the rules pertaining to the distribution of functions within an organization must be taken into consideration. One may assume that implied powers cannot change the distribution of functions. The constituent instruments of various international organizations include provisions, often based on a careful balance, specifying the distribution of functions. This is the case with the UN Charter. The final form of the Charter provides evidence of the political will of its founders and, in particular, the five great powers. As a result, the ICJ repeatedly gave its opinion on the division of powers, especially between the General Assembly and the Security Council. Examples of the most important advisory opinions on this matter have been provided above. Nevertheless, it is worth citing the most interesting positions of ICJ judges expressed in these cases.

Judge Moreno Quintana, for example, expressed in his dissenting opinion in the 1962 Certain expenses case, that as regards implied powers "nothing stands in the way of an appropriate distribution of responsibilities, obligations and powers […] Each organ has its due function."[32] The above view should be understood as meaning that it is insufficient that an organization as a whole is granted powers implied from its purposes and functions. Indeed, it is even more important that the adoption of an implied power by a given organ of this organization does not interfere with the powers of its other organs.[33] In his dissenting opinion, Judge and President Winiarski stressed the need for maintaining within the UN the balance of carefully established fields of competences, and stated that "[t]he fact that an organ of the United Nations is seeking to achieve one of the UN's purposes does not suffice to render its action lawful. The Charter, a multilateral treaty which was the result of prolonged and laborious negotiations, carefully created organs and determined their competence and means of action."[34] A. Campbell, who interprets the positions of both judges, believes that they wish to emphasise that the exercise of powers must be consistent with the relevant scope of competences of the UN organs.[35] The division of competences of the UN organs was also the subject of the 1950 Competence for the admission case. This advisory opinion concerned the powers of the UN organs in the process of admitting new members. In it, the ICJ rejected an interpretation that was potentially advantageous for the General Assembly because it would almost nullify the role of the Security Council in the exercise of one of the essential functions of the Organization.[36]

It is worth bearing in mind that the balance of powers between the organs of international organizations is reflected by Article 13(2) of the TEU, which explains the principle of institutional balance, widely accepted as forming part

32 Judge L. M. Moreno Quintana dissenting opinion, Certain expenses case, 245.
33 Campbell, 529.
34 President Winiarski dissenting opinion, Certain expenses case, 230.
35 Campbell, 529.
36 Competence of Assembly regarding admission to the United Nations case, Advisory Opinion, ICJ Reports 1950, 9.

of the institutional system of the EU. It stipulates that "[e]ach institution shall act within the limits of the powers conferred on it in the Treaty, and in conformity with the procedures, conditions and objectives set out in them". M. de Visser even claims that the principle of institutional balance is "the EU version of Montesquieu's classic notion of the separation of powers."[37]

It is generally believed that the principle of institutional balance applies to different categories of the powers of EU institutions. The most important aspect of the EU's institutional balance involves mutual respect between the powers of its institutions. Each EU institution must respect the powers of the other institutions and may neither replace nor omit them at any cost.[38] References to the principle of institutional balance may be found in the case law of the CJEU, although rather than using the term "principle" it restricts itself to statements referring to institutional balance.[39]

Concluding Remarks

While the attributed powers that are expressly granted in the constitutional instrument of a given international organization raise few doubts, implied powers, which are a special category of attributed powers but require a complex implication process often resting on uncertain foundations, attract far more criticism. The implication of powers nevertheless allows the interpretation of attributed powers to be more dynamic, which is especially important given the constantly developing activity of international organizations in areas that fall outside of the scope of their statutes. Given the particular character of this category of powers of international organizations, especially important questions relate to the nature and the basis for the implication of powers, as well

37 Maartje de Visser, *Constitutional Review in Europe. A Comparative Analysis*. Oxford, 2014, 200.

38 Paul Craig, "Institutions, Powers and Institutional Balance" in *The Evolution of EU Law*, eds. P. Craig, and G. de Burca. Oxford, 2011, 41.

39 A. Gadkowski, *Treaty-making*, 143.

as to the possible and necessary limits of this process, with particular attention being given to the conditions of necessity and essentiality that have been so thoroughly discussed in the doctrine and case law. Without a doubt, the case law, particularly that of the ICJ and – in relation to the system of the European Union that of the CJEU – formed and still forms the main intellectual basis for the analysis of different issues concerning the implied powers of international organizations in the doctrine of international law.

References

Campbell, A.I.L. "The Limits of the Powers of International Organizations." *International and Comparative Law Quarterly* 32, iss. 2. 1983: 523–533.

Craig, Paul. "Institutions, Powers and Institutional Balance." In *The Evolution of EU Law*, edited by Paul Craig, and Gráinne de Burca. Oxford, 2011: 41–84.

Crompton, Samuel Willard. *Mc Culloch v. Maryland. Implied Powers of the Federal Government*. New York, 2007.

de Visser, Maartje. *Constitutional Review in Europe. A Comparative Analysis*. Oxford, 2014.

Engström, Viljam. *Constructing the powers of international organizations*. The Hague, 2012.

Fitzmaurice, Gerald. "The Law and Procedure of the International Court of Justice 1951–1954: General Principles and Sources of Law." *British Yearbook of International Law* 30. 1953.

Fry, James D. *Legal Resolutions of Nuclear Non-Proliferation Disputes*. Cambridge, 2013.

Gadkowski, Andrzej. "The basis for the implication of powers of international organizations." *Adam Mickiewicz University Law Review* 11. 2020: 69–82.

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

Gadkowski, Andrzej. *Treaty-making powers of international organizations*. Poznań, 2018.

Gill, T.D. "Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter." *Nordic Journal of International Law* 26. 1995: 33–138.

Lauterpacht, Elihu. "The Development of the Law of International Organizations by the Decisions of International Tribunals." *Recueil des Cours de l'Académie de droit international de la Haye* 152/IV.1976: 377–478.

Lebeck, Carl. "Implied Powers Beyond Functional Integration? The Flexibility Clause in Revised EU Treaties." *Journal of Transnational Law and Policy* 17, no. 2. 2008: 303–358.

Schermers, Henry G., and Niels M. Blokker, *International Institutional Law*. Fifth edition. Leiden, 2011.

Schwarz, Ivo E. "Article 235 and the Law Making Powers in the European Community." *International and Comparative Law Quarterly* 27, no. 3. 1978: 614–628.

Skubiszewski, Krzysztof. "Implied powers of International Organizations." In *International Law at a Time of Perplexity. Essays in Honour of Shabatai Rosenne*, edited by Yoram Dimstein. Dordrecht, 1989: 855–868.

White, Nigel D. *The Law of International Organizations*. Manchester, 2005.

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European Standard for the Protection of Patients' Lives

Abstract: The aim of the study it to reconstruct the European standard for the protection of patients' lives in its substantive and procedural aspects. In the case-law of the bodies of the system of the Convention for the Protection of Human Rights and Fundamental Freedoms, the scope of the state authorities' substantive and procedural obligation to protect the right to life in the health care system was defined for the first time by the European Commission of Human Rights in the decision of 22 May 1995 in *Mehmet Işıltan v. Turkey*, and then repeated in the case-law of the reformed Court in the decision on the admissibility in *Powell v. United Kingdom*. The study of the European standard for the protection of patients' lives traces its history, from *Mehmet Işıltan v. Turkey* and *Powell v. United Kingdom*; through developments of the meaning of its substantive limb, as illustrated by *Mehmet and Bekir Senturk v. Turkey*, *Asiye Genc v. Turkey*, *Aydogdu v. Turkey*, and *Elena Cojocaru v. Romania*; to developments of the meaning of its procedural limb, as exemplified by *Calvelli and Ciglio v. Italy*, *Wojciech Byrzykowski v. Poland*, *Šilih v. Slovenia*, and *Gray v. Germany*; and finally covers the Court's attempt to sum up its previous approach to the European standard for the protection of patients' lives, as expressed in the case of *Lopes de Sousa Fernandes v. Portugal*.

Keywords: human rights law, case-law of the European Court of Human Rights, European standard for the protection of patients' lives.

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Introduction

In the context of healthcare,[1] Article 2[2] of the Convention for the Protection of Human Rights and Fundamental Freedoms[3] obliges States to implement an effective regulatory framework to ensure that hospitals, both private and public, take the necessary steps to protect patient lives.[4] This framework also requires the creation of an independent judicial system that can determine the cause of death of patients under the care of the medical profession, and that can hold those responsible for failings accountable[5]. In consequence "the acts and omissions of the authorities in the field of health care policy may in certain circumstances engage their responsibility under the positive limb of Article 2."[6] However, if a Contracting State that has made sufficient provisions for maintaining high professional standards among healthcare professionals and protecting patient lives, it cannot be held accountable under Article 2 of the Convention solely on the basis of errors in judgment or negligent coordination among healthcare professionals in the treatment of a specific patient.[7]

The scope of the state authorities' obligation to protect the right to life in the health care system is defined by the European Commission of Human Rights in the decision of 22 May 1995 in *Mehmet Işıltan v. Turkey*. In its statement on the substantive aspect of this commitment, the Commission underlines that:

> "The obligation to protect the right to life IS not limited for the High Contracting Parties to the duty to prosecute those who put life in danger

1 Katarzyna Łasak, *Prawa społeczne w orzecznictwie Europejskiego Trybunału Praw Człowieka*. Warszawa, 2013, 116–139; Robert Tabaszewski, *Prawo do zdrowia w systemach ochrony praw człowieka*. Lublin, 2016.

2 William A. Schabas, *The European Convention on Human Rights. A Commentary*. Oxford, 2015, 117–163.

3 Hereinafter: the Convention.

4 *Lopes de Sousa Fernandes v. Portugal*, Application No. 56080/13, Judgement of 19 December 2017.

5 *Calvelli and Ciglio v. Italy*, Application No. 32967/96, Judgement of 17 January 2002.

6 *Powell v. the United Kingdom*, Application No. 45305/99, Judgement of 4 May 2000.

7 *Powell v. the United Kingdom*.

> but implies positive preventive measures appropriate to the general situation – in particular the duty to ensure that hospitals have regulations for the protection of patients and to establish an effective system of judicial investigation into medical accidents."[8]

In its statement on the procedural aspect, the Commission points out that:

> "The obligation to establish an effective judicial system for establishing the cause of a dead which occurs in hospital and any liability on the part of the medical practitioners concerned."[9]

The distinction between the substantive and procedural aspect of the state authorities' obligation to protect the right to life in the health care system is perpetuated by the case-law of the reformed European Court of Human Rights in the decision on the admissibility of William and Anita Powell's application claiming violation of Article 2, Article 6 § 1 and Article 8 of the Convention lodged in connection with the loss of a child who died as a result of misconduct in diagnosis and treatment.[10] The Court declared their application inadmissible because of the settlement of a civil claim based on medical negligence against the responsible health authority, which denied them the possibility of an adversarial hearing on the circumstances of their son's death, although the domestic remedies used by the applicants had previously failed to determine the scope of responsibility of the doctors who had diagnosed and treated their late son.

In the part of the justification concerning the alleged violation of Article 2 of the Convention in its substantive aspect, the Court noted that State authorities are not responsible for misconduct in the coordination of the treatment pro-

8 *Mehmet Işıltan v. Turkey*, Application No. 20948/92, Judgement of 22 May 1995.
9 *Mehmet Işıltan v. Turkey*.
10 Jane Wright, "The Operational Obligation under Article 2 of the European Convention on Human Rights and Challenges for Coherence – Views from the English Supreme Court and Strasbourg", *Journal of European Tort Law* 7, no. 1. 2016: 58–81.

cess of a specific patient if it "has made adequate provision for securing high professional standards among health professionals and the protection of the lives of patients."[11] In the part of the justification concerning the alleged violation of Art 2 of the Convention in its procedural aspect, the Court emphasized that the applicants' decision to settle their civil action in negligence against the responsible health authority "closed another and crucially important avenue for shedding light on the extent of the doctors' responsibility for their son's death."[12] As emphasized by the Court:

> "where a relative of a deceased person accepts compensation in settlement of a civil claim based on medical negligence he or she is in principle no longer able to claim to be a victim in respect of the circumstances surrounding the treatment administered to the deceased person or with regard to the investigation carried out into his or her death."[13]

In the part of the justification concerning the alleged violation of Article 6 § 1 of the Convention, the Court did not share the applicants' position as to the special legal protection which doctors responsible for the diagnosis and treatment of their son enjoyed from the domestic authorities in the course the proceedings.

Standard for the Protection of Patients' Lives in the Case-Law of the European Court of Human Rights. The Scope of the Substantive Obligation

The Convention obliges States Parties to establish an effective regulatory framework for securing high professional standards among health professionals and the protection of the lives of patients. In assessing whether a State-Party is responsible for breaching this obligation the Court takes into account the fact

11 *Mehmet Işıltan v. Turkey*.
12 *Mehmet Işıltan v. Turkey*.
13 *Mehmet Işıltan v. Turkey*.

that "matters of health care policy, in particular as regards general preventive measures, were in principle within the margin of appreciation of the domestic authorities who were best placed to assess priorities, use of resources, and social needs and proportional in its response."[14] The Court's statement linking the substantive aspect of the positive obligation from Article 2 of the Convention with the obligation to establish an effective regulatory framework to protect judgments is illustrated by the cases of *Mehmet and Bekir Senturk v. Turkey*,[15] *Asiye Genc v. Turkey*,[16] *Aydogdu v. Turkey*,[17] and *Elena Cojocaru v. Romania*.[18]

In the judgment *Mehmet and Bekir Sentürk v. Turkey*,[19] the Court links the violation of Article 2 of the Convention with the circumstances of the death of pregnant Menekşe Şentürk, who was deprived of the possibility of access to appropriate emergency care because of the malfunctioning of the hospital departments. In one day, the deceased was denied access to appropriate medical in as many as four hospitals. In the first two hospitals, she was examined only by midwives, who did not see the necessity to call the doctors on duty. In the third hospital, she was prescribed medication for renal colic and recommended a postpartum follow-up. In the fourth hospital, fetal death was diagnosed. Because of the fetal death diagnosis, Menekşe Şentürk needed immediate surgery that was made conditional on the advance payment of an amount that the her husband did not have at that time. The surgery was not carried out, so a private ambulance without medical personnel was therefore arranged to transport

14 Martin J. R. Curtice, John J. Sandford, "Article 8 of the Human Rights Act 1998: A Review of Case Law Related to Forensic Psychiatry and Prisoners in the United Kingdom", *Journal of the American Academy of Psychiatry and the Law*, vol. 37, iss. 2. 2009: 232–238.

15 *Mehmet Şentürk and Bekir Şentürk v. Turkey*, Application No. 13423/09, Judgement of 9 April 2013.

16 *Asiye Genç v. Turkey*, Application No. 24109/07, Judgement of 27 January 2015.

17 *Aydoğdu v. Turkey*, Application No. 40448/06, Judgement of 30 August 2016.

18 *Elena Cojocaru v. Romania*, Application No. 74114/12, Judgement of 22 March 2016; Aleydis Nissen, "A Right to Access to Emergency Health Care: The European Court of Human Rights Pushes the Envelope", *Medical Law Review* 26, iss. 4. 2018: 693–702.

19 *Mehmet Şentürk and Bekir Şentürk v. Turkey*.

the patient to the gynecology and obstetrics hospital in Izmir. On the way to Izmir, Menekşe Şentürk died.

The circumstances of her death were investigated by the explanatory commission of the Ministry of Health. Criminal proceedings were also conducted, but resulted in the conviction of one of the seven defendants and discontinuation due to the statute of limitations for the other six. After exhausting domestic legal remedies, the late Menekşe Şentürk's husband and her son lodged an application to the Court for a violation of Articles 2, 3, 6 and 13 of the Convention. In its judgment the Court agreed with the applicants in the part concerning the alleged violation of Article 2 in its substantive and procedural aspect, drawing attention to the malfunctioning of the Turkish health care system, which led to the death of the patient.

In its judgment delivered in the *Asiye Genç v. Turkey* case,[20] the Court "concludes that, in the light, firstly, of the circumstances leading to the failure to provide essential emergency care and, secondly, of the insufficient nature of the domestic investigations carried out in that connection, the State must be regarded as having failed to meet its obligations under Article 2 of the Convention in respect of the child"[21] of the applicant. The applicant's child was born prematurely, in the thirty-sixth week, in urgent need of medical intervention due to respiratory distress. However, the required medical intervention was not provided by the hospital of delivery. Neither was it provided in two other Turkish hospitals, leading to death of the applicant's child. Domestic investigations carried out in connection with that circumstances were not sufficient either. In its judgment the Court found that there has been a violation of Article 2 in its substantive and procedural aspect and the applicant's late child:

> "Must be considered as having been the victim of a malfunctioning of the hospital departments, in that he was deprived of any access to appropriate

20 *Asiye Genç v. Turkey*.
21 *Asiye Genç v. Turkey*.

> emergency care. In other words, the child died not as a result of negligence or an error of judgment in the treatment administered to him, but because he was simply not offered any form of treatment at all – it being understood that such a situation was analogous to a denial of medical care such as to put a person's life in danger."[22]

In its judgment in *Aydoğdu v. Turkey*,[23] the Court ascribed the death of a premature baby with a respiratory disorder as a violation of Article 2 in its substantive and procedural aspect. The applicants' child was born prematurely in the 30th week of pregnancy and required emergency treatment but did not receive it in the hospital of delivery. The newborn was then transported to another medical facility, but owing to the lack of available space and equipment she was placed in a standard incubator instead of a specialized one, and in consequence died two day after. In its justification to the judgment stating there had been a violation of the Article 2 of the Convention the Court emphasized:

> "That this situation – common and typical for neonatology in this period – demonstrates that the authorities responsible for the health services could not claim that they have been unaware at that time of the events that the life of more than one patient, including that of the baby Aydoğdu, was in real danger, and that they take all the reasonably measures to reduce that risk, that are within their powers. […] Since the Government had not been able to show how taking such measures would have placed an unbearable or excessive burden on it in terms of the operational choices to be made in terms of priorities and resources it must therefore be concluded that Turkey has not sufficiently ensured the proper organization and proper functioning of the public hospital service in this region of the country […] in particular for lack of a regulatory framework capable of

22 *Asiye Genç v. Turkey*.
23 *Aydoğdu v. Turkey*.

> imposing on hospitals rules guaranteeing the protection of lives of premature children, including the life of the applicants' daughter."[24]

In its judgment in *Elena Cojocaru v. Romania*, the Court concluded that there had been a violation of Article 2 of the Convention in connection with a refusal to perform the emergency caesarean delivery that could have saved the lives of the applicant's daughter and granddaughter. The Court found certain dysfunctionalities in the coordination of the medical services involved in:

> "delay of the appropriate emergency treatment […] In this connection, the Court points out that an issue may arise under Article 2 where it is shown that the authorities of a Contracting State put an individual's life at risk through the denial of health care they have undertaken to make available to the population in general refused to fulfil his professional duties."[25]

Standard for the Protection of Patients' Lives in the Case-Law of the European Court of Human Rights. The Scope of the Procedural Obligation

The States Parties to the Convention are obliged to establish an effective judicial system to control for any liability on the part of the medical practitioners concerned. The Court's statement linking the procedural aspect of the positive obligation from Article 2 of the Convention with the obligation to establish an effective judicial system confirm the judgments delivered in the cases *Calvelli and Ciglio v. Italy*,[26] *Wojciech Byrzykowski v. Poland*,[27] *Šilih v. Slovenia*[28] and *Gray v. Germany*.[29]

24 *Aydoğdu v. Turkey*.
25 *Elena Cojocaru v. Romania*.
26 *Calvelli and Ciglio v. Italy*.
27 *Byrzykowski v. Poland*, Application No. 11562/05, Judgement of 27 June 2006.
28 Šilih *v. Slovenia*, Application No. 71463/01, Judgement of 9 April 2009.
29 *Gray v. Germany,* Application No. *49278/09*, Judgement of 22 May 2014.

In its judgment in *Calvelli and Ciglio*,[30] the Court focused on the alleged violation of Articles 2 and 6 § 1 in connection with the investigation of the medical negligence that led to the death of the applicants' newborn child. Domestic remedies used by the applicants had previously failed to determine the cause of death of their late son or the scope of responsibility of the doctors who had diagnosed and treated him. The civil proceedings involving the applicants and the doctor and clinic's insurers ended when the applicants agreed to a settlement and waived their right to continue the proceedings.[31] The criminal proceedings against the doctor were unsuccessful due to the expiration of the statute of limitations.[32] The applicants alleged a violation of Articles 2 and 6 § 1 of the Convention on the ground that owing to procedural delays a time-bar had arisen, making it impossible to prosecute the doctor responsible for the delivery of their child, who had died shortly after birth. However, the Court did not share their position and emphasized that through the settlement they had voluntarily resigned from further proceedings, denying themselves access to the most effective means – in the particular circumstances of this case, which would have satisfied the positive obligations pursuant to Article 2 – of determining the extent of the doctor's responsibility for their child's death.[33] In its justification the Court referred to the scope of the state's responsibility for the protection of the right to life in the health care system, as defined in the case of *Powell v. the United Kingdom*, which it supplemented with a procedural aspect requiring that "an effective independent judicial system to be set up so that the cause of death of patients in the care of the medical profession, whether in the public or the private sector, can be determined and those responsible made accountable"[34] and recalled its statement from the decision on the admissibility of William and Anita Powell's application by pointing out "where a relative of a deceased person accepts com-

30 *Calvelli and Ciglio v. Italy*.
31 *Calvelli and Ciglio v. Italy*.
32 *Calvelli and Ciglio v. Italy*.
33 *Calvelli and Ciglio v. Italy*.
34 *Calvelli and Ciglio v. Italy*.

pensation in settlement of a civil claim based on medical negligence he or she is in principle no longer able to claim to be a victim."[35]

The Court's view on the procedural aspect of the obligation to establish an effective and independent system of judicial control of the health care sector is also reflected in the judgment delivered in the case of *Wojciech Byrzykowski*,[36] whose wife has died as a result of postpartum complications after epidural anaesthesia, with the child being born with a serious health problems requiring permanent medical attention. In connection with these circumstances the applicant submitted a request to the Regional Chamber of Physicians to initiate disciplinary proceedings against the anaesthetist, lodged a compensation claim against the hospital and against the hospital's insurance company, and requested that a criminal investigation of the causes of his wife's death be instituted. When the Court delivered its judgment the disciplinary proceedings, civil proceedings and criminal investigations were still pending.

Finding a violation of the positive obligation of a procedural nature from Article 2 of the Convention, the Court pointed out that no effective investigation has been conducted. On the contrary, a violation of a substantive limb of Article 2 of the Convention was no found so the State Party established the appropriate regulations guaranteeing the protection of patients' lives. In its conclusion the Court reiterated "that the acts and omissions of the authorities in the field of health care policy may in certain circumstances engage their responsibility under the positive limb of Article 2. However, where a Contracting State has made adequate provision for securing high professional standards among health professionals and the protection of the lives of patients, it cannot accept that matters such as error of judgment on the part of a health professional or negligent co-ordination among health professionals in the treatment of a particular patient are sufficient of themselves to call a Contracting State to account from the standpoint of its positive obligations under Article 2 of the Convention to protect life."[37]

35 *Calvelli and Ciglio v. Italy*.
36 *Byrzykowski v. Poland*.
37 *Byrzykowski v. Poland*.

When assessing its temporal jurisdiction over the procedural limb of the protection of the right to life in the health care system, the Court "reiterates that the provisions of the Convention do not bind a Contracting Party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the Convention with respect to that Party."[38] However, there is an exception to this particular rule expressed in *Šilih v. Slovenia*,[39] brought before the Court by an applicant who alleged a violation of Article 2, 6 and 13 of the Convention in connection with the loss of a son who died as a result of hospital treatment.[40] The circumstances of the death of Šilih's son were not clarified in the course of the criminal proceedings, which lasted for five years. These circumstances were also not clarified in the course of civil proceedings lasting for twelve years. Having regard to the presented assumptions, the Court ruled "that the domestic authorities failed to deal with the applicants' claim arising out of their son's death with the level of diligence required by Article 2 of the Convention and found that there has been a violation of Article 2 in its procedural aspect."[41] This statement was also upheld by fifteen votes to two by the Grand Chamber, which presented an exception to the general *rationae temporis* rule in assessing the procedural dimension of the obligation under Article 2 of the Convention. As the Court emphasized, "the procedural obligation to carry out an effective investigation under Article 2 has evolved into a separate and autonomous duty"[42] and as such "can be considered to be a detachable obligation arising out of Article 2 capable of

38 Šilih *v. Slovenia*.
39 Šilih *v. Slovenia*.
40 William A. Schabas, "Do the 'Underlying Values' of the European Convention on Human Rights Begin in 1950?", *Polish Yearbook Of International Law*, no. 33. 2013: 247–258; Adam Wiśniewski, "Naruszenie prawa do życia z powodu braku skutecznego śledztwa w celu ustalenia odpowiedzialności za śmierć syna skarżącego (sprawa Przemyk przeciwko Polsce). Glosa do wyroku ETPC z dnia 17 września 2013 r., 22426/11", *Gdańskie Studia Prawnicze – Przegląd Orzecznictwa*. 2013: 117–124.
41 Šilih *v. Slovenia*.
42 Šilih *v. Slovenia*.

binding the State even when the death took place before the critical date."[43] This obligation "include[s] not only an effective investigation into the death of the person concerned but also the institution of appropriate proceedings for the purpose of determining the cause of the death and holding those responsible to account – will have been or ought to have been carried out after the critical date" [44] and "binds the State throughout the period in which the authorities can reasonably be expected to take measures with an aim to elucidate the circumstances of death and establish responsibility for it."[45] However, it is not open-ended and includes only procedural acts and/or omissions where a "genuine connection between the death and the entry into force of the Convention in respect of the respondent State for the procedural obligations imposed by Article 2 to come into effect."[46]

In the case of *Gray v. Germany*,[47] the Court examines an extraterritorial aspect of the positive obligation to provide effective remedies to determine the cause of death of a patient, and to made accountable those responsible, asking whether German authorities have jurisdiction over a German national in the case of medical negligence committed on the territory the United Kingdom. According to the Court, the German authorities had established effective remedies for determining the cause of the death of the applicant's father and the responsibility of U. in this regard. The Court also stated that the procedural safeguards enshrined in Article 2 do not give rise to a right or an obligation for a specific sentence to be imposed on a prosecuted third party under the domestic law of a specific State. The Court emphasized that the procedural obligation under Article 2 pertains to the means of investigation, not the result. [48]

43 Šilih *v. Slovenia*.
44 Šilih *v. Slovenia*.
45 Šilih *v. Slovenia*.
46 Šilih *v. Slovenia*.
47 *Gray v. Germany*.
48 *Gray v. Germany*.

Towards Clarification of the European Standard for the Protection of Patients' Lives

The Court's attempt to sum up its previous approach to the European standard for the protection of patients' lives is expressed in the Lopes de Sousa Fernandes case,[49] in which the applicant had lost her husband in hospital as a result of a hospital-acquired infection and due to carelessness and medical negligence.[50] The applicant's husband had undergone nasal polypectomy and was discharged from hospital. Two days later, he was admitted to the emergency department with violent headaches, but the doctors on duty concluded that he was suffering from psychological problems and so prescribed tranquilisers. In the morning of the next day the diagnosis of the new medical team on duty revealed bacterial meningitis, which required the patient to undergo intensive care therapy. After therapy the applicant's husband was discharged from the hospital in a stable condition. When his condition worsened, further tests were carried out, which led to the detection of duodenal ulcers and bacteria infecting the large intestine. Despite recommended treatment, the patient's condition did not improve and his last stay in the hospital ended in death, due to sepsis caused by peritonitis and a perforated viscus. Proceedings before the General Inspectorate for Health, the Regional Disciplinary Chamber of the Medical Society, the court in Vila Nova de Gaia and the administrative and tax court in Oporto brought by the applicant did not show the extent to which the standards of medical practice had been violated. The applicant therefore alleged violation of Article 2, 6 and 13 of the Convention. The Court shared the applicant's arguments in the part concerning the violation of Article

49 *Lopes de Sousa Fernandes v. Portugal*.

50 Julia Kapelańska-Pręgowska, "Medical Negligence, Systemic Deficiency, or Denial of Emergency Healthcare? Reflections on the European Court of Human Rights Grand Chamber Judgment in Lopes de Sousa Fernandes v. Portugal of 19 December 2017 and Previous Case-law", *European Journal of Health Law* 26, iss. 1. 2019: 26–43; Leszek Garlicki, "Prawo do ochrony zdrowia na tle 'prawa do życia' (uwagi o aktualnym orzecznictwie Europejskiego Trybunału Praw Człowieka)" in *Dookoła Wojtek… Księga pamiątkowa poświęcona Doktorowi Arturowi Wojciechowi Preisnerowi*, eds. R. Balicki, and M. Jabłoński. Wrocław, 2018: 211–220.

2 in its procedural dimension and clarified the view expressed previously in the case-law on state liability for the consequences of medical malpractice, focusing on:

- the scope of liability of the State-Parties when the death of a patient is a consequence of the negligence of medical professionals,
- the obligation of the State-Parties to establish an effective system of judicial investigation into medical accidents,
- exceptional situations in which certain actions or omissions of medical personnel may lead to the liability of the State-Party for violation of Article 2 of the Convention in its substantive aspect.

In its statement on the first of the selected dimensions the Court indicates the nature of the state's responsibility to establish an effective regulatory framework compelling hospitals to adopt appropriate measures for the protection of patients' lives. The second one connects with the effective implementation of an adequate regulatory framework. The third one is related to two types of exceptional circumstances in which the responsibility of the State under the substantive aspect of Article 2 of the Convention may be invoked with regard to the acts of healthcare providers, as well as their failures to act. [51] The first type of exceptional circumstances "concerns a specific situation where an individual patient's life is knowingly put in danger by denial of access to life-saving emergency treatment." The second type "arises where a systemic or structural dysfunction in hospital services results in a patient being deprived of access to life-saving emergency treatment and the authorities knew about or ought to have known about that risk and failed to undertake the necessary measures to prevent that risk from materialising, thus putting the patients' lives, including the life of the particular patient concerned, in danger."[52] In order to classify the examined circumstances to the exceptional one "when the responsibility of the State under the substantive limb of Article 2 of the Convention may be engaged in respect of the acts and omissions of health-care

51 *Lopes de Sousa Fernandes v. Portugal*.
52 *Lopes de Sousa Fernandes v. Portugal*.

providers."[53] In order to assign responsibility to the State-Party, the substantive limb of Article 2 of the Convention may be engaged in respect of the acts and omissions of health-care providers when:

- there is a violation of the professional duties by refusing to provide life-saving emergency treatment, thus putting patients' lives in danger,
- the violation is of a structural or systemic nature,
- there is a relationship between the malpractice and the detriment suffered by the patient,
- this malpractice results from the violation of the obligation to establish an effective regulatory framework compelling hospitals to adopt appropriate measures for the protection of patients' lives.

Therefore the Court found only a violation of Article 2 in its procedural aspect, because "the domestic system as a whole, when faced with an arguable case of medical negligence resulting in the death of the applicant's husband, failed to provide an adequate and timely response consonant with the State's obligation under Article 2."[54]

Conclusions

The Strasbourg case-law developed standard defining the scope of the state authorities' obligation to protect patients' lives in its substantive and procedural aspect ever since the decision of the Commission of 22 May 1995 in the case of *Mehmet Işıltan v. Turkey*. The presented distinction is reflected in the case-law of the reformed Court in the decision on the admissibility of William and Anita Powell's[55] application. The substantive aspect obliges States Parties to establish an effective regulatory framework that ensures the provision of high professional standards among health professionals and the protection of the lives of patients,

53 *Lopes de Sousa Fernandes v. Portugal*.
54 *Lopes de Sousa Fernandes v. Portugal*.
55 *Powell v. the United Kingdom*.

as illustrated in *Mehmet and Bekir Senturk v. Turkey*,[56] *Asiye Genc v. Turkey*,[57] *Aydogdu v. Turkey*,[58] and *Elena Cojocaru v. Romania*.[59] The procedural aspect "requires an effective independent judicial system to be set up so that the cause of death of patients in the care of the medical profession, whether in the public or the private sector, can be determined and those responsible made accountable"[60] as illustrated in *Calvelli and Ciglio v. Italy*,[61] *Wojciech Byrzykowski v. Poland*,[62] *Šilih v. Slovenia*,[63] and *Gray v. Germany*.[64] In the *Mehmet and Bekir Sentürk v. Turkey* case,[65] the Court linked the violation of Article 2 in its substantive aspect with the circumstances of the death of pregnant Menekşe Şentürk, who was deprived of the possibility of access to appropriate emergency care because of the malfunctioning of the hospital departments. In the *Asiye Genç v. Turkey* case,[66] the Court connected the violation of Article 2 in its substantive aspect with the circumstances leading to the failure to provide essential emergency care in respect of the applicant's child. In the *Aydoğdu v. Turkey* case,[67] the Court found the example of the violation of Article 2 in its substantive aspect in the "lack of a regulatory framework capable of imposing on hospitals rules guaranteeing the protection of lives of premature children, including, including the life of the applicants' daughter."[68] In the *Elena Cojocaru v. Romania*[69] case, the Court concluded that there had been a violation of Article 2 of the Convention in the "apparent lack of coordination of the medical services and the delay in administering the appropriate emergency treatment attested to a dysfunctionality of

56 *Mehmet Şentürk and Bekir Şentürk v. Turkey*.
57 *Asiye Genç v. Turkey*.
58 *Aydoğdu v. Turkey*.
59 *Elena Cojocaru v. Romania*.
60 *Calvelli and Ciglio v. Italy*.
61 *Calvelli and Ciglio v. Italy*.
62 *Byrzykowski v. Poland*.
63 Šilih *v. Slovenia*.
64 *Gray v. Germany*.
65 *Mehmet Şentürk and Bekir Şentürk v. Turkey*.
66 *Asiye Genç v. Turkey*.
67 *Aydoğdu v. Turkey*.
68 *Aydoğdu v. Turkey*.
69 *Elena Cojocaru v. Romania*.

the public hospital services, although no real systemic or structural deficiencies were detected"[70] in connection with a refusal to perform the emergency caesarean delivery that could have saved the lives of the applicant's daughter and granddaughter. In its judgment in *Calvelli and Ciglio v. Poland*,[71] the Court focused on the violation of Article 2 in its procedural limb in connection with the investigation of the medical negligence that led to the death of the applicants' newborn child by pointing out that a relative of a deceased person who has accepted a settlement of a civil claim based on medical negligence is no longer able to claim as a victim in other proceedings. In *Wojciech Byrzykowski v. Poland*[72] the Court connected the violation of Article 2 in its procedural limb with a lack of effective investigation after the applicant's wife had died as a result of postpartum complications after epidural anaesthesia, with the child being born with a serious health problems requiring permanent medical attention. In *Šilih v. Slovenia*[73] the Court presented an exception to the general *rationae temporis* rule in assessing the procedural dimension of the obligation to carry out an effective investigation under Article 2 when the death of a patient took place before the date of the entry into force of the Convention with respect to the Party. In *Gray v. Germany*,[74] the Court presented its view on an extraterritorial aspect of the positive obligation to provide effective remedies under procedural limb of the Article 2 of the Convention, concluding that the German authorities have jurisdiction over a German national in the case of medical negligence committed on the territory of the United Kingdom. In *Lopes de Sousa Fernandes* the Court made an attempt to sum up its previous approach to the European standard for the protection of patients' lives, with a special emphasis on the responsibility of the State-Party under the substantive limb of Article 2 of the Convention in respect to the acts and omissions of health-care providers.

70 *Elena Cojocaru v. Romania*.
71 *Calvelli and Ciglio v. Italy*.
72 *Byrzykowski v. Poland*.
73 Šilih *v. Slovenia*.
74 *Gray v. Germany*.

References

Curtice, Martin J. R., Sandford John J. "Article 8 of the Human Rights Act 1998: A Review of

Case Law Related to Forensic Psychiatry and Prisoners in the United Kingdom." *Journal of the American Academy of Psychiatry and the Law*, vol. 37, iss. 2. 2009: 232–238.

Garlicki, Leszek. "Prawo do ochrony zdrowia na tle 'prawa do życia' (uwagi o aktualnym orzecznictwie Europejskiego Trybunału Praw Człowieka)." In *Dookoła Wojtek… Księga pamiątkowa poświęcona Doktorowi Arturowi Wojciechowi Preisnerowi*, edited by Ryszard Balicki, and Mariusz Jabłoński. Wrocław, 2018: 211–220.

Kapelańska-Pręgowska, Julia. "Medical Negligence, Systemic Deficiency, or Denial of Emergency Healthcare? Reflections on the European Court of Human Rights Grand Chamber Judgment in Lopes de Sousa Fernandes v. Portugal of 19 December 2017 and Previous Case-law." *European Journal of Health Law* 26, iss. 1. 2019: 26–43.

Łasak, Katarzyna. *Prawa społeczne w orzecznictwie Europejskiego Trybunału Praw Człowieka*. Warszawa, 2013.

Nissen, Aleydis. "A Right to Access to Emergency Health Care: The European Court of Human Rights Pushes the Envelope." *Medical Law Review* 26, iss. 4. 2018: 693–702.

Schabas, William A. *The European Convention on Human Rights. A Commentary*. Oxford, 2015.

Schabas, William A. "Do the 'Underlying Values' of the European Convention on Human Rights Begin in 1950?." *Polish Yearbook Of International Law*, no. 33. 2013: 247–258.

Tabaszewski, Robert. *Prawo do zdrowia w systemach ochrony praw człowieka*. Lublin, 2016.

Wiśniewski, Adam. "Naruszenie prawa do życia z powodu braku skutecznego śledztwa w celu ustalenia odpowiedzialności za śmierć syna skarżą-

cego (sprawa Przemyk *przeciwko* Polsce). Glosa do wyroku ETPC z dnia 17 września 2013 r., 22426/11." *Gdańskie Studia Prawnicze – Przegląd Orzecznictwa*. 2013: 117–124.

Wright, Jane. "The Operational Obligation under Article 2 of the European Convention on Human Rights and Challenges for Coherence – Views from the English Supreme Court and Strasbourg." *Journal of European Tort Law* 7, no. 1. 2016: 58–81.

Asiye Genç v. Turkey, Application No. 24109/07, Judgement of 27 January 2015.

Aydoğdu v. Turkey, Application No. 40448/06, Judgement of 30 August 2016.

Byrzykowski v. Poland, Application No. 11562/05, Judgement of 27 June 2006.

Calvelli and Ciglio v. Italy, Application No. 32967/96, Judgement of 17 January 2002.

Elena Cojocaru v. Romania, Application No. 74114/12, Judgement of 22 March 2016.

Gray v. Germany, Application No. *49278/09*, Judgement of 22 May 2014.

Lopes de Sousa Fernandes v. Portugal, Application No. 56080/13, Judgement of 19 December 2017.

Mehmet Işıltan v. Turkey, Application No. 20948/92, Judgement of 22 May 1995.

Mehmet Şentürk and Bekir Şentürk v. Turkey, Application No. 13423/09, Judgement of 9 April 2013.

Powell v. the United Kingdom, Application No. 45305/99, Judgement of 4 May 2000.

Šilih *v. Slovenia*, Application No. 71463/01, Judgement of 9 April 2009.

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State Liability for Judicial Decisions Infringing EU Law – the Polish Experience

Abstract: The liability of Member States for damages caused by the issuance of a judicial decision in breach of EU law has been shaped in the jurisprudence of the CJEU, as a mechanism to ensure effective legal protection of EU citizens. Its primary purpose is to ensure that in a situation where a court of a Member State causes damage to a citizen by violating EU laws by its ruling, the citizen has a legal remedy to obtain compensation for such a violation. Based on the principle of procedural autonomy of the Member States, such claims can be asserted on the grounds of national procedural rules under the substantive legal grounds laid down by the CJEU in its case law.

Research conducted by the authors of the article indicates that despite more than 18 years of Poland's presence in the European Union, it is extremely difficult to find rulings on liability for damages for breach of EU law by Polish courts. It seems that such a state of affairs may be caused by ambiguities and interpretative doubts that arise on the grounds of Polish procedure in the case of claims for damages for breach of EU law by the courts. Both in the doctrine and case law there are far-reaching divergences as to whether the pre-judgment provided for in the Polish Civil Code should apply to claims for breach of EU law, and if so, when it should be applied. These doubts are

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reflected in the scant judicial case law on the issue in question. It seems that the indicated procedural doubts and lack of clarity as to the proper procedure in pursuing such claims may deter parties from more frequent initiation of proceedings to obtain compensation for breach of EU law by a national courts in the Polish context.
Keywords: judicial decision infringing EU law, state liability, EU law.

Introduction

The defining feature of the European Union's legal order as supranational law is the principle of direct effect and primacy.[1] The consequence of these principles is the recognition of EU law as part of the internal legal system of all the Member States.[2] EU citizens may rely directly on European law to protect their rights. It has consistently emerged from the case law of the Court of Justice of the European Union[3] that Member States, on the basis of the principle of sincere cooperation, are obliged to ensure in their national law the protection of an individual's rights derived from the Community law.[4] CJEU case law refers to the need to provide "effective judicial protection to the individuals."[5] The provision that somehow sanctions the jurisprudence of the Court with regard to the principle of effective legal protection is Article 19 TEU, which stipulates that "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law."[6] Meanwhile, Member States

1 See: José Antonio Gutiérrez-Fons, Koen Lenaerts, "The constitutional allocation of powers and general principles of EU law", *Common Market Law Review* 47, iss. 6. 2010: 1632; Armin von Bogdandy, and Jürgen Bast (eds.), *Principles of European Constitutional Law*. Oxford, and München, 2010, 29–30.

2 See: Martin Stiernstrom, "The Relationship Between Community Law and National Law", *Jean Monnet/Robert Schuman Paper Series* 5, no. 33. 2005: 5.

3 Hereinafter: "CJEU" or "Court."

4 *Amministrazione delle Finanze dello Stato v. Simmenthal* SpA, case 106/77, Judgment of the Court of 9 March 1978, ECLI:EU:C:1978:49.

5 *Traghetti del Mediterraneo SpA v. Repubblica italiana*, case C-173/03, Judgment of the Court of 13 June 2006, ECLI:EU:C:2006:391, paragraph 28.

6 Katharina Pabel, "The Right to an Effective Remedy Pursuant to Article II – 107 Paragraph 1 of the Constitutional Treaty", *German Law Journal* 6, no. 11. 2005: 1601–1602.

ensure effective legal protection by following the principle of procedural autonomy. This means that in areas not covered by EU law, it is for the Member States to lay down procedures to protect citizens' rights under EU law.[7]

The necessity for Member States to implement the principle of effective legal protection has led the CJEU to adopt specific mechanisms to ensure this protection. One such mechanism is the Member States' liability for damages for breaches of EU law that have caused harm to an individual in a particular situation.[8] In its jurisprudence, the Court has indicated that Member States also have an obligation to compensate their citizens for damages caused by violations of EU law by national courts.[9]

The authors of this paper have attempted to verify to what extent the institution of state liability for breach of EU law by national courts has so far been applied in the practice of the Polish legal system. In order to achieve this, a study was conducted by searching the largest electronic databases of Polish courts' jurisprudence for cases related to the recovery of damages for violation of EU law by a national courts.[10] The analysis of the available case law indicates that this mechanism has been applied only sporadically. In practice, therefore, citizens very rarely attempt to obtain compensation for possible violations of EU law by Polish courts. We argue that one of the possible reasons

7 Koen Lenaerts, "National Remedies for Private Parties in the Light of the EU Law Principles of Equivalence and Effectiveness", *Irish Jurist* 46. 2011: 13–37; Denis Baghrizabehi, "The Current State of National Procedural Autonomy: A Principle in Motion", *Intereulaweast* 3. 2016: 13–30.

8 See: *Andrea Francovich and Danila Bonifaci and others v. Italy*, Joined Cases C-6/90 and C-9/90, Judgement of the Court of 19 November 1991, ECLI:EU: C:1991:428; see also *Brasserie du Pêcheur SA v. Germany and The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and others*, joined cases C-46/93 and C-48/93, Judgment of the Court of 5 March 1996, ECLI: ECLI:EU:C:1996:79.

9 See: *Gerhard Köbler v. Republik Österreich*, case C-224/01, Judgment of the Court of 30 September 2003, ECLI:EU:C:2003:513; *Traghetti del Mediterraneo SpA v. Repubblica Italiana*.

10 We have conducted text searches in the two largest electronic databases of Polish case law, i.e. LEX Legal Information System (one of the largest Polish legal information systems, currently published by Wolters Kluwer Polska concern) and LEGALIS Legal Information System (a legal information system in Poland, created and developed by C.H. Beck Publishing House).

for the sporadic use of this legal remedy in Poland is the divergence in interpretation and uncertainty about the procedure for pursuing such claims under the Polish procedural provisions.

We begin with a brief introduction to the genesis and development of the Member States' liability for breach of EU law by national courts, shaped in the Court's jurisprudence. Then we move on to the Polish procedural provisions in this respect, which is followed by an analysis of the judgments regarding liability for damages for violation of EU law that we managed to find. The article concludes with the authors' observations concerning the State's liability for damages for breaches of EU law by national courts in the specific Polish context.

Development of the Concept of Member State Liability for Breach of EU Law by a National Courts in the CJEU Case Law

In order to analyze in detail the issue of state liability for breach of EU law by national courts in Poland, it is desirable to first devote some attention to the development of the concept in EU law. It is relevant for our considerations insofar as state liability for damages for breach of EU law by national courts is a legal mechanism shaped by the jurisprudence of the CJEU and does not have a precise basis in the Treaties.[11] It follows unequivocally from this case law that, in accordance with the principle of procedural autonomy, the establishment of the procedural framework for pursuing such claims rests solely with the individual Member States.[12] However, as the Polish example seems to prove, the specificity of procedural regulations has a significant impact on the practical use of this institution in the given judicial system.

11 Arwel Davies, "State liability for judicial decisions in European Union (EU) and international law", *The International and Comparative Law Quarterly* 61, no. 3. 2012: 595.

12 Davies, 586; Łukasz Stępkowski, "Naruszenie prawa UE przez sąd krajowy w odpowiedzialności odszkodowawczej państwa członkowskiego", *Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego* 13. 2015: 137.

The concept of Member States' liability for damage caused to individuals for breach of the Community law was first outlined by the Court in the judgment in the joined cases of *Andrea Francovich and Danila Bonifaci*.[13] The Court stated that the principle of Member States' liability for damages is "inherent in the system of the Treaty."[14] The Court emphasized that it is precisely the principle of the full effectiveness of Community law which requires that an individual must be able to claim compensation from the State where an infringement of Community law by that State has caused him harm.[15] The Court also noted that the principle of loyal cooperation requires that any unlawful effects of an infringement of EU law should be eliminated.

In *Francovich*, the Court was referring to a very concrete infringement of Community law by a Member State, namely the failure to transpose a directive into national law within the required period of time. In its subsequent case law, the Court has developed and clarified the general concept of Member States' liability for damages for breach of EU law. Of central importance in this context was the judgment in the joined cases *Brasserie du Pêcheur SA v. Federal Republic of Germany and The Queen v. Secretary of State for Transport, ex parte Factortame Ltd and Others*.[16] The cases concerned the issue of liability for damages for breach of European Union law resulting from a legislative act or omission. The Court stated that the principle of the Member States' liability for

13 *Andrea Francovich and Danila Bonifaci and others v. Italy*. It is worth to indicate that before the CJEU first articulated the general principle of Member States' liability for breach of EU law in the *Francovich* judgment, it had already signalled that the Treaty system inherently implies such liability(see: *Amministrazione delle Finanze dello Stato v. San Giorgio*, case 199/82, Judgment of the Court of 9 November 1983, ECLI:EU:C:1983:318, paragraph 12). The right to the reimbursement of fees and taxes wrongly levied by the state in breach of EU law, as established by the Court of Justice, should be regarded as a precursor to such liability(see: Oliver Dörr (ed.), *Staatshaftung in Europa: Nationales und Unionsrecht*. Berlin, and Boston, 2014, 44). The Court of Justice emphasized that the repayment of wrongly levied benefits, can only take place within the framework of the substantive and formal requirements laid down by the relevant national legislation.

14 *Andrea Francovich and Danila Bonifaci and others v. Italy*, paragraph 35.

15 *Andrea Francovich and Danila Bonifaci and others v. Italy*, paragraph 33.

16 *Brasserie du Pêcheur SA v. Germany and The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and others.*

damage caused to individuals by breaches of Community law "holds good for any case in which a Member State breaches Community law, whatever be the organ of the State whose act or omission was responsible for the breach."[17] States are therefore responsible for the actions of any of their organs which may cause damage to citizens due to the breach of EU law. The Court formulated three conditions for States to be liable for damages for breach of Community law: "the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties."[18] In the light of these conditions, it is essential for attribution of liability to determine whether the infringement is of a sufficiently serious nature. The Court has indicated that an infringement is sufficiently serious where the State has manifestly and gravely disregarded the limits of its discretion.[19] At the same time, the specific conditions of liability depend on the nature of the breach of Community law.

In *Brassarie*, the CJEU emphasised that the liability of a Member State for a breach of EU law is linked to an act or omission of any organ of that State. It follows from further Court case law that a national court is also such an organ that may infringe EU law. The Court had the opportunity to address this issue directly in the *Gerhard Köbler* case.[20] In this judgment the Court emphasized that:

"In the light of the essential role played by the judiciary in the protection of the rights derived by individuals from Community rules, the full effectiveness of those rules would be called in question and the protection of those rights would be weakened if individuals were precluded from being able, under certain conditions, to obtain reparation when their rights are affected by an

17 *Brasserie du Pêcheur SA v. Germany and The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and others*, paragraph 32.

18 *Brasserie du Pêcheur SA v. Germany and The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and others*, paragraph 51.

19 *Brasserie du Pêcheur SA v. Germany and The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and others*, paragraph 55.

20 *Gerhard Köbler v. Republik Österreich*.

infringement of Community law attributable to a decision of a court of a Member State adjudicating at last instance."[21]

It should be noted that in the *Köbler* case, the CJEU referred specifically to the actions of the court of last instance. In fact, the judgment pointed out that the court of last instance is the final authority before which individuals may assert the rights conferred upon them by Community law. Since the infringement of those rights by the final decision of such a court can no longer be remedied in any way, individuals cannot be deprived of the possibility of holding the State responsible in order to obtain effective judicial protection of their rights derived from Community norms.[22]

With regard to the conditions governing State liability for breach of EU law by a national court, the Court pointed out that those conditions are the same as those governing breaches of EU law by other State organs, i.e. the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation of the State and the loss or damage sustained by the injured party.[23] The Court noted that when referring to the second condition, thus determining whether a court has sufficiently seriously infringed Community law, account must be taken of the "specific nature of the judicial function and to the legitimate requirements of legal certainty."[24] Consequently, State liability for damages for breach of EU law by a national court of last instance can only arise in exceptional cases where the court has "manifestly infringed the applicable law."[25] In addition, the court noted that, in any event, an infringement of EU law is sufficiently serious if the ruling in question was given in clear breach of the Court's case law on the subject.[26]

21 *Gerhard Köbler v. Republik Österreich*, paragraph 33.
22 *Gerhard Köbler v. Republik Österreich*, paragraph 34.
23 *Gerhard Köbler v. Republik Österreich*, paragraph 51.
24 *Gerhard Köbler v. Republik Österreich*, paragraph 53.
25 *Gerhard Köbler v. Republik Österreich*, paragraph 53.
26 *Gerhard Köbler v. Republik Österreich*, paragraph 56.

What is important for the considerations of this article is that in the *Köbler* judgment the Court made it clear that, while the substantive conditions for the liability of a Member State for an infringement of EU law by a national court of last instance are determined by Community law, the enforcement of claims on this subject is based entirely on national law.[27]

An important development and clarification of the Court's jurisprudence in the area of state liability for breach of EU law by a national court was the *Traghetti* judgment.[28] In this judgment, the Court referred to Italian legislation which excluded State liability for infringement of EU law by courts of last instance where such infringement was the result of an interpretation of provisions of law or an assessment of facts and evidence by that court. Furthermore, the Italian rules limited State liability only to cases of intentional fault or gross misconduct on the part of the judge or for refusal of legal protection.

Referring to its previous case law on the subject, the Court stated that there are three necessary and at the same time sufficient conditions for the State to be liable for a judicial decision contrary to EU law.[29] The Court emphasized that a state may be liable under less restrictive criteria. On the other hand, creating more stringent conditions, as the Italian legislation did, is contrary to EU law, as it would nullify the effectiveness of the Court's case law to date on the liability of States for damages for breach of EU law by the courts of last instance.[30] Consequently, the Court decided that Community law precludes the

27 *Gerhard Köbler v. Republik Österreich*, paragraph 58.

28 *Traghetti del Mediterraneo SpA v. Repubblica Italiana*; On the importance of *Traghetti* judgement see also: Tomasz Tadeusz Koncewicz, *Zasada jurysdykcji powierzonej Trybunału Sprawiedliwości Wspólnot Europejskich – o jurysdykcyjnych granicach i wyborach w dynamicznej „wspólnocie prawa"*. Warszawa, 2009, 190; Marten Breuer, *Staatshaftung für judikatives Unrecht. Eine Untersuchung zum deutschen Recht, zum Europa- und Völkerrecht*. Tübingen, 2011, 464.

29 Referring to previous case law, the Court reiterated in this judgment that the State's liability for damages occurs under the following conditions: the rule of law infringed is intended to confer rights on individuals; there is a direct causal link between the breach of the obligation incumbent on the State and the loss or damage sustained by the injured parties; the breach must be sufficiently serious. *Traghetti del Mediterraneo SpA v. Repubblica Italiana*, paragraph 45.

30 *Traghetti del Mediterraneo SpA v. Repubblica Italiana*, paragraph 40.

existence of such national laws that would, in principle, exclude state liability for damage caused to an individual by a national court of last resort if it follows from "the interpretation of provisions of law" or "an assessment of facts or evidence carried out by that court."[31]

In the same way, also unacceptable from the point of view of Community law are national provisions that would limit state liability for breaches of Community law by the courts to the intentional fault and serious misconduct on the part of the court, if such a limitation were to lead to exclusion of the liability of the Member State where a manifest infringement of the applicable law was committed.[32]

For the considerations undertaken in this article, the ruling of the Court in the case of the *European Commission v. Italian Republic*[33] is also important. It seems that this ruling has further complicated the already complex picture of Member States' liability for breach of EU law by national courts and thus influenced the concerns related to the application of national procedures when seeking compensation for violations of EU law by the courts. This judgment was a follow-up to the *Traghetti* case. After the Court found that Community law precluded Italian legislation laying down criteria for liability that were more restrictive than the existing case law of the Court, the Commission brought an action against Italy, which, despite warnings, had not changed its legislation on the matter. In the operative part of its decision, the Court pointed to the "General principle that Member States are liable for the infringement of European Union law by one of their courts adjudicating at last instance."[34]

It therefore appears that the Court has explicitly articulated the legal principle of Member States' liability for breach of EU law by national courts of final instance.[35] This is significant insofar as legal principles are a source of EU law that can be the basis for judicial decisions of the Court. As the Court did

31 *Traghetti del Mediterraneo SpA v. Repubblica Italiana*, paragraph 46.
32 *Traghetti del Mediterraneo SpA v. Repubblica Italiana*, paragraph 46.
33 *European Commission v. Italian Republic*, case C-379/10, Judgment of the Court of 24 November 2011, ECLI:EU:C:2011:775.
34 *European Commission v. Italian Republic*, operative part of the judgement.
35 Stępkowski, 150–151.

not elaborate further on the nature of this principle of EU law in its judgment, including its relationship to the general principle of Member States' liability for breach of EU law arising from the *Francovich* and subsequent judgments, questions remain about its place in the EU legal system.[36]

Action for Damages for Breach of EU Law by a National Court in the Polish Legal System

According to the case law of the Court, having regard to the principle of procedural autonomy, the recovery of damages for a judgment which infringes Community law takes place on the basis of the procedural rules of national law.[37] Therefore, when looking at the problem of practical functioning of the model of liability for issuing a judicial decision contrary to EU law in Poland, it is justified at this stage to devote some attention to the Polish procedural regulations in this regard.[38]

In the Polish legal system the liability of the state for damage caused to citizens by the actions of public authorities has its constitutional basis**.** According to Article 77 (1) of the Constitution of the Republic of Poland: "Everyone has the right to compensation for damage caused to him by unlawful action of a public authority."[39] The provisions specifying conditions for state liability for damage caused to individuals are provided in the Civil Code in Articles 417–420.[40] The general principle of liability is set forth in Article 417 § 1, which states that "The State Treasury, territorial self-government unit or an-

36 Stępkowski, 150–151.

37 The CJEU used the concept of procedural autonomy of the member states in: *The Queen, on the application of Delena Wells v. Secretary of State for Transport, Local Government and the Regions*, case C-201/02, Judgment of the Court of 7 January 2004, ECLI:EU:C:2004:12, paragraph 65, 67, 70.

38 Maciej Taborowski, *Konsekwencje naruszenia prawa Unii Europejskiej przez sądy krajowe*. Warszawa, 2012.

39 Constitution of the Republic of Poland of April 2, 1997 (Journal of Laws of 1997, no. 78, item 483, of 2001, no. 28, item 319, of 2006, no. 200, item 1471, of 2009, no. 114, item 946).

40 Act of April 23, 1964 – Civil Code (consolidated text – Journal of Laws of 2022, item 1360).

other legal person exercising public authority by virtue of law shall be liable for a damage inflicted by unlawful activity or cessation thereof which occurred in exercise of such authority."[41]

The problem of liability for issuing a judicial decision causing damage is addressed in art. 4171 § 2 of the Civil Code which stipulates as follows:

"If damage has been caused by the issuance of a final judgment or a final decision, its redress may be demanded after their unlawfulness has been established in appropriate proceedings, unless separate provisions stipulate otherwise. This shall also apply in the event that a final decision or judgment has been issued on the basis of a normative act which is inconsistent with the Constitution, the ratified international agreement or a statute."[42]

Polish regulations on this subject raise a number of practical problems. First of all, the literature on the subject expresses different views as to whether Article 4171 § 2 of the Civil Code should apply at all to procedural claims for breach of EU law by courts. For this purpose, it is necessary to clarify that Article 4171 § 2 requires that an action for damages for a violation of the law by a court must be preceded by a determination in a relevant proceeding that such a judgment was unlawful. We refer to this prior proceeding for the purposes of our discussion with the term "pre-judgment." The concept of pre-judgment has already been analyzed by the Court in the context of obtaining compensation for violation of the EU law by national courts. In *Transportes Urbanos y Servicios Generales SAL v. Administración del Estado*, the Court found that the use of pre-judgment violates the principle of equivalence.[43] From the perspective of this article, however, this issue does not require further analysis, because, as Ł. Stępkowski aptly points out, the Polish regulation does not violate the principle of equivalence. This is because the pre-judgment applies equally to obtaining compensation for the violation of Polish and Euro-

41 Civil Code, Article 417 § 1.

42 Civil Code, Article 4171 § 2.

43 *Transportes Urbanos y Servicios Generales SAL v. Administración del Estado*, case C-118/08, Judgment of the Court of 26 January 2010, ECLI:EU:C:2010:39, paragraph 46.

pean law by the court.[44] Thus, the pre-judgment procedure *per se*, as long as it does not discriminate against claims for violations of EU law, does not conflict with the rules for seeking liability for violations of EU law by a national court as established by Court.

Therefore, some representatives of the doctrine take it for granted that such a pre-judgment must also apply to compensation proceedings related to breaches of EU law by the courts.[45] However, there are authors who point out that the pre-judgment procedure for pursuing claims of violation of EU law by a national court is not necessary at all, due to the specificity of such claims.[46] At this point, it should also be noted that other authors also point out that, at least in some cases, because of the failure of the Polish regulation to meet the condition of effectiveness, a pre-trial is not necessary to pursue claims for damages related to the court's violation of EU law.[47]

In addition to doubts about whether Article 4171 § 2 of the Civil Code should apply at all to claims for damages related to a court's breach of EU law, even if we acknowledge that the norm is applicable, the question arises: what is the appropriate procedure for such a pre-judgment procedure? Polish legislation provides for a number of regulations allowing the commencement of such a procedure. First, it is necessary to recall the general principle, regulated by the provisions of the Code of Civil Procedure. According to Article 4241 § 1 of

44 Stępkowski, 156.

45 See: Zbigniew Banaszczyk, *Odpowiedzialność za szkody wyrządzone przy wykonywaniu władzy publicznej*, chapter IX – *Odpowiedzialność władzy publicznej za naruszenie prawa unijnego*. Legalis/el., 2015, 21–22; Edyta Gapska, *Wady orzeczeń sądowych*. Warszawa, 2009, 202; Monika Wałachowska, "Komentarz do artykułu 4171" in *Kodeks cywilny. Komentarz*. Vol. 3. *Zobowiązania. Część ogólna (art. 353–534)*, eds. M. Fras, and M. Habdas. LEX/el., 2018, 24.

46 See: Gerard Bieniek, "Komentarz do art. 4171" in *Kodeks cywilny. Komentarz*, ed. G. Bieniek. LEX/el., 2011, 8.

47 See: Nina Półtorak, *Ochrona uprawnień wynikających z prawa Unii Europejskiej w postępowaniach krajowych*. Warszawa, 2010, 480; Ewa Bagińska, "Odpowiedzialność Skarbu Państwa za szkody wyrządzone przez wydanie niezgodnego z prawem orzeczenia sądu", *Transformacje Prawa Prywatnego*, no. 3. 2011: 19; Jolanta Zatorska, "Odpowiedzialność odszkodowawcza państwa członkowskiego za działania władzy sądowniczej na przykładzie Polski i Francji", *Europejski Przegląd Sądowy*, no. 7. 2008: 7; Stękowski, 158.

the Code of Civil Procedure: "A petition for a final and non-revisable judgment of the court of second instance to be declared unlawful may be filed if a party suffered loss as a result of such judgment being rendered, provided that such judgment neither could nor can be varied or set aside through the exercise of legal remedies available to the party."[48]

As it is stipulated in abovementioned provision the rule is that the final and non-revisable judgment of the court of second instance can be petitioned as unlawful. However, § 2 of the indicated provision sets forth an exception to this general rule. According to this norm, in exceptional cases, where unlawfulness results from a violation of the fundamental principles of the rule of law or constitutional freedoms or human and civil rights, "a petition for a final and non-revisable judgment of the court of first or second instance may also be filed if a party has not exercised legal remedies available to it, unless the judgment may be varied or set aside through the exercise of other legal remedies available to the party."[49]

Furthermore, it is necessary to mention that in accordance with the Article 4241b § 1 of the Civil Procedure Code, no petition may be filed against judgments of the court of second instance appealed to the Supreme Court or against judgments of the Supreme Court. In such a situation, when the final judgment is not subject to the complaint, it is possible to claim compensation without prior finding that the decision is unlawful in the proceedings under the co plaint, unless the party has not resorted to the legal remedies available to it.[50]

The literature on the subject also raises doubts as to whether the aforementioned Polish regulations satisfy the principle of effectiveness (efficiency) in pursuing claims for damages for breach of EU law. In the course of proceedings for a declaration of unlawfulness of a final judgment (which con-

48 Act of November 17, 1964 – Code of Civil Procedure (consolidated text – Journal of Laws of 2021, item 1805, 1981, 2052, 2262, 2270, 2289, 2328, 2459, of 2022, item 1, 366, 480, 807, 830, 974, 1098).

49 Code of Civil Procedure, Article 4241 § 2.

50 Code of Civil Procedure, Article 4241b.

stitutes the pre-judgement procedure), the basis for the complaint may not be allegations concerning the establishment of facts or assessment of evidence. Such a solution, however, contradicts the position of the Court expressed in the *Traghetii* case.[51]

All of the doubts identified above indicate that an individual who deems that a judgment that has been issued in his case violates EU law has a very complicated procedural path to follow. The Polish civil procedure, which will apply in his case on the basis of the procedural autonomy of the Member States, raises a number of interpretative doubts with regard to compensation claims related to the breach of EU law.

It seems that it is the complexity and ambiguity of this procedure that is central to the infrequency of initiating compensation proceedings for violations of EU law in Poland. This thesis seems to be confirmed by the research described below.

Claiming Compensation for a National Court Judgment that Violates EU Law in Polish Judicial Practice

As mentioned above, the authors' research consisted of searching electronic case law databases of Polish courts for judgments concerning compensation for breach of EU law by Polish courts. The authors conducted text searches in the two largest electronic databases of Polish case law, i.e. LEX Legal Information System (one of the largest Polish legal information systems, currently published by Wolters Kluwer Polska concern) and LEGALIS Legal Information System (a legal information system in Poland, created and developed by C.H. Beck Publishing House).

Following various search configurations, we managed to find only two rulings by Polish courts regarding the liability for the issuance of a judicial decision in breach of EU law. They were: Judgment of the Court of Appeals

51 Stępkowski, 157.

in Warsaw on March 19, 2021 in case number V ACa 502/19[52] and Judgment of the Court of Appeals in Warsaw dated February 27, 2018, in case number VI ACa 1578/16.[53]

The first case (Judgment of the Court of Appeals in Warsaw on March 19, 2021 in the case numbered V ACa 502/19) involved a claim for damages related to the issuance of an order dismissing the plaintiff's complaint for protracted proceedings. The plaintiff, having waited more than a year for a ruling on the cassation complaint in the administrative proceedings, filed a complaint regarding the lengthiness of the proceedings. This complaint was dismissed. The plaintiff then filed a lawsuit seeking damages, indicating that the ruling in the protracted proceedings violated EU law. The plaintiff did not specify what this violation consisted of. He sought compensation before the Warsaw Regional Court.

The Regional Court dismissed the claim, indicating that the plaintiff had failed to provide a pre-judgement ruling, which is a condition for awarding damages for breach of EU law under the art. 4171 § 2 of the Civil Code. The court indicated that the plaintiff should have obtained such pre-judgment in accordance with the rules of administrative court procedure as his case was originally tried in an administrative court. The court concluded that in the absence of a pre-judgment procedure stating the illegality of the order dismissing the complaint for lengthy proceedings, the action in the case was unjustified.[54]

The plaintiff appealed the ruling of the Regional Court. Then the case was decided by the Appellate Court in Warsaw. From our perspective, the appellate court's decision aptly highlights the problems associated with seeking damages for breach of EU law by national courts in Poland. The Court of Appeals pointed out that the Regional Court misinterpreted Polish procedural rules for

52 Judgment of the Court of Appeals in Warsaw of 19 March 2021, V ACa 502/19. LEX no. 3248320.

53 Judgment of the Court of Appeals in Warsaw of 27 February 2018, VI ACa 1578/16. LEX no. 2545167.

54 Judgment of the Court of Appeals in Warsaw of 19 March 2021.

seeking compensation for violations of EU law. According to the Court of Appeals, neither the provisions of administrative procedure nor the provisions of civil procedure regarding the necessity of obtaining a pre-judgment declaring the unlawfulness of the ruling should apply in the case at issue. The Court of Appeals pointed out that the Act of June 17, 2004 on complaints for violation of a party's right to have a case heard in court proceedings without undue delay was applicable to the dispute. Therefore in the court's opinion, the provisions of the Act should be interpreted in such a way that the legislator did not provide at all for the possibility of filing an action for a declaration of the illegality of a final decision issued as a result of a complaint concerning the lengthiness of court proceedings, whether civil or administrative. This means that in the opinion of the Appellate Court, in cases concerning the lengthiness of proceedings, an action for a declaration of the illegality of rulings issued in such proceedings is not available at all. As the court put it: "Contrary to the position of the court of first instance, therefore, the plaintiff could never be able to obtain a pre-judgment declaring the illegality of the order he challenged in the absence of a procedure giving the possibility of obtaining one at all."[55]

The Court of Appeals made it clear that the plaintiff was seeking damages in connection with a judgment rendered in a case involving protracted proceedings. There is no procedure to declare the unlawfulness of judgments issued in these proceedings. Under these circumstances the court pointed out that the proper basis for the claim for damages should be Article 417 of the Civil Code rather than Article 4171 § 2 (which is generally dedicated to this type of claim, but not in the situation in question).[56]

The divergence of positions between the district and appellate courts as to the necessity of obtaining a pre-judgment for the assertion of damages for

55 Judgment of the Court of Appeals in Warsaw of 19 March 2021.

56 The court referred to the position expressed in the literature on the subject (Zbigniew Banaszczyk, "Odpowiedzialność za szkodę wyrządzoną przy wykonywaniu władzy publicznej" in *Prawo zobowiązań – część ogólna. System Prawa Prywatnego*, vol. 6, ed. A. Olejniczak. Warszawa, 2018, 891–892), according to which "when the legislation does not provide for a preliminary procedure, it should be up to the compensation court to decide on the illegality of the decision."

violation of EU law by the court clearly shows that on the ground of Polish procedure regarding such claims, theoretical ambiguities also have a practical dimension. Not only is there a lack of consensus among representatives of the doctrine as to whether it is necessary to obtain a pre-judgment for the vindication of claims related to the violation of EU law by the court, but there is also a lack of a consistent position in the case law.

Similarly, in the second ruling identified by the authors of this article regarding state liability for breach of EU law by a national court, the problem of the procedure for pursuing such claims took an important place.

In the case VI ACa 1578/16, which was pending before the Warsaw Court of Appeals, the plaintiff was a company that filed a claim in relation to her participation in a public tender procedure.[57] During the bidding process, the contracting authority accepted the plaintiff's bid and rejected the bid of another competing entity. The entity whose bid was not selected appealed to the court. The court upheld the appeal and ordered the contracting authority to repeat the evaluation of the bids. As a result of the re-tendering, the contracting authority again selected the plaintiff's bid, but the new bid was for a significantly lower amount than the original tender.

The plaintiff demanded damages from the State, claiming that the ruling under which the tender procedure was reopened caused damage to his property in the form of lost benefits. The plaintiff derived its claim primarily from the court's application of Article 43(1)(17) of the VAT Act[58] in complete disregard of the provisions of the VAT Directive[59] and their interpretation adopted in the CJEU rulings, which, according to the plaintiff, was contrary to the principle of interpreting domestic law in accordance with European Union law.

On the merits of the case, both the appellate court and the court of first instance agreed that the plaintiff was not entitled to compensation, because the plaintiff had

57 Judgment of the Court of Appeals in Warsaw of 27 February 2018.

58 Act of March 11, 2004 on tax on goods and services (Journal of Laws of 2004, no. 54, item 535, with further amendments).

59 Council Directive 2006/112/EC of November 28, 2006 on the common system of value added tax (OJ L 347, 11.12.2006, 1–118).

not appealed the unfavorable court judgment invalidating the first tender, which was supposed to have caused it damage. The Court of Appeals, citing the Court jurisprudence, pointed out that the injured party failed to exercise due diligence to avoid incurring damage or to limit the extent of damage by failing to use all legal remedies available to it In the present case, the plaintiff, knowingly did not use the available review of the ruling of the adverse judgment and proceeded with a new tender. Thus, the plaintiff failed to prevent the development of an unfavorable causal link, and as a result, the plaintiff itself is liable for any damage that may have occurred.[60]

However, given the thesis posed by the authors of this text, the regional court's consideration of the procedural requirements for seeking damages for violation of EU law by a national court deserves attention. Namely, the Regional Court in Warsaw stated that in the pending case, the provisions of national law should be applied to assess the plaintiff's claim for damages, provided they are not less favorable than the EU rules. As a result, the court stated that:

"while Articles 417 and subsequent articles of the Civil Code, specifying that the prerequisites of the State liability for damage are 1. the illegality of the authority's action, 2. the existence of damage, and 3. the causal link between the illegality and the resulting damage (which prerequisites coincide with those indicated by the CJEU), according to the principles of the EU legal order, Article 4171 § 2 of the Civil Code will not apply, from which stems the requirement to obtain a so-called «pre-judgment» if the damage was caused by the issuance of a final judgment or final decision."[61]

Thus, in the opinion of the Regional Court, the plaintiff company, when seeking compensation for damage caused by the unlawful action of a State in violation of EU law, was not required to obtain the pre-judgment declaring the illegality of a final decision at all.[62]

This position of the court emphatically demonstrates the fundamental problem associated with the issue of seeking compensation for violation of EU law by a national court in Poland. Both in the doctrine and case law there are divergent

60 Judgment of the Court of Appeals in Warsaw of 27 February 2018.
61 Judgment of the Court of Appeals in Warsaw of 27 February 2018.
62 Judgment of the Court of Appeals in Warsaw of 27 February 2018.

opinions as to the proper procedure in pursuing such claims. The Warsaw court, following part of the academic community, pointed out that Article 4171 § 2 does not apply at all in the case of such claims. By the same token, a party does not need to seek a pre-judgment before asserting a claim for damages. Such a conclusion by no means follows from the previous ruling cited in the case V ACa 502/19. In that ruling the court declared that in all those situations where it is possible to obtain a pre-judgment, it should be sought. However the court indicated that one of the exceptions to this main rule are rulings issued in cases concerning the lengthiness of proceedings. In such cases, it is not necessary to obtain a prejudicial ruling, because the law simply does not provide for such a possibility.

The two rulings indicated above show how much doubt and lack of uniformity there is in the approach of the courts themselves to the issue of compensation for issuing a ruling contrary to EU law.

Concluding Remarks

The liability of Member States for damages caused by the issuance of a judicial decision in breach of EU law has been shaped in the jurisprudence of the Court, as a mechanism to ensure effective legal protection of EU citizens. Its primary purpose is to ensure that in a situation where a court of a Member State causes damage to a citizen by violating EU laws by its ruling, the individual has a legal remedy to obtain compensation for such a breach Based on the principle of procedural autonomy of the Member States, such claims can be asserted on the grounds of national procedural rules under the substantive legal grounds laid down by the Court in its case law.

Research conducted by the authors of the article indicates that despite more than 18 years of Poland's presence in the European Union, it is extremely difficult to find rulings on liability for damages for breach of EU law by Polish courts. It seems that such a state of affairs may be caused by ambiguities and interpretative doubts that arise on the grounds of Polish procedure in the case of claims for damages for breach of EU law by the courts. Both in the doctrine and

case law there are far-reaching divergences as to whether the pre-judgment provided for in the Polish Civil Code should apply to claims for breach of EU law, and if so, when it should be applied. Some representatives of the doctrine believe that in order to file a claim for damages for breach of EU law by a national court, as a rule, a pre-judgment under Article 4171 § 2 of the Civil Code should be obtained, while others take the position that this is not necessary. These doubts are reflected in the scant judicial case law on the issue in question.

It seems that the indicated procedural doubts and lack of clarity as to the proper procedure in pursuing such claims may deter parties from more frequent initiation of proceedings to obtain compensation for breach of EU law by a national courts in Polish context.

Certainly, further research on the jurisprudence of Polish courts regarding liability for damages for breach of EU law by the courts is necessary to be able to determine the reasons for the rarity of such cases in Poland, but there is no doubt that the ambiguities articulated by the doctrine and jurisprudence regarding the proper procedure in pursuing damages affect the preservative attitude of the parties in initiating such cases.

References

Baghrizabehi, Denis. "The Current State of National Procedural Autonomy: A Principle in Motion." *Intereulaweast* 3. 2016: 13–30.

Bagińska, Ewa. "Odpowiedzialność Skarbu Państwa za szkody wyrządzone przez wydanie niezgodnego z prawem orzeczenia sądu." *Transformacje Prawa Prywatnego*, no. 3. 2011: 13–27.

Banaszczyk, Zbigniew. "Odpowiedzialność za szkodę wyrządzoną przy wykonywaniu władzy publicznej." In *Prawo zobowiązań – część ogólna. System Prawa Prywatnego*, vol. 6, edited by Adam Olejniczak. Warszawa, 2018.

Banaszczyk, Zbigniew. *Odpowiedzialność za szkody wyrządzone przy wykonywaniu władzy publicznej*, chapter IX – *Odpowiedzialność władzy publicznej za naruszenie prawa unijnego*. Legalis/el., 2015.

Bieniek, Gerard. "Komentarz do art. 4171." In *Kodeks cywilny. Komentarz*, edited by Gerard Bieniek. LEX/el., 2011.

von Bogdandy, Armin, and Jürgen Bast (eds.). *Principles of European Constitutional Law*. Oxford and München, 2010.

Breuer, Marten. *Staatshaftung für judikatives Unrecht. Eine Untersuchung zum deutschen Recht, zum Europa- und Völkerrecht*. Tübingen, 2011.

Davies, Arwel. "State liability for judicial decisions in European Union (EU) and international law." *The International and Comparative Law Quarterly* 61, no. 3. 2012: 585–611.

Dörr, Oliver (ed.). ‚*Staatshaftung in Europa: Nationales und Unionsrecht*. Berlin and Boston, 2014.

Gapska, Edyta. *Wady orzeczeń sądowych*. Warszawa, 2009.

Gutiérrez-Fons, José Antonio, and Koen Lenaerts. "The constitutional allocation of powers and general principles of EU law." *Common Market Law Review* 47, iss. 6. 2010: 1629–1669.

Koncewicz, Tomasz Tadeusz. *Zasada jurysdykcji powierzonej Trybunału Sprawiedliwości Wspólnot Europejskich – o jurysdykcyjnych granicach i wyborach w dynamicznej „wspólnocie prawa"*. Warszawa, 2009.

Lenaerts, Koen. "National Remedies for Private Parties in the Light of the EU Law Principles of Equivalence and Effectiveness." *Irish Jurist* 46. 2011: 13–37.

Pabel, Katharina. "The Right to an Effective Remedy Pursuant to Article II – 107 Paragraph 1 of the Constitutional Treaty." *German Law Journal* 6, no. 11. 2005: 1601–1616.

Półtorak, Nina. *Ochrona uprawnień wynikających z prawa Unii Europejskiej w postępowaniach krajowych*. Warszawa, 2010.

Stępkowski, Łukasz. "Naruszenie prawa UE przez sąd krajowy w odpowiedzialności odszkodowawczej państwa członkowskiego." *Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego* 13. 2015: 136–159.

Stiernstrom, Martin. "The Relationship Between Community Law and National Law." *Jean Monnet/Robert Schuman Paper Series* 5, no. 33. 2005.

Taborowski, Maciej. *Konsekwencje naruszenia prawa Unii Europejskiej przez sądy krajowe*. Warszawa, 2012.

Wałachowska, Monika. "Komentarz do artykułu 4171." In *Kodeks cywilny. Komentarz.* Vol. 3. *Zobowiązania. Część ogólna (art. 353–534)*, edited by Mariusz Fras, and Magdalena Habdas. LEX/el., 2018.

Zatorska, Jolanta. "Odpowiedzialność odszkodowawcza państwa członkowskiego za działania władzy sądowniczej na przykładzie Polski i Francji." *Europejski Przegląd Sądowy*, no. 7. 2008: 4–13.

Act of April 23, 1964 – Civil Code (consolidated text – Journal of Laws of 2022, item 1360).

Act of November 17, 1964 – Code of Civil Procedure (consolidated text – Journal of Laws of 2021, item 1805, 1981, 2052, 2262, 2270, 2289, 2328, 2459, of 2022, item 1, 366, 480, 807, 830, 974, 1098).

Act of March 11, 2004 on tax on goods and services (Journal of Laws of 2004, no. 54, item 535, with further amendments).

Constitution of the Republic of Poland of 2 April 2 1997 (Journal of Laws of 1997, no. 78, item 483, of 2001, no. 28, item 319, of 2006, no. 200, item 1471, of 2009, no. 114, item 946).

Council Directive 2006/112/EC of November 28, 2006 on the common system of value added tax (OJ L 347, 11.12.2006, 1–118).

Judgment of the Court of Appeals in Warsaw of 19 March 2021, V ACa 502/19. LEX no. 3248320.

Judgment of the Court of Appeals in Warsaw of 27 February 2018, VI ACa 1578/16. LEX no. 2545167.

Amministrazione delle Finanze dello Stato v. San Giorgio, case 199/82, Judgment of the Court of 9 November 1983, ECLI:EU:C:1983:318.

Amministrazione delle Finanze dello Stato v. Simmenthal SpA, case 106/77, Judgment of the Court of 9 March 1978, ECLI:EU:C: 1978:49.

Andrea Francovich and Danila Bonifaci and others v. Italy, joined cases C-6/90 and C-9/90, Judgement of the Court of 19 November 1991, ECLI:EU: C:1991:428.

Brasserie du Pêcheur SA v. Germany and The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and others, joined cases C-46/93 and C-48/93, Judgment of the Court of 5 March 1996, ECLI: ECLI:EU:C:1996:79.

European Commission v. Italian Republic, case C-379/10, Judgment of the Court of 24 November 2011, ECLI:EU:C:2011:775.

Gerhard Köbler v. Republik Österreich, case C-224/01, Judgment of the Court of 30 September 2003, ECLI:EU:C:2003:513

The Queen, on the application of Delena Wells v. Secretary of State for Transport, Local Government and the Regions, case C-201/02, Judgment of the Court of 7 January 2004, ECLI:EU:C:2004:12.

Traghetti del Mediterraneo SpA v. Repubblica Italiana, case C-173/03, Judgment of the Court of 13 June 2006, ECLI:EU:C:2006:391.

Transportes Urbanos y Servicios Generales SAL v. Administración del Estado, case C-118/08, Judgment of the Court of 26 January 2010, ECLI:EU:C:2010:39.

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The Right to Disconnect in the Context of Employees' Mental Health[1]

Abstract: The development of technology has a significant impact and creates new requirements in the field of labour-law relations. One of these requirements is the protection of occupational health and safety by preventing the blurring of boundaries between employees' work and private lives. The most important means which is currently the subject of discussions in the professional community, but also in practice, is the right to disconnect. This paper is devoted exactly to this right, its perception at the level of the institutions of the European Union, and its legal enshrinement in the legislation of the Slovak Republic.
Keywords: mental health, right to disconnect, teleworking, occupational safety and health.

Introduction

The digital age brings with it a number of benefits that have a positive impact on the work environment and ways of performing work. It led to the develop-

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ment of flexible working opportunities and, ultimately, should make it easier to organize time so that the employee has sufficient time for rest and regeneration in addition to working life. Employees no longer perform work only in the standard way at the employer's workplace and under their direct and continuous supervision. Like the company itself, work in many areas is moving to the virtual world, where communication between employer and employee is closely linked to technology and the Internet. Actual practice clearly indicates that modern technologies also have negative consequences, including blurring the boundaries between work and private life. This dangerous and growing psychosocial factor should be reduced by granting employees the right to disconnect.

The right to disconnect has been a matter of interest for a long time, but due to the pandemic, which has fundamentally affected the way work is performed, the need for its legal enshrinement is growing. Such tendencies are also present in the institutions of the European Union, and we can clearly identify efforts to legally enshrine the right to disconnect, which would belong to all employees without exception.

Although the specific text of the directive has not been approved to date, we can expect its adoption to become a priority. The Slovak Republic has also responded to these demands and, with effect from 1 March 2021, has granted teleworkers the right to disconnect. Assessing the sufficiency of the legal regulation of the right to disconnect in the light of the trends developing in the European Union institutions, which are also a matter of interest, forms the main objective of this paper. In the conclusion, we will try to formulate *de lege ferenda* proposals which, in our opinion, will sooner or later have to be considered, and suggestions are made as to how the current legislation could be amended to reflect European trends in this area and thus achieve the stated objective of protecting employees.

Right to Disconnect

The right to disconnect is currently not explicitly defined in any human rights document. However, many of them regulate rights that provide a solid basis for securing and enforcing workers' rights to fair working conditions, limitations on working time to ensure time off work, rest and leave, measures to reconcile work and private life and, more generally, to ensure occupational health safety.[2] In this context, we refer in particular to Article 24 of the Universal Declaration of Human Rights, Article 7 of the International Covenant on Economic, Social and Cultural Rights, and International Labour Organisation Convention No. 1/1919 concerning the limitation of working time to eight hours a day and forty-eight hours a week in industrial enterprises.

Furthermore, European Union[3] law does not currently contain an explicitly defined and recognised right to disconnect. However, if we take a closer look at the various sources of EU law, in particular the Directives, we can find connections to the right to disconnect in their provisions. The most significant is Directive 2003/88/EC of the European Parliament and of the Council of 4 September 2003 concerning certain aspects of the organisation of working time, according to which all workers should have adequate rest periods, the concept of 'rest' being expressed in units of time, i.e. days, hours or parts thereof. Adequate rest for the purposes of the Directive is understood to mean that workers have a regular period of rest, the duration of which is expressed in units of time and which is of sufficient duration and continuity to ensure that they do not cause injury to themselves, to co-workers or to others as a result of exhaustion or other irregular work scheduling, and that they do not cause themselves, their co-workers or others any short-term or long-term damage to their health.

Although the above-mentioned sources guarantee the right of employees to rest after work, at present in practical terms it is available in its entirety mainly to employees whose work is exclusively performed in the employer's

2 *ETUC Position on the Right to disconnect*. Adopted at the Executive Committee of 22–23 March 2021, 2.

3 Hereinafter: EU.

workplace, but when they are outside the workplace they have no possibility to react to the employer's requirements, or the employer does not make these requirements due to the type of work performed by the employee. Such employees are exposed to the risk that the employer will order them to work overtime or will not respect the maximum limits set by law for working time and the minimum limits set for their rest periods. In this case, however, they have several statutory instruments to remedy the unlawful situation. We are talking in particular about a complaint addressed to the employer or a complaint to the competent labour inspectorate. This is the threat of a financial sanction which the employer faces in the event of a breach of the provisions of Act No. 311/2001 Coll. on the Labour Code[4] which in practice appears to be the most effective means of encouraging the employer to comply with the limits set by law concerning the organisation of working time.

Employees who carry out their work in whole or in part by means of information and communication technologies are in a completely different situation. Despite the many advantages that information and communication technologies bring to the performance of work, they also come with many negatives and risks. The constant connectivity made possible by ICT-based mobile devices can pose risks to health and well-being, as well as causing work-life balance conflicts associated with longer working hours and the blurring of work-life boundaries.[5] Information and communication technologies are a primary reason for the blurring of spatial and temporal boundaries between work and private life, and today's Internet and devices allow for constant accessibility. This makes it difficult to define and measure actual working time, especially when employees read and respond to work emails from home. New communication cultures are also emerging, characterised by a high level of expectation that responses and replies will be prompt.[6]

4 Hereinafter: the Labour Code.

5 Eurofound, *Right to disconnect: Exploring company practises*. Luxembourg, 2021, 1.

6 Elke Ahlers, "Flexible and remote work in the context of digitalization and occupational health", *International Journal of Labour Research* 8. no. 1–2. 2016: 90.

In general, it appears that there are two paradigms for addressing the problems associated with enhanced communications technology involving connectivity and immediacy. One approach, known as the "French legislative model," is characterized by efforts to regulate electronic communication between employers and employees after hours through statutes and standard-setting. This approach has so far achieved the highest popularity. The second method, which can be referred to as the "German self-regulatory model," involves voluntary individual instruments in which private companies adopt policies in the light of their specific and individual needs. This tactic is based on the assumption that any government intervention is a legislative missstep.[7] Some authors stress that the right to disconnect should be implemented mainly through collective agreements that can ensure a work-life balance.[8]

Legally Enshrining the Right to Disconnect

The working environment and ways of doing work have for years been accompanied by the tendency of change, driven in particular by the rapid and continuous development of digital technologies. Even if it might seem that I am talking mainly about the period from the millennium to the present day, the opposite is true. More than 30 years ago, the US Supreme Court declared that the workplace is no longer just a place located in between four walls. The workplace is a place where you take your smartphone, pager, laptop or smartwatch and where you can continue working long after the workday is over.[9] These have led, and continue to lead, to psychosocial risks that include invasion of employee privacy, threats to occupational health and safety, reduced produc-

7 Clarence W. Von Bergen, Martin Bressler, "Work, Non-Work Boundaries and the Right to Disconnect", *Journal of Applied Business and Economics* 21, no. 2. 2019: 51–70.

8 Matteo Avogaro, "Right to disconnect: French and Italian proposals for a global issue", *Revista Direito das Relações Sociais e Trabalhistas* 4, no. 3. 2018: 110.

9 Paul M. Secunda, "The employee right to disconnect" *Notre Dame Journal of International & Comparative Law* 9, no. 1. 2019: 8.

tivity of employees whose (especially) mental health is at risk, and last but not least the blurring of the boundaries between work and private life.

The blurring of the boundaries between work and private life is just one of many consequences affecting the mental health of employees, and the risks arising from employers' demands for the constant availability of employees affect both teleworkers and employees who carry out their work at the employer's workplace. Employees are required to be online at all times, to complete tasks immediately, or even to perform multiple tasks simultaneously, according to employers' needs and expectations. And this way of doing work (multitasking) is associated with increased mental effort and stress, which can lead to tele-bullying.[10] The blurring of the boundaries between work and private life is an important psychosocial factor that can lead to increased employee stress, anxiety and even physical problems related to the constant sedentary lifestyle resulting from the need to be online all the time.[11]

The absence of real rest time, not just formally declared, has a significant negative impact on employees' health. The understanding of health in this respect cannot be limited to the physical health of the individual. Health is made up of both physical and mental health, and it is mental health that has become a frequently debated topic in recent years, and efforts to protect it have been the subject of international, European and national debates.

The growing need to recognise and regulate the right of employees to disconnect and thus protect their health has also become a major issue in the European Union institutions. On the basis of the case-law of the Court of Justice[12] and various studies,[13] the European Parliament proceeded to adopt the Reso-

10 Marcel Dolobáč, "Technostres – ochrana duševného zdravia zamestnanca" in *Pracovné právo v digitálnej dobe*. Praha, 2017: 58.

11 International Labour Organization. Teleworking Arrangements during the COVID-19 crisis and beyond. 2021, 11.

12 See the Judgment of the Court of Justice C-518/15 and C-55/2018.

13 See the study by the European Added Value Unit of the European Parliament's Research Service entitled *The Right to Disconnect* (available online at: <https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/642847/EPRS_BRI(2020)642847_EN.pdf>).

lution of the European Parliament of 21 January 2021 with recommendations to the Commission regarding the right to disconnect (2019/2181(INL)).[14] In the Resolution, the European Parliament highlights the negative consequences of the use of information and communication technologies and the need to be constantly connected, including the blurring of the boundaries between work and private life, the impact on employees' mental health (reduced concentration, cognitive and emotional overload, isolation, dependence on technology, lack of sleep, anxiety and burnout syndrome) and their physical health (the impact of static body postures over long periods of time causing muscle strain and musculoskeletal disorders). The objective of the EU Directive on the Right to Disconnect should be to protect health and safety and improve working conditions for all workers by setting minimum requirements for the implementation and enforcement of the right to disconnect.[15] The European Parliament Resolution also called on the Commission to include the right to disconnect in its new strategy on occupational health and safety and to explicitly develop new psychosocial and occupational health and safety measures.

At the same time, the European Parliament called upon the Commission to submit a proposal for an act on the right of disconnect on the basis of Article 153(2)(b) in conjunction with Article 153(1)(a), (b) and (i) TFEU, while the proposal for an act in the form of a directive is being annexed to the said Resolution. In the Resolution, the European Parliament defines the right to disconnect as the right not to perform directly or indirectly work activities and not to engage in work-related communication via digital tools outside working hours, while defining working time in accordance with Article 2(1) of Directive 2003/88/EC.[16] The right to disconnect should belong to all workers who use equipment, including information and communication technologies, for

14 Hereinafter: the Resolution.

15 *ETUC Position on the Right to disconnect.* Adopted at the Executive Committee of 22–23 March 2021, p. 6

16 'working time' means any time during which a worker works under the instructions of an employer and performs his activity or duties in accordance with national law and/or practice.

work purposes, and employers should be obliged to respect this right, and the European Parliament stresses that this should be granted to all workers, regardless of their status and working conditions, and should apply to all sectors, both private and public.

The European Parliament, in the wording of the requested draft directive, not only takes the approach of prescribing an obligation for Member States to legally enshrine the right to disconnect for all employees indiscriminately, but obliges Member States to ensure that employers take the necessary measures to implement the right of employees to disconnect. To this end, Member States should ensure that employers set up an objective, reliable and accessible system to measure the amount of time each worker works each day, in accordance with the right to the protection of the privacy and personal data of employees. The requested draft directive also obliges Member States to establish, in consultation with the social partners, the following minimum working conditions:

- practical arrangements for switching off digital tools for work purposes, including all work-related monitoring tools;
- a system for measuring working time;
- a health and safety assessment, including psychosocial risks, regarding the right to disconnect;
- the criteria for any exemption from the requirement that employers exercise the right of workers to disconnect;
- in the case of an exemption under point (d), the criteria for determining how compensation for work performed outside work is calculated in accordance with Directives 89/391/EEC, 2003/88/EC, (EU) 2019/1152 and (EU) 2019/1158 and with national laws and procedures;
- awareness-raising measures, including on-the-job training, to be taken by employers regarding the working conditions referred to in this paragraph.[17]

17 Article 4(1) of the Annex to the European Parliament Resolution of 21 January 2021 with recommendations to the Commission on the right of disconnect (2019/2181(INL)).

The requested draft directive also includes a requirement for Member States to ensure the protection of employees who have exercised their right to disconnect and to take appropriate measures to prevent any sanctions against them by the employer based on the exercise of the right to disconnect. At the same time, the requested draft directive proposes to eshrine a reversal of the burden of proof in the event of termination of employment or other unfavourable treatment by the employer, the remedy for which (in the event of termination of employment) would be sought by the employee concerned in court, if the facts preceding the termination of employment or other unfavourable treatment would lead to the presumption that the reason for their exrcise or imposition by the employer was vested in the application of the employee's right to disconnect.

As is clear, the requested draft directive is not limited to the requirement that the right to disconnect be legally enshrined in national legislation, but also stipulates minimum requirements to ensure that it is actually enforceable in practice. If the directive as requested is adopted by the European Parliament and the Council in the near future, we can expect that its transposition will significantly improve the current position of employees performing their work using information and communication tools and will thus contribute significantly to preventing the blurring of the boundaries between the work and private lives of these employees.

The requested draft directive included in the resolution is viewed positively and the European Trade Union Confederation required in its opinion[18] the Commission to start the legislative process without further delay and to present the draft directive as proposed by the European Parliament.

The Right to Disconnect Under Legislation in Slovakia

Before the adoption of the right to disconnect in the Labour Code, theory and practice in Slovakia recommended the employee to assert in the employment con-

18 *ETUC Position on the Right to disconnect*. Adopted at the Executive Committee of 22–23 March 2021.

tract the so-called right to disconnect from the network, i.e. not to be disturbed by the employer on non-working days.[19] However, while such a recommendation is appropriate, it is essential to point out that few employees will be given a real opportunity to influence the content of their employment contract. The legislation in the Slovak Republic has undergone a seemingly significant change with the legal enshrinement of the right of employees to disconnect, which until 1 March 2021 was not adjusted or regulated in the Slovak legislation.[20] The amendment to the Labour Code introduced a new concept of legal regulation of homeworking and teleworking, which responds to the needs of practice resulting from the increasing number of employees who, also (but not exclusively) due to the pandemic, started to perform their work from their homes. According to a study carried out by the European Foundation for the Improvement of Living Conditions, in 2020 around 37% of employees across the EU Member States started working from home (in the form of teleworking), while in Slovakia this is almost 30% of employees.[21] With effect from 1 March 2021, the right to disconnect is conceived in the Labour Code as follows: "An employee performing homework or telework shall have the right not to use the work equipment used for the performance of work from home or telework during his or her continuous daily rest and continuous weekly rest, unless he or she is ordered or has agreed to be on work standby or to work overtime during that time, during the period of leave, on a holiday for which work has been cancelled or during obstacles to work. An employer shall not treat as a failure to perform an obligation if an employee refuses to perform work or comply with an instruction during the time referred to in the first sentence."[22]

19 Helena Barancová, *Nové technológie v pracovnom práve a ochrana zamestnanca (možnosti a riziká)*. Praha, 2016: 116.

20 The change was brought about by Act No. 76/2021 Coll. amending Act No. 311/2001 Coll. the Labour Code as amended and supplementing certain acts (hereinafter: the amendment to the Labour Code).

21 Eurofound, *Living, working and COVID-19. First findings – April 2020*. Luxembourg, 2020: 5.

22 Provision of Sec. 52 (10) of Act No. 311/2001 Coll., the Labour Code.

The quoted provision grants the right to disconnect exclusively to employees performing work from home and teleworking. The personal scope of the provision is therefore limited and employees who exercise their right at the employer's workplace are not granted a right to disconnect by the legislation. We see this fact as a major shortcoming, since, as many studies have shown, the rest time of employees who carry out their work using information and communication technologies is very often interfered with by requests from the employer or the employees' supervisors. This refers to short e-mail replies, but also to tasks that require a significant part of the employee's rest time. At the same time, trends in the European Union institutions suggest that the right to disconnect should be granted to all employees without distinction, as long as they meet the condition that they use information and communication technologies in their work. It is expected that in the near future it will be necessary to regulate the personal scope of the right to disconnect and, in accordance with the principle of equal treatment, to grant it to all employees working with information and communication technologies, whether they work in the public sphere (civil service, public works) or in the private sphere.

The right to disconnect is formulated by the Slovak legislator as the right not to use work equipment used for homeworking or teleworking of an employee during his/her continuous daily rest and continuous weekly rest (except when ordered – or he or she has agreed – to work overtime or work standby), during leave, holidays for which work is cancelled, and when there are obstacles to work. However, the concept of work equipment is not further defined by the legislator in the Labour Code. Its definition, however, can be found in Section 2(a) of Slovak Government Regulation No. 392/2006 Coll. on minimum safety and health requirements for the use of work equipment, according to which work equipment is a machine, device, apparatus or tool used at work. However, the non-use of work equipment used for the performance of work, as the essence of the right to disconnection, is not sufficient. The nature of the employees' work and the extent of the work equipment may vary in practice. Where an employee

performs work the substance of which consists in the use of particular software or a program whose functionality is implemented by means of a laptop or desktop computer, the laptop, the desktop computer and the program or software may be regarded as the work equipment. In this case, the employee's private mobile phone may not be considered work equipment and the employer may nevertheless use it to contact the employee with a question or request. In order for the right to disconnect, as enshrined by the Slovak legislator, to be truly effective, it is necessary for the employer, in cooperation with the employee or employee representatives, to set out in the employment contract or in its internal regulations what is considered to be work equipment used for the performance of work. However, the Labour Code does not impose such an obligation on the employer. The practical significance and application benefit of the right to disconnect thus conceived remains highly questionable. In this respect, we consider that a more targeted and precise definition of the right to disconnect, as proposed by the European Parliament in the Directive, would be more appropriate, i.e. the right to disconnect should consist of the right not to carry out work activities directly or indirectly, and of the right not to engage in work-related communication via digital tools outside working hours. Such a right would not be dependent on the definition of work-related equipment, but would directly allow employees to refuse to carry out any activities related to their work outside working hours.

The protection of employees exercising the right to disconnect under the Slovak legislation is ensured by the legislator through the prohibition of treating the non-use of work equipment as a failure to fulfil an obligation. Thus, in practice, an employer could not sanction an employee who exercised the right not to use work equipment outside working hours with a warning about unsatisfactory performance of work tasks, which is a substantive condition for termination of the employment relationship by notice by the employer under Section 63(1)(d)(4) of the Labour Code.[23] Although the protection thus provided is undoubtedly in

23 Provision of Section 63(1)(d)(4): "The employer may give notice to an employee only for reasons where the employee is not performing his/her work tasks satisfactorily and the

place, it cannot be regarded as sufficient anymore, since the employee is the weaker party in the employment relationship and we can reasonably expect that an employee who had the will to exercise the right to disconnect would not do so if he or she knew in advance that such an action would be perceived negatively by the employer. On the other hand, an employer who naturally respects the rest time of his employees will not contact them outside their working hours and it is in principle irrelevant to him whether the right to disconnect is legally enshrined in the Labour Code. However, of course, the right of employees to disconnect cannot be left to the employer's goodwill alone. From this point of view, we consider the protection of the employee exercising the right to disconnect to be insufficient, and it is necessary for this protection to be extended and for the legislator to oblige the employer to take measures to enable the right to disconnect to be exercised. In this regard, we again refer to the requested draft directive contained in the European Parliament Resolution, which sets out in detail the minimum requirements for such measures.

In relation to the protection of the physical and mental health of employees performing telework, it is necessary to point out the direct limited scope of the Labour Code, as it provides in Section 52(7) that an employee who schedules his/her own working time when working at home or teleworking is not covered by certain provisions on the scheduling of weekly working time, continuous daily rest and continuous weekly rest, and others. Despite the fact that the legislator, as mentioned above, has proceeded from the change of the legal regulation of telework, it has not eliminated one fundamental deficiency. It should be noted that even a teleworker who schedules his own working time is entitled to uninterrupted daily rest and uninterrupted weekly rest. This is recognised both by international documents and by the Constitution of the Slovak Republic. The effective wording of Article 52(7) gives the impression that the teleworker is not entitled to it, or that the employer does not have to respect and observe

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employer has called upon him/her in writing within the last six months to remedy the deficiencies and the employee has failed to remedy them within a reasonable time."

the minimum limits applicable to continuous daily rest and continuous weekly rest. We hold that the correct grammatical wording should be that "the performance of telework is not covered by the provisions of (…) on the distribution of uninterrupted daily rest, uninterrupted weekly rest (…)."Teleworkers also have the right to adequate rest after work, they just have to determine the rules for scheduling it themselves, as in the case of rest and meal breaks.[24] However, this shortcoming is not the only one that needs attention. We hold that a teleworkers are employees just like those who work directly at the employer's workplace. They should therefore be entitled to the same rest during the day and week as regular employees. After all, the prohibition of discrimination or giving preferential treatment to teleworkers is legally expressed in Article 52(11) of the Labour Code, which provides that an employee performing homeworking or teleworking shall not be favoured or restricted in comparison with a comparable employee with a place of work at the employer's place of work. We hold that teleworkers who schedule their work hours entirely by themselves are entitled to uninterrupted daily rest and uninterrupted weekly rest, even if they schedule their own hours. However, the current legislation does not directly reflect this fact. In order to protect the health of employees and to prevent the blurring of the boundaries between work and private life, it is necessary that this entitlement be directly expressed and that mechanisms be established to enable the extent of continuous daily rest and continuous weekly rest to be monitored, e.g. in the form of monitoring and recording of the working time of teleworkers. In this context, it is precisely digital technologies that allow us to create a control system that reflects the actual time worked by the employee. At the same time, it is possible to impose an obligation on teleworkers to inform the employer of their working time and, at the same time, to treat the employer's work requirements outside this framework as working time or overtime, for which employees will be compensated in the form of wages or

24 Jana Žuľová, "Sociálne práva zamestnancov vykonávajúcich teleprácu" in *Pracovné právo v digitálnej dobe*. Praha, 2017: 90.

compensatory time off. Such provisions of the Labour Code could have a positive impact on eliminating the employer's arbitrariness as to the frequency of interference with the employee's rest and recovery time.

The modification of the provision limiting the scope of certain provisions on working time is a key point of interest, since the currently effective right to disconnect in the Slovak Republic's legal order is directly dependent on it being clearly and distinctly determined, or at least identifiable, which part of the day is considered to be a time of continuous daily rest and which part of the week is designated for the employee's continuous rest during the week. If this is not clear and distinct, there is a risk that the employee will not be able to exercise the right to disconnect and, in a worse case scenario, will be sanctioned for unsatisfactory performance of work tasks by the employer.

We view positively the efforts of the Slovak legislator to legally enshrine the right to disconnect. However, we would question its applicability and benefit, which should be to protect the (mental) health of employees and prevent the blurring of the boundaries between work and private life. It is essential that the current effective provision on the right to disconnect is seen only as a first step and that it is followed up by further legislative steps towards real protection of employees and their right to rest. At the same time, it is necessary to create or legally enshrine means of protecting employees whose right to disconnect will not be respected by employers.

Conclusion

European Union law does not currently contain an explicitly defined and recognised right to disconnect. The contrary is true though. Employees suffering from stress, anxiety or burnout caused by the persistent blurring of the boundaries between work and private life are experiencing higher rates of absenteeism and increased healthcare costs. It is essential to bear these facts in mind, as their negative effects are felt indirectly by both the employer and the state. It is therefore essential to enshrine the right to disconnect in law, not just in a for-

mal sense, but in such a way that its regulation be actually applied and achieve the stated aim of protecting the employee.

Trends emerging in the European Union institutions suggest that we may soon reach such a regulation. At present, we can also see attempts to regulate the right to disconnect at the level of the Member States, which includes the Slovak Republic. Despite the efforts of the Slovak legislator, effective regulation of the right to disconnect in Slovakia is not currently the means that would actually provide the required and sufficient protection for employees. It is necessary to amend this regulation and to focus in particular on ensuring that the right to disconnect is granted to all employees and not only to those performing work from home or telework. At the same time, the regime of this right should be changed so that it is not only linked to the non-use of work equipment, but also allows employees not to respond in their free time to any requests from the employer, supervisors or colleagues. Finally, it is essential that the legislator creates means of protection for employees exercising their right to disconnect, which are genuinely effective and have a preventive and deterrent effect in relation to the employer.

However, in order not to confine ourselves to criticising our legislator, we must, however, take a positive view of their move to change the legislation as regards the right to disconnect. However, it is essential to pay more attention to the content of this right and its application, because a right that is incorporated into the text of a law without its subsequent application and the means used to enforce it fails to achieve the objective of protecting employees and their health.

References

Ahlers, Elke. "Flexible and remote work in the context of digitalization and occupational health." *International Journal of Labour Research* 8, no. 1–2. 2016: 85–100.

Avogaro, Matteo. "Right to disconnect: French and Italian proposals for a global issue." *Revista Direito das Relações Sociais e Trabalhistas* 4, no. 3. 2018: 110–129.

Barancová, Helena. *Nové technológie v pracovnom práve a ochrana zamestnanca (možnosti a riziká)*. Praha, 2016.

Bergen Von, Clarence W., and Martin Bressler. "Work, Non-Work Boundaries and the Right to Disconnect." *Journal of Applied Business and Economics* 21, no. 2. 2019: 51–70.

Dolobáč, Marcel. "Technostres – ochrana duševného zdravia zamestnanca." In *Pracovné právo v digitálnej dobe*. Praha, 2017: 55–64.

ETUC Position on the Right to disconnect. Adopted at the Executive Committee of 22–23 March 2021. <https://www.etuc.org/sites/default/files/document/file/2021–04/Adopted-%20EN%20ETUC%20Position%20Right%20to%20Disconnect_0.pdf>.

Eurofound. *Right to disconnect: Exploring company practises*. Luxembourg, 2021.

Eurofound. *Living, working and COVID-19*. *First findings – April 2020*. Luxembourg, 2020. <https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef20058en.pdf>.

European Parliament Resolution of 21 January 2021 with recommendations to the Commission on the right to disconnect (2019/2181/INL)).

International Labour Organization. *Teleworking Arrangements during the COVID-19 crisis and beyond.* 2021. <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---ddg_p/documents/publication/wcms_791858.pdf>.

Secunda, Paul M. "The employee right to disconnect." *Notre Dame Journal of International & Comparative Law* 9, no. 1. 2019: 1–39.

Žuľová, Jana. "Sociálne práva zamestnancov vykonávajúcich teleprácu." In *Pracovné právo v digitálnej dobe*. Praha, 2017: 87–102.

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The Enforcement of Non-Discrimination Law and Sexual Minorities' Rights in the EU: The Cases of Hungary and Poland[1]

Abstract: The principle of equality and the prohibition of discrimination on grounds of sexual orientation are enshrined in the EU Treaties. A strong baseline is also laid down in secondary EU legislation. However, the impact of the respective provisions is constrained in two ways: by challenges to their enforcement and, regarding the secondary EU law, by limitations in their scope to employment.

This paper takes stock of the EU non-discrimination law with respect to sexual minorities' rights as well as the enforcement mechanisms applied by the EU to safeguard implementation in Member States. To contextualize the findings, we analyse the cases of Hungary and Poland where measures adopted by state and local authorities have led to decisive steps by the EU, including withholding financial transfers. The paper identifies systemic weaknesses in existing enforcement mechanisms and concludes by pointing to institutional reform which could address them.

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Introduction

Under Art. 2 of the Treaty on European Union,[2] the respect of "human rights, including the rights of persons belonging to minorities," constitutes one of the values on which the Union is said to be founded. The experience of the past indicates that ethnic and sexual minorities belong to one of the most vulnerable groups in the EU. However, while EU law prohibiting discrimination on grounds of ethnic origin is very broad in scope, EU legislation protecting sexual minorities is limited to employment. This incoherence cannot be attributed to diachronic development of anti-discrimination law in the EU, as the respective instruments establishing rules on ethnic and sexual minorities protection were adopted in the same year.

Against this backdrop, this paper seeks to take stock of the EU non-discrimination law with respect to sexual minorities' rights as well as its enforcement mechanisms in the EU Member States. Sexual minority is an umbrella term referring to people whose sexual identity is denoted as lesbian, gay, bisexual, transgender, intersex or queer (LGBTIQ). Thus, it appears more appropriate to speak about multiple "sexual minorities." To contextualize the findings, the argument turns to a case study on how such enforcement mechanisms were applied with respect to Hungary and Poland. The article places the deterioration of the situation of sexual minorities in these countries in a broader setting of the decline of democratic standards. While maintaining the rule of law in Central and Easter Europe has attracted substantial scholarly attention, the interrelated issue of the respect of sexual minorities' rights appears to be by and large under-explored.

The article proceeds as follows: First we briefly outline the state of the art of the EU non-discrimination legislation so as to identify regulatory gaps in the protection of the LGBTIQ people against any form of discrimination. Next we point to the role of the Court of Justice of the European Union[3] in enhancing sexual minorities' protection in the face of regulatory lacuna. The follow-

2 Hereinafter: TEU.
3 Hereinafter: CJEU.

ing sections look at the existing EU law enforcement mechanisms and how they have been applied to enforce EU non-discrimination rules in Hungary and Poland. The paper identifies systemic weaknesses in existing enforcement mechanisms and concludes by offering some reflection on institutional reform that could address them.

Non-Discrimination and Sexual Minority Rights Under EU Law

The principle of equality and the prohibition of discrimination on grounds of sexual orientation are enshrined in the EU treaties. Article 2 TEU stipulates that "[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail." Combating social exclusion and discrimination as well as promoting social justice and the protection of equality between women and men count amongst the Union objectives (Art. 3(3) subpara 2 TEU). More concretely, under Art. 10 of the Treaty on the Functioning of the European Union,[4] when defining and implementing its policies and activities, the EU shall combat discrimination based on sex, racial or ethnic origin,[5] religion or belief, disability, age or sexual orientation.

Initially, anti-discrimination law in the European Community was limited to provisions prohibiting discrimination on grounds of sex in employment.[6] With the Treaty of Amsterdam, the Community (and subsequently the EU) received new competences to combat discrimination, which correspond

4 Hereinafter: TFEU.

5 In addition, in the EU composed of 27 Member States and their citizens, the prohibition of discrimination on the basis of nationality is a fundamental principle laid down in Art. 18 TFEU.

6 Art. 119 EEC Treaty of 25 March 1957.

to the current wording of Art. 10 TFEU. In effect, in 2000 the body of EU anti-discrimination law was extended by two instruments. Strikingly, despite being adopted in the same year, the material scope of the said instruments differs substantially. The Employment Equality Directive (2000/78/EC)[7] prohibited discrimination on the basis of sexual orientation, religion or belief, age and disability in the area of employment. The Race Equality Directive (2000/43/EC)[8] prohibited discrimination on the basis of race or ethnicity in employment, education, access to the welfare system and social security as well as goods and services. Whereas the principle of non-discrimination on grounds of sex was subsequently extended to goods and services (Gender Goods and Services Directive (2004/113/EC))[9] and social security (Gender Equality Directive (2006/54/EC)),[10] no similar progress has been achieved in extending protection of sexual orientation, religious belief, disability and age beyond the context of employment. The proposed horizontal equal treatment Directive[11] put forth by the European Commission in 2008 would prohibit discrimination on the aforementioned grounds in the areas of social protection, including social security and healthcare, education and access to goods and services, including housing. Such a Directive could potentially close the gaps in EU law protection against discrimination, including that based on sexual orientation.[12] Its adoption requires unanimity in the Council and consent of

7 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. OJ L 303, 2.12.2000, 16–22.

8 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. OJ L 180, 19.7.2000, 22–26.

9 Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services. OJ L 373, 21.12.2004, 37–43.

10 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast). OJ L 204, 26.7.2006, 23–36.

11 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM/2008/0426 final.

12 Cf. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Union of

the European Parliament. To date, however, little progress has been achieved in the Council. The positions of delegations remain polarized. Some express general reservations to the proposal, notably the alleged violation of the subsidiarity principle, lack of an adequate legal basis to legislate and the burden that the proposed measures would impose on businesses, especially SMEs. Other delegations express concern that the text has already been watered down as a result of the introduced modifications. The latter are said to be weakening the protection it offered, and potentially opening the door for discrimination in areas such as marital and family law.[13] It is noteworthy that even in its original version, the horizontal draft Directive did not propose comparable protection to that afforded under the Race Equality Directive. While the ban on discrimination based on race or ethnical origin applies "to all persons […] in relation to […] access to and supply of goods and services which are available to the public, including housing" (Articles 3.1 and 3.1.h), in the horizontal draft Directive the prohibition covers individuals "only insofar as they are performing a professional or commercial activity" (Articles 3.1 and 3.1.d(2)). Thus, contrary to the solution adopted in the Race Equality Directive, making goods or services available to the public would not automatically be covered by the horizontal draft Directive.[14]

Regulatory gaps in the EU protection of sexual minorities also concern penal law. The Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia[15]

Equality: LGBTIQ 2020–2025 Strategy, COM(2020) 698 final, 8.

13 Cf. Progress Report of 23 November 2021, <https://www.consilium.europa.eu/en/documents-publications/public-register/public-register-search/results/?WordsInSubject=&WordsInText=&DocumentNumber=&InterinstitutionalFiles=2008%2F0140%28CNS%29&DocumentDateFrom=&DocumentDateTo=&MeetingDateFrom=&MeetingDateTo=&DocumentLanguage=EN&OrderBy=DOCUMENT_DATE+DESC&ctl00%24ctl00%24cpMain%24cpMain%24btnSubmit=>.

14 See the statement on the proposed directive by the European Commission on Sexual Orientation Law (ECSOL) <https://www.sexualorientationlaw.eu/images/documents/080916_comments_horiz_directive-lo.pdf>.

15 OJ L 328, 6.12.2008, 55.

neither explicitly covers anti-LGBTIQ hate crime and hate speech, nor does it include targeting sexual orientation or gender identity among the defining characteristics of hate crime and hate speech.

In the absence of dedicated protection in salient socio-economic areas, members of sexual minority groups benefit from the freedom of movement within the EU territory to safeguard the enjoyment of their rights. This resonates the general state of affairs of minority groups' protection in the EU. The protection in question is linked to the EU Internal Market principles (Art. 26(2) TFEU), notably the economic objectives of the integration process such as the realization of EU economic freedoms and fair competition. This market-driven approach to the minority protection, when coupled with the regulatory lacuna and ailing enforcement measures (see below) is unlikely to prove highly effective. For the above specified reasons, it is even described in legal scholarship as dysfunctional,[16] albeit the same legal scholarship rightly ascertains that the problem lies in the limitations of EU's competences in the protection of human rights in general,[17] which may be attributed to the Member States' unwillingness to yield their sovereign powers in that field. On a positive note, it is worth exploring the extent to which the enforcement of Internal Market rules may compensate for the lack of EU competences in minority rights' protection.

How are Regulatory Gaps Addressed at the EU Level?

The CJEU's effective interpretation of existing non-discrimination rules has considerably contributed to the enhanced protection of sexual minorities, thus partly filling regulatory gaps in the EU law. In view of the existing substantive rules, the Court's jurisprudence is particularly rich in the area of employment. By way of example, in the case *P v. S and Cornwall County Council* the Court ruled that the principle of equal treatment for men and women laid down in the Gender

16 Dimitry Kochenov, and Timofey Agarin, "Expecting Too Much: European Union's Minority Protection Hide-and-Seek", *Anti-Discrimination Law Review* 1. 2017.

17 Kochenov, and Agarin.

Equality Directive precludes dismissal for a reason related to gender reassignment.[18] More recently, CJEU jurisprudence extended protection against discrimination through a public statement by the employers and persons that could have an influence on the recruitment process. The first landmark judgment in *Feryn* concerned a public statement by an employer who excluded recruiting employees of certain ethnic or racial origin in view of his "customers' requirements."[19] The Court held that public statements may constitute direct discrimination in respect of recruitment even if there is no identifiable victim, as such statements are "likely strongly to dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market."[20]

In a subsequent judgment in *Accept*,[21] the CJEU further acknowledged that a person making discriminatory statements in public does not necessarily need to have the legal capacity to bind or represent the employer in recruitment matters. It suffices that such a person is perceived among the general public and the social group concerned as capable of exerting a decisive influence on that employer's recruitment policy, which is likely to deter members of that group from applying for a post offered by that employer. In that case a shareholder of a Romanian football club publicly stated that the club would not employ a homosexual and the club in question has not distanced itself from that statement. The CJEU also held that for determining direct discrimination by the club it is irrelevant whether or not the recruitment process has actually been initiated.[22] This argument was

18 *P v. S and Cornwall County Council*, case C-13/94, Judgement of 30 April 1996, ECLI:EU:C:1996:170.

19 *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV*, case C-54/07 ECLI:EU:C:2008:397.

20 *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV*, paras 23–25, 28. At first the President of the Brussels Labour Court dismissed the claim by the Belgian equal treatment authority, stating that there was neither proof nor a presumption that somebody had applied for a job and had not been employed as a result of his/her ethnic origin. On the claimant's appeal, the Brussels Labour Court stayed the proceedings and referred the issue to the CJEU for a preliminary ruling.

21 *Asociaţia Accept v. Consiliul Naţional pentru Combaterea Discriminării*, case C-81/12 ECLI:EU:C:2013:275.

22 *Asociaţia Accept v. Consiliul Naţional pentru Combaterea Discriminării*, para 52–53.

further developed by the Court in case *NH* concerning a statement made by an Italian lawyer in an interview during a radio programme that he would neither recruit homosexual persons to his law firm nor use their services in his firm.[23] On the one hand the CJEU confirmed that the non-existence of an ongoing or planned recruitment procedure is not decisive to determine whether public statements relate to a given employer's recruitment policy. However, the Court specified that such statements must *de facto* be capable of being related to the recruitment policy of that employer, which means that the *link* between those statements and the conditions for access to employment with that employer must not be hypothetical.[24] This criterion is essential for determining the employer's intention to discriminate on the basis of one of the criteria laid down by the Employment Equality Directive,[25] otherwise their homophobic statement could potentially enjoy protection under freedom of expression as private opinion.[26] This embedded division between the private and the public further constrains the impact of anti-discrimination provisions and poses challenges in their application. This effect is mitigated, but not resolved, through the litigation model of *actio popularis* under EU law established by the CJEU in *Feryn*, which enables national anti-discrimination bodies and NGOs to launch proceedings in the absence of plaintiffs. "In the case of homophobic expressions, the common dearth of individual plaintiffs should be foremost explained by the nature

23 *NH v. Associazione Avvocatura per i diritti LGBTI — Rete Lenford*, case C-507/18, Judgement of 23 April 2020, ECLI:EU:C:2020:289. Italy is among the few EU states without a specific legislation to protect individuals from homophobic discrimination. On 27 October 2021 a centre-right majority in the Italian Senate blocked the *Disegno di Legge* (DdL) Zan, i.e. a bill that would expand anti-discrimination laws to protect women, disabled people and members of the LGBTQI community. Viola Stefanello, *Italian Senate torpedoes anti-discrimination bill*, EURACTIVE.it, 28.10.2021; <https://www.euractiv.com/section/politics/short_news/italian-senate-torpedoes-anti-discrimination-bill/?utm_source=piano&utm_medium=email&utm_campaign=15143&pnespid=7b1iGn5fOKQLxajc.SqqHY3RvRa1DoQuMPfjw_JqvB9mDyhQkcgfnyN7MpQAau3ChZyAzoM3Gg>.

24 *NH v. Associazione Avvocatura per i diritti LGBTI — Rete Lenford*, para 43.

25 *NH v. Associazione Avvocatura per i diritti LGBTI — Rete Lenford*, para 45.

26 Maciej Kułak, "Does the *Feryn-Accept-NH* Doctrine enhance a Common Level of Protection against Discrimination in the EU? A Reflection on the Procedural Aspects of the CJEU's Concept of Discriminatory Speech", *European Law Review*, no. 4. 2021: 554.

of their often-silenced identity. That silence is trapped within heteronormative chains in labor."[27]

The absence of protection of sexual minorities in salient socio-economic areas is also partly compensated by the safeguards provided under the freedom of movement within the EU territory. By way of example, although the EU does not have competences in the area of family law, its Internal Market rules have far-reaching effect on the *de facto* recognition of same-sex unions and families around the Union.[28] A strong baseline is established by Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.[29] Accordingly, in the *Coman* case the CJEU determined that "the term 'spouse' within the meaning of Directive 2004/38/EC is gender-neutral and may therefore cover the same-sex spouse of the Union citizen concerned."[30] Moreover, the Court held that "a Member State cannot rely on its national law as justification for refusing to recognise in its territory, for the sole purpose of granting a derived right of residence to a third-country national, a marriage concluded by that national with a Union citizen of the same sex in another Member State in accordance with the law of that state."[31]

Implementing Sexual Minorities' Rights in EU Member States: Key Questions

While *de jure* Member States have to implement the EU non-discrimination law, the *de facto* compliance of national authorities with their obligations in that re-

27 Uladzislau Belavusau, "A Penalty Card for Homophobia from EU Non-Discrimination Law", *Columbia Journal of European Law* 21, no. 2. 2015: 381.

28 Kochenov, and Agarin, 12. Enhanced protection of cross-border rainbow families and the availability of legal gender recognition are spelled out as the main objectives of the EU LGBTQI Equality Strategy 2020–2025, supra n. 8.

29 OJ L 158, 30.4.2004, 77–123.

30 *Coman*, case C- 673/16, Judgement of 5 June 2018, ECLI:EU:C:2018:385, at 35.

31 *Coman*, at 36.

spect unveils a more complex picture. The implementation of the EU equality directives into the national legal order (typically through adopting national legislation, regulations and administrative provisions) is only the first step. Member States may enjoy a certain margin of manoeuvre regarding such implementation as long as the objectives of the specific directive are met. Nevertheless, implementation in the sense of the realisation of sexual minorities' rights by Member States requires the commitment of public authorities at state and local government levels. The recent experience of declining rule of law standards in Central and Eastern Europe has shown that the Union is to a large extent powerless in the face of a defiant Member State refusing to take the values of Article 2 TEU seriously.[32] Although discussing this issue is beyond the scope of this paper, it raises two questions which are pertinent for the development of the argument. The first is of a general nature and asks: What instruments (if any) does the EU have at its disposal to intervene in cases involving infringements of minority rights by a Member State public authority action or inaction? Are these instruments adequate in terms of the type and depth of intervention? The second relates to the unavoidable interaction between national and EU judiciaries when EU minority rights are at stake in cases pending before national courts. There the major concern is: Does the EU judicial mechanism of minority protection still function when a national jurisdiction is affected by court capture? We will attempt to address both questions, albeit with varying degrees of success.

Infringements of Sexual Minority Rights in Hungary and Poland

In July 2021 the European Commission[33] initiated treaty infringement procedures (Art. 258 TFEU) against Hungary and Poland in connection with measures adopted in both countries which target the equality principle and funda-

32 Jan-Werner Müller, "Should the European Union Protect Democracy and the Rule of Law in Its Member States", *European Law Journal* 21, iss. 2. 2015: 141.

33 Hereinafter: EC.

mental rights of LGBTIQ people. The EC emphasized that equality and the respect for dignity and human rights constitute core values of the EU enshrined in Art. 2 TEU and that it "will use all the instruments at its disposal to defend these values."[34] In relation to Hungary the procedure concerns two presumed instances of infringement. The first concerns a law published in June 2021 which, under the pretext of protecting minors, prohibits or limits access to content that depicts or promotes the so-called "divergence from self-identity corresponding to sex at birth, sex change or homosexuality" for individuals under 18. The second instance relates to a disclaimer imposed by the Hungarian Consumer Protection Authority on a children's book with LGBTIQ content that the book depicts forms of "behaviour deviating from traditional gender roles." Regarding Poland, the infringement procedure is linked to the infamous local government resolutions on "LGBT-ideology free zones" and the failure by Polish authorities to respond to the EC's concerns regarding the nature and impact of such resolutions.[35]

In recent years in both countries concerted repressive policy measures have detrimentally affected the rights of the LGBTIQ community. In Hungary these included eliminating the Hungarian Equal Treatment Authority (the most successful body addressing LGBTIQ discrimination claims),[36] a ban on legal gender recognition (the amended act on registry procedures provides for the inalterability of the 'sex at birth'), and restrictions on becoming an adoptive parent as a single person, in particular for those living with their same-sex partner.[37]

34 Press Release, 15 July 2021, <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3668>.

35 Press Release, 15 July 2021.

36 The competences of the Authority have been allocated to the Hungarian Commissioner for Fundamental Rights. The shift of competences to the Commissioner was officially justified with the need to provide a more efficient institutional structure to create a procedure that could address discrimination claims in a more comprehensive manner. While this move would not be controversial as such in a well-functioning democracy, in Hungary the Ombudsman is no longer considered as an independent actor, see Eszter Polgári, and Tamás Dombos, *A New Chapter in the Hungarian Government's Crusade Against LGBTQI People*. Verfassungsblog, 18.11.2020. <https://verfassungsblog.de/a-new-chapter-in-the-hungarian-governments-crusade-against-lgbtqi-people/>.

37 Refusing the authorization of adoption for single individuals solely on grounds of their sexual orientation is a violation of Article 14 in conjunction with Article 8 of the European Conven-

Moreover, the ruling party bans the access of LGBTIQ sensitising programs from schools, thereby entrenching an educational embargo on sexual and gender minorities in the Fundamental Law of Hungary. Under its Ninth Amendment, "Hungary protects children's right to their identity in line with their birth sex, and their right to education according to our country's constitutional identity and system of values based on Christian culture." As rightly argued by Polgári and Dombos (2020), a proclamation by the public authority of its preference as to the content of school instruction is at odds with the states' duty of neutrality with regard to religious and philosophical convictions.[38] Most recently, the Hungarian parliament has passed the aforementioned legislation that bans images or content depicting or 'promoting' homosexuality or trans-identity from the public space. Legal scholarship rightly describes the objective of such measures as clearly discriminating against and stigmatising the LGBTIQ population.[39]

Regarding the developments in Poland, by the end of 2019, more than 80 local governments in Poland had passed resolutions declaring themselves "LGBT-free zones" or "Free from LGBT-ideology." In 2020, this number increased to 94, which amounted to one third of the territory of the Republic of Poland.[40] This development was linked to verbal oppression that LGBT persons had been subjected to in public debate,[41] as well as civil and penal lawsuits[42]

tion on Human Rights (ECHR). See e.g. Grand Chamber of the ECtHR in *E.B. v. France.*

38 Polgári, and Dombos, 32. On the State's duty to remain neutral and impartial, see e.g. ECtHR, case *Barankevich v. Russia*, par. 30.

39 Sébastien Van Drooghenbroeck, Cecilia Rizcallah, Emmanuelle Bribosia, Olivier de Schutter, Isabelle Rorive, Jogchum Vrielink, Stéphanie Wattier, et al., *Attack on the Rights of LGBTQIA+ People in Hungary: Not Just Words, but Deeds as Well?: An Open Letter*. Verfassungsblog, 25.06.2021. <https://verfassungsblog.de/attack-on-the-rights-of-lgbtqia-people-in-hungary-not-just-words-but-deeds-as-well/>.

40 ILGA-Europe, *Annual Review of the Human Rights Situation of Lesbian, Gay, Bisexual, Trans and Intersex People in Europe and Central Asia*. Brussels, 2021.

41 The Commissioner for Human Rights, *The legal situation of non-heterosexual and transgender persons in Poland. International standards for the protection of LGBT persons' human rights and compliance therewith from the perspective of the Commissioner for Human Rights. Report Synthesis*. Warsaw, 2019, 5.

42 According to Art. 196 of the Polish penal code, offending the religious feelings of others is a crime and carries a maximum prison sentence of two years. Maintaining Art. 196 (commonly known as the "blasphemy law") in the Polish penal code remains prob-

whereby the situation of sexual minorities in Poland radically deteriorated.[43] Gender and LGBTIQ movements were described by the highest state officials and the Catholic Church representatives as ideologies comparable to communism and National Socialism which threaten national traditions, the majority religion, and the traditional family model.[44] The hate speech directed at the LGBTIQ community was eagerly disseminated by the public media subordinated to political power and radical organizations whose statutory goal was to counteract abortion. This narrative contributed to the radicalization of views within the society. It also gave a sense of the state apparatus consenting to aggressive actions against non-heterosexual people. This was reflected, amongst other things, by the increasingly aggressive activity of nationalist circles, including physical attacks by nationalists on participants of the Białystok equality parade in July 2019 (where, with the passivity of the police, over a dozen people were severely beaten)[45] and in Łódź in June 2021. The aggressive narrative was subsequently transposed to the local government level where the resolutions on 'LGBTIQ ideology-free zones' were drivers of hostile attitudes towards LGBTIQ people in many local communities.

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lematic in the light of international and European human rights law, notably the freedom of expression. One of the recent cases concerns penal proceedings against an activist who placed posters and badges in the streets of Płock bearing the image of the Virgin Mary with her halo painted in the colours of the rainbow flag. For discussion, see Dominika Bychawska-Siniarska, *Offence Intended – Virgin Mary With a Rainbow Halo as Freedom of Expression*. Verfassungsblog, 14.05.2019. <https://verfassungsblog.de/offence-intended-virgin-mary-with-a-rainbow-halo-as-freedom-of-expression/>.

43 The Commissioner for Human Rights, 5, refers to a survey conducted by the Public Opinion Research Center (CBOS) in 2019, according to which public acceptance of non-heteronormative persons decreased compared to 2017, although previously it had been growing for a number of years.

44 Cf. Anna Śledzińska-Simon, "Populists, gender, and national identity", *International Journal of Constitutional Law* 18, iss. 2. 2020: 449.

45 Jan Skórzyński, *Atak na Marsz Równości w Białymstoku. Kronika Skórzyńskiego (20–26 lipca 2019)*. OKO.press, 27.07.2019. <https://oko.press/atak-na-marsz-rownosci-w-bialymstoku-kronika-skorzynskiego-20–26-lipca-2019/>.

Ideological Discourse on Gender and LGBTIQ: A Socio-Political Perspective

The labelling of LGBTIQ as an *ideology* had an inflammatory effect and has been spreading in online and offline communication, the same phenomenon being observable for the ongoing campaign against the so-called "gender *ideology*."[46] The reference to "LGBTIQ *ideology*" by representatives of state and local government authorities was arguably a targeted tactic to discredit and stigmatise members of the LGBTIQ community. In political discourse the notion of ideology is mostly used with negative connotations that are particularly strong in societies which were tormented by totalitarian regimes. In countries of the post-communist bloc, the very reference to *ideology* in political and public discourse awakens distrust, while describing something as *ideology* or *ideological* typically stigmatizes.

Ideology is, however, a highly flexible conceptual tool encompassing attributes which tend to be contradictory. The social sciences, for instance, operate with value-free definitions of the notion of ideology. A definitional analysis of the concept reveals that the *coherence* (or *consistency*) of views on political or other matters is semantically most prevalent and thus also a core attribute of *ideology*.[47] Therefore, to say that ideological pluralism is the distinct characteristic of open-minded, liberal societies should raise no controversies. Surprisingly, though, while the need for ideological pluralism seems undisputed

46 COM(2020) 698 final, 13.

47 John Gerring, "Ideology: A definitional Analysis", *Political Research Quarterly* 50, no. 4. 1997: 960, 984. The definitions of ideology referred to by the author as most influential are that of Martin Seliger, *Ideology and Politics.* London, 1976: George Allen and Unwin, at 11: "Sets of ideas by which men posit, explain and justify ends and means of organized social action, and specifically political action, irrespective of whether such action aims to preserve, amend, uproot or rebuild a given social order;" and of Malcolm Hamilton, "The Elements of the Concept of Ideology", *Political Studies* 35, 1987: 39: "A system of collectively held normative and reputedly factual ideas and beliefs and attitudes advocating a particular pattern of social relationships and arrangements, and/or aimed at justifying a particular pattern of conduct, which its proponents seek to promote, realize, pursue or maintain."

in the context of transnational and global legal orders,[48] the rationale for its existence in the state context is by and large underestimated. Part of the problem is the enduring dogma of the homogeneity of the *demos*. It does not mean that a minimum convergence of legal culture is not requisite for a well-functioning constitutional order.[49] Still, claims that self-affirm as the only valid interpretation of constitutional tradition and values, without connecting to the pluralism of society, are ideological in the negative sense and therefore damaging to inclusive democratic discourse and culture.[50] The latter imply a society embracing a plurality of world views and not infrequently competing conceptions of what may constitute the *common good*. From this perspective, neither the wording of a constitution nor its interpretation should serve only the interests of the dominant group within its constituent society.[51] On the contrary, a constitution must contain mechanisms to effectively safeguard the interests of minorities and vulnerable or marginalised groups. As aptly put by Max Steinbeis, "*Majoritising* minorities is not authoritarian, it's the opposite: It is a service to the diversity of opinion, a basic condition for the political spectrum from left to right to fan out in all its pluralistic beauty."[52]

Not surprisingly, the dismantling of ideological pluralism constitutes one of the manifestations of a broader tendency of democratic backsliding.[53] It pairs with a growing gap between the constitutional text and constitutional reality, notably in terms of rule of law and protection of minority rights.[54] The observ-

48 Michel Rosenfeld, "Rethinking constitutional ordering in an era of legal and ideological pluralism", *International Journal of Constitutional Law* 6, no. 3–4. 2008.

49 Cf. Rosenfeld, 453.

50 Arguably, such ideological manipulation is a deeply rooted syndrome of the statist context. Neil Walker, "The Idea of Constitutional Pluralism", *The Modern Law Review* 65, no. 3. 2002.

51 Walker.

52 Maximilian Steinbeis, *Majority*. Verfassungsblog, 19.11.2021. <https://verfassungsblog.de/majority/>.

53 Cf. in that sense e.g. Śledzińska-Simon, 40, 448; Ben Stanley, "The thin ideology of populism", *Journal of Political Ideologies* 13, iss. 1. 2008: 95–110.

54 For a methodological approach to analyse such a divergence, see Stefan Voigt, "Mind the gap: Analyzing the divergence between constitutional text and constitutional reality", *International Journal of Constitutional Law* 19, iss. 5. 2021: 2.

able deterioration of sexual minority protection in some Central and Eastern European states should be placed in exactly this setting. Gender and LGBTIQ not only stand in contradiction to the traditionally conditioned roles for men and women in society, but also uphold inherently non-conforming attitudes which are both inconvenient and unwelcome in the political and societal architecture authoritatively acclaimed and propagated by populist right-wing governments.

The Enforcement of Non-Discrimination Law by the EU

Since possible infringements of EU law by Member States' action or inaction may not be excluded, the central question is how the Union can enforce the respect of its principles and rules. The EU disposes of various instruments which may be applied according to the type of infringement, its scale and gravity. These include soft measures such as political dialogue and (peer) pressure, conditionality mechanisms linked to the suspension of funding, regular judicial mechanisms within the preliminary ruling procedure and, *ultima ratio*, the treaty infringement procedure under Art. 258 TFEU. Consequently, the EU has no competence to directly intervene in cases of violations of human rights by Member States as long as these do not infringe on concrete EU provisions e.g. protecting sexual minorities' rights.

This becomes apparent in the light of the legal grounds specified by the Commission regarding the on-going infringement procedure against Hungary. The EC considered that the aforementioned law banning access to LGBTIQ content by children violates the EU rules on, inter alia, i) the Audiovisual Media Services Directive[55] with respect to standards for audio-visual content and the free provision of cross-border audiovisual media services; and ii) the Direc-

55 Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services. OJ L 95, 15.4.2010, 1–24.

tive on electronic commerce[56] by restricting cross-border information society services. Thus, the EC deems Hungary to have infringed Treaty principles of the free movement of services (Art. 56 TFEU) and the free movement of goods (Art. 34 TFEU) by prohibiting the provision of goods or services displaying content showing different sexual orientations to minors. Since the Hungarian authorities have failed to explain in what way the exposure of children to such content could be detrimental to their well-being, the EC considers that the restrictions introduced by the law are unjustified, disproportionate and discriminatory. The same conclusions have been reached regarding the disclaimer on children books with LGBTIQ content. Particularly noteworthy is the statement in the press release of 15 July 2021, which clearly spells out the limits to the EU action due to the restricted field of application of the EU Charter of Fundamental Rights and the EU's deficient competences in the area of human rights, namely:

> "the Commission believes that in these fields falling into the area of application of EU law, the Hungarian provisions also violate human dignity, freedom of expression and information, the right to respect of private life as well as the right to non-discrimination as enshrined respectively in Articles 1, 7, 11 and 21 of the EU Charter of Fundamental Rights. Because of the gravity of these violations, the contested provisions also violate the values laid down in Article 2 TEU."[57]

Against this backdrop, the question arises of whether the instruments the Union has at its disposal to enforce the respect of its principles and rules are

56 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market. OJ L 178, 17.7.2000, 1–16.

57 Press Release, 15 July 2021, *supra* n. 36. On the EU's approach to minority protection resulting from Member States' reluctance to confer explicit competences to the EU in that area, see e.g. Bruno de Witte, "The Constitutional Resources for an EU Minority Protection Policy" in: *Minority Protection and the Enlarged European Union*, ed. Gabriel N. Toggenburg. Budapest, 2004, 123.

adequate in terms of type and depth of intervention. In simplified terms, the adequacy of enforcement instruments may be assessed on the basis of whether or not they bring about the desired effects.

In that regard, even the ultimate instrument of the Treaty infringement procedure in its initial phase has the form of a dialogue between a potentially defector state and the EC. It begins with a letter of formal notice from the Commission specifying the grounds for the presumption of the alleged infringement. Depending on the Member State's response (observations), the EC may submit a reasoned opinion on the matter. Should the State concerned fail to comply within that opinion, the EC may refer the matter to the CJEU (Art. 258 TFEU).

On 15 July 2022, the Commission decided to bring the case of the Hungarian law before the CJEU. The EC considers that Hungary has not provided a sufficient response to its concerns "in terms of equality and the protection of fundamental rights,"[58] a reasoned opinion to that effect having been delivered to Hungary in December 2021.

The enforcement of EU non-discrimination rules with regard to Poland has not reached this stage yet. This is due to a different form of infringement of EU rules (local government resolutions) and thus also the possibility to apply other available instruments to induce corrective measures on the part of national authorities. On 27 May 2020 the Commission addressed a letter to five local government authorities which represent the regions of Lublin, Łódź, Małopolskie, the Podkarpackie and Świętokrzyskie and were among the Polish local communities declared as "zones free from LGBT ideology." The EC called on the local authorities to ensure compliance with EU law and to ensure non-discriminatory access to activities financed by cohesion policy (all five regions had run programs supported by the EU's Structural and Investment Funds). It also demanded clarification on the matter and information as to measures to be un-

58 Agence Europe, Bulletin of 16 July 2022.

dertaken to promote equality and non-discrimination.[59] Since political pressure turned out to be insufficient, the EU suspended financial transfers to the local governments which adopted the infamous resolutions. The financial sanction proved to be effective and some local governments have already repealed the resolutions in question. It is noteworthy that the EC had no other option than taking action with regard to discriminatory local governments' resolutions. Otherwise, the EU cohesion policy and the financial benefits linked to it could have been abused by Polish local authorities to enhance discriminatory policies, thus creating a precedent of the Commission itself being inadvertently in breach of EU law, be it through its action (providing financing to potentially unlawful activity) or inaction (by turning a blind eye to breaches of EU law by local authorities).

Enforcement through the EU judicial mechanism unveils a yet more complex picture. Minority protection within that mechanism rests on the interaction between a national court and the CJEU, including the national court's power (or, as the case may be, obligation) to activate the CJEU in the preliminary ruling procedure.[60] The question arises as to whether such a judicial mechanism still functions when a national jurisdiction is affected by court capture, as it "calls into question the decision-making ability, the neutrality, and the legitimacy of courts."[61] The case of Polish local governments' resolutions is only a single instance for such a "functionality test" and thus provides only limited insight. Nonetheless, the fact that judicial procedures targeting the said resolution have been launched and their relative success allows for some op-

59 Agence Europe, Bulletin of 5 June 2020. It should be noted that under the EU equality directives an instruction to discriminate against persons on the grounds covered by those directives is deemed to be discrimination within the meaning of those directives (see e.g. Art. 2 para 4 of the Employment Equality Directive (2000/78/EC)).

60 Under Art. 267 TFEU, the national court may refer the matter to the CJEU if it deems the interpretation of EU law is necessary for it to pronounce judgment in a case pending before it. However, when the case is pending before a national court against whose decision there is no remedy under national law (last instance decision), that court is obliged to bring the matter before the CJEU.

61 Jonas Anderson, "Court Capture", *Boston College Law Review* 59, iss. 5. 2018, 1593.

timism. Nine anti-LGBT resolutions have been challenged by the Ombudsman before Polish administrative courts. Some courts initially questioned their own jurisdiction over the matter, claiming that resolutions of this kind are not enactments of local law. Such decisions were quashed by the Polish Supreme Administrative Court (NSA) which returned these claims for re-consideration to the respective lower administrative courts, thus confirming that all the resolutions of the local government authority must be subject to judicial review.

The Ombudsman challenged the local government resolutions on grounds such as the following:

- violation of the principle of legality (Art. 7 of the Constitution of the Republic of Poland[62]);
- violation of Art. 32 para 1&2 ConRP by discriminating on grounds of sexual orientation and sexual identity through the exclusion of LGBT people from the community of their respective municipalities;
- violation of Art. 31 para 3 ConRP by limiting constitutional freedoms, whereas such limitation may be imposed only by statute;
- violation of the provisions of the ConRP and ECHR by infringing on the human dignity of LGBT people, their right to private life according to their sexual orientation and identity and free expression of such features;
- unlawful restriction of parents' rights to educate their children in accordance with their own convictions (Art. 48 ConRP) through interference in the activities of educational institutions and imposing values representing only one worldview;
- violation of EU law with respect to the freedom of movement within the territory of Member States (discouraging aspect of the resolutions), the right to private and family life, freedom of expression, and the prohibition on discriminating on the basis of sexual orientation.[63]

62 Hereinafter: ConRP.

63 See e.g. Complaint of the Commissioner for Human Rights against Resolution No. VII.67.2019 of the Tarnów Poviat Council of 30 April 2019 concerning the adoption of the Resolution on stopping the "LGBT" ideology by the local government community,

All the seized administrative courts have declared the discriminatory resolutions invalid. The argument that the resolutions in question would not infringe on individual rights as they refer to LGBT *ideology*, not people, was rejected. The courts held that, by adopting the resolutions in question, local authorities acted without a legal basis and exceeded their competence by establishing rules on i) defining the school curricula and ii) who can enter schools within their territory (notably by banning psychological support for LGBT pupils/students, banning educational and sensitizing programs conducted by NGOs, providing instructions to exclude non-heteronormative teachers from employment). Moreover, the courts held that the resolutions discriminated against individuals whose sexual orientation was other than heteronormative and excluded them from the community of their respective municipalities. The courts also ruled that, in breach of Art. 47 ConRP and Art. 8 of the ECHR, the challenged resolutions constitute an unauthorized interference with the freedoms and rights of non-heteronormative persons by violating their dignity and the right to personal and family life in accordance with their sexual orientation and identity.[64] A noteworthy stance was also expressed by the administrative court in Warsaw regarding minorities. The court recollected that each minority requires special care on the part of public authorities. In the opinion of the Court, the position of minorities in a given community and the attitude of public authorities to them is "a measure of the maturity" of that community,[65]

XI.505.1.2020.MA; Complaint of the Commissioner for Human Rights against Resolution No. X/40/2019 of the Ryki Poviat Council of 30 April 2019, XI.505.2.2020.MA.

64 See i.a. Judgement of WSA in Kielce, II SA/Ke 382/20; Judgement of WSA in Kraków, III SA/Kr 975/21; Judgement of WSA in Warsaw, VIII SA/Wa 42/20. The courts agreed with the argumentation presented by the Ombudsman that, in accordance with the established case law of the ECtHR, sexual orientation, sexual life and gender identity are essential elements of private life. In some cases, the ECtHR found a violation of the rights of an individual even if a concrete law was not applied to him or her. Unlawful interference in private life by such law was established based on the effect of fear and anxiety it had induced in the applicant (e.g. case *Dudgeon v. United Kingdom*), which made it impossible for him or her to live freely in accordance with his or her identity. See Complaint of the Commissioner for Human Rights against Resolution No. VII.67.2019 of the Tarnów Poviat Council para 59.

65 Judgement of WSA in Warsaw, VIII SA/Wa 42/20.

be it as a democracy[66] or a community embodying the idea of humanism, for which aspect the court preferred to leave an understatement.

None of the administrative courts resorted to the preliminary ruling procedure. The courts considered that the CJEU's answer is not indispensable for deciding these cases given the multiple legal grounds under national law to declare the resolutions invalid. While in general the administrative courts rose to the challenge of protecting sexual minorities, the decisions in question are not yet final since the captured public prosecutors' offices have appealed at the court of higher instance.

It is likely that the issue of discriminatory local governments' resolutions will eventually be resolved in the course of the national judicial procedures. The Commission could then discontinue the aforementioned treaty infringement procedure against Poland. However, the existing concerns would not be completely eliminated, given that some local governments have adopted so-called *Charters of family rights*, which in essence are anti-LGBT resolutions, albeit under the veil of protecting the constitutionally entrenched traditional family model.[67]

The question of a possible court capture in a Member State and its detrimental effects on the EU judicial mechanisms, including in cases of minority protection, remains unresolved. For the mechanism to function properly, it must be based on the sincere cooperation of national courts and the CJEU, requiring respect for the principle of primacy of application of EU law and of the obligation of courts of last instance to refer unsettled matters of interpretation

66 For the concept of ECHR rights as counter-majoritarian rights, see ECtHR, case *Barankevich v. Russia*, par. 30: "Referring to the hallmarks of a "democratic society," the Court has attached particular importance to pluralism, tolerance and broadmindedness. In that context, it has held that although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of the majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position (see *Gorzelik and Others v. Poland* [GC], no. 44158/98, § 90, 17 February 2004). (…) What is at stake here is the preservation of pluralism and the proper functioning of democracy, and the role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other."

67 See e.g. <http://powiatdebicki.esesja.pl/zalaczniki/58704/xi1012019_548147.pdf>.

of EU law to the CJEU under the preliminary ruling procedure. This can hardly be expected where individual judges are harassed and suspended for applying EU law or asking preliminary questions to the CJEU.[68] Following the launch of an infringement procedure in December 2021, the Commission transmitted on 15 July 2022 a reasoned opinion to Poland concerning the Polish Constitutional Tribunal which, in its judgments of 14 July 2021 and 7 October 2021, had held the provisions of the EU Treaties incompatible with the Polish Constitution. The Commission considers that the Polish Constitutional Tribunal has violated the general principles of autonomy, primacy, efficiency, uniform application of Union law and the binding effect of judgments of the CJEU and that the Tribunal no longer meets the requirements of an independent and impartial court.[69]

Conclusions

This paper takes stock of the EU non-discrimination law with respect to sexual minorities as well as enforcement mechanisms applied by the EU to safeguard its enforcement in Member States, based on the examples of Hungary and Poland.

As has been shown, the protection of sexual minorities in the EU is partly safeguarded under the umbrella of Internal Market freedoms. This is helpful in individual cases, but does not fill the regulatory gap related to the limited material scope of existing EU anti-discrimination rules. Adopting the horizontal Equal Treatment Directive would be essential to extend protection of sexual minorities beyond the context of employment. From a legal standpoint, notably the principle of equality, different levels of protection provided to minority groups under EU law may not reasonably be justified. Potentially the protection of sexual minorities could additionally be enhanced by the introduction of EU-wide human rights due diligence obligations for business (the respec-

68 See <https://ruleoflaw.pl/judge-niklas-bibik-suspended-for-applying-eu-law-and-for-asking-preliminary-questions-to-the-cjeu/>.

69 Agence Europe, Bulletin of 16 July 2022.

tive legislative proposal has been put forth by the Commission in February 2022).[70] Corporate actors (including platform companies[71] operating biased algorithms) could be held liable for instances of discrimination they have the duty to prevent within their own structures, their subsidiaries and their supply chains.[72]

The existing judicial mechanism of the enforcement of EU law in Member States has two major systematic weaknesses. Where a national court of last instance disregards the obligation to refer a matter to the CJEU, there is no effective remedy. In order to better safeguard proper enforcement of individual rights flowing from EU law, the Treaty provisions concerning the preliminary ruling procedure could be supplemented by a provision enabling individuals to exceptionally refer a question directly to the CJEU, when their request to refer that question to the CJEU was unlawfully declined by a national court deciding in the last instance, thus obliging the latter court to stay its procedures until the CJEU has ruled on that question. Another systemic challenge is posed by the case law of several national constitutional courts[73] creating ambiguity on the primacy of application of EU law. Since primacy results from the doctrine elaborated by the CJEU,[74] a possible way to strengthen its effect would be to enshrine it in the EU Treaties, as was already proposed in Article 10 of the 2003 Convention Draft

70 Proposal for a Directive of the European Parliament (EP) and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM(2022) 71 final.

71 On 9 December 2021 the EU Commission proposed a Directive on improving working conditions in platform work, COM(2021) 762 final.

72 Silvia Borelli, "EU anti-discrimination law and the duty of care: fellows in the regulation of MNEs' business relationships", *Revue de droit comparé du travail et de la sécurité sociale*, no. 4. 2018: 40. The condition for such liability under the current corporate liability regime would be that the company knew or should have known about the instances of discrimination if it had exercised its duty of care properly. See Izabela Jędrzejowska-Schiffauer, "Business Responsibility for Human Rights Impact under the UN Guiding Principles: At Odds with European Union Law?", *European Law Review* 46, no. 4. 2021.

73 Cf. the influential judgment of the German Federal Constitutional Court of 5 May 2020, 2 BvR 859/15.

74 See declaration 17 annexed to the final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon. OJ 2016, C 202, 335.

Treaty Establishing a Constitution for Europe.[75] In the same vein, a treaty change would be necessary to introduce the aforementioned institution of rights-holders' referral for a preliminary ruling. Leaving aside the prospects of such treaty changes to be endorsed and ratified by all 27 Member States, the proper enforcement of EU non-discrimination rules in Member States requires *prima facie* the independence and impartiality of the national judiciary.

References

Anderson, Jonas. "Court Capture", *Boston College Law Review* 59, iss. 5. 2018: 1545–1594.

Belavusau, Uladzislau. "A Penalty Card for Homophobia from EU Non-Discrimination Law." *Columbia Journal of European Law*, 21, no. 2. 2015: 353–381.

Borelli, Silvia. "EU anti-discrimination law and the duty of care: fellows in the regulation of MNEs' business relationships." *Revue de droit comparé du travail et de la sécurité sociale*, no. 4. 2018: 30–43.

Bychawska-Siniarska, Dominika. *Offence Intended – Virgin Mary With a Rainbow Halo as Freedom of Expression*. Verfassungsblog, 14.05.2019. <https://verfassungsblog.de/offence-intended-virgin-mary-with-a-rainbow-halo-as-freedom-of-expression/>.

De Witte, Bruno. "The Constitutional Resources for an EU Minority Protection Policy." In: *Minority Protection and the Enlarged European Union*, edited by Gabriel N. Toggenburg. Budapest, 2004: 107–124.

The Commissioner for Human Rights. *The legal situation of non-heterosexual and transgender persons in Poland. International standards for the protection of LGBT persons' human rights and compliance therewith from the perspective of the Commissioner for Human Rights. Report Synthesis*. Warsaw, 2019.

Gerring, John. "Ideology: A definitional Analysis." *Political Research Quarterly* 50, no. 4. 1997: 957–994.

75 OJ 2003, C 169, 10.

ILGA-Europe. *Annual Review of the Human Rights Situation of Lesbian, Gay, Bisexual, Trans and Intersex People in Europe and Central Asia*. Brussels, 2021.

Jędrzejowska-Schiffauer, Izabela. "Business Responsibility for Human Rights Impact under the UN Guiding Principles: At Odds with European Union Law?." *European Law Review* 46, no. 4. 2021: 481–504.

Kochenov, Dimitry, and Timofey Agarin. "Expecting Too Much: European Union's Minority Protection Hide-and-Seek." *Anti-Discrimination Law Review* 1. 2017: 1–52.

Kułak, Maciej. "Does the *Feryn-Accept-NH* Doctrine enhance a Common Level of Protection against Discrimination in the EU? A Reflection on the Procedural Aspects of the CJEU's Concept of Discriminatory Speech." *European Law Review*", no. 4. 2021: 551–563.

Müller, Jan-Werner. "Should the European Union Protect Democracy and the Rule of Law in Its Member States," *European Law Journal* 21, iss. 2. 2015: 141–160.

Polgári, Eszter, and Tamás Dombos. *A New Chapter in the Hungarian Government's Crusade Against LGBTQI People*. Verfassungsblog, 18.11.2020. <https://verfassungsblog.de/a-new-chapter-in-the-hungarian-governments-crusade-against-lgbtqi-people/>.

Rosenfeld, Michel. "Rethinking constitutional ordering in an era of legal and ideological pluralism." *International Journal of Constitutional Law* 6, no. 3–4. 2008: 415–455.

Skórzyński, Jan. *Atak na Marsz Równości w Białymstoku. Kronika Skórzyńskiego (20–26 lipca 2019)*. OKO.press, 27.07.2019. <https://oko.press/atak-na-marsz-rownosci-w-bialymstoku-kronika-skorzynskiego-20–26-lipca-2019/>.

Stanley, Ben. "The thin ideology of populism." *Journal of Political Ideologies* 13, iss. 1. 2008: 95–110.

Stefanello, Viola. *Italian Senate torpedoes anti-discrimination bill*, EURACTIVE.it, 28.10.10.2021. <https://www.euractiv.com/section/politics/short_news/italian

-senate-torpedoes-anti-discrimination-bill/?utm_source=piano&utm_medium=email&utm_campaign=15143&pnespid=7b1iGn5fOKQLxajc.SqqHY3RvRa1DoQuMPfjw_JqvB9mDyhQkcgfnyN7MpQAau3ChZyAzoM3Gg>.

Śledzińska-Simon, Anna. "Populists, gender, and national identity." *International Journal of Constitutional Law* 18, iss. 2. 2020: 447–454.

Van Drooghenbroeck, Sébastien, Cecilia Rizcallah, Emmanuelle Bribosia, Olivier de Schutter, Isabelle Rorive, Jogchum Vrielink, Stéphanie Wattier, et al., *Attack on the Rights of LGBTQIA+ People in Hungary: Not Just Words, but Deeds as Well?: An Open Letter*. Verfassungsblog, 25.06.2021. <https://verfassungsblog.de/attack-on-the-rights-of-lgbtqia-people-in-hungary-not-just-words-but-deeds-as-well/>.

Voigt, Stefan. "Mind the gap: Analyzing the divergence between constitutional text and constitutional reality." *International Journal of Constitutional Law* 19, iss. 5. 2021: 1–32.

Walker, Neil. "The Idea of Constitutional Pluralism." *The Modern Law Review* 65, no. 3. 2002: 317–359.

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Council Directive (EU) 2018/822 and the Right to Privacy. An Attempt to Answer the Preliminary Question in Case C-694/20

Abstract: Through an action before the Court of Justice of the European Union (CJEU), the Belgian Constitutional Court intends to obtain an answer to the question related to the compatibility of Council Directive (EU) 2018/822 with the fundamental right to respect for private life. The mechanism provided by this Directive may violate this right because it consists in obliging the lawyer who has invoked the Legal Professional Privilege to provide information about the evasion of the obligation to inform the authorities about the cross-border arrangement. This arrangement may amount to tax avoidance by the client. I will try to predict the possible response of the CJEU by analyzing its previous case law. Interference with fundamental rights must be proportionate. The secrecy of the lawyer's communication with his client deserves special protection. The proportionality of the interference may be evidenced by filters such as judicial supervision, intermediation by an independent authority etc.

Keywords: right to respect for private life, tax avoidance, human rights, cross-border agreements

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Introduction

On 21 December 2020, the Court of Justice of the European Union[1] received a request for a preliminary ruling from the Belgian Constitutional Court (Grondwettelijk Hof) with the reference C-694/20. The Belgian Constitutional Court issued an order on 17 December 2020 to refer a question to the CJEU for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union[2] at the request of the Orde van Vlaamse alies (Flemish Bar Association), the unincorporated association "Belgian Association of Tax Lawyers," and others. This application concerned the compliance of Article 1(2) of Directive (EU) 2018/822[3] with Article 7 (right to respect for private life) and Article 47 (right to a fair trial) of the Charter of Fundamental Rights of the European Union[4] in so far as it imposes an obligation on an intermediary lawyer who intends to rely on his professional secrecy to inform any other intermediaries concerned of their obligation to notify.[5]

In this article I will attempt to consider a request for a preliminary ruling regarding the compatibility of Article 1(2) of the Directive 2018/822 with one of the fundamental rights listed in the application, namely the right to respect for private life. The question for preliminary ruling on this right seeks to determine whether Article 1(2) of the Directive 2018/822 violates the right to respect for private life guaranteed in Article 1(2) of the Directive 2018/822 violates the right to respect for private life guaranteed in Article 7 of the Charter, in that it imposes an obligation on intermediaries to notify, without delay, any other intermediary or, if there is no such intermediary, the relevant taxpayer of their reporting obligations, in so far as that obligation has the effect of requiring a lawyer acting as

1 Hereinafter: the CJEU.

2 *Treaty on the Functioning of the European Union OJ.EU. C 326.*

3 Hereinafter: Directive 2018/822.

4 *Charter of Fundamental Rights of the European Union, OJ. EU C 326/391*. Hereinafter: the Charter.

5 *Council Directive (EU) 2018/822* of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements OJ. EU *L 139/1*.

an intermediary to disclose to other intermediaries, who are not his clients, information which he has obtained in the course of carrying out the essential functions of his profession, namely defending, representing a client in court or giving legal advice, even outside the context of any legal proceedings. This obligation arises when the intermediary invokes the obligation to maintain legally protected secrets, including the attorney-client privilege.

Two points should be noted at the outset. First, the mechanism described in the preliminary question need not appear in all transpositions of Directive 2018/822 into the national legal orders of the Member States. Article 1(2) of Directive 2018/822 provides only the possibility for Member States to adopt the necessary measures to allow intermediaries to be released from their obligation to provide information on reportable cross-border arrangements if such reporting would result in an infringement of professional secrecy under the national law of that Member State. If a Member State chooses to do this, it shall adopt the necessary measures to oblige intermediaries to inform without delay any other intermediary or, where there is no such intermediary, the relevant taxable person, of their obligations to notify cross-border arrangements. Intermediaries may be entitled to an exemption from the obligation set out in the first paragraph only to the extent that they act within the limits of the relevant national provisions relating to their profession. In my view, the very optionality of this option is a weakness of the Directive, especially in the context of the ruling and the Opinion of the Advocate General in the case of Ordre des barreaux francophones et germanophone.[6] While the Court of Justice found that Directive 2015/8492 of the European Parliament and of the Council (EU)[7] was compliant with the Charter's right to a fair trial, the Directive itself concerned serious crimes and threats to democracy. In addition, the CJEU pointed out that an important element of the compliance of the interference of the AML Directive with fundamental rights is, inter alia, a safeguard, in the form of an

6 *Ordre des barreaux francophones et germanophone v. Conseil des* ministers, case C-305/05, Opinion of the Advocate General, ECLI:EU:C:2006:788.

7 Hereinafter: AML – Anti-Money Laundering.

exemption from the obligation to cooperate with lawyers in relation to activities which are part of the essence of that legal profession.[8] If, in matters of far greater importance than the financial interests of the Member States, one of the conditions for finding the duty to inform compatible with fundamental rights is the limitation of that duty to professional secrecy, the optionality of that mechanism in Directive 2018/822 cannot be regarded as sufficient protection of fundamental rights.

The second question that requires explanation is the term intermediary. In practice, it often refers to legal professionals protected by professional secrecy, such as advocates or tax advisers. Article 1(1)(b) of Directive 2018/822 defines an intermediary as a person that designs, markets, organises or manages the implementation of a reportable cross-border arrangement. It goes on to further clarify the term as also including a person that, having regard to the relevant facts and circumstances and based on available information and the re evant expertise and understanding required to provide such services, knows or could be reasonably expected to know that they have undertaken to provide, directly or by means of other persons, aid, assistance or advice with respect to designing, marketing, organising, or managing the implementation of a reportable cross-border arrangement. Any person shall have the right to provide evidence that such person did not know and could not reasonably be expected to know that this person was involved in a reportable cross-border arrangement. For this purpose, that person may refer to all the relevant facts and circumstances, as well as the available information and their relevant expertise and understanding.

The Belgian legislator has chosen to transpose the institution of the intermediary literally, and has also used a mechanism for the exclusion of the

8 *Directive (EU) 2015/849 of the European Parliament and of the Council* of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No. 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC OJ. UE *L 141/73.*

information obligation in order to protect the secrecy of public trust professions. It therefore decided to use a more literal method of transposition of Directive 2018/822, which is called the copy-out method.[9] In such circumstances, the Member State's domestic regulations were not challenged. In other words, the preliminary question did not concern the compatibility of Belgian regulations with European Union secondary law, but the compatibility of the Directive 2018/822 itself, i.e. secondary law, with EU primary law. The case therefore concerns the norms of EU constitutional rights, namely the right to respect for private life and to a fair trial.

The Right to Respect for Private Life in the EU Legal System

The right to respect for private life is contained in Article 7 of the Charter. According to this article, everyone has the right to respect for private and family life, home and communication. This right[10] is complemented by the right to protection of personal data contained in Article 8 of the Charter. According to this provision, everyone has the right to the protection of personal data concerning them. Paragraphs 2 and 3 of this Article contain limitation clauses that define the conditions for interference with this fundamental right. According to Article 8(2), personal data must be processed fairly for specified pur-

9 Jędrzej Maśnicki, "Metody transpozycji dyrektyw", *Europejski Przegląd Sądowy*, no. 8. 2017: 4.

10 The protection of private life should also be linked to the protection of personal data, in particular the limitation of the collection and access to databases created by states. The protection of private life also extends to protection from interference with the normal functioning of the environment. In turn, the protection of family life extends to relationships between spouses, between parents and children, as well as other interpersonal relationships. The protection of privacy within the meaning of the ECHR also refers to the protection of the home in the sense of, inter alia, the protection of the home. Privacy in the sense of the Convention also means the confidentiality of correspondence and the limitation of state interference in this area, Leszek Garlicki, "Komentarz do art. 8" in *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności*, vol. 1, *Komentarz do artykułów 1–18*, ed. L. Garlicki. Warszawa, 2010, 493, 498, 500, 501, 508, 515, 519, 521, 541, 542, 543.

poses and with the consent of the data subject or on other legitimate grounds laid down by law. Everyone has the right of access to data which has been collected concerning them and the right to have it rectified. However, in accordance with Article 8(3) of the Charter, compliance with these principles is subject to control by an independent authority.

All fundamental rights are understood through the perspective of Article 52 of the Charter. Paragraph 1 of this provision states the general principle of proportionality, according to which any limitation on the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the EU or the need to protect the rights and freedoms of others.

The principle of proportionality has also been described in the literature. It is argued that the measures adopted by the EU should not impose excessive burdens. Also, sanctions should be proportionate to possible violations. This principle applies regardless of the legal space in which the restriction occurs. The spheres of both domestic and EU law are subject to it. It should be noted that proportionality means examining whether the restrictive measure is appropriate and necessary. This means that if there is a less restrictive measure that would be less burdensome for the addressee, but would achieve the same goal, it should be chosen over the restriction in question. Finally, the restriction adopted should be proportionate, i.e. not interfere with the freedom in question beyond what is necessary.[11]

The principle of proportionality was initially developed by the case law of the CJEU. At first, it was not concretized. The freedom of action of individuals should not be limited beyond what is necessary in the public interest.[12] A more

11 Anna Wyrozumska, "Zasady działania UE" in *Instytucje i prawo Unii Europejskiej. Podręcznik dla kierunków prawa, zarządzania i administracji*, eds. J. Barcz, M. Górka, and A. Wyrozumska. Warszawa, 2015, 95.

12 Justyna Maliszewska-Nienartowicz, "Rozwój zasady proporcjonalności w europejskim prawie wspólnotowym", *Studia Europejskie/Centrum Europejskie Uniwersytetu Warszawskiego*, no. 1, 2006, 61.

complex definition of the principle can be found in the Fromançais judgment[13] of 1983, which reads: "In order to establish whether a provision of EU law is compatible with the principle of proportionality it is necessary to establish, first, whether the means envisaged for achieving the objective correspond to the seriousness of that objective and, second, whether they are necessary for achieving it."[14]

The measures adopted by the EU should therefore not impose excessive burdens. Sanctions, too, should be proportionate to possible infringements. This principle applies irrespective of the legal space in which the restriction occurs. Both national and EU law spheres are subject to it. It should be noted that proportionality means examining whether the restrictive measure is appropriate and necessary. This means that if there is a less onerous measure for the addressee, but it achieves the same goal, it should be chosen over the restriction in question. Finally, the restriction adopted should be proportionate, i.e. not interfere with the freedom in question beyond what is necessary.[15]

The right to respect for private life is also derived from Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms.[16] The impact of this instrument has a significant impact on the application of the Charter itself. This is due to several factors. First, the axiology of the Convention and the case law of the European Court of Human Rights[17] ECHR inspired the drafters of the Charter. The content of the latter is therefore not something new, but is a creative complement to the acquis related to the Convention. For this reason alone it is impossible to separate the two acts from each other.[18] Secondly, the

13 *Fromançais SA v. Fonds d'orientation et de régularisation des marchés agricoles (FORMA)*, case C-66/82, ECLI:EU:C:1983:42.

14 Maliszewska-Nienartowicz, 62 in fine.

15 Wyrozumska, 95.

16 European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, Rome 4 November 1950. Hereinafter: the Convention.

17 Hereinafter: ECHR.

18 Jerzy Jaskiernia, "Karta Praw Podstawowych Unii Europejskiej a Europejska Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności – konflikt czy komplementarność"

direct reference to the provisions of the Convention is found in Article 52(3) of the Charter. Pursuant to this provision, in relation to the rights recognised by both instruments, the Charter may not confer weaker protection than the Convention. Thirdly, even before the creation of the Charter, references to the Convention had appeared in successive treaties, and its rights, despite not being formally bound, were reflected in the judgments of the CJEU. Finally, another reason why the Convention is relevant to the internal law of the Union is that each of the Member States has acceded to the Convention.

The CJEU readily draws on the case law of the ECHR. The above-described mutual relations between two acts protecting human rights lead to the Charter being understood as a living instrument. The sense of this issue is expressed in the fact that the provisions of the Charter do not have a single, unchangeable content, but their scope is constantly evolving along with the changing social and cultural conditions.[19] The content of human rights should therefore be continuously decoded, taking into account the prevailing socio-cultural realities. Multicentricity in this sense is therefore not a burden on the system, but an advantage in that two independent bodies seek optimal solutions by inspiring each other.

Standards of Protection for the Right to Respect for Private Life

From the perspective of this paper, two aspects of the right to privacy should be noted.[20] The first is the protection of correspondence, especially between a member of the lawyers profession and his or her client. The second aspect of this right is the protection of personal data. Although it functions as a separate

in *Karta Praw Podstawowych w europejskim i krajowym porządku prawnym*, ed. A. Wróbel. Warszawa, 2009, 157.

19 Marcin Górski, "Karta Praw Podstawowych UE jako living instrument" in *Unia Europejska w przededniu Brexitu*, eds. J. Barcik, and M. Półtorak. Warszawa, 2018, 91.

20 Garlicki, 493, 498, 500, 501, 508, 515, 519, 521, 541, 542, 543.

fundamental right in the Charter, this article recognizes that privacy and personal data are linked in the present case. Indeed, the very existence of the right to the protection of personal data is the result of a longstanding evolution of the approach to the right to privacy.[21]

The ECHR Niemietz ruling,[22] concerning the case of a police search of office premises belonging to a lawyer, held that "under certain conditions the right to privacy may extend to business premises." It was also acknowledged that there are no reasons why this right should exclude an individual's professional activity. In doing so, it pointed out that, especially in the case of freelancers, it is not always possible to separate the spheres of personal and professional life, and that most people can also develop their personal relationships through their work.[23] This ruling led the CJEU to adopt an approach to privacy protection that does not distinguish between private and business entities. In Roquette Frères SA,[24] it was held that the need to protect against arbitrary or disproportionate interference by a public authority with a person's private activities, whether natural or legal, is a general principle of EU law. In Nexans France SAS,[25] the CJEU stated the need to protect against arbitrary and disproportionate interference by the authorities, irrespective of legal subjectivity, derives from the principles of EU law and from Article 7 of the Charter.[26]

In contrast, the ECHR in 2002, in its Société Colas Est judgment,[27] developed the protection of privacy for legal persons. It then granted protection of privacy under Article 8 of the Convention during an administrative inspection. In doing so, it indicated that any restrictions on this right based on the public

21 Jacek Sobczak, "Komentarz do art. 8" in *Karta Praw Podstawowych Unii Europejskiej. Komentarz*, ed. A. Wróbel. Warszawa, 2013, 259, 260.

22 *Niemietz v. Germany*, Application No. 13710/88.

23 Jens Vedsted-Hansen, "A Commentary to Article 7" in *The EU Charter of Fundamental Rights. A Commentary*, eds. S. Peers, T. Hervey, J. Kenner, and A. Ward. Oxford, 2014, 154, 157.

24 *Roquette Frères SA v. Directeur général de la concurrence, de la consommation et de la répression des frauds*, case C-94/00, ECLI:EU:C:2002:603.

25 *Nexans France SAS and Nexans SA v.* Commision, case T-135/09, ECLI:EU:T:2012:596.

26 Vedsted-Hansen, 154.

27 *Société Colas Est v. France*, Application No. 37971/97.

interest must be accompanied by safeguards that effectively protect against abuse.[28]

According to the ECHR, protection of privacy does not extend only to the domestic sphere. It also covers some spheres of public space. In the ECHR decision *Gillan and Quinton v. UK*,[29] the ECHR stated that the state cannot justify random stops and searches in the street on the grounds that they are carried out in a public space. The ECHR noted that in such cases, the violation of Article 8 of the Convention may thus be even more severe. Indeed, a public, disproportionate interference by the authorities may prove much more severe than a private one, regardless of whether private documents were read during the search.[30] It cannot therefore be assumed that the automaticity of the transfer of data bound by the obligation in Directive 2018/822 does not violate the right to respect for private life. Such automatism may also serve the purpose of random control.

The right to privacy therefore also extends to legal persons, and to natural persons in professional activities. This includes the right to communicate, especially in the situation of professionals. However, this does not mean that this right is absolute. This is particularly relevant to this article, as it relates to the new information obligations imposed on legal professionals. Considerable controversy has arisen over the need to inform the authorities of the crime of money laundering. It has been argued that this is a disproportionate interference with the secrecy of communications.[31]

A restrictive understanding of the privacy of correspondence was applied. In the Klass ruling. It was considered that the violation of this right is independent of the actual use of wiretapping, since the mere possibility caused by the existence of relevant legislation negatively affects the freedom of com-

28 Vedsted-Hansen, 158.

29 *Gillan and Quinton v.* UK, Application No. 4158/05.

30 *Volker und Markus Schecke GbR and Hartmut Eifert v. Land* Hessen, joined cases C-92/09 and C-93/09, ECLI:EU:C:2010:662, pos. 87.

31 Adam Ploszka, "Tajemnica zawodowa prawników a przeciwdziałanie praniu pieniędzy w kontekście dialogu trybunałów europejskich" in *Wpływ Europejskiej Konwencji Praw Człowieka na funkcjonowanie biznesu*, eds. A. Bodnar, and A. Ploszka. Warszawa, 2016, 113.

munication.[32] Also in the cases of strategic call monitoring, the ECHR paid attention to the requirement of the predictability of law. The understanding here is that the norms should give sufficiently clear indications as to the conditions and circumstances under which the state may resort to such measures.[33] Secret surveillance measures, due to their extensive interference with fundamental rights, have received in the jurisprudence of the Court clarification of minimum safeguards against abuse. Among these were the statutory definition of the categories of persons potentially subject to wiretapping and the definition of the nature of the offences whose suspicion is a prerequisite for the use of wiretapping.[34] Meanwhile, Directive 2018/822 mandates the automatic transfer of taxpayer data. It is worth noting that this is a very far-reaching idea, as merely taking part in an arrangement within the meaning of Directive 2018/822 is not a crime. It does not even have to cause any negative social consequences.

There are spheres of life that involve strict privacy as well as personal data protection. There is not even a greater need to separate these rights, since the explanations to the Charter state that Articles 7 and 8 of the Charter are based on Article 8 of the Convention and should be interpreted in accordance with it.[35] One such sphere is business secrecy. In *Pilkington v. Commission*, the CJEU held that the protection of privacy should justify the prohibition of publication of certain business data which constitute business secrets.[36] It recognized then that the pooling of such data, even as a result of antitrust proceedings, could result in grossly egregious harm.

The ECHR has ruled that state authorities such as the police have the right to track citizens, but only if this is necessary to protect democratic institutions.[37] This does not mean, however, that the ECHR has not recognized the

32 *Klass and others v. Germany*, Application No. 5029/71.
33 *Weber and Saravia v. Germany*, Application No. 54934/00.
34 *The association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria*, Aplication No. 62540/00.
35 Vedsted-Hansen, 177.
36 *Commission v. Pilkington Group* Ltd, case C-278/13, ECLI:EU:C:2013:558.
37 Sobczak, 275.

threat to democracy posed by the creation of classified databases to ensure state security. Such an interference should be adequately protected against abuse.[38] First of all, the purposes for which databases are created should be legitimate and provide citizens with a guarantee against abuse. Furthermore, the relevant laws should precisely define the subject and object of the interference, as well as a system of effective and adequate safeguards, and appropriate supervisory authorities.[39]

The CJEU held that the criterion of necessity has its source in EU law and is an autonomous concept, independent of national legal orders. This means that different definitions of necessity in the Member States should not have a restrictive effect on data protection law. It also gives some criteria that have to be fulfilled for an intrusion to be considered necessary. Therefore, data processed within the scope of the register must be limited to what is necessary for the application of the EU rules, and the centralised nature of the register allows for a more effective application of the rules.[40] However, it is difficult to find in the obligation to provide information on cross-border arrangements an appropriate limitation which narrows the obligation to data necessary for the effective application of the legislation.

In ASNEF and FECEMD, the CJEU noted that the examination of the necessity of the processing is always linked to the weighing of the rights and interests of the controller and the data subject. Such an examination should always relate to the specific situation of the individual person and his or her rights. A distinction is also made between situations involving the processing of data which are publicly available and those which are not.[41] Data collected for automated processing require specific safeguards from the state to protect against misuse.

38 *Malone v. UK*, Application No. 8691/79; *Rotaru v. Romania*, Application No. 28341/95.
39 Sobczak, 277.
40 *Heinz Hubner v. Bundesrepublik* Deutschland, case C-524/06, pos. 52 and 66.
41 *Asociación Nacional de Establecimientos Financieros de Crédito (ASNEF), Federación de Comercio Electrónico y Marketing Directo (FECEMD) v. Administración del* Estado, joined cases C-468/10 and C-469/10, pos. 40, 43, 45.

The state must therefore ensure, inter alia, that data are processed only for essential purposes.[42]

An Attempt to Assess Directive 2018/822

The best oversight in the ECHR's view is judicial oversight. The ECHR ruled that, in the public interest of combating the most serious crimes, account must be taken of the prejudice that interference may cause to fundamental rights.[43] In addition, it has been indicated that the person subjected to interference must be able to have a judicial review in order to determine whether the interference is unlawful.[44] Transferring the above to the context of Directive 2018/822, it has to be stated once again that the automaticity of the obligation to inform public authorities does not meet the standard of protection of personal data protection law. The obligation to provide information on cross-border arrangements should at least be subject to the option of a court challenge. One would also expect this obligation to be narrowed down to activities that clearly indicate tax avoidance.

Protecting the tax base of Member States is itself a value worthy of recognition. The protection of competition is also a particularly protected value in the EU. However, it cannot justify a completely arbitrary interference with human rights, which are one of the pillars of the EU. Recitals 6 and 9 of Directive 2018/822 emphasize the need to effectively counter aggressive tax planning. However, no attempt is made to distinguish in detail between the value of creating fair taxation conditions in the internal market and the protection of fundamental rights. Only recital 18 informs that Directive 2018/822 does not infringe fundamental rights and is in line with the principles recognised in particular by the Charter.

42 Nowicki, 514.
43 *Segerstedt-Wiberg v. Sweden*, Application No. 623332/00.
44 Nowicki, 524.

In the Pharmacie populaire – La Sauvegarde SCRL judgment,[45] the CJEU took the view that the need to ensure the effectiveness of fiscal controls can constitute an overriding reason of general interest capable of justifying a restriction on the freedom to provide services[46] and thus one of the foundations of the functioning of the EU. However, it requires that the measures restricting the freedom to provide services should be suitable for securing the attainment of the objective which they pursue and that they do not go beyond what is necessary to attain it.[47] However, the CJEU has found unacceptable the sanction for failure to comply with a reporting obligation where that failure has not resulted in tax evasion.[48] The CJEU therefore recognizes the value of combating tax fraud, but differentiates it from the convenience of state authorities. Also important is the intended effect of the regulation in question. Tax fraud is a crime, while a cross-border arrangement is not, although member states may consider certain arrangements illegal.

Referring back to the Niemietz ruling, the ECHR stated that when a lawyer is involved in a search, a breach of professional secrecy may affect the proper administration of justice and thus the rights guaranteed by Article 6 of the Convention.[49] Furthermore, the ECHR noted that for this to be the case the publicity surrounding the search must have had a negative impact on the lawyer's professional reputation, both in the eyes of his existing clients and the general public. If a one-off incident can have a non-negative impact on lawyers' reputations, surely the legal injunction to provide information will have a dimension that is at least equal, and on all members of the profession.

It is worth recalling that interference with the right to respect for private life is possible provided that the interference meets the requirement of statutory definition. The ECHR understands this requirement not only as an obliga-

45 *Pharmacie populaire – La Sauvegarde SCRL v.* État belge, joined cases C-52/21 and C-53/21, ECLI:EU:C:2022:127.
46 *Pharmacie populaire – La Sauvegarde SCRL v.* État belge, pos. 34.
47 *Pharmacie populaire – La Sauvegarde SCRL v.* État belge, pos. 35.
48 *Pharmacie populaire – La Sauvegarde SCRL v.* État belge, pos. 46.
49 *Niemietz v. Germany*, pos. 37.

tion to establish an adequate legal basis, but also to maintain the quality of regulation. The ECHR takes the view that, even if it could be said that there was a general legal basis for the measures provided for in Finnish law, the absence of adequate provisions specifying with sufficient precision the circumstances in which privileged material may be subject to search and seizure deprived the applicants of the minimum degree of protection to which they were entitled under the rule of law in a democratic society.[50] Privileged material is understood here as evidence covered by professional secrecy.

Correspondence between a lawyer and his client, whatever its purpose (including strictly professional correspondence),[51] enjoys a privileged status in terms of confidentiality. This is undoubtedly essential to the effective practice of the legal profession, as well as to the proper administration of justice.[52] Although Article 8 of the Convention protects the confidentiality of all "correspondence" between individuals, it provides enhanced protection for the exchange of information between lawyers and their clients. This is justified by the fact that lawyers perform the fundamental role in a democratic society of defending litigants. Lawyers cannot perform this task without being able to provide guarantees of confidentiality in the exchange of information for those they defend. Indirectly but necessarily, everyone's right to a fair trial, including the right of defendants not to incriminate themselves,[53] depends on this, so it is not possible to fully distinguish between the right to respect for private life and the right to a fair trial. The enhanced protection of confidentiality may also prevent the contested regulation from being regarded as proportionate, since it seeks to circumvent professional secrecy.

50 *Sallinen and others v. Finland*, Application No. 50882/99, pos. 92–94; *Narinen v. Finland*, Application No. 45027/98, pos. 36.

51 *Niemietz v. Germany*, pos. 32.

52 Magdalena Matusiak-Frącczak, *Tajemnica adwokacka a obowiązek informowania o transakcjach podejrzanych na podstawie przepisów o przeciwdziałaniu praniu pieniędzy i finansowaniu terroryzmu. Glosa do wyroku ETPC z dnia 6 grudnia 2012 r*. LEX/el., 2013, access 24.02.2022, 4; Garlicki, 548.

53 *Michaud v. France*, Application No. 12323/11, pos. 118.

While the Michaud judgment concerns AML legislation, the similar mechanism of interference with the right to privacy and the right to a fair trial allows for some plausible conclusions. The ECHR considers that the obligation to report suspicions constitutes a "continuing interference" with the right to respect for private life, even if it does not concern the most intimate sphere of private life, but the right to respect for the exchange of professional correspondence with clients.[54] The safeguard mechanism has been introduced alongside the existing repressive mechanism, but their coexistence does not disturb the necessity of the interference.[55] For the purposes of Article 8 of the Convention, the concept of necessity means that the interference meets a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued.[56] However, the requirement to report suspicions of money laundering and terrorist financing does not, in the ECHR's view, constitute an undue interference with the right to respect for private life, in view of the important general interest served by the fight against money laundering and the guarantee afforded by the exclusion from the obligation of information received or obtained by lawyers in the course of their litigation activities or in the course of their legal advice.[57] Thus, it can be assumed that the necessity to combat the most serious crimes threatening democratic societies is a sufficient reason to consider that this interference with the right to respect for private life is proportionate. Unfortunately, it is difficult to acknowledge the same seriousness of the tax avoidance that Directive 2018/822 is intended to counteract. It remains to be seen what interpretation the CJEU will adopt, but equating money laundering and terrorist financing with tax planning seems unlikely. In addition, it should be mentioned that the obligation to inform about suspicions related to AML regulations does not therefore concern the essence of the role of defense counsel, which, as stated earlier, is the basis of the professional secrecy of the

54 *Michaud v. France*, pos. 92.
55 *Michaud v. France*, pos. 124.
56 *Michaud v. France*, pos. 120.
57 *Michaud v. France*, pos. 121.

lawyer. In addition, the transmission of information takes place through the body of the professional self-government.[58]

It must also be determined whether the alternative obligation provided for in Directive 2018/822 of having to provide information, not about the arrangement, but about the mere evasion of the main obligation to the other actors involved in the arrangement, also constitutes a violation of the right to respect for private life. First, it should be noted that such an obligation redirects the information transmitted. The recipient of the information is no longer the authority but another participant in the arrangement. However, this does not fundamentally change the fact that Directive 2018/822 still forces legal professionals to share information with others. This can be seen as an interference with the right to respect for private life. Secondly, although the information transmitted is already of a different content, the lawyer is still obliged to inform another entity of the fact that a service has been provided to a particular individual. Moreover, if the duty to provide information to the other participants in the arrangement rests with the lawyer, it means that the lawyer has noted an emerging cross-border arrangement. In other words, the lawyer is compelled to inform others of at least some of the content of the relationship between him and his or her client. Thus, ultimately the state authorities will obtain the information, but from other individuals. This appears to be a circumvention of the right guaranteed by Article 8 of the Convention.

Professional secrecy is particularly protected, and appropriate filters are required when interfering with it. One is the aforementioned intermediation of an independent body when providing information. Another filter is the presence of a representative of the professional self-government during the search. Also, the transmitted information must not relate to the essence of the legal profession. It follows that the possible interference can never assume an automatic character in relation to the lawyer. The exact content of the information is irrelevant. Meanwhile, Directive 2018/822, in a situation where the obliga-

58 *Michaud v. France*, pos. 128, 129.

tion to provide information is evaded, forces the lawyer to inform others of the legal advice given, and of the existence of the cross-border arrangement. Thus, the legislator seems to recognize that professional secrecy applies only to state authorities and can be circumvented by ordering the communication of information covered by this secrecy to other entities that are not already covered by legal professional secrecy.

Attention should also be paid to the relevance of the data processing. I propose that the test of relevance should be based on the purpose of combating tax avoidance. However, I believe that a cross-border arrangement as such is not necessarily the same as tax avoidance. It is therefore very likely that information about cross-border arrangements will not always meet the relevance test.

Summary

Interference with the right to privacy must meet certain requirements. The case law of the CJEU emphasizes the principle of necessity or indispensability.[59] At this point, the question must be asked of whether these objectives could not be achieved by less intrusive methods. Recital 14 of Directive 2018/822 itself mentions that cross-border aggressive tax planning arrangements, the primary purpose or one of the primary purposes of which is to obtain a tax advantage contrary to the object or purpose of the applicable tax legislation, are subject to the general anti-avoidance provisions set out in Article 6 of Council Directive (EU) 2016/1164. It would therefore be necessary to explain why interference with fundamental rights is being undertaken despite the existence of other tools to combat aggressive tax planning.

Directive 2018/822 will not be compatible with the right to respect for private life until several amendments are made. First, the information obligation should not be absolutely automatic. In other words, there should be a way to challenge

59 *Asociación Nacional de Establecimientos Financieros de Crédito (ASNEF) and Federación de Comercio Electrónico y Marketing Directo (FECEMD) v. Administración del Estado.*

the obligation before a court under Article 47 of the Charter. Second, Directive 2018/822 should contain a clear balance between the objectives it pursues and the right to respect for private life. Simply stating that Directive 2018/822 does not infringe fundamental rights seems too weak a safeguard.

There is also no reason to exclude the professional activities of individuals from the protection of the right to respect for private life. Moreover, the activity of lawyers is particularly important from the point of view of the confidentiality of correspondence between a professional and his client. The contested mechanism leads to the mandatory receipt of information about the cross-border agreement by the state authorities. Thus, according to the solutions contained in Directive 2018/822, it is not possible for the relevant authority not to receive the said information. The side effect of this solution is that the other participants in the reconciliation have to be informed about the evasion of the information obligation, i.e. actually about professional activities regarding the client and the existence of the cross-border arrangement. This is a mechanism that circumvents the right to privacy and undermines its essence. The prevention of crime is a greater value than the mere acquaintance.

The fairly consistent view of the CJEU and the ECHR that there is no reason to exclude the professional activities of individuals from the protection of the right to respect for private life. Moreover, the activity of lawyers is particularly important from the point of view of the confidentiality of correspondence between a professional and his client. It is worth noting that the contested mechanism leads to the mandatory receipt of information about the cross-border agreement by the state authorities. The side effect of this solution is that the other participants in the reconciliation have to be informed about the evasion of the information obligation, i.e. actually about the performance of professional activities regarding the client and the existence of the cross-border reconciliation. This is a mechanism that circumvents the right to privacy and undermines its essence. The prevention of crime is of greater value than the mere acquaintance of state authorities with cross-border arrangements. It

seems that the CJEU should take a more restrictive approach to the notification of cross-border arrangements as they do not constitute a crime.

For the reasons set out above, it now appears doubtful that the contested legislation will be regarded by the CJEU as compatible with the right to respect for private life, including the right to confidentiality of correspondence between a lawyer and his client. The fact that particular importance is attached to such confidentiality also constitutes an obstacle to the contested mechanism being regarded as proportionate, since it in fact circumvents the protection of that confidentiality.

References

Garlicki, Leszek. "Komentarz do art. 8." In *Konwencja o ochronie Praw Człowieka i Podstawowych Wolności*, vol. 1, *Komentarz do artykułów 1–18*, edited by Leszek Garlicki. Warszawa, 2010: 479–550.

Górski, Marcin. "Karta Praw Podstawowych UE jako living instrument." In *Unia Europejska w przededniu Brexitu*, edited by Jacek Barcik, and Magdalena Półtorak, Warszawa, 2018: 9191–1000.

Jaskiernia, Jerzy. "Karta Praw Podstawowych Unii Europejskiej a Europejska Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności – konflikt czy komplementarność." In *Karta Praw Podstawowych w europejskim i krajowym porządku prawnym*, edited by Andrzej Wróbel. Warszawa, 2009: 153–190

Maliszewska-Nienartowicz, Justyna. "Rozwój zasady proporcjonalności w europejskim prawie wspólnotowym." *Studia Europejskie/Centrum Europejskie Uniwersytetu Warszawskiego*, no. 1. 2006: 59–80.

Maśnicki, Jędrzej. "Metody transpozycji dyrektyw." *Europejski Przegląd Sądowy*, no. 8. 2017: 4–13.

Matusiak-Frącczak, Magdalena. *Tajemnica adwokacka a obowiązek informowania o transakcjach podejrzanych na podstawie przepisów o przeciwdzia-*

łaniu praniu pieniędzy i finansowaniu terroryzmu. Glosa do wyroku ETPC z dnia 6 grudnia 2012 r. LEX/el., 2013, access: 24.02.2022.

Ploszka, Adam. "Tajemnica zawodowa prawników a przeciwdziałanie praniu pieniędzy w kontekście dialogu trybunałów europejskich." In *Wpływ Europejskiej Konwencji Praw Człowieka na funkcjonowanie biznesu*, edited by Adam Bodnar, and Adam Ploszka. Warszawa, 2016: 113 - 132.

Sobczak, Jacek. "Komentarz do art. 8." In *Karta Praw Podstawowych Unii Europejskiej. Komentarz*, edited by Andrzej Wróbel. Warszawa, 2013: 192–690.

Vedsted-Hansen, Jens. "A Commentary to Article 7." In *The EU Charter of Fundamental Rights. A Commentary*, edited by Steve Peers, Tamara Hervey, Jeff Kenner, and Angela Ward. Oxford, 2014: 153–182.

Wyrozumska, Anna. "Zasady działania UE." In *Instytucje i prawo Unii Europejskiej. Podręcznik dla kierunków prawa, zarządzania i administracji*, edited by Jan Barcz, Maciej Górka, and Anna Wyrozumska. Warszawa, 2015: 76–112.

Charter of Fundamental Rights of the European Union, OJ. EU C 326/391.

Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements OJ. EU L 139/1.

Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No. 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC OJ. UE L 141/73.

European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, Rome 4 November 1950.

Treaty on the Functioning of the European Union OJ.EU. C 326 of 26.10.2012.

The association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria, Application No. 62540/00.

Asociación Nacional de Establecimientos Financieros de Crédito (ASNEF), Federación de Comercio Electrónico y Marketing Directo (FECEMD) v. Administración del Estado, joined cases C-468/10 and C-469/10.

Commission v. Pilkington Group Ltd, case C-278/13, ECLI:EU:C:2013:558.

Fromançais SA v. Fonds d'orientation et de régularisation des marchés agricoles (FORMA), case C-66/82, ECLI:EU:C:1983:42.

Gillan and Quinton v. UK, Application No. 4158/05.

Heinz Hubner v. Bundesrepublik Deutschland, case C-524/06.

Klass and others v. Germany, Application No. 5029/71.

Malone v. UK, Application No. 8691/79.

Michaud v. France, Application No. 12323/11.

Narinen v. Finland, Application No. 45027/98.

Nexans France SAS and Nexans SA v. Commision, case T-135/09, ECLI:EU:T:2012:596.

Niemietz v. Germany, Application No. 13710/88.

Ordre des barreaux francophones et germanophone v. Conseil des ministers, case C-305/05, Opinion of the Advocate General, ECLI:EU:C:2006:788.

Orde van Vlaamse Balies and *Others*, case C-694/20, summary of the request for a preliminary ruling.

Pharmacie populaire – La Sauvegarde SCRL v. État belge, joined cases C-52/21 and C-53/21, ECLI:EU:C:2022:127.

*Roquette Frères SA v. Directeur général de la concurrence, de la consommation et de la répression des fraud*e, case C-94/00, ECLI:EU:C:2002:603.

Rotaru v. Romania, Application No. 28341/95.

Sallinen and others v. Finland, Application No. 50882/99.

Segerstedt-Wiberg v. Sweden, Application No. 623332/00.

Société Colas Est v. France, Application No. 37971/97.

Weber and Saravia v. Germany, Application No. 54934/00.

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Problems with applying human rights in the actions of public administration

Abstract: This article aims to analyze the contemporary problem of respecting human rights in the actions of public administration. To that end, it aims to show the causes of the issue in question and propose solutions.

The article opens with a description of the legal aspect of human rights from the general perspective as a matter of rules and elements of the legal system. This part of the article presents the legal grounds for and obstacles to incorporating human rights and the acts that regulate them into the actions of public administration.

In the subsequent sections, the analysis shifts to a detailed perspective. The first one concerns the reliance of the public administration's actions on Art. 6 point 1 of the European Convention on Human Rights and shows the issues with applying it to administrative cases, as noted in the literature and jurisprudence. The second addresses the issues associated with incorporating human rights regulations into the application of the substantial law. This problem is analyzed from the standpoint of legal regulations, values and interpretation. At the same time, the article aims to show that while on the one hand public administration is responsible for safeguarding rights, on the other it is also entitled to breach and limit.

Keywords: public administration, human rights, European Convention on Human Rights, legal system, administrative values.

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I

Human rights are undoubtedly the foundation of the legal system and the actions of authorities in every democratic state of law. Both as values and standards, they determine and set limits on such actions. Contemporary states of law guarantee human rights. Therefore, on the one hand, they must refrain from breaching them and create measures for their protection, and on the other, provide ways for everyone to exercise them. This is what should be done according to the concept of positive obligations of the state,[1] as established in the jurisprudence of the European Court of Human Rights.[2] Although it is not a unified concept but rather a set of rules that depend on the circumstances of the case, which allows it to be adapted to every situation,[3] there is no doubt that it applies to the state in general and to its authorities responsible for implementing it. The Polish literature underlines that public administration must not breach human rights, and at the same time, is obliged to create conditions for their exercise on the grounds of law.[4] It may therefore be noted at the very outset that human rights are the core of the legal system, allowing it to develop along specified lines and setting limits on the actions of authorities.

Consequently, human rights in the actions of public administration cannot be analyzed without viewing them as part of the legal system's foundation and as the object of the actions of public administration. This also raises the issue

1 Leszek Garlicki, "Horyzontalne oddziaływanie praw człowieka a standardy EKPCz" in *Wpływ Europejskiej Konwencji Praw Człowieka na funkcjonowanie biznesu*, eds. A. Bodnar, and A. Ploszka. Warszawa, 2016, 25.

2 Andrzej Nałęcz, "Podsumowanie" in *Wzorce i zasady działania współczesnej administracji publicznej*, eds. B. Jaworska-Dębska, P. Kledzik, and J. Sługocki. Warszawa, 2020.

3 Cezary Mik, "Charakter, struktura i zakres zobowiązań z Europejskiej Konwencji Praw Człowieka", *Państwo i Prawo*, no. 4. 1992: 12; Cezary Mik, *Koncepcja normatywna prawa europejskiego praw człowieka*. Toruń, 1994, 203. See, e.g., Judgment of 21 February 1975 in the case of *Golder v. UK*, §39 or Judgment of 9 October 1979 in the case of *Airey v. Ireland*, § 26.

4 Jakub Czepek, *Zobowiązania pozytywne państwa w sferze praw człowieka pierwszej generacji na tle Europejskiej Konwencji Praw Człowieka*. Olsztyn, 2014, 12 et seq.; Mirosław Granat, "Godność człowieka z art. 30 Konstytucji RP jako wartość i jako norma prawna", *Państwo i Prawo*, no. 8. 2014: 3–22.

of including them in the administration monitoring process carried out by administrative courts.

The role of human rights in the actions of public administrative authorities cannot be discussed without referring to their place in the system of the sources of law. Just as public administrative authorities are obliged to act in accordance with the law, so too administrative courts monitor their compliance with the law, which also includes acts aimed at protecting human rights. Here, it is necessary to establish the legal context of human rights. Legal regulations pertaining to human rights make up part of the legal order by means of:

- reflecting the need to protect human rights in the domestic legal order (e.g., in the Constitution of the Republic of Poland, or specific laws expanding the constitutional regulation);
- including in the Polish legal order such acts of international law as the Universal Declaration of Human Rights, the Charter of Fundamental Rights of the European Union, and the European Convention on Human Rights.

In this way, human rights become an axiological basis for the legal system and a normative element of the domestic order, deriving both from acts in force at home and internationally. Given that the existing European and global human rights protection standards are governed particularly by international law, the latter must be discussed as well.

The ratification of acts of international law means that they become part of the domestic legal order. Thus, they must be considered by the legislator in the law-making process, and by public administrative authorities and courts[5] in their actions. These standards provide the legal basis and axiological guidelines for the actions of authorities, affecting their forms and methods alike. Apart from their content, the way these standards are interpreted by international courts, including the European Court of Human Rights, also becomes part of the legal

5 Zygmunt Wiśniewski, "Postępowanie sądowo-administracyjne w świetle standardów międzynarodowych" in *Europejska przestrzeń sądowa*, eds. A. Frąckowiak-Adamska, and R. Grzeszczak. Wrocław, 2010, 106.

order.[6] It can therefore be concluded that while the general human rights protection standards are established in international acts, it is the domestic legal order that must develop and adapt them to the conditions of the given state.

This is consistent with the principle of compliance with international law laid down in the Constitution, which states, among other things, that the interpretation of domestic law should follow the existing jurisprudence of international authorities.[7] The Constitutional Court noted that "the legal consequence of Art. 9 of the Constitution is a constitutional assumption that on the territory of the Republic of Poland, in addition to the norms (provisions) established by the domestic legislator, there are also regulations (provisions) created outside the system of domestic (Polish) legislative bodies […] Therefore, the constitution-maker consciously assumed that the legal system in force on the territory of the Republic of Poland will be multi-component. In addition to legal acts established by domestic (Polish) legislative bodies, acts of international law are in force and are applicable in Poland as well."[8]

Above all, courts (including administrative courts) are obliged to not only consider the axiological values underlying the domestic legal system when interpreting the law but also to take into account international law when determining the legal situation.[9] Likewise, when applying the law, public administrative authorities must take into account the sources of international law applicable to a specific case.[10]

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6 Zbigniew Cichoń, "Europejska Konwencja Praw Człowieka nadal najskuteczniejszym na świecie instrumentem ochrony prawa człowieka (w 55. rocznicę podpisania Konwencji)", *Palestra*, no. 11–12. 2005: 179.

7 Michał Balcerzak, "Zobowiązania międzynarodowe w dziedzinie praw człowieka a krajowy porządek prawny" in Bożena Gronowska, Tadeusz Jasudowicz, Michał Balcerzak, Maciej Lubiszewski, and Rafał Mizerski, *Prawa człowieka i ich ochrona*. Toruń, 2010, 100–101.

8 Judgment of the Constitutional Court of the Republic of Poland of 11 May 2005, K 18/04. Legalis.

9 Andrzej Redelbach, *Europejska Konwencja Praw Człowieka w polskim wymiarze sprawiedliwości*. Poznań, 1997, 30.

10 Paweł Sarnecki, "Komentarz do art. 9" in *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. V, ed. L. Garlicki. Warszawa, 2007, 2; Bogusław Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*. Warszawa, 2012, 101.

II

The above problem does not raise doubts about the actions of administrative courts, and it is possible to apply the provisions of international law even with disregard to domestic legal acts. In the context of administrative authorities, problems arise in terms of the uniform perception of public administrative authorities being bound by the provisions establishing human rights protection standards. This applies to Art. 6 of the European Convention on Human Rights and Fundamental Freedoms,[11] which is of the utmost importance to the protection of human rights.

Pursuant to Art. 6 point 1 of the Convention: "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice." Since its content is addressed to courts, the question remains as to whether it also applies to public administrative authorities. There are diverging views on this issue in the doctrine and jurisprudence.

Some claim that this rule should also shape the actions of public administration;[12] others flatly reject that possibility.[13] For instance, Z. Kmieciak notes that "the appropriate application of an act's provisions in matters governed by another act is possible only where the construct of a relevant reference is used. I am not aware of any instances of its use in any regulation, but even a brief

11 European Convention on Human Rights of 4 November 1950 (Journal of Laws of 1993, no. 61, item 284); hereinafter: the Convention.

12 Barbara Adamiak et. al. *Kodeks postępowania administracyjnego. Komentarz*. Warszawa, 2014, 45.

13 Zbigniew Kmieciak, "W poszukiwaniu modelu postępowania odpowiadającego naturze administracji publicznej", *Państwo i Prawo*, no. 11. 2015: 11.

look at the line of the jurisprudence of the European Court of Human Rights shows that the Convention's requirements regarding the right to a fair trial, with limitations as to the subject matter resulting from the words: *civil rights and obligations* and *any criminal charge*, extend to the part of the administrative proceedings that we qualify as mandatory proceedings before an appeal to the court against action and/or the execution of a court judgment." He therefore denies that it can be directly applied to the actions of public administration. In another one of his publications, Z. Kmieciak also notes that "none of the provisions of the Convention makes it possible to challenge excessively long preliminary administrative proceedings on a standalone basis, i.e. in isolation from court proceedings. The established jurisprudence of the European Court of Human Rights indicates that when examining a complaint concerning a breach of the right to have a case heard by a court within a reasonable time, as defined in Art. 6 sec. 1 of the European Convention, the preliminary administrative proceedings necessary for initiating court proceedings are taken into account, as are the proceedings carried out for the execution upholding the appeal measure of the ruling."[14] Similar views can also be found among other representatives of the doctrine. A. Krawczyk believes that, among other things, Art. 6 sec. 1 Convention must not be the basis for administrative procedure standards because it leads to identifying constructs typical of court proceedings with the standards of administrative procedure and imposing incompatible mechanisms onto the latter, thus giving rise to numerous practical doubts.[15]

Based on the jurisprudence, it should be recognized that Art. 6 sec. 1 of the Convention is applied not only to assess the actions of courts but also

14 Zbigniew Kmieciak, "Przewlekłość postępowania administracyjnego w świetle ustaleń europejskiego case law", in *Analiza i ocena zmian kodeksu postępowania administracyjnego w latach 2010–2011*, eds. M. Błachucki, T. Górzyńska, and G. Sibiga. Warszawa 2010–2011, 117–118.

15 See Agnieszka Krawczyk, "Standardy współczesnej regulacji postępowania administracyjnego" in Barbara Adamiak, Janusz Borkowski, Agnieszka Krawczyk, and Andrzej Skoczylas, *Prawo procesowe administracyjne. System Prawa Administracyjnego*, vol. 9. Warszawa, 2014, 36 et seq.

of public administrative authorities, which results from the requirement to ensure the Convention's effectiveness in the domestic legal order. This is despite the initial recognition that the scope of Art. 6 sec. 1 of the Convention is narrower than the right to have a case heard under Art. 45 sec. 1 of the Constitution since the former only applies to criminal and civil cases.[16] However, it was assumed in the jurisprudence focused on the Convention that the term "civil rights and obligations" should be construed on a autonomous basis, independently of the definitions adopted in the internal legal systems of the States Parties to the Convention, taking into account the informal assignment of cases to the jurisdiction of civil, criminal or administrative justice and of the nature of law under which a dispute should be resolved (civil, commercial, administrative, tax law), but depending on the legal essence of cases.[17] Consequently, a civil case is not just a private law case since its civil nature is determined by whether there is a dispute regarding the existence of a subjective right or manner of its exercise, regardless of the type of subjects involved in such a case.[18] This means that the term "civil case" should be construed in the broadest sense, that is, as comprising administrative and judicial/administrative matters.[19] This view is also consistent with the direction of the jurisprudence of administrative courts and international courts, which used international regulations as a standard for monitoring administrative authorities,[20] notably, in terms of the

16 Leszek Leszczyński, and Bartosz Liżewski, *Ochrona praw człowieka w Europie: szkic zagadnień podstawowych*. Lublin, 2008, 71. Leszek Garlicki, "Prawo do sądu" in *Prawa człowieka. Model prawny*, ed. R. Wieruszewski. Wrocław, 1991, 544. See also: Judgment of the Constitutional Court of the Republic of Poland of 7 March 2005, P 8/03, published in OTK No. 3/2005, item 20.

17 See, e.g., Judgment of European Court of Human Rights of 16 July 1971 in the case of *Ringeisen v. Austria*, Application No. 2614/65.

18 Leszczyński, Liżewski, 74.

19 Garlicki, *Prawo*, 544; also Judgments of European Court of Human Rights of: 29 May 1996 in the case of *Feldbrugge v. Holland*, Application No. 8562/79; 16 July 1971 in the case of *Ringeisen v. Austria*, Application No. 2614/65.

20 Judgment of the Regional Administrative Court in Olsztyn of 3 April 2012, II SAB/Ol, CBOSA; similarly: Judgment of the Regional Administrative Court in Wrocław of 4 December 2012, II SAB/Wr 20/12, CBOSA; Judgment of the Regional Administrative Court in Gliwice of 18 March 2013, II SAB/Gl 60/12, CBOSA; Judgment of the Regional Ad-

excessive length of proceedings. However, this view also suggests that numerous administrative legal issues remain outside the regulation deriving from the Convention.[21]

III

While it may be accepted that there are grounds for recognizing that international norms establishing human rights standards form a procedural environment that ought to be respected by public administrative authorities, a vital issue arises as to their validity within the scope of the application of the law at the substantive law level. This is due both to the problem of including the value of human rights in the jurisprudence of authorities and the problem of the direct application of standards.

Starting with the issues related to the application of standards, it should be noted that public administration indisputably operates based on law and within its limits. This does not imply that every legal provision is suitable for direct application and may therefore be the basis for an administrative decision. This gives rise to a problem with the direct application by the authorities of acts establishing the human rights protection standards without any laws intermediating in the process.

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ministrative Court in Gliwice of 9 January 2017, I SAB/Gl 8/16, CBOSA; see Judgments of European Court of Human Rights of: 22 July 2008 in the case of *Przepałkowski v. Poland*, Application No. 23759/02; 9 June 2009 in the case of *Kamecki and others v. Poland*, Application No. 62506/00; 4 October 2011 in the case of *Mularz v. Poland*, Application No. 9834/08; 1 December 2009 in the case of *Trzaskalska v. Poland*, Application No. 34469/05. See also: *Bukowski v. Poland* (dec.), Application No. 38665/97, Judgment of 11 June 2002; *Koss v. Poland*, Application No. 52495/99, Judgment of 28 March 2006;*Turczanik v. Poland*, Application No. 38064/97, Judgment of 5 July 2005; *Kania v. Poland*, Application No. 12605/03, Judgment of 21 July 2009 and *Derda v. Poland*, Application No. 58154/08, Judgment of 1 June 2010.

21 Judgments of European Court of Human Rights of: 9 December 1994 in the case of *Schouten and Meldrum v. Holland*, Application No. 19005/91 and 19006/91; 12 July 2001 in the case of *Ferrazzini v. Italy*, Application No. 44759/98.

Apart from the above issues concerning the wording of international provisions and the literal exclusion of their application from the administrative cases that they lay down, the following problems may be identified: 1) the general nature of some international provisions establishing the human rights protection standards; 2) the specific role of internal law in administrative actions; and 3) public administrative authorities not being able to challenge the incompatibility of acts of a lower rank with international laws and acts.

In particular, the problem related to the legal acts regulating the issue of human rights occurs in cases where such acts contain norms of a general, declarative nature, which prevents their direct use by public administrative authorities as the basis for administrative decisions. As already pointed out by T. Bigo, an international treaty must meet the following conditions to be an independent source of administrative law: 1) it must enter the legal order as its constituent part in an unmodified form, i.e. as a treaty; 2) it must relate to the object of administration and have substantive/legal content; and 3) the execution of the standards and provisions of the treaty must fall within the competences of administration.[22] These should be expanded to include one more condition — one concerning the provisions deriving from such acts to be applied by public administrative authorities. The legislator must formulate them in a precise manner.

The problem with international treaties regulating the issue of human rights does not concern the formal inclusion of the former in the system of domestic law, but rather their content. The problem in this regard is not the so-called self-executing treaties, which enable the direct application of the law based on international legal norms, without the intermediation of a domestic act implementing the treaty.[23] Their norms constituting subjective rights are, in principle, precise, clear and unconditional, thereby making it possible to apply such treaties directly. However, the treaties that fail meet such conditions

22 Tadeusz Bigo, *Prawo administracyjne. Część I. Instytucje ogólne*. Compilation Władysław Kawka. Wrocław, 1948, 49–51, 52.

23 Małgorzata Masternak-Kubiak, *Przestrzeganie prawa międzynarodowego w świetle Konstytucji Rzeczypospolitej Polskiej*. Kraków, 2003, 218.

are executory ones,[24] which may be applied by authorities only when they are implemented into the domestic legal order by statute, pursuant to Art. 91 sec. 2 of the Constitution. Another category includes treaties that make it possible to use international norms only to interpret domestic law norms, including ones adopted to implement international norms. This interpretation removes the doubts arising due to the application of a domestic norm or the adoption of a specific standard. The latter two instances may be deemed an indirect operation of an international treaty. They may cause issues in the area of application since they may not be an independent basis for issuing administrative acts, and because the need to rely on domestic law during their application may alter their meaning, thus distorting the protective system.

It seems that a specific risk in that regard is posed by the role that internal law plays in public administration. This is due to its detachment from the hierarchy of the sources of law and because of the phenomenon of the inverted hierarchy of the sources of law referred to in the literature. Acts of internal law are sources of law yet their scope is limited. They concern only the relations taking place within the administrative structure and can only be used when shaping the relationship between organizationally related entities of law engaged in a relationship of subordination. The assumption is that acts of internal law must not shape the legal situation of an individual and that they may be constituted by statute.[25] Given their wide-ranging functions, including executive, managing, organizational, regulatory and information ones,[26] they profoundly affect the understanding of the law, including the understanding of human rights. Although the principle of good administration should play a significant role in the constitution of acts of internal law, mandating their

24 Masternak-Kubiak, 233.

25 Renata Raszewska-Skałecka, "Funkcje prawa zakładowego na przykładzie wybranych zakładów administracyjnych", *Acta Universitatis Wratislaviensis. Przegląd Prawa i Administracji* 67, no. 2663. 2005: 244–245.

26 Tadeusz Kuta, "Funkcje współczesnej administracji i sposoby ich realizacji", *Acta Universitatis Wratislaviensis. Prawo* 217, no. 1458. 1992: 7.

legality and the rule of law,[27] they may allow the administration to shape the understanding of human rights protection issues as expected by the authorities, which is inconsistent with the general standards of protection. Acts of internal law do affect the legal situation of an individual — both directly and indirectly. Yet it is also indicated that "in general, explanations, instructions and ministerial letters are not sources of universally binding law, and therefore, cannot constitute the basis for issuing an administrative decision."[28] On the other hand, "this does not mean that […] an administrative authority may not use the interpretative guidelines of authorities – particularly central authorities – to interpret the legal provisions that raise doubts when deciding on an individual administrative case."[29] This may distort the human rights protection system to the extent that an individual subjected to such decisions may be unable to contest them in any way.

This problem takes on new meanings if viewed from a public administration perspective. Because of the rule of law, authorities are sometimes unable to challenge domestic acts which, in their view, may be inconsistent with the acts establishing the human rights standards. It should be noted that Art. 6 of the Code of Administrative Proceedings[30] does not make it possible to omit a positive legal norm even where it does not correspond directly with the provisions of the Constitution or international acts that form the basis for the protection of human rights, such as the Convention. This provision explicitly obliges administrative authorities to apply the provision in force. Called the

27 See, e.g., Dorota Dąbek, "Zakres aksjologicznej samodzielności samorządowego prawa miejscowego" in *Aksjologia prawa administracyjnego*, vol. 1, ed. J. Zimmermann. Warszawa, 2017, 479 et seq.; Piotr Lisowski, "Aksjologiczny kontekst i wymiar rządowych aktów prawa miejscowego" in *Aksjologia prawa administracyjnego*, 491.

28 Judgment of the Supreme Administrative Court of the Republic of Poland of 19 July 2012, I OSK 685/12, Legalis. Also see the Judgment of the Regional Administrative Court in Kielce of 22 December 2010, II SA/Ke 736/10. *Wspólnota*, no. 5. 2011, 45.

29 I OSK 685/12.

30 Code of Administrative Proceedings of 14 June 1960 (Journal of Laws of 2022, item 2000).

formal rule of law, this approach excludes the evaluation of legal norms applied by a public administrative authority due to extra-legal values.[31]

Unlike courts, public administrative authorities may not for that reason evaluate the compliance of lower-rank acts with statutes, the Constitution or international acts, and they do not have legal instruments enabling them to refer possible doubts to competent authorities for consideration. Consequently, acting like Pilate and expecting the issue to be resolved by an administrative court is often their only option. This means that the references to acts, particularly international ones that make up the human rights protection system on the European and global level, which are contained in their jurisprudence, must always take into account whether or not there are any subordinate norms of domestic law which must be applied in such a situation.

IV

In the axiological context, it must be noted that the need to ensure the protection of human rights means that their significance turns out to be much wider than that which results from the provisions of applicable law.

Since human rights are universal, determining whether they were breached does not depend on what is considered to be such a breach in a given country.[32] The judgment referred to reads as follows: "Were the assessment of whether a breach of human rights took place to depend on what is considered to be such a breach in a given country, the meaning of these rights, as rights arising from the essence of the human being, would be undermined."[33] By the same token, in the context of the actions of public administrative authorities, the broadest possible understanding of this issue is required. This may nonetheless bring

31 Andrzej Wróbel, "Komentarz do art. 6" in Małgorzata Jaśkowska, Martyna Wilbrandt-Gotowicz, and Andrzej Wróbel, *Komentarz aktualizowany do Kodeksu postępowania administracyjnego*. Warszawa, 2022.

32 Judgment of the Supreme Administrative Court of the Republic of Poland of 24 August 2008, V SA 1781/99, CBOSA.

33 V SA 1781/99.

problems both in terms of balancing goods and interests by public administration and the very application of the law. This in turn raises doubts as to the validity of linking the human rights protection system to the rule of law, if only from the point of view of the principle of competence. The acceptance of such possibilities would entail a risk of discretionary treatment of the protection of human rights and its uncontrolled expansion or restriction, depending on the adopted attitude. It would also create another problem: public administrative authorities acting beyond their competences. After all, public administrative authorities cannot operate where there is no legal basis for doing so.

Focusing on axiological issues, it should be noted that the very concept of human rights violations becomes broad under this approach, which also results in this framing of the concept in practice. However, it is indicated in this regard that a distinction should be made between a breach of human rights and a risk of their breach. It is assumed in this case that public administration must take action in the case of a breach; however, where there is a risk of a breach, action can only be taken in states of greater necessity (due to the lack of legal grounds for interference). If a breach of human rights can result in irreparable damage or an irreversible condition (human death, environmental pollution), an earlier administrative response would be deemed the most appropriate.[34]

Moreover, public administration comes close to breaching human rights due to the conflicting nature of administrative law, and it does so when justifying the protection of other goods. In every case subjected to administrative legal regulation, public administration must take into consideration not only a conflict between individual and public interests but also between individual interests. This is because a conflict of values occurs in this regard and one of these values is given priority. From the point of view of public administrative authorities, it is normal that one value is compromised in favor of another in

34 Irena Lipowicz, "Zagrożenia dla realizacji praw człowieka wynikające z prawa administracyjnego", *Roczniki Nauk Społecznych* 22–23, no. 1. 1994–1995: 356.

such a situation. However, a breach of human rights still occurs, which requires an appropriate response.

Since it is "the guardian of public order" which dominates over the individual, public administration will always risk breaching human rights (under the conditions laid down by law) to protect other values. Irrespective of this justification, such actions always constitute interference in the sphere of human rights, which requires an appropriate response. This may be aptly illustrated by numerous judgments of the European Court of Human Rights concerning compensation for the designation of real estate for a public purpose in spatial development plans.[35] Although the breach of the ownership right was lawful in those cases (because it was committed based on the law), the Court considered that interference with ownership rights had still occurred, which should have led to an appropriate response from the authorities.

Bearing in mind the specificity of the functioning of public administration, which safeguards human rights and, ironically, is simultaneously entitled to breach them, it should be noted that resolving this issue requires systemic changes. Recalling the view presented by I. Lipowicz, it is most important in such cases to ensure that citizens have access to a quick and "cheap" procedure for claiming their rights and can receive compensation for any instances of their violation. She noted that "while under the previous system many breaches resulted from the primacy of the 'public interest' over the individual interest, under the rule of law the administration takes more care of individual matters, paying less attention to breaches resulting from neglecting human rights, e.g., concerning the environment."[36] Since it is impossible to rule out decisions made by administrative authorities based on the inevitable conflict described

35 Judgments of European Court of Human Rights of: 14 November 2006 in the case of *Skibińscy v. Poland*, Application No. 52589/99; 17 October 2007 in the case of *Rosiński v. Poland*, Application No. 17373/02; 6 December 2007 in the case of *Skrzyński v. Poland*, Application No. 38672/02; 26 May 2008 in the case of *Buczkiewicz v. Poland*, Application No. 10446/03; 7 July 2008 in the case of *Pietrzak v. Poland*, Application No. 38185/02; 7 March 2011 in the case of *Tarnawczyk v. Poland*, Application No. 27480/02.

36 Lipowicz, 357.

above, in cases where the protection of one good requires a breach of another, measures must be established to mitigate the effects of such interferences.

V

Given the above, the issue comes down to a demand that the protection of human rights by public administrative authorities should be enabled primarily through appropriate amendments to the law, and that the contradictions in the procedures designed to protect such rights should be removed. This requires clarifying the administrative law and the authorities' involvement in it, e.g., that of the Constitutional Court, to remove from the legal system any acts incompatible with human rights protection standards.[37] This would allow administrative authorities to exercise their powers in a manner consistent with those standards, without facing dilemmas which invariably involve bearing the consequences of the erosion of state authority.

It is also impossible to deny that, apart from amendments to the law, human rights protection may also be effected through the very actions of public administrative authorities, in particular, by means of an interpretation favorable to the human rights protection standards, even when domestic regulations contain no relevant provisions in this regard. Consequently, regardless of the problems that this may entail, administrative authorities can clearly ensure human rights protection, primarily at the level of interpretation, by taking into account the axiology and making a human rights-friendly interpretation. It is also undeniable that public administrative authorities are obliged to interpret the law in line with the Constitution and the international treaties binding Poland.

Such an understanding of the problem results from such things as jurisprudence, which makes it possible to refer to acts regulating human rights when assessing statutory provisions, provided that no applicable regulations exist.[38]

37 Lipowicz, 356.

38 Judgment of the Regional Administrative Court in Łódź of 22 November 2019, II SA/Łd 240/19.

Moreover, it is explicitly stated that "it is not permissible to interpret any legal provision in a manner that would breach the constitutionally guaranteed civil rights or would be in conflict with international acts ratified by Poland, and would be in conflict with other provisions of the applicable laws."[39] This stems from the duty to provide a uniform and consistent interpretation of the provisions of law, which also results from the rule of law.[40]

VI

Actions taken by an authority are controlled by administrative courts. As regards the human rights protection standards shaped at the level of international acts, this control is carried out on two levels: 1) controlling the regulatory compliance of a public administrative authority; 2) determining if the given action is acceptable in light of human rights protection acts (e.g. the Convention). Therefore, the criterion of legality underlying the control is expanded to also include a specific criterion of purposefulness to check whether the public administration's actions comply with the objectives of acts of international law.

Administrative courts control the regulatory compliance of the actions taken by authorities, which also includes compliance with international law. Moreover, not being bound by the limits of means of appeal, they may also check whether an authority interpreted domestic provisions in line with the principle of compliance with the norms of international law. Thus, the assessment of compliance with the provisions of the laws that constitute the framework of the human rights protection system is made in a distinctive manner. This assessment is aimed at determining whether the actions of an authority and the content and effects of an issued decision are acceptable in light of the

39 Judgment of the Regional Administrative Court in Warsaw of 26 November 1991, II SA 937/91, ONSA 1993/1, item 10. See more: Agnieszka Sołtys, *Obowiązek wykładni prawa krajowego zgodnie z prawem unijnym jako instrument zapewniania efektywności prawa Unii Europejskiej*. Warszawa, 2015.

40 Among others Judgment of the Regional Administrative Court in Gdańsk of 29 June 2005, III SA/Gd 257/04.

Convention's provisions. Thus, it does not consist solely of verifying whether an authority acted within the limits of the law and on a legal basis.[41]

This is also where the insufficient means enabling the implementation of the human rights protection standards by public administrative authorities, as compared to administrative courts, become apparent. Above all, courts are entitled to forward their enquiries in that regard to international courts and authorities. This allows them to verify their actions as early as this stage in case of doubt, as well as to avoid potential contradictions. Moreover, they may also refuse to apply acts ranking lower than a statute or an international treaty to avoid issuing a decision that would be incompatible with acts regulating human rights protection. This may mean that, given the construct of administrative and judicial/administrative proceedings, the burden of human rights protection falls mainly on administrative courts, which do not manage but merely verify the actions of public administration.

VII

The above only highlights a narrow segment of the problem, yet it clearly illustrates that the issue in question should be regulated simultaneously by the legislator and public administrative authorities. This is particularly true in the case of potential problems that may arise in connection with the application of human rights protection measures in the actions of public administrative authorities. What makes this issue especially vital is the fact that human rights protection – the foundation of a democratic state ruled by law – should accompany every action taken by public administration.

The above problems, which may be caused by the implementation of human rights protection measures, show the multiplicity and multidimensionality of the described problematic issues. Therefore, it seems necessary to introduce

41 Piotr M. Przybysz, "Komentarz do art. 6" in *Kodeks postępowania administracyjnego. Komentarz aktualizowany*. Warszawa, 2022.

comprehensive solutions, particularly changes to the law, actions by authorities responsible for rectifying the incompatibility of law with acts establishing human rights protection standards, as well as encouraging authorities to perform such actions, including by selecting the appropriate staff. It appears that the problem described above cannot be resolved only by fragmented actions.

Regardless of the foregoing problems with the application of human rights in the actions of public administration, the current situation seems satisfactory. The fact that acts establishing human rights protection measures are included in the legal order, as well as all the legal principles ensuring that they are respected, means that public administrative authorities act in compliance with them. Public administration itself is aware of the need to protect human rights, which means that it is also focused on them in this respect. For this reason, one ought to admit that the actions of public administration should be oriented towards the development and improvement of the human rights protection system.

References

Adamiak, Barbara et. al. *Kodeks postępowania administracyjnego. Komentarz*. Warszawa, 2014.

Banaszak, Bogusław. *Konstytucja Rzeczypospolitej Polskiej. Komentarz*. Warszawa, 2012.

Balcerzak, Michał. "Zobowiązania międzynarodowe w dziedzinie praw człowieka a krajowy porządek prawny." In Gronowska, Bożena, Tadeusz Jasudowicz, Michał Balcerzak, Maciej Lubiszewski, and Rafał Mizerski, *Prawa człowieka i ich ochrona*. Toruń, 2010.

Bigo, Tadeusz, *Prawo administracyjne. Część I. Instytucje ogólne*. Compilation Władysław Kawka. Wrocław, 1948.

Cichoń, Zbigniew. "Europejska Konwencja Praw Człowieka nadal najskuteczniejszym na świecie instrumentem ochrony prawa człowieka (w 55. rocznicę podpisania Konwencji)." *Palestra*, no. 11–12. 2005.

Czepek, Jakub. *Zobowiązania pozytywne państwa w sferze praw człowieka pierwszej generacji na tle Europejskiej Konwencji Praw Człowieka*. Olsztyn, 2014.

Dąbek, Dorota. "Zakres aksjologicznej samodzielności samorządowego prawa miejscowego." In *Aksjologia prawa administracyjnego.* T. 1, edited by Jan Zimmermann. Warszawa, 2017.

Garlicki, Leszek. "Horyzontalne oddziaływanie praw człowieka a standardy EKPCz." In *Wpływ Europejskiej Konwencji Praw Człowieka na funkcjonowanie biznesu*, edited by Adam Bodnar, and Adam Ploszka. Warszawa, 2016: 25–40.

Garlicki, Leszek. "Prawo do sądu." In *Prawa człowieka. Model prawny*, edited by Roman Wieruszewski. Wrocław, 1991.

Granat, Mirosław. "Godność człowieka z art. 30 Konstytucji RP jako wartość i jako norma prawna." *Państwo i Prawo*, no. 8. 2014: 3–22.

Kmieciak, Zbigniew. "Przewlekłość postępowania administracyjnego w świetle ustaleń europejskiego case law." In *Analiza i ocena zmian kodeksu postępowania administracyjnego w latach 2010–2011*, edited by Mateusz Błachucki, Teresa Górzyńska, and Grzegorz Sibiga. Warszawa 2010–2011.

Kmieciak, Zbigniew. "W poszukiwaniu modelu postępowania odpowiadającego naturze administracji publicznej." *Państwo i Prawo*, no. 11. 2015: 3–18.

Krawczyk, Agnieszka. "Standardy współczesnej regulacji postępowania administracyjnego" In Barbara Adamiak, Janusz Borkowski, Agnieszka Krawczyk, and Andrzej Skoczylas, *Prawo procesowe administracyjne. System Prawa Administracyjnego*, vol. 9. Warszawa, 2014.

Kuta, Tadeusz. "Funkcje współczesnej administracji i sposoby ich realizacji." *Acta Universitatis Wratislaviensis. Prawo* 217, no. 1458. 1992.

Leszczyński, Leszek, and Bartosz Liżewski. *Ochrona praw człowieka w Europie: szkic zagadnień podstawowych*. Lublin, 2008.

Lipowicz, Irena. "Zagrożenia dla realizacji praw człowieka wynikające z prawa administracyjnego." *Roczniki Nauk Społecznych* 22–23, no. 1. 1994–1995: 355–364.

Lisowski, Piotr. "Aksjologiczny kontekst i wymiar rządowych aktów prawa miejscowego." In *Aksjologia prawa administracyjnego*. vol. 1, edited by Jan Zimmermann. Warszawa, 2017.

Masternak-Kubiak, Małgorzata. *Przestrzeganie prawa międzynarodowego w świetle Konstytucji Rzeczypospolitej Polskiej*. Kraków, 2003.

Mik, Cezary. "Charakter, struktura i zakres zobowiązań z Europejskiej Konwencji Praw Człowieka." *Państwo i Prawo* 4. 1992.

Mik, Cezary. *Koncepcja normatywna prawa europejskiego praw człowieka*. Toruń, 1994.

Nałęcz, Andrzej. "Podsumowanie." In *Wzorce i zasady działania współczesnej administracji publicznej*, edited by Barbara Jaworska-Dębska, Przemysław Kledzik, and Janusz Sługocki. Warszawa, 2020.

Przybysz, Piotr M. "Komentarz do art. 6." *Kodeks postępowania administracyjnego. Komentarz aktualizowany*. Warszawa 2022.

Raszewska-Skałecka, Renata. "Funkcje prawa zakładowego na przykładzie wybranych zakładów administracyjnych." *Acta Universitatis Wratislaviensis. Przegląd Prawa i Administracji* 67, no. 2663. 2005.

Redelbach, Andrzej. *Europejska Konwencja Praw Człowieka w polskim wymiarze sprawiedliwości*. Poznań, 1997.

Sarnecki, Paweł. "Komentarz do art. 9." In *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. V, edited by Leszek Garlicki. Warszawa, 2007.

Sołtys, Agnieszka. *Obowiązek wykładni prawa krajowego zgodnie z prawem unijnym jako instrument zapewniania efektywności prawa Unii Europejskiej*. Warszawa, 2015.

Wiśniewski, Zygmunt. "Postępowanie sądowo-administracyjne w świetle standardów międzynarodowych." In *Europejska przestrzeń sądowa*, edited by Agnieszka Frąckowiak-Adamska, and Robert Grzeszczak. Wrocław, 2010.

Wróbel, Andrzej. "Komentarz do art. 6." In Małgorzata Jaśkowska, Martyna Wilbrandt-Gotowicz, and Andrzej Wróbel, *Komentarz aktualizowany do Kodeksu postępowania administracyjnego*. Warszawa, 2022.

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Evidence From Artificial Intelligence in General Administrative Procedure

Abstract: Artificial intelligence is becoming an element of everyday life, and also a part of administrative proceedings. The legislator systematically adds regulations that allow public administration bodies to use artificial intelligence. At the same time, the Code of Administrative Procedure has not been amended in this respect. The article tries to establish what artificial intelligence evidence is. In addition, the issue of whether the rules on administrative evidence should be changed to cover the use of AI evidence is examined.
Keywords: artificial intelligence, evidence, administrative procedure.

Introduction

Algorithms facilitate the analysis of huge amounts of data. Moreover, they are quick and the results of their work are assumed to be objective. Consequently, artificial intelligence units are increasingly used in legal transactions. One of the important issues in this regard is the admissibility of evidence developed by algorithms. However, the Polish legislator is introducing regulations relating to the use of artificial intelligence in the judiciary only to a limited extent. Suffice it to say that in the field of public administration activities in the con-

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text of evidence, there are only regulations concerning the so-called automated processing of personal data by tax administration authorities.

Bearing the above in mind, one should consider the admissibility of evidence from artificial intelligence in the so-called general administrative procedure, the course of which was regulated in the Code of Administrative Procedure. Therefore, the purpose of these considerations is to determine whether the current legal solutions regarding evidence in administrative proceedings are adequate in cases where the evidence proceedings would be based on artificial intelligence.

Evidence in Administrative Proceedings

The adopted method of assessing the collected evidence is of key importance for issuing an administrative decision. As it is aptly noted in the doctrine, "the image of the factual state in the consciousness of an organ is not simply a reflection, a photograph of the facts of objective reality. In this picture, which is the breaking of the objective reality through the prism of the organ's consciousness, not only the reflections of the facts of the objective reality are contained, but also conclusions about the facts."[1] Thus, the form of an administrative decision is determined both by the collected means and their evaluation. Such means are referred to in the doctrine as both evidence and means of evidence. This nomenclature duality is caused, among other things, by the lack of a common position of the doctrine on the meaning of the concept of evidence.[2] On the one hand, then, one can encounter the view that the concept of evidence has a different meaning than the concept of means of evidence. Supporters of

1 Emanuel Iserzon, "Komentarz do art. 70", in Emanuel Iserzon, and Jerzy Starościak, *Kodeks postępowania administracyjnego. Komentarz, teksty, wzory i formularze*. Warszawa, 1970, 153.

2 Zbigniew Janowicz, *Kodeks postępowania administracyjnego. Komentarz*. Warszawa, and Poznań, 1992, 190; Similar difficulties emerge in the preparation of civil and criminal proceedings – Robert Suwaj, *Judycjalizacja postępowania administracyjnego*. Warszawa, 2009. <https://sip.lex.pl/#/monograph/369198202/165542>, access: 02.05.2022.

this view assume that "the concept of evidence in administrative proceedings should be understood as all sources of true information enabling evidence."[3] On the other hand, evidence can be viewed as a proving process or its result, or as an evidence-based act.[4] In other words, the evidence in the case is the process of collecting the means of evidence, their analysis and the result of this action. The presented approach shows the relationship between the concepts cited, which consists in the fact that it is impossible to take evidence without means of evidence. Therefore, the doctrine assumes that "means of evidence are an integral part of the evidence on the basis of which the authority conducts the evidentiary proceedings, and the result of which is obtaining specific information about a specific fact."[5] It should be pointed out, however, that the doctrine is dominated by the view that "in the strict sense of the word, evidence should be understood as means of evidence."[6]

Considering the above, reference should be made to Article 75 §1 of the Code of Administrative Procedure.[7] According to this provision, anything that may contribute to clarifying the matter and that is not in violation of the law may be admitted as evidence. In particular, documents, witness testimony, expert opinions and inspections may constitute evidence. It is generally accepted that the content of the cited provision does not distinguish between evidence and means

3 Barbara Adamiak, "Komentarz do art. 75" in Barbara Adamiak and Janusz Borkowski, *Kodeks postępowania administracyjnego. Komentarz*. Warszawa, 2021. <https://sip.legalis.pl/document-view.seam?documentId=mjxw62zogi3damrxgu3tcoboobqxalrvgmytemrzg44a#>, access: 02.05.2022.

4 Zbigniew Kmieciak, *Postępowanie administracyjne, postępowania egzekucyjne w administracji i postępowanie sądowoadministracyjne*. Warszawa, 2011, 116.

5 Monika Sadowska, "Komentarz do art. 75" in *Kodeks postępowania administracyjnego*. Tom II. *Komentarz do art. 61–126*, eds. Mirosław Karpiuk, Przemysław Krzykowski, and Agnieszka Skóra. Olsztyn, 2020. <https://sip.lex.pl/#/commentary/587841192/638632/karpiuk-miroslaw-red-krzykowski-przemyslaw-red-skora-agnieszka-red-kodeks-postepowania...?cm=URELATIONS>, access: 02.05.2022.

6 Aleksandra Szopieraj-Kowalska, "Dowody i postępowanie dowodowe według kodeksu postępowania administracyjnego i ordynacji podatkowej", *Studia z zakresu nauk prawnoustrojowych*, no. 2. 2012: 210.

7 Ustawa z dnia 14 czerwca 1960 r. – Kodeks postępowania administracyjnego. Journal of Laws of 2021, item 735.

of evidence.[8] However, one can also come across the view that under the above-mentioned Article 75 §1 of the Code of Administrative Procedure, "the term" evidence "is used in the meaning of the general concept of evidence («anything that may contribute to clarifying the matter and that is not in violation of the law») and means of evidence («in particular documents, witness testimony, expert opinions and inspections»)."[9] In other words, the legislator uses the concept of evidence to define two different procedural institutions which, from the perspective of the doctrine, are means of evidence and evidence. On the one hand, this approach is part of the natural discrepancy between the legal language and the language of legal acts. On the other hand, the presented interpretative proposal seems to be better suited to the legislator's intentions. The above-mentioned means (e.g. documents) are only examples of sources of information that are not *ex lege* evidence. The point is that the means listed in Article 75 §1 sentence 2 of the Code of Administrative Procedure, obtain the status of an evidence only when the conditions referred to in Article 75 §1 sentence 1 of the Code of Administrative Procedure are met.

The first of the above-mentioned premises can be described as positive. It is based on the fact that everything that contributes to the clarification of the case is evidence. In this context, it should be recalled that the doctrine makes a distinction between evidence based on "the criterion of the manner in which the adjudicating authority contacts the fact which is the subject of evidence."[10] On this basis, on the one hand, direct evidence is distinguished, i.e. "such measures at which the adjudicating authority has the ability to directly perceive and determine the truthfulness of a specific fact (e.g. inspection)."[11] On the other hand, there is indirect evidence, i.e. evidence that allows us to establish

8 Paweł Daniel, *Administracyjne postępowanie dowodowe*. Wrocław, 2013, 21.

9 Wacław Dawidowicz, *Ogólne postępowanie administracyjne. Zarys systemu*. Warszawa, 1962, 153.

10 Barbara Adamiak, "Dowody i postępowanie wyjaśniające" in Barbara Adamiak, and Janusz Borkowski, *Postępowanie administracyjne i sądowoadministracyjne*. Warszawa, 2007, 207.

11 Adamiak, *Dowody*, 207.

a certain fact on the basis of another fact.[12] It is, among other things, obtaining information from personal sources such as e.g. witnesses.[13]

In connection with the above, it should be noted that from the perspective of the cited Article 75 of the Code of Administrative Procedure, it can be said that both types of evidence (i.e. direct and indirect) may be used in administrative proceedings. Moreover, due to the lack of a different position of the legislator, it should be assumed that direct and indirect evidence are equal.[14] As a consequence, it is solely up to the authority conducting the proceedings to assess their credibility and usefulness for establishing the facts in a specific case. This approach of the legislator seems to be justified. It can be noticed that, despite the specifics of indirect evidence presented above, specific evidence of this type may better serve to establish the facts in a given case. This is, in particular, the case where the indirect evidence confirms or supplements the conclusions drawn from the remaining evidence.

The second premise concerning the recognition of a specific measure of evidence as evidence is negative. It consists in the fact that evidence cannot be a means of evidence that is against the law. It should be noted that the legislator did not specify the violation of which law is meant. Therefore, reference should be made to the principle *lege non distinguente nec nostrum distinguere*. Therefore, it can be concluded that the evidence is not a means of evidence which is inconsistent with any legal provision. In other words, means of evidence inconsistent with the provisions of administrative, civil or criminal law will not be granted the status of evidence.[15] Likewise, a breach of substantive

12 Adamiak, *Dowody*, 207.

13 Adamiak, *Dowody*, 207.

14 Marcin Kopeć, "Glosa do wyroku NSA z dnia 2 grudnia 2008 r., II GSK 384/08", *Przegląd Prawa Publicznego*, no. 2. 2010: 89–96. <https://sip.lex.pl/#/publication/385988122/kopec-marcin-glosa-do-wyroku-nsa-z-dnia-2-grudnia-2008-r-ii-gsk-384–08?cm=URELATIONS>, access: 02.05.2022.

15 Agnieszka Skorupka, "Pojęcie dowodów bezprawnych (nielegalnych, sprzecznych z prawem)" in *Dowody w postępowaniu cywilnym*, ed. Łukasz Błaszczak. Warszawa, 2021. <https://sip.legalis.pl/document-full.seam?documentId=mjxw62zogi3damzygq2dmmq#>, access: 02.05.2022; Piotr Marek Przybysz, *Kodeks postępowania administracyjnego. Komentarz aktualizowany*.

and procedural law will not allow the means of evidence to be considered evidence within the meaning of Article 75 the Code of Administrative Procedure.[16]

In the context of the above, it should be emphasized that the evidence regulations are different under the Code of Civil Procedure[17] and the Code of Criminal Procedure.[18] To be precise, the legislator did not define directly in the Code of Civil Procedure the rules concerning the legality of evidence. According to Article 227 of the Code of Civil Procedure, facts that are relevant to the determination of a case are the subject-matter of evidence. Therefore, "in relation to the 'fruit of the poisoned tree', three positions can be taken on a procedural level:

- restrictive, prohibiting the use of this type of evidence in any case, even if it could significantly contribute to the outcome of the case;
- liberal, with no restrictions on the use of this type of evidence and allowing a judgment to be based on it in each case;
- indirect, allowing a judgment to be made based on unlawful evidence only under certain conditions."[19]

Bearing the above in mind, however, it should be pointed out that currently the majority of doctrine representatives agree with the concept of at least the partial admissibility of unlawful evidence.[20] In the case of criminal proceedings,

LEX/el., 2022. <https://sip.lex.pl/#/commentary/587751140/677368/przybysz-piotr-marek-k-odeks-postepowania-administracyjnego-komentarz-aktualizowany?cm=URELATIONS>, access: 10.05.2022.

16 Andrzej Wróbel, "Komentarz do art. 75" in *Komentarz aktualizowany do Kodeksu postępowania administracyjnego*, eds. Małgorzata Jaśkowska, Martyna Wilbrandt-Gotowicz, and Andrzej Wróbel. LEX/el., 2022. <https://sip.lex.pl/#/commentary/587260174/673629/jaskowska-malgorzata-wilbrandt-gotowicz-martyna-wrobel-andrzej-komentarz-aktualizowany-do-kodeksu...?cm=URELATIONS>, access: 02.05.2022.

17 Ustawa z dnia 17 listopada 1964 r. – Kodeks postępowania cywilnego. Journal of Laws of 2021, item 1805.

18 Ustawa z dnia 6 czerwca 1997 r. – Kodeks postępowania karnego. Journal of Laws of 2021, item 534.

19 Anna Wilk, "Dowody pozyskane z naruszeniem prawa i zasad współżycia społecznego w orzecznictwie sądów cywilnych", *Monitor Prawniczy*, no. 21. 2018. <https://sip.legalis.pl/document-full.seam?documentId=mjxw62zogi3damrrge4teny>, access: 02.05.2022.

20 Agnieszka Laskowska, "Dowody w postępowaniu cywilnym uzyskane w sposób sprzeczny z prawem", *Państwo i Prawo*, no. 12. 2003: 88–101. <https://sip.lex.pl/#/publica-

it should be noted that "the rule is to take legal evidence, but if the evidence is obtained in violation of the provisions of the procedure or by means of a prohibited act, it cannot be considered inadmissible for the purposes of the proceedings (subject to exceptions indicated *in fine*)."[21] According to Article 168a of the Code of Criminal Procedure, evidence shall not be treated as inadmissible exclusively due to the fact that it was gained in violation of procedural law or by commission of a prohibited act referred to in Article 1 § 1 of the Criminal Code,[22] unless it was gained by a public official in connection with the performance of his duties as a result of manslaughter, willful commission of a grievous bodily injury or deprivation of freedom.

Therefore, it can be stated that any means of evidence disqualified due to its illegality in criminal or civil proceedings may not constitute evidence in administrative proceedings. On the other hand, the admission of a specific evi-

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tion/151036573/laskowska-agnieszka-dowody-w-postepowaniu-cywilnym-uzyskane-w-sposob-sprzeczny-z-prawem?cm=URELATIONS>, access: 10.05.2022; Dariusz Korszeń, "Zakres zakazu przeprowadzania w postępowaniu cywilnym dowodów nielegalnych (bezprawnych)", *Monitor Prawniczy*, no. 1. 2013. <https://sip.legalis.pl/document-full.seam?documentId=mjxw62zoge2tkmbvgi3dsn27onzg6zdupf2dc&refSource=guide#tabs-metrical-info>, access: 10.05.2022; Błażej Gadek, "Bezprawny dowód z korespondencji internetowej stron w postępowaniu cywilnym", *Prawo Mediów Elektronicznych*, no. 3. 2018: 16. <https://sip.legalis.pl/document-full.seam?documentId=mjxw62zogi3damrrg44donc7onzg6zdupf2dg&refSource=guide#tabs-metrical-info>, access: 10.05.2022.

21 Agata Pawlak, and Katarzyna Firaza, " *Polska koncepcja „owoców zatrutego drzewa". Artykuł 168a k.p.k. w kontekście doktryny amerykańskiej*" in *Verba volant, scripta manent. Proces karny, prawo karne skarbowe i prawo wykroczeń po zmianach z lat 2015–2016. Księga pamiątkowa poświęcona Profesor Monice Zbrojewskiej*, eds. Tomasz Grzegorczyk, and Radosław Olszewski. Warszawa, 2017. https://sip.lex.pl/#/monograph/369404606/345330 (access: 10.05.2022). Also Ryszard A. Stefański, "Dowód uzyskany z naruszeniem przepisów postępowania lub za pomocą czynu zabronionego" in *Postępowanie przed sądem I instancji w znowelizowanym procesie karnym*, eds. Dariusz Kala, and Igor Zgoliński. Warszawa, 2018. <https://sip.lex.pl/#/monograph/369430322/347178>, access: 10.05.2022; Sebastian Brzozowski, "Dopuszczalność dowodu w kontekście regulacji art. 168a k.p.k.", *Przegląd Sądowy*, no. 10. 2016: 60–74. <https://sip.lex.pl/#/publication/151295744/brzozowski-sebastian-dopuszczalnosc-dowodu-w-kontekscie-regulacji-art-168-a-k-p-k?cm=URELATIONS>, access: 10.05.2022.

22 Article 1§ 1 ustawy z dnia 6 czerwca 1997 r. – Kodeks karny. Journal of Laws of 2021, item 2345: Only a person who commits an act punishable under the law in force at that time shall incur criminal liability.

dence in a civil or criminal case does not automatically mean that it may be used in administrative proceedings.

As already indicated above, the legislator has not specified what constitutes the unlawfulness of the evidence. Therefore, neither does the Code of Administrative Procedure contain information as to whether the evidence cannot be an illegal means of evidence or whether the evidence cannot be a legal means of evidence that was obtained illegally. In this context, it should be noted that the illegality of the evidence as such may, on the one hand, only concern a limited number of means (e.g. drugs). Hence, the prohibition of evidence included in Article 75 §1 sentence 1 the Code of Administrative Procedure would have a small scope of application. On the other hand, it should be noted that *ex lege* illegal materials may repeatedly constitute the basis for establishing the actual state of affairs, in particular in the cases of those administrative proceedings that concern the imposition of an administrative fine. By way of example, we can mention the administrative procedure the subject of which is to determine the amount of the fine for failure to comply with administrative and legal obligations, where the perpetrator used a forged license during the inspection.

It should be assumed then that *ex lege* illegal materials should not always be disqualified as evidence. The situation seems to be different when it comes to secondary illegal materials. This therefore concerns such evidence that is not illegal in itself, but was obtained unlawfully. For example, it is possible to point to an inspection that was carried out without initiating administrative proceedings or notifying the parties to the proceedings.

Finally, it is worth noting that not every violation of the law may constitute a basis for disqualifying means of evidence as evidence.[23] It can be seen that failure to comply with selected legal regulations does not deprive the authority of its competence to deal with a specific case. This concerns, in particular, violations of the regulations defining the deadline for completing administrative

23 Robert Kędziora, *Kodeks postępowania administracyjnego. Komentarz*. Warszawa, 2017. <https://sip.legalis.pl/document-view.seam?documentId=mjxw62zogi3damjxgu2dgnboobqxalrtheytemjtge2a#tabs-metrical-info>, access: 10.05.2022.

proceedings. On this basis, it could therefore be concluded that evidence inconsistent with the provisions of substantive law is always inadmissible.[24] On the other hand, evidence that is inconsistent with procedural law is admissible provided that the violation of the law did not affect the outcome of the case.[25]

The Concept of Artificial Intelligence

The origins of the idea of artificial intelligence can already be found in Greek myths.[26] On the other hand, the earliest ideas for building analogues for today's robots are ascribed to the ancient Egyptians.[27] There is no doubt, however, that research on "intelligent robots" did not gain momentum until the 20th century, when Alan Turing wrote the scientific article "Computing Machinery and Intelligence,"[28] in which he proposed an experiment[29] that was later called the Turing test after him.[30] In simple terms, it would consist of a conversation between a tester, a human and one machine. If, on the basis of such a conversation, it would be impossible to determine which of the interlocutors is not a human, it would mean that the machine has passed the test positively. Thus, one might start to wonder whether such a device could be considered a thinking unit.[31]

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24 Kędziora.

25 Kędziora.

26 Pamela McCorduck, *Machines Who Think: A Personal Inquiry into the History and Prospects of Artificial, Intelligence*. Natick, 2004, 23; Also Adrienne Mayor, *Gods and Robots Myths, Machines, and Ancient Dreams of Technology*. Princeton, and Oxford, 2018.

27 Nadia Ambrosetti, *Cultural Roots of Technology: An Interdisciplinary Study of Automated Systems from the Antiquity to the Renaissance*. Dissertation, The University of Milan, 2010: 25–27. <https://air.unimi.it › handle › phd_unimi_R07642>, access: 10.05.2022. Also Nicholas Reeves, "A Rare Mechanical Figure from Ancient Egypt", *Metropolitan Museum Journal* 50. 2015: 43–61.

28 Stephen Muggleton, "Alan Turing and the development of Artificial Intelligence", *AI Communications* 27, no. 1. 2014: 1.

29 Alan M. Turing, "Computing Machinery and Intelligence", *Mind* no. 49. 1950: 433–460.

30 Donald Michie, "Turing's Test and conscious thought", *Artificial Intelligence*, no. 60. 1993: 3.

31 Turing; Also Paweł Łupkowski, *Test Turinga. Perspektywa sędziego*. Poznań, 2020, 15–20.

It should be emphasized that there are currently no legal regulations defining the concept of artificial intelligence. Nevertheless, it should be noted that intensified legislative work is being carried out at the European Union level, where the first legal act is being prepared that is devoted directly to the issue of regulating artificial intelligence. This is the draft regulation establishing harmonized rules on artificial intelligence published by the European Commission on April 21, 2021.[32] Pursuant to Article 3 (3) of this draft, "Artificial Intelligence System" means software developed using one or more of the techniques and approaches listed in Annex I, which can – for a given set of human-defined goals – generate results such as content, predictions, recommendations or decisions affecting the environments with which it interacts. The presented understanding of artificial intelligence fits into the way this concept is defined in the literature. For example, A. Shchitova defines artificial intelligence as "set of programs, procedures, rules and relevant documentation of information processing systems that are capable of independent data processing and analysis and decision making based on the conclusions obtained, aimed at achieving the goal."[33] It should be noted that the cited author proposes that instead of the concept of artificial intelligence, the term "intelligent software" should be used.[34]

The definitions presented above undoubtedly do not allow artificial intelligence to be distinguished from typical computer software. Therefore, it should be pointed out that the way of understanding artificial intelligence is not limited only to indicating technical instruments serving its operation (i.e. software) and their effects (i.e. goals set by humans). It is equally important to indicate the operating mechanisms of individual algorithms. In this context, it should be emphasized that the literature proposes a number of types of divisions of artificial intelligence units precisely due to the way they function, or more precisely

32 COM (2021) 206 final; 2021/0106(COD).

33 Anastasia Shchitova, "Definition of Artificial Intelligence for Legal Regulation, Advances in Economics" in *2nd International Scientific and Practical Conference on Digital Economy* (ISCDE 2020), ed. Anton Nazarovp. Dordrecht, Paris, and Zhengzhou, 2020, 618.

34 Shchitova, 618.

due to the methods of solving the tasks entrusted to them. It should be noted that the most common division is between Artificial Narrow Intelligence,[35] Artificial General Intelligence[36] and Artificial Superintelligence.[37, 38]

Based on this division, it should be noted that the most technically advanced type of artificial intelligence is ASI. ASI means "the level of artificial intelligence that has been reached when a computer has exponentially surpassed the intelligence level of a human by several orders of magnitude".[39] ASI can take a form similar to a human (i.e. a humanoid robot) or a bare computer program. As an aside, it can be noted that ASI was presented in the Terminator series of films in both these forms: as independent robots (the 'terminators')[40] and as an omnipotent computer system (i.e. Skynet).[41]

Moving on to the way of understanding AGI, it should be noted that, as in the case of artificial intelligence itself, so far we cannot speak of a universally accepted definition of this concept.[42] However, based on individual studies, it can be assumed that AGI "also referred to as strong AI or deep AI"[43] is "the intelligence of a machine that could successfully perform any intellectual task that

35 Hereinafter: ANI.

36 Hereinafter: AGI.

37 Hereinafter: ASI.

38 Bartosz Sądel, "Sztuczna Inteligencja – czyli gdzie jesteśmy i dokąd zmierzamy?", *Zeszyty Studenckiego Ruchu Naukowego Uniwersytetu Jana Kochanowskiego w Kielcach* 24. 2015: 153.

39 Jens Pohl, "Artificial Superintelligence: Extinction or Nirvana?" in *Proceedings for Inter-Symp-2015, IIAS, 27th International Conference on Systems Research, Informatics, and Cybernetics, August 3–18, Baden-Baden, Germany*. 2015, 2.

40 More Hossein Hassani, Emmanuel Sirimal Silva, Stephane Unger, Maedeh TajMazinani, Stephen Mac Feely, "Artificial Intelligence (AI) or Intelligence Augmentation (IA): What Is the Future ?", *AI*, no. 1. 2020: 146.

41 Ronald Bailey, "Is Skynet Inevitable? Artificial intelligence and the possibility of human extinction", *Reason*, April. 2014. <https://reason.com/2014/03/31/is-skynet-inevitable>, access: 17.10.2022.

42 Mark R. Waser, "What Is Artificial General Intelligence? Clarifying The Goal For Engineering And Evaluation" in *Proceedings of the 2nd Conference on Artificial General Intelligence*. 2009. <https://www.atlantis-press.com/proceedings/agi09/1832>, access: 17.10.2022.

43 Vijay Kanade, *Narrow AI vs. General AI vs. Super AI: Key Comparisons*. Spiceworks, 25.03.2022. <https://www.spiceworks.com/tech/artificial-intelligence/articles/narrow-general-super-ai-difference/>, access: 17.10.2022.

a human being is capable of," "for example, there would likely be communication in natural language, understanding the context of most situations, as well as performing most of the intellectual tasks that humans are able to perform."[44]

On the basis of the above, it can be said that while AGI is equal to a human, ASI significantly exceeds it. In this context, it should be emphasized that, in accordance with the dominant view at the current level of technical development, it is not possible to speak of fully functioning AGI, and therefore let alone ASI.[45] With this in mind, it is also worth paying attention to the launch of projects such as "DeepMind, OpenCog, and OpenAI,"[46] the aim of which is to create AGI. Despite this, there is a position asserted in the literature that the production of AGI is not possible at all.[47] The logical consequence of this view will therefore be the exclusion of the possibility of creating an ASI. However, the isolated nature of the presented position should be emphasized.

The last type of artificial intelligence is referred to as "narrow AI,"[48] "applied AI"[49] or simply "weak AI."[50] The term "narrow" (weak) comes from the fact that the artificial intelligence units thus defined "operate strictly within the confine

44 Mikhail Batin, Alexey Turchin, Sergey Markov, Alice Zhila, and David Denkenberger, "Artificial Intelligence in Life Extension: from Deep Learning to Superintelligence", *Informatica*, no. 41. 2017: 503.

45 Hein de Haan, *How Some Experts Are Wrong About Artificial Superintelligence A critique of naïve views on our future*. Predict. Where the future is written, 13.10.2021. <https://medium.com/predict/how-some-experts-are-wrong-about-artificial-superintelligence-d45fa40a9d6b>, access: 17.10.2022.

46 Matthew N. O. Sadiku, Olaniyi D. Olaleye, Abayomi Ajayi-Majebi, and Sarhan M. Musa, "Artificial General Intelligence: A Primer", *International Journal of Trend in Research and Development* 7, no. 6. 2020: 7.

47 Pei Wang, and Ben Goertzel, "Introduction: Aspects of Artificial General Intelligence" in *Advances in Artificial General Intelligence: Concepts, Architectures and Algorithms: Proceedings of the AGI Workshop 2006*, ed. Ben Goertzel and Pei Wang. Amsterdam, 2007, 4.

48 Krishna Nand Patel, Sachin Raina, and Saurabh Gupta, "Artificial Intelligence and its Models", *JASC: Journal of Applied Science and Computations* 7, iss. 2. 2020: 95.

49 Ted Goertzel, "The path to more general artificial intelligence", *Journal of Experimental & Theoretical Artificial Intelligence* 26, no. 3. 2014: 343.

50 Bin Liu, *Weak AI" is Likely to Never Become "Strong AI", So What is its Greatest Value for us?*. arXiv:2103.15294. https://arxiv.org/pdf/2103.15294.pdf.

of the scenarios for which they are programmed,"[51] "for example, there's AI that can beat the world chess champion in chess, but that's the only thing it does." [52] It should also be emphasized that ANI "remains important and especially useful for humans on laborious and repetitive tasks, as machines are more efficient and accurate, which in turn shortens the decision cycles of the human."[53] In this connection, the fundamental question may of course arise of how ANI works differently from the "traditional" program that underlies the operation of, for example, a calculator. In order to explain this difference, the ability of an artificial intelligence unit to independently learn (so-called "machine learning"[54]) should be indicated. Specifying the way of understanding the cited concept, it should be indicated that its purpose is "to develop methods that can automatically detect patterns in data, and then to use the uncovered patterns to predict future data or other outcomes of interest."[55] To illustrate the difference between a "traditional device" and an artificial intelligence unit, one can refer to the aforementioned chess game. An "unintelligent" device will only make moves on the board that are captured in its software. However, for an artificial intelligence unit it will be enough to equip its resources with knowledge about the rules of chess. Already on this basis, the right program will be able to independently decide on the next moves and adapt to the opponent's strategy. An important feature of an artificial intelligence unit is also the fact that, unlike "traditional" programs, "they are, by nature, adaptive to changes in the environment they interact with."[56]

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51 Nicolas Miailhe, and Cyrus Hodes, "The Third Age of Artificial Intelligence", *Field Actions Science Reports. The journal of field actions*, no.17 (Special Issue). 2017: 9.

52 Olga Strelkova, *Three Types of Artificial Intelligence*. 2017. <http://eztuir.ztu.edu.ua/handle/123456789/849>, access: 17.10.2022.

53 Gee-Wah Ng, and Wang Chi Leung, "Strong Artificial Intelligence and Consciousness", *Journal of Artificial Intelligence and Consciousness* 7, no. 1. 2020: 64.

54 Ethem Alpaydin, *Machine Learning*. Massachusetts, 2021.

55 Kevin P. Murphy, *Machine Learning A Probabilistic Perspective*. Massachusetts, 2012, XXVII.

56 Yosri Ghorbel, *Machine learning*. Medium, 31.01.2020. <https://medium.com/@yosrig1997/machine-learning-653ff9123510>, access: 17.10.2022.

Extracting the Evidence from Artificial Intelligence

The provisions of the Code of Administrative Procedure contain regulations specifying the principles of taking particular types of evidence, such as, inter alia, the inspection or testimony of a witness. This type of evidence is known as named evidence. Alongside this, unnamed evidence can also be distinguished. Based on Article 75 of the Code of Administrative Procedure, it can be said that this concerns everything that has not been regulated in the Code of Administrative Procedure that may contribute to the clarification of the matter, and that is lawful. The key issue in this respect is the use of the word "everything" in the cited provision. As noted in the doctrine, "this provision clearly indicates a very broad approach to evidence: the word «everything» should be understood as the totality of things, the totality of cases, the entire collection (*Słownik języka polskiego*..., vol. III, p. 721)."[57] From this perspective, it can be concluded that, by definition, proof from artificial intelligence will be acceptable. It should be made clear here that, as a rule, the artificial intelligence unit itself will not constitute evidence within the meaning of the Code of Administrative Procedure. However, it should be assumed that exceptions to this rule will be possible, i.e. situations where a given piece of software will be the subject of evidence proceedings. An example may be the proceedings before the President of the Personal Data Protection Office, where the subject of the analysis may be the correctness of personal data processing based on a given algorithm.

As mentioned above, the rule will be a situation where the proof will not be an artificial intelligence unit, but its product, such as, for example, the identification of a vehicle that is illegally occupying a road lane. Therefore, it can be said that in this respect the evidence from artificial intelligence has an analogous character to the previously mentioned named evidence. The subject

57 Grzegorz Łaszczyca, and Czesław Martysz, "Komentarz do art. 75" in *Kodeks postępowania administracyjnego. Komentarz.* Tom I. *Komentarz do art. 1–103*, eds. Andrzej Matan, Grzegorz Łaszczyca, and Czesław Martysz. Warszawa, 2010. <https://sip.lex.pl/#/commentary/587229745/83479/laszczyca-grzegorz-martysz-czeslaw-matan-andrzej-kodeks-postepowania-administracyjnego-komentarz...?cm=URELATIONS>, access: 17.10.2022.

of evidence from the witness is not his or her person, but his or her testimony. Likewise, the party's evidence is its statement.

Supplementing the above, it should be explained how the proof is created from an artificial sequence. Therefore, first of all, it is necessary to indicate what it is made of. Two possibilities can be distinguished in this respect. First of all, it is necessary to point to the data that has been provided to an artificial intelligence unit by a human and at the same time those that it has obtained from the available collections, e.g. from digitized documents that are in the database of a given office. In short, it is a situation where the entirety of the data used by an AI unit comes "outside of it." The second variant is a situation where the artificial intelligence unit relies on data that it "collects on its own," e.g. from the monitoring it supervises. Regardless of the origin of the data, the proof will be the result of their analysis. So this can be compared with the result of the laboratory tests that provide evidence in the case.

When talking about the method of creating evidence from artificial intelligence, one should secondly refer to the previous point of consideration in the section on machine learning. On this basis, it can be said that the evidence from artificial intelligence is distinguished by the fact that it arises as a result of the "independent" processing of data by given devices. In this connection, however, the question may arise of whether a separate method of obtaining specific evidence alone allows for its distinction. It could be argued that intelligent evidence is in fact of the same nature as information obtained with the use of "normal" computer hardware. However, the difference comes down to the level of technical advancement of the devices used to obtain evidence. Such a claim would seem to be justified in cases where the use of artificial intelligence will differ from obtaining other evidence, since with its help obtaining relevant information will be much faster. On the other hand, it cannot be ignored that the fact of establishing the same using various means of evidence (e.g. witness testimony and inspection) does not deprive the latter of the

status of separate evidence within the meaning of the Code of Administrative Procedure.

In connection with the above, it should be emphasized that "ordinary" electronic devices are based only on what is introduced into them by a human. Moreover, such devices can only take such actions that were foreseen by human beings. In other words, their use is simply a human action, which facilitates their work, but at the same time a human being could come to the same conclusions without the given device. For example, you can use a calculator instead of making calculations yourself. However, as was mentioned earlier, in the case of using artificial intelligence units, it is enough to set them a task, and on this basis an "intelligent" device is able to achieve the desired result.

Next, it is necessary to point out the specific difficulties associated with verifying the correctness and truthfulness of the evidence provided by artificial intelligence. In the case of using information obtained by means of "traditional" electronic equipment, it is easy to determine what data was entered into the computer and what activities were performed with it (e.g. making a complex calculation). It is different in the case of the operation of an artificial intelligence unit. In such a case, only the task entrusted to such a device is known, and possibly the output data (i.e. information provided by a human). In the context, however, it is worth mentioning that this output data may be entirely or partially omitted by an artificial intelligence unit. In the same way, a given device can select data unknown to a human for its task. In short, in the case of obtaining evidence from artificial intelligence, the way in which it was developed is not known. In the literature, this issue is referred to as the black box problem.[58] On the other hand, one could of course say that in the case of using "ordinary" devices, the model of their operation is known, but not necessarily the way. The point is that an exemplary employee of a public administration body usually does not know how a computer works in the sense that he does

58 More: Yavar Bathaee, "The Artificial Intelligence Black Box and the Failure of Intent and Causation", *Harvard Journal of Law & Technology* 31, no. 2. 2018: 890–938.

not know how the individual components of such a device are connected and on what principles they perform their tasks. Returning, however, to the issue under analysis, it is worth emphasizing that the mode of operation of "ordinary" devices can be explained by their manufacturers and specialists in the field of technical and engineering. In turn, when it comes to artificial intelligence units, due to the above-mentioned black box, the problem is that it is not known how the device reaches its findings.

In connection with the above, the verification of the correctness of the findings of the artificial intelligence unit should proceed in a different way than in the case of other evidence. For this reason, it may be proposed that the use of artificial intelligence evidence is admissible, as long as the circumstances demonstrated on its basis can be proved in a different way. Otherwise, there will be no certainty as to the correctness of the findings made by an artificial intelligence unit. Therefore, two acceptable process scenarios can be distinguished. In the first place, it is possible to envisage a situation where there is simply other evidence confirming the findings of artificial intelligence. The situation in which obtaining evidence from artificial intelligence becomes the basis for working out a method of obtaining other means of evidence may also be considered admissible. An exception to the above-described prohibition to limit oneself in administrative proceedings only to evidence from artificial intelligence will be a situation in which, on the basis of this evidence, it will be possible to determine the manner in which it determined the actual situation in a given case. In other words, based on the outcome (that is, the circumstances shown by "intelligent" evidence) it will be possible to recreate the "line of thought" of the artificial intelligence.

In the context of the above, it is worth emphasizing that it seems unnecessary to amend the Code of Administrative Procedure. The explanation of the method of resolving an administrative case and the obligation to maintain clarity and the clarity of the actions taken by public administration bodies are already set out in Art. 8, 9 and 11 of the Code of Administrative Procedure.

Finally, it can be noticed that the methods of falsifying the findings of artificial intelligence are generally of a different nature than in the case of other evidence. There are two possibilities in this respect. In the first place, it is possible to indicate a malfunction of a specific device, which is the result of defects in its software. This concerns, in particular, cases of inappropriate selection of data or their improper combination in a cause-and-effect relationship. Incorrect operation of a given artificial intelligence unit may also be the result of inappropriate human behavior, including illegal actions. This concerns, in particular, cases of entering incorrect data into the device as well as interference in the operating mechanism of an artificial intelligence unit, e.g. by introducing a virus into the software.

On the basis of the above, it can first be concluded that the evidence from artificial intelligence is rather open to manipulation. Taking into account the aforementioned difficulty related to the verification of the "way of thinking" of artificial intelligence, it may turn out that verifying the correctness of the "intelligent" evidence may be significantly more difficult. On the other hand, however, it should be pointed out that even the aforementioned named evidence may be manipulated in a way that significantly impedes the detection of its irregularities, e.g. when the testimony of a witness was given as a result of blackmail. It should also be pointed out that on the basis of the previously proposed rules of evidence proceedings with the use of "intelligent" evidence, the aforementioned dangers can be eliminated.

Bearing in mind such a specificity of the operation of artificial intelligence, it can be said, with some simplification, that "intelligent evidence" is the result of the analysis of data possessed by the software. Thus, it is not, as in the case of witness testimonies, a direct description of a specific factual state. Accordingly, in the literature, evidence from artificial intelligence is often classified as hearsay. It also seems that providing "intelligent proof" can be treated as a kind of trial experiment. For example, it can serve to reconstruct the method and scope of contributing to environmental pollution by throwing waste in a place not intended for it.

Supplementing the above, it should be clearly indicated that in the case of artificial intelligence arrangements being used by any participant in the administrative procedure, two process scenarios should be considered. First, it may be a situation where only AI findings are reported (e.g. in the form of a party's statement). In such a case, it should be assumed that there is only "intelligent" evidence in the case. The second trial scenario assumes that the evidence from artificial intelligence appears in the case as a specific element of other evidence. This is, in particular, the case of an expert opinion, which was formulated using the findings of an artificial intelligence unit. As it has already been pointed out, it is impossible to equate "ordinary" and "intelligent" devices, because the latter somehow independently determines the mode of its operation. Consequently, the expert opinion given as an example should contain a recreation of the reasoning of the artificial intelligence unit. The mere comment on its findings will not be verified by the authority conducting the proceedings precisely because of the repeatedly mentioned "machine learning."

The above comments therefore lead to the conclusion that the evidence from artificial intelligence can be distinguished from other means of evidence. Nevertheless, it should be remembered that the status of the evidence depends on the fulfillment of the conditions set out in Art. 75 of the Code of Administrative Procedure, which will be considered in more detail later in the discussion.

The Prerequisite for Contributing to the Clarification of the Matter

At the outset, it should be recalled that pursuant to Art. 75 § 1 of the Code of Administrative Procedure, only what may contribute to the clarification of the case may be considered evidence. "Therefore, only facts relevant to the resolution of the case can be the subject of evidence."[59] On the other hand, as mentioned

59 Sadowska.

before, it does not matter "what" contributes to the explanation, so it may be the result of artificial intelligence, as long as it has not been illegally obtained.

When it comes to the possibility of contributing to the clarification of the facts, the most important is undoubtedly the fact that proving certain circumstances may only be possible with the use of artificial intelligence. This therefore concerns cases in which the reconstruction of the actual state is impossible due to the limitations of the human mind. It is obvious that "with more and more available digitally recorded data, it becomes obvious that there are treasures of meaningful information buried in data archives that are way too large and too complex for humans to make sense of."[60]

Secondly, as already indicated, the operation of an artificial intelligence unit is much faster than that of humans and "traditional" devices. Therefore, the findings of an artificial intelligence unit may set the direction of the taking of evidence. Thus, the stage of arduous searching for all possible evidence may be skipped, and instead concentrating on that which is actually relevant to the clarification of the case.

Third, unlike other kinds of evidence, the AI unit's findings are essentially objective (impartial).[61] Such devices do not have their own preferences or tendency to ignore facts that are inconvenient for them. To put it simply, the point is that machines are devoid of human feelings. Of course, in this context, it can be indicated that the artificial intelligence unit depends on the preferences of the programmer. On the other hand, the possible negative influence of the programmer may be eliminated by the AI unit itself in the course of its learning, e.g. by analyzing the way of considering similar matters. Moreover, as indicated earlier, it is proposed to exclude the possibility that the evidence from artificial intelligence should be the only means of evidence in the case.

60 Shai Shalev-Shwartz, and Shai Ben-David, *Understanding Machine Learning: From Theory to Algorithms*. New York, 2014, 22.

61 Giampiero Lupo, "Regulating (Artificial) Intelligence in Justice: How Normative Frameworks Protect Citizens from the Risks Related to AI Use in the Judiciary", *European Quarterly of Political Attitudes and Mentalities* 8, no. 2. 2019: 86.

As mentioned at the beginning of the considerations, when it comes to the activities of public administration in the context of evidence, only the Act of August 29, 1997 Tax Ordinance (hereinafter referred to as op)[62] mentions artificial intelligence. It concerns the provisions of Art. 119zn § 2 op on so-called automated data processing. Pursuant to Art. 119zn § 1 of the Act, this action is taken in connection with the analysis of the risk of using the activities of banks and cooperative savings and credit unions. This risk analysis is performed for tax fraud purposes. Attention is drawn to the fact that Art. 119zn § 1 of the Act clearly indicates that in order to carry out the aforementioned risk analysis, it is obligatory not only to use evidence from artificial intelligence (i.e. the result of the abovementioned automated data processing) but also other data (including information and summaries described in detailed provisions of op). It can therefore be said that the legislator, in the wording of Art. 119zn § 1 of the Tax Ordinance Act established a protective mechanism that allows the dangers described in the previous point of considerations to be prevented.

Inadmissibility of Evidence from Artificial Intelligence

Based on the division into indirect and direct evidence adopted in the doctrine, it is proposed that the evidence from artificial intelligence should be divided in this way as well. Therefore, it can be assumed that the artificial intelligence unit itself will be direct evidence. There are two types of inadmissibility with regard to this type of evidence. First of all, it is necessary to mention a situation where an artificial intelligence unit has been obtained unlawfully. In this context, one can point to, for example, the theft of an artificial intelligence unit and then using it as evidence in the course of administrative proceedings. The second type of illegal direct evidence will be all those cases where an artificial intelligence unit has been illegally constructed. For example, it may be a situation where the creation of a given mechanism did not comply with the rules of patent law.

62 Journal of Laws of 2021, item 1540.

In addition, it should be emphasized that an illegal artificial intelligence unit may be used as evidence in administrative proceedings if its evidentiary significance is related to the fact of its non-compliance with the law. In addition to direct evidence, one can distinguish indirect evidence from artificial intelligence. We are talking here about the effects of its use. First of all, we can mention the forecasts of future events. For example, it may be an environmental assessment where the environmental impact of a planned (future) investment is examined. Another type of indirect evidence from artificial intelligence may be the verification of the facts in terms of meeting the requirements provided for in the law. By way of example, this can be an assessment of the implementation of remediation. The last type of indirect evidence from artificial intelligence could be an attempt to reconstruct the actual state of the past events, e.g. assessing how the soil was contaminated.

Bearing the above in mind, it should be assumed that the illegality of artificial intelligence analyses is of a consequential nature, i.e. resulting either from it or the way it is used. In the first case, it would be a situation where the artificial intelligence unit itself is illegal (e.g. it was stolen). It is obvious then that neither would its use be in accordance with the law. When it comes to the illegal use of artificial intelligence, two more cases can be distinguished in this respect. First of all, it is necessary to point out the situation where an unauthorized entity uses an artificial intelligence unit. For example, this would be the case if an office employee is excluded by law in a given proceeding. Secondly, there are cases where an artificial intelligence unit operates on illegal information. For example, it may be personal data obtained contrary to the provisions of the GDPR.[63]

Summing up the considerations presented above, it should be noted that the described types of illegal evidence from artificial intelligence fall within the formula specified in Article 75 of the Code of Administrative Procedure. Thus, it can be said that the code regulations on evidence are also adequate in the case of

63 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (OJ L 119, 4.5.2016, 1–88).

evidence involving artificial intelligence. In addition, it should be remembered that for the purposes of this article, software is considered artificial intelligence. In this context, it should be noted that the way it is programmed is also of great importance to the AI evidence. Two points should be noted. First, a malfunction of the artificial intelligence (e.g. failure to take into account relevant data) can be regarded as tantamount to a breach of the obligation to take complete evidence. In other words, in such a case, it is possible to speak of an infringement of Article 7 and 77 §1 of the Code of Administrative Procedure.[64] Secondly, it should be pointed out that pursuant to Articles 8 §1, 9 and 107 §1 point 6 and §3 of the Code of Administrative Procedure,[65] the authority is obliged not only to properly handle the case, but also to clearly present its course of reasoning, both in the course of administrative proceedings and in the justification of the issued decision. On this basis, it can be assumed that it will be illegal to use artificial intelligence units in a manner that is unclear to the party to the administrative procedure. As indicated above, the obligation to ensure the clarity of decisions results from the provisions of law. On this basis, it should be concluded that it is

64 Article 7 of the Code: In the course of the proceedings public administration authorities shall safeguard the rule of law and undertake, ex officio or upon application, any actions necessary to accurately clarify the facts of a matter and to dispose of the matter, taking into account the public interest and just interest of citizens.
Article 77 §1 of the Code: A public administration authority shall exhaustively collect and evaluate all evidence.

65 Article 8 § 1 of the Code: Public administration authorities shall conduct the proceedings in such a manner as to deepen the trust of its participants in the public authorities, abiding by the principles of proportionality, impartiality and equal treatment.
Article 9 of the Code: Public administration authorities shall duly and fully inform the parties on factual and legal aspects which may influence the establishment of the parties' rights and duties being the object of the proceedings. The authorities shall safeguard the parties and other persons participating in the proceedings, so that neither the parties nor the persons suffer any damage due to their ignorance of law and to this end the authorities shall furnish the parties and persons with necessary explanations and guidelines.
Article 107 §1 point 6 and §3 of the Code: A decision should include factual and legal reasons. Factual reasons of the decision shall in particular include the following: identification of facts which the authority considered to be proven, evidence on which the authority relied and reasons why the authority refused to consider other evidence as credible and refused to rely thereon; the legal reasons shall in particular include an explanation of the legal basis of the decision with citation of the provisions of law.

not necessary to adjust the Code of Administrative Procedure due to the evidence being derived from artificial intelligence.

Summary

When in 1956 John McCarthy introduced the concept of artificial intelligence into scientific circulation, no one could have expected that half a century later, such devices would not only become an element of the consumer world, but would also be systematically introduced into the justice system. In fact, however, artificial intelligence evidence appears with increasing frequency in administrative proceedings.

The analysis carried out in this text leads to the conclusion that the Code of Administrative Procedure, which is eight years younger than the concept of artificial intelligence, contains sufficiently flexible evidence regulations that it is not necessary to amend this law to cover the use of evidence involving artificial intelligence. In this context, it should also be pointed out that there is no fundamental difference between evidence from artificial intelligence and "classic" evidence. Nevertheless, it must not be forgotten that the use of artificial intelligence is still a novelty in administrative proceedings. Therefore, it becomes necessary to develop standards of reliable information to the parties about the proceedings conducted on the basis of artificial intelligence technology.

References

Adamiak, Barbara. "Dowody i postępowanie wyjaśniające." In Barbara Adamiak, and Janusz Borkowski, *Postępowanie administracyjne i sądowoadministracyjne*. Warszawa, 2007: 203–239.

Adamiak, Barbara. "Komentarz do art. 75." In Barbara Adamiak, and Janusz Borkowski, *Kodeks postępowania administracyjnego. Komentarz*. Warszawa, 2021. <https://sip.legalis.pl/document-view.seam?documentId=mjxw62zogi3damrxgu3tcoboobqxalrvgmytemrzg44a#>, access: 02.05.2022.

Alpaydin, Ethem. *Machine Learning*. Massachusetts, 2021.

Ambrosetti, Nadia. *Cultural Roots of Technology: An Interdisciplinary Study of Automated Systems from the Antiquity to the Renaissance*. Dissertation, The University of Milan, 2010. <https://air.unimi.it › handle › phd_unimi_R07642>, access: 10.05.2022.

Bailey, Ronald. "Is Skynet Inevitable? Artificial intelligence and the possibility of human extinction." *Reason*, April. 2014. <https://reason.com/2014/03/31/is-skynet-inevitable>, access: 17.10.2022.

Bathaee, Yavar. "The Artificial Intelligence Black Box and the Failure of Intent and Causation." *Harvard Journal of Law & Technology* 31, no. 2. 2018: 890–938.

Batin, Mikhail, Alexey Turchin, Sergey Markov, Alice Zhila, and David Denkenberger. "Artificial Intelligence in Life Extension: from Deep Learning to Superintelligence." *Informatica*, no. 41. 2017: 501–505.

Brzozowski, Sebastian. "Dopuszczalność dowodu w kontekście regulacji art. 168a k.p.k." *Przegląd Sądowy*, no. 10. 2016: 60–74, <https://sip.lex.pl/#/publication/151295744/brzozowski-sebastian-dopuszczalnosc-dowodu-w-kontekscie-regulacji-art-168-a-k-p-k?cm=URELATIONS>, access: 10.05.2022.

Daniel, Paweł. *Administracyjne postępowanie dowodowe*. Wrocław, 2013.

Dawidowicz, Wacław. *Ogólne postępowanie administracyjne. Zarys systemu*. Warszawa, 1962.

Gadek, Błażej. "Bezprawny dowód z korespondencji internetowej stron w postępowaniu cywilnym." *Prawo Mediów Elektronicznych*, no. 3. 2018: 16. <https://sip.legalis.pl/document-full.seam?documentId=mjxw62zogi3damrrg44donc7onzg6zdupf2dg&refSource=guide#tabs-metrical-info>, access: 10.05.2022.

Gee-Wah Ng, and Wang Chi Leung, "Strong Artificial Intelligence and Consciousness." *Journal of Artificial Intelligence and Consciousness* 7, no. 1. 2020: 63–72.

Ghorbel, Yosri. *Machine learning*. Medium, 31.01.2020. <https://medium.com/@yosrig1997/machine-learning-653ff9123510>, access: 17.10.2022.

Goertzel, Ted. "The path to more general artificial intelligence." *Journal of Experimental & Theoretical Artificial Intelligence* 26, no. 3. 2014: 343–354.

Haan de, Hein. *How Some Experts Are Wrong About Artificial Superintelligence A critique of naïve views on our future*. Predict. Where the future is written,

13.10.2021. <https://medium.com/predict/how-some-experts-are-wrong-about-artificial-superintelligence-d45fa40a9d6b>, access: 17.10.2022.

Hassani, Hossein, Emmanuel Sirimal Silva, Stephane Unger, Maedeh TajMazinani, and Stephen Mac Feely. "Artificial Intelligence (AI) or Intelligence Augmentation (IA): What Is the Future ?." *AI*, no. 1. 2020:143–155.

Iserzon, Emanuel. "Komentarz do art. 70." In Emanuel Iserzon, and Jerzy Starościak. *Kodeks postępowania administracyjnego. Komentarz, teksty, wzory i formularze*. Warszawa, 1970: p.152–162.

Janowicz, Zbigniew. *Kodeks postępowania administracyjnego. Komentarz*. Warszawa, and Poznań, 1992.

Kanade, Vijay. *Narrow AI vs. General AI vs. Super AI: Key Comparisons*. Spiceworks, 25.03.2022. <https://www.spiceworks.com/tech/artificial-intelligence/articles/narrow-general-super-ai-difference/>, access: 17.10.2022.

Kędziora, Robert. *Kodeks postępowania administracyjnego. Komentarz*. Warszawa, 2017. <https://sip.legalis.pl/document-view.seam?documentId=mjxw62zogi3damjxgu2dgnboobqxalrtheytemjtge2a#tabs-metrical-info>, access: 10.05.2022.

Kmieciak, Zbigniew. *Postępowanie administracyjne, postępowania egzekucyjne w administracji i postępowanie sądowoadministracyjne*. Warszawa, 2011.

Kopeć, Marcin. "Glosa do wyroku NSA z dnia 2 grudnia 2008 r., II GSK 384/08." *Przegląd Prawa Publicznego*, no. 2. 2010: 89–96. <https://sip.lex.pl/#/publication/385988122/kopec-marcin-glosa-do-wyroku-nsa-z-dnia-2-grudnia-2008-r-ii-gsk-384–08?cm=URELATIONS>, access: 02.05.2022.

Korszeń, Dariusz. "Zakres zakazu przeprowadzania w postępowaniu cywilnym dowodów nielegalnych (bezprawnych)." *Monitor Prawniczy*, no. 1. 2013. <https://sip.legalis.pl/document-full.seam?documentId=mjxw62zoge2tkmbvgi3dsn27onzg6zdupf2dc&refSource=guide#tabs-metrical-info>, access: 10.05.2022.

Laskowska, Agnieszka. "Dowody w postępowaniu cywilnym uzyskane w sposób sprzeczny z prawem." *Państwo i Prawo*, no. 12. 2003: 88–101. <https://sip.lex.pl/#/publication/151036573/laskowska-agnieszka-dowody-w-postepowaniu-cywilnym-uzyskane-w-sposob-sprzeczny-z-prawem?cm=URELATIONS>, access: 10.05.2022.

Liu, Bin. *Weak AI" is Likely to Never Become "Strong AI", So What is its Greatest Value for us?*. arXiv:2103.15294. https://arxiv.org/pdf/2103.15294.pdf.

Lupo, Giampiero. "Regulating (Artificial) Intelligence in Justice: How Normative Frameworks Protect Citizens from the Risks Related to AI Use in the Judiciary." *European Quarterly of Political Attitudes and Mentalities* 8, no. 2. 2019: 75–96.

Łaszczyca, Grzegorz, and Czesław Martysz. "Komentarz do art. 75." In *Kodeks postępowania administracyjnego. Komentarz.* Tom I. *Komentarz do art. 1–103*, edited by Andrzej Matan, Grzegorz Łaszczyca, and Czesław Martysz. Warszawa, 2010. <https://sip.lex.pl/#/commentary/587229745/83479/laszczyca-grzegorz-martysz-czeslaw-matan-andrzej-kodeks-postepowania-administracyjnego-komentarz...?cm=URELATIONS>, access: 17.10.2022.

Łupkowski, Paweł. *Test Turinga. Perspektywa sędziego*. Poznań, 2020.

Mayor, Adrienne. *Gods and Robots Myths, Machines, and Ancient Dreams of Technology*. Princeton, and Oxford, 2018.

McCorduck, Pamela. *Machines Who Think: A Personal Inquiry into the History and Prospects of Artificial, Intelligence*. Natick, 2004.

Miailhe, Nicolas, and Cyrus Hodes. "The Third Age of Artificial Intelligence." *Field Actions Science Reports. The journal of field actions*, no.17 (Special Issue). 2017: 6–11.

Michie, Donald. "Turing's Test and conscious thought." *Artificial Intelligence*, no. 60. 1993: 1–22.

Muggleton, Stephen. "Alan Turing and the development of Artificial Intelligence." *AI Communications* 27, no. 1. 2014: 3–10.

Murphy, Kevin P. *Machine Learning A Probabilistic Perspective*, Massachusetts, 2012.

Nand Patel, Krishna, Sachin Raina, and Saurabh Gupta. "Artificial Intelligence and its Models." *JASC: Journal of Applied Science and Computations* 7, iss. 2. 2020: 95–97.

Pawlak, Agata, and Katarzyna Firaza. "Polska koncepcja „owoców zatrutego drzewa". Artykuł 168a k.p.k. w kontekście doktryny amerykańskiej." In *Verba volant,*

scripta manent. Proces karny, prawo karne skarbowe i prawo wykroczeń po zmianach z lat 2015–2016. Księga pamiątkowa poświęcona Profesor Monice Zbrojewskiej, edited by Tomasz Grzegorczyk, and Radosław Olszewski. Warszawa, 2017. <https://sip.lex.pl/#/monograph/369404606/345330>, access: 10.05.2022.

Pohl, Jens. "Artificial Superintelligence: Extinction or Nirvana?." In *Proceedings for InterSymp-2015, IIAS, 27th International Conference on Systems Research, Informatics, and Cybernetics, August 3–18, Baden-Baden, Germany*. 2015, 1–19.

Przybysz, Piotr Marek. *Kodeks postępowania administracyjnego. Komentarz aktualizowany*. LEX/el., 2022. <https://sip.lex.pl/#/commentary/587751140/677368/przybysz-piotr-marek-kodeks-postepowania-administracyjnego-komentarz-aktualizowany?cm=URELATIONS>, access: 10.05.2022.

Reeves, Nicholas. "A Rare Mechanical Figure from Ancient Egypt." *Metropolitan Museum Journal* 50. 2015: 43–61.

Sadowska, Monika. "Komentarz do art. 75." In *Kodeks postępowania administracyjnego*. Tom II. *Komentarz do art. 61–126*, edited by Mirosław Karpiuk, Przemysław Krzykowski, and Agnieszka Skóra. Olsztyn, 2020. <https://sip.lex.pl/#/commentary/587841192/638632/karpiuk-miroslaw-red-krzykowski-przemyslaw-red-skora-agnieszka-red-kodeks-postepowania...?cm=URELATIONS>, access: 02.05.2022.

Sadiku, Matthew N. O., Olaniyi D. Olaleye, Abayomi Ajayi-Majebi, and Sarhan M. Musa, "Artificial General Intelligence: A Primer." *International Journal of Trend in Research and Development* 7, no. 6. 2020: 7–9.

Sądel, Bartosz. "Sztuczna Inteligencja – czyli gdzie jesteśmy i dokąd zmierzamy?." *Zeszyty Studenckiego Ruchu Naukowego Uniwersytetu Jana Kochanowskiego w Kielcach* 24. 2015: 151–158.

Shalev-Shwartz Shai, and Shai Ben-David. *Understanding Machine Learning: From Theory to Algorithms*. New York, 2014.

Shchitova, Anastasia. "Definition of Artificial Intelligence for Legal Regulation, Advances in Economics." In *2nd International Scientific and Practical*

Conference on Digital Economy (ISCDE 2020), edited by Anton Nazarovp. Dordrecht and Paris and Zhengzhou, 2020, 616–620.

Skorupka, Agnieszka. "Pojęcie dowodów bezprawnych (nielegalnych, sprzecznych z prawem)." In *Dowody w postępowaniu cywilnym*, edited by Łukasz Błaszczak. Warszawa, 2021. <https://sip.legalis.pl/document-full.seam?documentId=mjxw62zogi3damzygq2dmmq#>, access: 02.05.2022.

Stefański, Ryszard A. "Dowód uzyskany z naruszeniem przepisów postępowania lub za pomocą czynu zabronionego." In *Postępowanie przed sądem I instancji w znowelizowanym procesie karnym*, edited by Dariusz Kala, and Igor Zgoliński. Warszawa, 2018. <https://sip.lex.pl/#/monograph/369430322/347178>, access: 10.05.2022.

Strelkova, Olga. *Three Types of Artificial Intelligence*. 2017. <http://eztuir.ztu.edu.ua/handle/123456789/849>, access: 17.10.2022.

Suwaj, Robert. *Judycjalizacja postępowania administracyjnego*. Warszawa, 2009. <https://sip.lex.pl/#/monograph/369198202/165542>, access: 02.05.2022.

Szopieraj-Kowalska, Aleksandra. "Dowody i postępowanie dowodowe według kodeksu postępowania administracyjnego i ordynacji podatkowej." *Studia z zakresu nauk prawnoustrojowych*, no. 2. 2012: 207–222.

Turing, Alan M. "Computing Machinery and Intelligence." *Mind*, no. 49. 1950: 433–460.

Wang, Pei, and Ben Goertzel. "Introduction: Aspects of Artificial General Intelligence." In *Advances in Artificial General Intelligence: Concepts, Architectures and Algorithms: Proceedings of the AGI Workshop 2006*, edited by Ben Goertzel, and Pei Wang. Amsterdam, 2007: 1–16.

Waser, Mark R. "What Is Artificial General Intelligence? Clarifying The Goal For Engineering And Evaluation." In *Proceedings of the 2nd Conference on Artificial General Intelligence*. 2009. <https://www.atlantis-press.com/proceedings/agi09/1832>, access: 17.10.2022.

Wilk, Anna. "Dowody pozyskane z naruszeniem prawa i zasad współżycia społecznego w orzecznictwie sądów cywilnych." *Monitor Prawniczy*, no. 21.

2018. <https://sip.legalis.pl/document-full.seam?documentId=mjxw62zogi-3damrrge4teny>, access: 02.05.2022.

Wróbel, Andrzej. "Komentarz do art. 75." In *Komentarz aktualizowany do Kodeksu postępowania administracyjnego*, edited by Małgorzata Jaśkowska, Martyna Wilbrandt-Gotowicz, and Andrzej Wróbel. LEX/el., 2022. <https://sip.lex.pl/#/commentary/587260174/673629/jaskowska-malgorzata-wilbrandt-gotowicz-martyna-wrobel-andrzej-komentarz-aktualizowany-do-kodeksu...?cm=URELATIONS>, access: 02.05.2022.

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The Qualification of Action in Administrative Justice and its Perils – the Czech Experience[1]

Abstract: This paper concerns the system of the 'main' types of administrative action in the Czech administrative justice, more precisely the qualification of the 'correct' type of an action. The boundaries between action types are not always clear, which has consequences for the protection of applicants' rights in the administrative justice proceedings. The first part of the paper deals with the theoretical level of the problem outlined. The second part deals with some recent changes in Czech case law and proposes possible solutions.

Keywords: Administrative Justice, Type of Action, Qualification of Action in Administrative Justice, Administrative Decision, Unlawful Interference, Boundaries between Actions, Administrative Act.

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Introduction

The importance of administrative justice seems unquestionable across the legal systems of European countries. It constitutes one of the key features of the rule of law and enables the executive to be controlled by independent and impartial courts. However, the path to justice is not always simple. Access to justice is influenced by a number of legal conditions and potential obstacles. These can be court fees, the possible obligation to be represented by a legal professional (and the related accessibility of free legal aid), or the clarity and 'user-friendliness' of relevant legislation.

According to Zrvandyan, administrative justice places most of the responsibility on the private person to initiate administrative proceedings against the state. Moreover, judicial systems can often be difficult for individuals to understand.[2] Navigating the procedural regulation contained in the Code of Administrative Justice[3] seems to be somewhat problematic also for the Czech administrative judiciary.

The aim of this article is to present, from our point of view, the most notable conceptual problem of the CAJ at the moment. This is related to the definition of the 'main' types of actions in Czech administrative justice, or more precisely to the qualification of the 'correct' type of action (claim) in an environment of unclear boundaries between these types and its possible implications. With this in mind, the article is divided into two parts. The first part deals with the theoretical level of the outlined problem. The second part discusses some recent developments in the Czech case-law closely related to the subject and finally suggests some possible solutions.

The Basics of the Czech Administrative Justice System

The administrative justice system in the Czech Republic is of single instance, but it does provide for the possibility of a cassation complaint as a so-called

2 Arman Zrvandyan, *Casebook on European fair trial standards in administrative justice*. Strasbourg, 2016, 10.

3 Act No. 150/2002 Coll. Hereinafter: CAJ.

extraordinary remedy.[4] Thus, in addition to the administrative courts at the regional level, the Supreme Administrative Court[5] is also part of the system. The primary intended role of the SAC is to unify the case-law of administrative courts. This is done through its extended chamber. Three-member chambers of the SAC may refer cases to the extended chamber if they have a legal opinion that is different from previous decisions or find a conflict in the case-law. However, the case-law unifying role of the SAC is continually weakening due to the increasing number of cassation complaints.[6] A similar trend can also be observed in the Polish administrative justice.[7]

In Czech law there are three 'main' (rudimental) types of actions that can be used when accessing an administrative court: an action against a decision of an administrative authority, an action against an unlawful interference, instruction or enforcement[8] of an administrative authority, and an action for protection against the inaction of an administrative authority.[9] These action types do not represent the whole scheme of action types regulated in the CAJ. The scope of CAJ is wider, containing *inter alia* disciplinary proceedings with judges, prosecutors and executors, electoral matters, and competence matters.

The concept of categorisation (or classification) of action types in administrative judicial proceedings is of course not specific to the Czech legislation. German law distinguishes between several different types of administrative action that are related to single-case decisions, general administrative acts, public law contracts, by-laws, executive regulations, and administrative direc-

4 It must be noted that the administrative judicial system in the Czech Republic is not two-instanced. However, in its current form the cassation complaint is close to an appeal, therefore the role of the SAC oftentimes resembles that of an appellate instance (which has been criticised by some authors).

5 Hereinafter: SAC.

6 Data on the increase in the number of cassation complaints is available at the webpage of SAC: <http://www.nssoud.cz/main2Col.aspx?cls=Statistika&menu=190>.

7 See Wojciech Piątek, "Access to the highest administrative courts: between a right of an individual to hear a case and a right of a court to hear selected cases", *Central European Public Administration Review* 18, no. 1. 2020.

8 Hereafter: unlawful interference.

9 See (in order): Article 65 CAJ *et seq.*, Article 82 CAJ *et seq.*, Article 79 CAJ *et seq.*

tions. For each type of administrative action or inaction, a corresponding type of review procedure is applicable. In France, the boundary between different types of administrative action runs between unilateral and bilateral measures (administrative decisions versus contracts). On the other hand, in the common law system, judicial review is independent of a strict classification of administrative action. In English administrative law, the central question is whether a certain remedy can be obtained against the administration.[10]

From a historical perspective, a comparison with the recent Slovak legislation[11] could also be made. Slovak regulation of administrative justice includes a much more specific subdivision of action types, namely a general administrative action, an action in matters of administrative punishment, an action in matters of social security, and an action in matters of asylum, detention and expulsion. However, the list of types of action does not end there – one can also find an action against the inaction of an administrative authority or an action against another intervention of a public administration body. As in the case of the Czech CAJ, the list includes special proceedings in electoral or competence matters and more. For the purposes of this paper these specific types of proceedings are not considered.

Determination of the type of action is closely connected to protection of the public subjective rights of applicants and their right to a fair trial. The classification of administrative acts cannot therefore serve as an acceptable justification for the limitation of the right of access to court.[12] The problem of unclear classification was also strongly manifested in the context of the COVID-19 pandemic and the related judicial review of public administration acts. In the context of the pandemic, there were also legislative proposals for much

10 For more detailed discussion, see Mariolina Eliantonio, and Franziska Grashof, "Types of Administrative action and corresponding review" in *Cases, materials and text on judicial review of administrative action*, eds. C. Backes, and M. Eliantonio. Oxford, 2019, 190–197.

11 Act No. 162/2015 Coll., Správny súdny poriadok.

12 In the context of drawing boundaries between normative and individual administrative acts, see Zrvandyan, 66 and the case-law of the ECHR cited there.

less formalised administrative decision-making, such as quarantine imposed through an SMS.[13]

The Problem of Non-Standard Administrative Acts

In the Czech administrative justice system, the problem of unclear boundaries between types of actions under the CAJ arises especially (but not exclusively) in the context of distinguishing between an action against a decision of an administrative authority and an action for protection against unlawful interference. In our view, the difficulties in distinguishing between the categories of decision and unlawful interference within the scope of the CAJ lie mainly in their essentially *material definition* (definition based on material effects, not formal characteristics). More precisely, this is how a decision is defined under the CAJ (as an act of an administrative authority having the effects commonly attributed to an administrative decision without the act having to be legally designated as such), while unlawful interference is defined mostly negatively in relation to a decision (therefore a decision cannot be an unlawful interference and *vice versa*), which leads to the existence of a certain 'grey area' between these categories. Consequently, it is this grey area that the administrative courts and even more significantly the claimants must navigate.

The fact that the choice of a 'correct' type of action can be difficult is illustrated by the case-law of the SAC, which after approximately seven years proceeded to change the previously applied approach for the judicial review of administrative acts legally identified in the Czech law as 'approvals' under the Building Act, which are procedurally not administrative decisions according to the Code of Administrative Procedure.[14] The SAC first chose the form of unlawful interference for the review of these acts. Later, however, it moved

13 This regulation is contained in the amended version of the so-called Pandemic Act intended for the implementation of certain restrictive measures in connection with the COVID-19 pandemic (Act No. 94/2021 Coll.).

14 Act No. 500/2004 Coll. Hereinafter: CAP.

towards reviewing these acts as decisions within the meaning of Article 65(1) CAJ. This was mainly because the initial qualification did not lead to the effective judicial protection of applicants.[15]

Approvals under the Building Act in particular appear to be a good example of what could be described as non-standard or 'borderline' administrative acts. However, many more similar acts can be found in practice. Administrative courts have recently dealt, for example, with the nature of the judicial review of an administrative authority's request to remove an advertising device, a measure to withhold a subsidy, a resolution of a regional assembly, a reprimand to a public prosecutor, a 'notification' of a request for a review of a matriculation examination, or, most recently, the opinion of an expert committee for the implementation of gender reassignment for transsexual patients.

It should be emphasized that the non-standard acts of administrative authorities mentioned above do not occur frequently in practice. These are therefore rather exceptional situations. At the same time, however, it can be pointed out that their usage in the Czech administrative law seems to be on the rise. Secondly, although the consequences of such acts may not be significant in numbers, the use of such non-standard acts may nevertheless have negative impacts in individual cases.

Negative Impacts of Non-Standard Administrative Acts

The first and probably most significant potential consequence of the unclear boundaries between types of action in administrative justice is that the applicant does not choose the appropriate type of action. More precisely, this consequence is the non-adjudicability of the action (on its merits).

15 Which has also been pointed out in the literature, e.g. see Josef Vedral, "K některým otázkám přezkumu „souhlasů" podle stavebního zákona", *Stavební právo – Bulletin*, no. 2. 2015: 19–20.

The central question is to what extent the failure to provide judicial protection in that context can be attributed to the applicant. It may be pointed out that the Czech administrative justice system does not, with the exception of proceedings before the SAC, require the applicant to be represented by a person with legal training (nor does the applicant need such training). Therefore, in some cases it can be very difficult, if not impossible, for applicants to correctly classify their claim.

Regardless of the question of legal representation, the essence of the problem is that while in simple cases, which make up the vast majority, the classification of standard administrative actions is a rather trivial and largely imperceptible step. In the case of non-standard acts, this step becomes a separate legal question, the resolution of which may be far more complex than the merits of the case. In principle, it does not seem appropriate to base the applicants' access to the administrative courts on the correct 'answer' to that question.

Secondly, it can also be argued that a distinction is being drawn between applicants, who can be divided into two groups – one which is allowed to sue 'directly' and the other which is in a sense disadvantaged by the procedural ambiguity of the contested administrative act. It should be emphasized, however, that the State is usually the originator of this ambiguity, both in terms of normative language and in terms of application by the administrative authorities. In our view, it is therefore primarily the responsibility of the State to facilitate the applicants' position.

However, the case-law of the administrative courts did not follow this assumption at first. The SAC has, in fact, routinely held that an applicant's incorrect choice of the type of action should lead to the procedural dismissal of the action. Nevertheless, this practice has been surpassed by two jurisprudential shifts. Firstly, the case-law of the SAC (following the findings of the Czech Constitutional Court) has allowed for permeability between the different types of action in the administrative justice system. Secondly, and even more significantly, the case-law introduced the obligation for the administrative court to

instruct the applicant on the 'correct' type of action in his or her case (in case the correct type was not chosen).[16]

However, all the negative impacts of the unclear boundaries between types of action in administrative justice can be associated with the applicant's position. Some will remain even after the obligation to instruct the applicant has been introduced.

In our view, first of all, it is apparent that it is not impossible that the incorrect type of action will also be chosen by the administrative court itself. Although this will not result in the inability to examine the merits of the action, it may lead to an ineffective form of judicial protection for the applicant (whereby we could argue that the correct type of action is the one which provides effective protection for the applicant). In such a case, the applicant may defend himself against such a conclusion by making a cassation complaint to the SAC.

The necessity of this procedure is, however, problematic, as it generates what could be described as an 'action-type determination procedure'. It could be described as a judicial proceeding that is entirely dedicated – instead of providing protection to the applicant – to the question of how to provide such protection. In the worst cases, there may be situations where the applicant litigates for several years before the administrative courts (or even the Constitutional Court) only to establish that the administrative act by which the applicant's rights have been infringed should have been reviewed in another type of procedure. In the meantime, the applicant has not obtained any meaningful protection of his or her rights.

In a broader sense, the problem of so-called borderline situations between types of actions in the administrative justice system is *inefficiency*, particularly in the form of increased economic costs for both the applicants and administrative courts. On the applicant's side, in particular, it will be more difficult to prepare the action. On the part of the administrative courts, it may be mainly

16 For both questions see, *inter alia*, the finding of the Constitutional Court of 14 August 2019, No. II. ÚS 2398/18.

the staff or material resources spent on the aforementioned 'action-type proceedings'. Particular mention should be made of the previously recommended practice whereby, if the applicant was unsure of the appropriate type of action, they had to bring several actions simultaneously (with only one being heard on the merits). The inefficiency of this practice is obvious.[17]

Administrative Decision According to the CAJ

For the reasons outlined above, it seems appropriate to pay attention to the boundaries between types of action in administrative justice. In the Czech context, the simplest solution seems to be to adopt a clear interpretation of what is meant by the decision according to the CAJ, since it is this category and its application that more or less (directly or indirectly) determines the applicability of each type of action. In this context, the case-law of the Czech administrative courts has undergone a certain development in the last decade, which, however, did not fully meet the mentioned requirement.

A 'decision', within meaning of Article 65(1) of the CAJ, is one of the key institutions of administrative justice. This is due to the fact that the action against decisions accounts for the largest proportion of all types of administrative actions in the Czech administrative justice. However, a decision for the purpose of judicial review cannot simply be identified with a decision within the meaning of the CAP because 'a decision' within the meaning of Article 67(1) of the CAP and within the meaning of Article 65(1) of the CAJ do not necessarily overlap (the latter is generally broader).

Earlier case-law of administrative courts emphasised the so-called material concept of a decision for the purposes of judicial review.[18] The material

17 For more details, see Tomáš Svoboda, "Nad (nejasnými) hranicemi mezi žalobními typy podle soudního řádu správního (2. část)", *Právní rozhledy* 27, no. 12. 2019: 435–439.

18 See Zdeněk Kühn, "§ 65 [Standing]." in Zdeněk Kühn, Tomáš Kocourek, Petr Mikeš, Ondřej Kadlec, Karel Černín, Filip Dienstbier, and Karel Beran, *Soudní* řád *správní: komentář*. Praha, 2019, 514.

concept prefers the content of the challenged administrative act at the expense of its statutory designation or procedural form. However, over time a requirement for the 'correction' of this concept through introduction of certain formal criteria has begun to take shape in the case-law. The approach of taking into account both material and formal criteria was first adopted by the extended chamber of the SAC some 10 years ago and has persisted to the present day. The formal requirements imposed on the decisions of administrative authorities are not expressly laid down by the CAJ but are derived from case-law. The primary consideration in the qualification of an administrative act is still its material criteria, but formal criteria are added. The resulting approach is referred to as the so-called *material-formal* concept of the decision.[19]

According to the Czech literature, the main reason for this correction of the earlier strictly material approach is considered to be the need to preserve the boundary between the types of action, namely between an action against a decision and an action for protection against unlawful interference. Without considering the formal criteria, even informal acts would be subject to judicial review through an action against a decision.[20] This could result into merging of the categories of administrative decision and unlawful interference.[21] The proclaimed purpose of the distinction between a decision and an unlawful interference is to provide effective judicial protection for the public subjective rights of individuals,[22] thereby fulfilling the very purpose of administrative justice.

These formal criteria adopted by case-law constitute a prerequisite for judicial review of an administrative act through the action against a decision. If the court does not assess the challenged act as a decision under Article 65(1) of the CAJ, it is obliged to inform the applicant of the possibility of changing the type of action. However, this can only happen under certain conditions

19 Kühn, 514.

20 See Pavel Šuránek, "§ 65 [Standing]." in *Soudní* řád *správní. Komentář*, ed. L. Jemelka. Praha, 2013, 499.

21 See also Lukáš Potěšil, "§ 65 [Standing]." in Lukáš Potěšil, Vojtěch Šimíček, Lukáš Hlouch, Filip Rigel, and Martin Brus, *Soudní* řád *správní. Komentář*. Praha, 2014, 550.

22 See also Kühn, 514.

(e.g. timeliness of the appropriate type of action), otherwise the court will reject the action as inadmissible.[23]

Overview of Formal Criteria According to the Case-Law of the SAC

Despite the different nature of individual acts examined by the SAC in cassation proceedings, certain recurring formal requirements can be identified and abstracted. However, the administrative courts do not always require all these requirements and their presence does not necessarily mean that a certain act is qualified as a decision under Article 65(1) of the CAJ.

The most frequently required formal criteria is the procedure for issuing a decision as a formalised binding procedure of the administrative authority preceding the issuance of the act. This does not have to be an administrative proceeding or procedure within meaning of the CAP.[24] However, it should have similar characteristics, such as the presence of the parties to the proceedings and the purpose, which is to issue an individual administrative act in a specific case for a specific subject. Such a procedure should be regulated by law and conducted by the administrative authority within the limits of its competence. The minimum standard of the protection of the rights of the subject is to be guaranteed by the basic principles.[25]

Other frequently occurring formal criteria are the formal aspects of the decision. The SAC has interpreted this concept in different ways. It is possible to encounter a requirement for the content of the decision within the meaning of Article 68 of the CAP, and the reasoning of the decision is emphasized. However, the absence of reasoning is not an obstacle; the designation of the

23 See, *inter alia*, the resolution of the Supreme Administrative Court of 28 February 2018, No. 6 As 357/2017–26; or resolution of the Supreme Administrative Court of 13 August 2020, No. 6 Afs 61/2020–41.

24 Or similarly according to the Tax Code (Act No. 280/2009 Coll.).

25 Which are regulated in Articles 2–8 of the CAP and also represent the procedure for issuing a decision in its minimalist sense.

administrative authority, the designation as a decision and the statements may suffice.

Emphasis is placed on the notification of the decision to the addressee and the documentation of the procedure and its outcome, typically the administrative file. In some cases, a written record in the relevant documentation is sufficient. The requirement for a written form of the decision is not often explicitly stated, but it is generally considered necessary.

However, none of the above-mentioned formal criteria is universally required, and it is possible to encounter cases where, on the contrary, the presence of a particular formal criteria is rather (indirectly) called in question. Thus, these are more typical criteria that occur in various combinations, but neither their cumulative fulfilment nor a particular combination is required. Probably the most frequently occurring formal criteria remains the formalised procedure leading to issue of the act under review.

It is clear that the case-law of the SAC does not currently provide clear guidance to applicants (and their legal representatives) on the qualification of the challenged administrative act. Indeed, the very fact that the formal characteristics are predominantly determined by the extended chamber of the SAC testifies to the diversity of legal opinions across the three-member chambers of the SAC. In assessing the nature of the acts at issue, the SAC sometimes follows a pragmatic approach and is guided more by the similarity of the act under review to an act it has already dealt with in a previous decision. While in some cases the court refers to more detailed formal criteria, in other cases it is satisfied with the existence of an individual administrative act in written form issued by the competent administrative authority.

Applicants therefore may be advised to follow the case-law and try to look for parallels between the currently challenged administrative act and the acts that the SAC has previously reviewed. Thanks to the courts' duty to instruct, it is no longer a problem that separates applicants from access to the court for good. However, the current case law is not always unambiguous, let alone

'user-friendly', and does not provide the necessary certainty for the parties to the proceedings.[26]

Even some of the SAC judges have previously stated that they do not consider its case-law to be consistent.[27] Similarly, authors of this paper, as they have also similarly expressed earlier in literature,[28] believe that there needs to be a clear interpretation the concept of a decision according the CAJ in the Czech administrative law. However, the inconsistency of the SAC case-law seems to have made the boundary between a decision and an unlawful interference even more unclear. This conclusion is, however, somewhat paradoxical; the SAC case-law should, of course, lead to the opposite.

Conclusions

We believe that the problem of the qualification of an act of an administrative authority, and choice of the corresponding type of action in subsequent judicial review, can currently be divided into two basic levels. The first level is the problem of the inconsistency of the legislator in the use of statutorily defined forms of administrative acts, specifically the use of so-called non-standard acts (other than the general legal types of administrative acts foreseen by the legislator). In the case of so-called non-standard acts, the solution, of course, is not to use such acts at all. But this expectation does not seem realistic, as these acts seem to be used more rather than less. This will secondarily generate and

26 For more details, see Denisa Skládalová, "Formální znaky rozhodnutí podle soudního řádu správního pohledem judikatury NSS", *Právní rozhledy* 29, no. 12. 2021: 435–442.

27 According to judge F. Dienstbier, the extended chamber of the SAC should admit the inconsistency of its case law and clearly state whether, in addition to the fulfilment of the material criteria of a decision, it insists on the requirement of a certain form prescribed by law (which is already certain at present), and, where appropriate, what formal criteria an administrative authority's act must fulfil in order to be considered a decision within the meaning of the CAJ. See the dissenting opinion of Judge F. Dienstbier on the reasoning of the Resolution of the Extended Chamber of the Supreme Administrative Court of 18 April 2017, No. 6 Afs 270/2015–48.

28 See Skládalová, 435–442.

reinforce the implied unclear boundaries between types of action in the administrative justice system.

Therefore, more can probably be done on the second level – the level of an unambiguous interpretation of the categories defined by the CAJ, in particular on the level of an easy-to-understand interpretation of decisions made under the CAJ.

The case-law of the SAC has more or less consistently required the presence of formal criteria of a decision over the last decade. Despite this fact, the court has been rather casuistic in determining these formal criteria and has so far resigned itself to trying to define these in a generalised manner. In our opinion the case-law of the Czech administrative courts has not yet established a sufficiently clear and universal interpretation of the 'correction' of the material concept of a decision within the meaning of Article 65(1) of the CAJ. A common consensus in the form of the minimum required formal criteria of a decision is thus lacking.

We believe that this interpretation is achievable by the case-law (setting aside possible legislative changes) only if properly clarified by the SAC's extended chamber. Its case-law should provide non-casuistic guidance to applicants in the form of universally required formal criteria. What is less clear is whether a completely convincing solution can be reached in this way. Otherwise, the solution could be a revision of the legislation; a revision that would take into account the fact that the legislator may not be consistent in other instances in creating so-called non-standard acts of administrative authorities, which may be difficult to classify under the defined types of actions in the administrative justice system. Or, in other words, the legislative construction of the administrative justice system should account for these situations.

References

Eliantonio, Mariolina, and Franziska Grashof. "Types of Administrative action and corresponding review." In *Cases, materials and text on judicial review of administrative action*, edited by Chris Backes, and Mariolina Eliantonio. Oxford, 2019.

Kühn, Zdeněk. "§ 65 [Standing]." In Zdeněk Kühn, Tomáš Kocourek, Petr Mikeš, Ondřej Kadlec, Karel Černín, Filip Dienstbier, and Karel Beran, *Soudní* řád *správní: komentář*. Praha, 2019, 511–530.

Piątek, Wojciech. "Access to the highest administrative courts: between a right of an individual to hear a case and a right of a court to hear selected cases." *Central European Public Administration Review* 18, no. 1. 2020: 7–23.

Potěšil, Lukáš. "§ 65 [Standing]." In Lukáš Potěšil, Vojtěch Šimíček, Lukáš Hlouch, Filip Rigel, and Martin Brus, *Soudní* řád *správní. Komentář*. Praha, 2014, 544–574.

Skládalová, Denisa. "Formální znaky rozhodnutí podle soudního řádu správního pohledem judikatury NSS." *Právní rozhledy* 29, no. 12. 2021: 435–442.

Šuránek, Pavel. "§ 65 [Standing]." In *Soudní řád správní. Komentář*, edited by Luboš Jemelka. Praha, 2013, 485–522.

Svoboda, Tomáš. "Nad (nejasnými) hranicemi mezi žalobními typy podle soudního řádu správního (2. část)." *Právní rozhledy* 27, no. 12. 2019: 435–439.

Vedral, Josef. "K některým otázkám přezkumu „souhlasů" podle stavebního zákona." *Stavební právo – Bulletin*, no. 2. 2015: 14–23.

Zrvandyan, Arman. *Casebook on European fair trial standards in administrative justice*. Strasbourg, 2016.

Finding of the Constitutional Court of 14 August 2019, No. II. ÚS 2398/18.

Resolution of the Supreme Administrative Court of 28 February 2018, No. 6 As 357/2017–26.

Resolution of the Supreme Administrative Court of 13 August 2020, No. 6 Afs 61/2020–41.

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Efficiency of criminal proceedings and their cost[1]

Abstract: To sum up, it should be stated that the concept of efficiency should be understood as a quick, effective and rational operation of the participants in the proceedings, taking into account the principles of efficiency and savings of financial resources.[2] The length of proceedings is one of the most acute problems not only of criminal law, but also of the administration of justice in general. The first and foremost reason for such a classification is that the excessive length of proceedings prevents a fair hearing, since it does not respect the constitutional right to have a case heard without undue delay. Secondly, long proceedings generate high costs, an issue particularly important when these costs are borne by the State Treasury and thus not by the convict whose culpable behavior has caused them to arise.

The issues of efficiency of criminal proceedings and their costs are inextricably linked. Furthermore, it establishes that the efficiency of criminal proceedings determines the level of generated costs. The research shows that the quality of the proceeded cases depends on the financial outlays and that the costs indicated by the procedural authorities do not correspond with those actually incurred.

In conclusion, it should be pointed out that financial aspects fall within the scope of the regulatory impact assessment and constitute a priority when im-

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2 Agnieszka Orfin, *Sprawność postępowania karnego a jego koszty*. Warszawa, 2020, 25–39.

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plementing new legal provisions, in direct relation to the economic analysis of law and the efficiency and costs of ongoing proceedings.
Keywords: criminal trial, efficiency, costs, relations.

Introduction

In the words of the four-time Prime Minister of Great Britain (1868–1894), William Gladstone: "Justice delayed is justice denied." A lengthy procedure not only prevents the administration of justice, but above all, generates very high costs. The problem of costs appears to be particularly important when they are borne by the State Treasury, which means that it is society, not the convicted person, who has to bear them.[3] The problem of lengthy criminal proceedings and their high costs is interesting enough for it to have become the reason for conducting scientific research on a national scale, UMO-2015/17/N/HS5/00438, Competition: Preludium 9; A. Orfin position: project manager, scientific supervisor: prof. dr hab. Paweł Wiliński; (the results of the grant have been published).[4] Its aim was to answer the question of whether there is any relationship between the efficiency of criminal proceedings and their costs, and if yes, then what its nature is. It is also important to find out the time during which cases are considered before the court of first instance, what this depends on, what the final costs of criminal trials are, and what determines them.[5] The aim of this paper is to answer the question of whether the efficiency of criminal proceedings determines the amount of costs incurred; to investigate

3 Monika Klejnowska, Piotr Hofmański et. al., *System prawa karnego procesowego. Tom XVIII. Koszty procesu w sprawach* karnych. Warszawa, 2018, 53–624; Paweł Wiliński, "Criminal procedure" in *Foundations of Law. The Polish Perspective*, eds. W. Dajczak, T. Nieborak, and P. Wiliński. Warszawa, 2021, 417–468; Paweł Wiliński, "Koszty procesu" in *Polski proces karny*, ed. P. Wiliński. Warszawa, 2020, 775–784.

4 Orfin, *Sprawność*.

5 Agnieszka Orfin, "Czy polski proces karny jest kosztowny? Kilka uwag o sprawności postępowania karnego i jego kosztach" in *Proces karny w dobie przemian. Przebieg postępowania*, eds. S. Steinborn, and K. Woźniewski. Gdańsk, 2018, 539–548; Agnieszka Orfin, "Should Money Be the Issue in Criminal Proceedings? Some Remarks from the Perspective of Law and Economics", *Polish Yearbook of Law & Economics* 6. 2015: 131–151.

what the efficiency depends on, and what relations exist between the efficiency of the procedure and its costs. It is worth determining when a criminal procedure lasts too long, what determines the effectiveness of the examination of cases, and what the interdependencies are between the efficiency and costs of criminal proceedings. Furthermore, it is important to establish what criteria can be used to judge the rationality of the action of judicial bodies and what the maximum cost of a particular case is. It also needs to be established whether, as some authors argue, criminal proceedings are actually too costly and inefficient.[6]

In order to address the above-mentioned issues, two types of research were conducted: quantitative and qualitative (triangulation of research methods). An examination of court files, a case study and a quasi-Delphi survey were carried out (qualitative and quantitative research):[7]

- The case study took place between January 2015 and August 2015, in the criminal departments of eight district courts located in Poland. It was important for the author of the research to obtain information from the administrative staff of the secretariats of the Criminal Divisions, as well as Financial, Economic and Human Resources Departments, concerning the impact of cases per year, the number of completed and unfinished cases, the number and procedures for examining criminal cases in 2012–2015, employment in a given court in 2012–2015, with a specific focus on criminal departments and the costs of court functioning (types and amounts).
- In the documentary examination of court files, about 800 criminal cases were analyzed (in each court ca. 100 cases), in the same courts as in the

6 Stanisław Momot, and Andrzej Ważny, "Postępowanie przyspieszone w praktyce", *Prokuratura i Prawo*, no. 11–12. 2009: 122; Robert Cooter, and Thomas Ulen, *Ekonomiczna analiza prawa*. Warszawa, 2011, 508.

7 Chava Frankfort-Nachmias, and David Nachmias, *Metody badawcze w naukach społecznych*. Poznań, 2011, 65; Jerzy Apanowicz, *Metodologiczne uwarunkowania pracy naukowej. Prace doktorskie. Prace habilitacyjne*. Warszawa, 2005, 70; Hubert Witczak, "Problemy naukowe" in *Podstawy metodologiczne prac doktorskich w naukach ekonomicznych*, eds. M. Sławińska, and H. Witczak. Second updated edition. Poznań, 2012, 72.

case study, i.e. in the District Court for the Capital City of Warsaw in Warsaw, 3rd Criminal Division, DC Poznań-Stare Miasto in Poznań, 3rd Criminal Division, DC for Wrocław-Fabryczna in Wrocław, II Criminal Division, DC Szczecin-Centrum in Szczecin, IV Criminal Division, DC in Giżycko, II Criminal Division, DC in Krosno, II Criminal Division, DC in Wałcz, II Criminal Division.

– The survey was conducted in 2016 and 2018, using the so-called quasi-Delphi method (one round) and face-to-face interviews with judges and administrative staff from secretariats in criminal divisions, as well as court directors in the courts under analysis. The survey was carried out among experts in law and economics who were invited to the survey. Among them were the administrative staff of courts and court presidents, judges, directors and employees (heads) of criminal divisions, and administrative, accounting and financial departments in district courts in Poland where the research was conducted; employees of the Ministry of Justice and the Institute of Justice (IWS), legislators and persons responsible for regulatory impact assessment (RIA), prosecutors, academics and scholars in the field of law or economics, lawyers, managers or employees of legal associations and foundations (including the Polish Association for Economic Analysis of Law, Helsinki Foundation for Human Rights).

Selected research results will be presented below.

The Concept of Efficiency and Costs of the Criminal Trial

The concept of efficiency is an interdisciplinary concept, primarily used in the fields of law and economics, and should be explained in relation to ideas such as speed, effectiveness, rationality, and productivity. Court proceedings should be conducted without unnecessary breaks or inhibitions. Appropriate speed is understood as the lack (or prevention) of unjustified delays, rather than as hurry

and haste to present a ruling. For the judiciary, the term pertains to the time within which cases are heard, rulings are issued, and actions are undertaken by participants to the proceedings.[8] Another concept that characterizes the efficiency of the proceedings is effectiveness. In order for court proceedings to be called efficient, the intended, planned purpose must be achieved. The scope of the concept includes the effectiveness of action, because an efficient action allows one to get closer to the intended goals.[9] Therefore, in order for the court proceedings to be called efficient, it is first of all necessary to achieve the intended purpose, or effect. In the field of law, the adjectives efficient and effective are often used interchangeably to describe the proceedings. In economic sciences, in the most general terms, efficiency is perceived as an effect in relation to the effort, while the effect must be measurable. Such an effect does not occur in court proceedings. C. Kulesza maintains that the striving for lower functional costs (cost efficiency) should be related to the appeal for speedier proceedings and might be a sign – or even a synonym – of proceedings efficiency. The general principle of efficiency states that an action is more efficient if it has more impact with concrete investments. The principle of maximum savings proposes that an action brings more benefits if it requires less investment for a particular impact to be achieved. Another equally important matter is the estimation of financial resources that are allocated to the Polish legal system, and the question of how these resources are utilized there. Rationality is also an important concept related to efficiency: to be called smooth, a criminal trial requires rational, thoughtful, planned, logical and concentrated activities of all its participants in a compact temporal framework. Each decision of a participant in court proceedings should be rational. In the light of the above, it should be stated that it is not possible to

8 Stanisław Pikulski, and Jarosław Szczechowicz, "Ludzki wymiar prawa a przewlekłość postępowania sądowego" in *Księga jubileuszowa Profesora Tadeusza Jasudowicza*, eds. J. Białocerkiewicz, M. Balcerzak, and A. Czeczko-Durlak. Toruń, 2004, 354.

9 Cezary Kulesza, *Efektywność udziału obrońcy w procesie karnym w perspektywie prawnoporównawczej*. Warszawa, 2005, 30.

hear a court case efficiently without rational planning of its course, with particular emphasis on the behavior of its participants.

In economics, speed may be a feature of a phenomenon that occurs at greater speed, more frequently, or faster than usual. It is a value that describes how fast someone moves or something happens. The notion may be used to describe the time required for an enterprise to achieve profit, or the speed of occurring changes. In the economic sciences, effectiveness is sometimes understood as a measure of achieving goals.[10] On the other hand, efficiency is the result of economic activity, determined by the ratio of the obtained effect to the expenditure.[11] Efficiency is a measure for the work conducted and an indicator of the profits gained; sometimes it equated with thriftiness and rational choices. Economists often identify the category of efficiency with the law of rational management. The latter is one of the key notions in economics: according to it, the subject makes such an allocation of their limited resources that optimizes the benefits it derives from them.

To sum up, it should be stated that the concept of efficiency should be understood as a quick, effective and rational operation of the participants in the proceedings, taking into account principles of efficiency and savings of financial resources.[12]

Case Study Research

At the outset, it is worth highlighting some of the most important results of the case study. The analysis of the obtained data was made with the courts divided into three groups. Group I included the court in Warsaw, the capital of Poland. The reason for that is that other courts located in the country are modeled on it and its functioning. Group II included courts in cities with more than 400,000 – 550,000 inhabitants – the District Court Poznań-Stare Miasto in Poznań, the Dis-

10 Ksymena Rosiek, "Skuteczność – przegląd definicji", *Zeszyty Naukowe Uniwersytetu Ekonomicznego w Krakowie*, no. 771. 2008: 125.

11 Frankfort-Nachmias, Nachmias, 86.

12 Orfin, *Sprawność*, 26–39.

trict Court for Wrocław-Fabryczna in Wrocław, and the District Court Szczecin--Centrum in Szczecin. The selection of these courts was justified not only by the number of inhabitants of these cities, but also by their location in Poland: Poznań lies in the Wielkopolskie Province, Wrocław in the Dolnośląskie Province, and Szczecin in the Zachodniopomorskie Province. It is crucial to understand the court mechanisms in cities with very high populations and high caseloads. Further, for group III it was decided to select courts in cities with fewer than 50,000 residents – the District Court in Giżycko, the District Court in Krosno, and the District Court in Wałcz. Here as well, the criteria for selecting these courts were the number of city residents (29,000 – 48,000) and their geographical location: Giżycko (30,000 inhabitants, Warmińsko-Mazurskie Province), Wałcz (26,000 inhabitants, Zachodniopomorskie Province) and Krosno (47,000 inhabitants, Podkarpackie Province).

The same information was analyzed for each court, i.e. the total number of cases, the number of completed and unfinished cases, the number of cases heard in the ordinary and special procedures, the financial condition of the court and employment. The costs selected for the purpose of this study have been divided into direct and indirect. The direct ones relate to specific criminal proceedings and all their elements, e.g. the cost of court experts, reimbursement of travel expenses of witnesses, costs of legal aid provided ex officio, fees for correspondence. In contrast, the indirect ones are those that do not directly relate to a single criminal proceedings but are necessary for the court's operation. Among the indirect costs, the following can be distinguished: 1) purchase costs, which include the purchase of materials and equipment, depreciation of buildings, purchase of energy, purchase of Internet access, telephone services, administration and rent fees, property taxes, the salaries of experts, translators, and retired judges, the costs of maintenance services for office equipment, alarm systems, and small repairs and renovations in buildings. The following may also be included in this division: salaries and benefits for employees, judges and assistants, salaries of administrative employees (officials), salaries

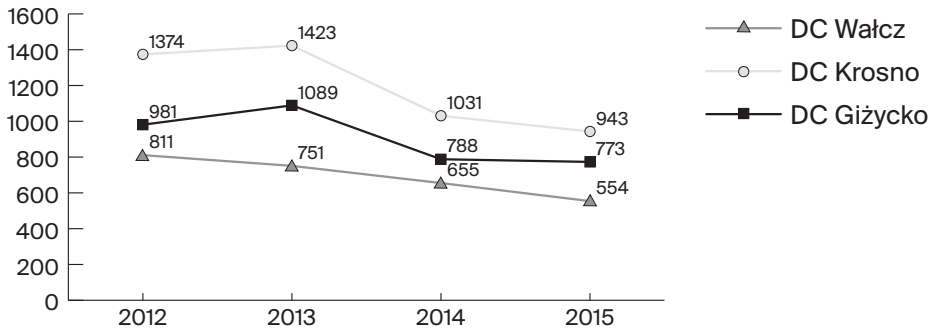

Figure 1. Inflow of criminal cases, K repertory of group III in 2012–2015.
Source: the author's own research.

of employees who are not clerks (e.g. janitors, security guards, porters), social insurance, company social benefits funds, employee training.

To start with, let us analyze the values for criminal cases in the K repertory in 2015 in the District Court for the Capital City of Warsaw. In 2015, 948 cases were brought before the court. The number of closed cases stood at the level of 1108. At this point, it should be emphasized that the number of closed cases also includes those cases that were brought to the court before 2015. The number of unfinished cases was also analyzed. In 2015, there were as many as 831.[13]

The inflow of criminal cases in the group of courts in cities with fewer than 50,000 inhabitants is presented in Figure 1.

The total inflow of all criminal cases (K repertory) in the DC in Giżycko in 2012 amounted to 981 cases, a year later it was the highest, with 1089 cases, and then significantly decreased to 788 and 773 cases in subsequent years. In 2012, 1,374 cases were brought before the DC in Krosno, while in the following year – 1,423. In 2014, there was a noticeable decrease in cases to 1031 and a year later to 943. In DC Wałcz, the inflow decreased year by year and amounted to: 2012: 811, 2013: 751, 2014: 655 and 2015: 554. The

13 Orfin, *Sprawność*, 199.

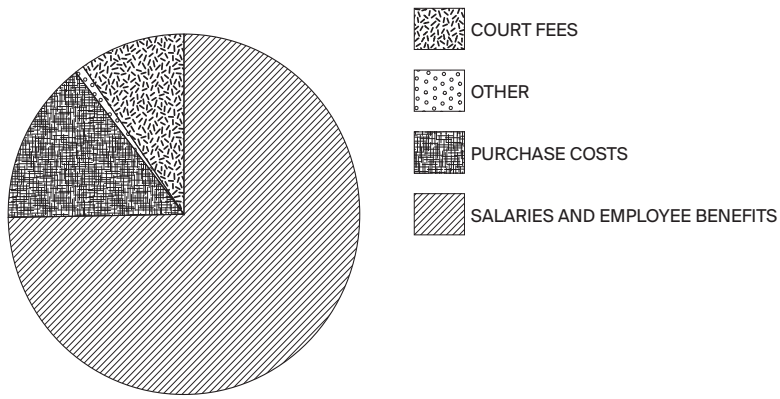

Figure 2. Percentage share of individual expenses in the budget of DC Szczecin-Centrum in Szczecin in 2012–2015. Source: the author's own research.

lowest inflow of cases occurred in the DC in Wałcz and the highest in the DC in Krosno. It is worth adding that the total number of cases concerns cases run according to the ordinary, simplified, prescriptive, private and accelerated procedures. Completed and unfinished cases were analyzed in the same way.

The analysis of financial matters will be presented on the basis of data obtained in courts in cities with more than 400,000 inhabitants – Poznań, Wrocław and Szczecin. Figure 2 presents the percentage shares of expenditures of the DC Szczecin-Centrum in the years 2012–2015. The highest percentage of expenses, 74.87%, was allocated to employee salaries and benefits, 14.62% to purchase costs, and only 9.48% to proceedings costs.

In turn, the purchase costs of the DC Poznań-Stare Miasto are presented in Figure 3. The amount of PLN 1,917,041.71 was allocated to depreciation of the building. A little less, i.e. PLN 1,411,935.36 was spent on the purchase of external services.

In Figure 4, it can be observed that the expenses on court costs in the DC for Wrocław-Fabryczna in Wrocław in 2012–2015 amounted to approx. PLN 2,500,000.00.

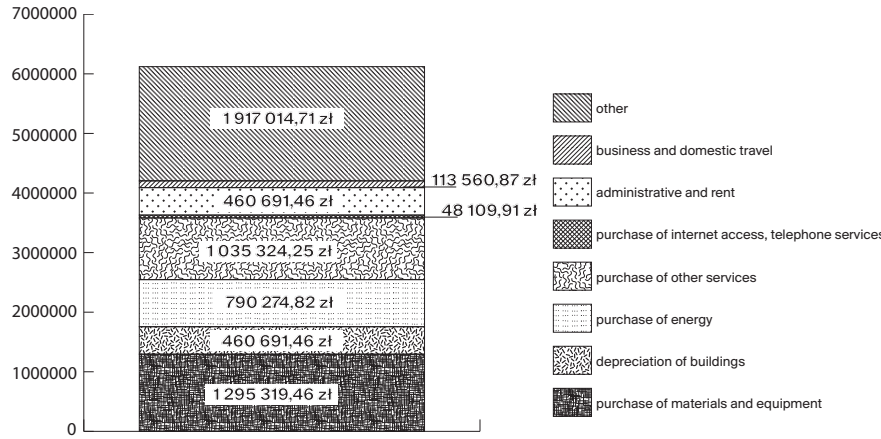

Figure 3. Purchase costs at DC Poznań-Stare Miasto in Poznań in 2012–2015.
Source: the author's own research.

It is puzzling that only PLN 70,000.00 was spent on compensation for excessive length of proceedings, taking into account the fact that almost a quarter of criminal proceedings of each court are carried out "with undue delay." The above was found on the basis of examination of court files and questionnaires completed by the employees of the secretariat of the Criminal Division. As was the case in each examined court, also in this one the costs incurred by the Court (State Treasury), from which the party was released were not indicated – the data was not provided. PLN 70,000.00 was allocated for compensation for excessive length of proceedings. It is worth emphasizing that none of the analyzed courts indicated the amount of costs incurred by the State Treasury. Therefore, it is worth considering whether such costs are counted at all.

The research carried out in selected district courts in Poland made it possible to analyze the employment of judges, assistants and other employees. Figure 5 below concerns the employment level divided into district courts in Poznań, Szczecin and Wrocław in 2015.

The District Court in Wrocław employed the highest number of judges, as many as 100, while the one in Szczecin the fewest: 94.

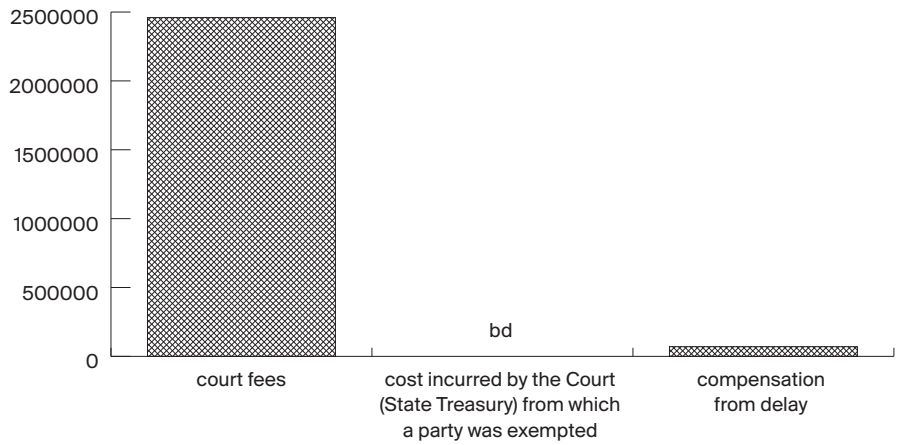

Figure 4. Proceedings costs incurred in DC for Wrocław-Fabryczna in Wrocław in 2012–2015. Source: the author's own research.

Examination of Files in Criminal Cases

The files of criminal cases were also examined in the same courts as described in the case study. It is worth recalling once again that the research was conducted in January 2015 – August 2015, while the interviews with the secretariats of criminal departments took place in 2018. As part of the research, about 100 criminal cases in each court (a total of about 800 cases) were analyzed.[14] The following information concerning criminal cases affecting the efficiency and costs of court proceedings was analyzed: the duration of the case before the court of first instance, the procedure (ordinary, simplified, prescriptive, private prosecution, accelerated), the manner of terminating the proceedings (ordinary, consensual, issuing a prescriptive or default ruling, discontinuation of the proceeding and conditional discontinuation of the proceeding), the number of defendants, the number of hearings, the number of adjournments and hearings of the case, the circumstance of temporary arrest or incarceration in a given or another case, the number of court experts (of various specialties),

14 Orfin, *Sprawność*, 213.

Figure 5. The number of employed judges and administrative staff in courts in Szczecin, Poznań and Wrocław in 2015. Source: the author's own research.

the number of witnesses, a defense ex officio. Regarding the costs of the proceedings, the following were considered: correspondence (flat rate), escorting (flat rate), claims of court experts, claims to witnesses (reimbursement of travel expenses and lost earnings), ex officio defense, costs of preparatory proceedings, the fee and other costs indicated in the decision concluding the proceedings, trial costs indicated in the order for the enforcement of the judgment, exemption from court costs, the entity responsible for bearing the costs of the trial: the convicted person; the State Treasury; convicted person and the State Treasury; mutual dissolution.[15]

Collected information subjected to verbal analysis also regarded the type of crime or the circumstances of exemption from trial costs. On the basis

15 Orfin, *Sprawność*, 213; Orfin, *Should*, 131–151.

of the conducted research, it should be stated that the most frequent crimes are those regulated in the provisions of the Penal Code,[16] Articles 148–162 – crimes against life and health, 173–180a – crimes against safety in communication, and 197–204 – crimes against sexual freedom and decency. The most important quantitative conclusions on the basis of the analyzed cases are subsequently presented. Cases were examined in the following modes: ordinary: 25%, simplified: 38%, prescriptive: 11%, accelerated: 7%, and private prosecution: 14%. The endings of the proceedings were as follows: 44% of them ended in a consensual procedure (21% as a result of the application of the provisions of Art. 387 of the Code of Criminal Procedure, and 23% following Art. 335 of the Code of Criminal Procedure), 10% were discontinued (including 4% conditionally), 15% had a prescriptive sentence, 1% judgment in default, 21% of cases ended normally i.e. after the taking of evidence, a judgment was issued. Cases before the court of first instance lasted on average: up to 3 months – 57%, over 3 to 6 months – 20%, over 6 months to 1 year – 12%, over 1 to 2 years – 4%, over 2 to 3 years – 2%, and over 3 years – 8%. One court expert (of various specialties) appeared in 60% of cases, 2 experts in 10%, 3 and more experts in 5%. There were no experts in the remaining cases. Ex officio defense in court proceedings appeared in 75% of cases, a probation officer and sworn translator in 4%. In 90% of cases, one person was accused. Two – in 6%, three in 5%, four in 1%, five in 1% and more than five also in 1%. Regarding procedural acts, a line-up took place in 1% of all analyzed cases. In a ruling concluding the proceedings, the court adjudicated the amount of stamp duty in 95% of cases and the costs of proceedings in 100% of cases.[17]

Moreover, in 42% of cases, the court decided to exempt the convict from paying the costs of the trial and charges, and thus charge them to the State Treasury; in 40% of cases the convict was to pay, in 5% of cases the court cancelled the costs mutually, and in 3% of cases the private prosecutor was

16 The Act of June 6, 1997, the Penal Code, item 952, item 966, item 1214; Orfin, *Sprawność*, 212–222.

17 Orfin, *Sprawność*, 214.

to pay. In situations where the accused was released from the obligation to pay the costs of the trial and fees, they were not calculated at all. The inventory of expenses from preparatory and court proceedings was found only in 70% of cases. There were bills (invoices) for the work performed by court experts (or translators) in each case in which they appeared. The same is true for witness bills for reimbursement of travel expenses. Based on the analysis of court files and the literature, it should be stated that the total cost of a specific case before a court consists of a number of expenses. In order to estimate the average costs of criminal cases, it was necessary to establish two groups of costs. The first group consisted of administrative (indirect) costs related to the functioning of the court, while the second group covers procedural costs, which vary due to the nature of a specific case and might include fees of court experts, sworn translators and institutions appointed to issue opinions, witness fees, expenses for service of pleadings, the travel expenses of judges, prosecutors and other persons due to procedural acts; bringing the accused to the trial and transporting them (escorting), fees for inspections, tests undertaken in the course of the proceedings, storage of seized items, advertisements in the press, radio and television, and costs of mediation proceedings.

Analysis of court documents indicates that: 1) firstly, a list of expenses showing the costs incurred in the course of court proceedings is usually very general and imprecise, because it collectively presents all the costs incurred in the case and does not separate them according to individual defendants and specific activities; the list of expenses does not allow for the specification of individual costs, 2) secondly, costs are usually not recorded in a computer system, 3) thirdly, cases files often lack bills for activities performed or they are collected defectively. As a result of such a method of recording costs, the examination of cases takes longer and their actual costs (which in most cases are borne by the State Treasury) are usually higher than those indicated by the judicial bodies. Importantly, it is still unknown at what level they stand.[18]

18 Orfin, *Should*, 131–151.

If the convicts were exempted from paying the costs, then they were not estimated and recorded at all. As a result, it is not known what financial resources were spent and what part of the costs is borne by society. Particularly incomprehensible are the situations where at the same time the accused were charged with high fines or an obligation to repair the damage.[19] However, if the costs were awarded to parties to the proceedings, their estimation consisted in the analysis of the files of the (pre-trial and court) proceedings and the calculation of individual expenses incurred in the case.[20] These activities were performed by employees of the secretariat of the executive department, and sometimes by the judge, or their assistant. Additional difficulties arise when in the same case some of the accused were exempted from incurring costs or awarded only to a certain extent (depending on the degree of guilt.[21] The issue of the methodology of recording costs incurred as part of specific cases is also closely related to the discussed issues (the so-called *case accounting*).[22] The costs are calculated incorrectly and inaccurately. Consequently, it is not known at what level they stand.[23]

In connection with the above conclusions and on the basis of the survey, it was possible to establish the mutual relations between the efficiency of criminal proceedings and their costs. These are primarily as follows: 1) high efficiency is related to the optimal level of costs, 2) low efficiency (lengthiness) is related to a high level of costs, and 3) striving for high efficiency while optimizing costs results in the court fulfilling its social role. The aforementioned interdependencies are probably not the only ones that occur between the efficiency of criminal proceedings and their costs.[24]

It is also worth pointing out that the most common problems related to the functioning of the courts regard: A) organizational and systemic issues: 1) sec-

19 Orfin, *Sprawność*, 214.
20 Orfin, *Sprawność*, 216.
21 Orfin, *Czy polski*, 539–548.
22 Orfin, *Should*, 131–151.
23 Orfin, *Sprawność*, 259.
24 Orfin, *Sprawność*, 250–253.

retarial staff only calculate costs which are to be incurred by the convicted person, and do not do so if they are borne by the State Treasury, which results in the lack of knowledge about the final amount, 2) lack of an appropriate computer system to work with in courts and law enforcement agencies, 3) disorder in the collected case files which often lack tables of contents, bills, invoices, record numbers (where the bill or invoice were filed). The problems were also B) substantive issues, namely: 1) frequent changes of legal regulations, 2) inadequate "shape and nature of legal provisions" and the way of formulating them, 3) case files often contained the total amount of all costs in the "other costs" column, and thus it was not clear what it consisted of. There were also some imperfections regarding C) personnel (personal) issues: e.g. 1) heads of secretariats of criminal divisions and court directors without firm and decisive personalities, 2) an insufficient number of staff, frequent staff reductions, and 3) low salaries of administrative staff.[25]

One of the aims of this paper is also to establish the factors determining the efficiency of criminal proceedings. Based on the analysis of the literature and the conducted documentary examination, it can be stated that these are: 1) the procedure, 2) the manner of its conclusion (ordinary, consensual: pursuant to the provisions of Articles 387 of the Code of Criminal Procedure and 335 of the Code of Criminal Procedure, issuing a prescriptive or default judgment, discontinuation of the procedure and conditional discontinuation of the procedure), 3) the duration of the case before the court of first instance, 4) the number of accused persons, 5) the number of hearings and their adjournments, 6) the circumstance of pre-trial detention or incarceration in a given or another case, 7) the number of court experts (of various specialties), 8) the number of witnesses, and 9) ex officio legal assistance (defense ex officio).

On the other hand, basic factors (circumstances) determining the amount of the costs of the case in criminal cases are: 1) the administrative costs of the operation of the court, and 2) the costs of the trial. The first group of costs con-

25 Orfin, *Sprawność*, 218–220.

sists of the administrative costs associated with the functioning of the court, including: the cost of energy, rent and administrative costs, personal expenses that are not salaries, the salaries of the court personnel, purchase of repair services, and purchase of medical or other services. The second group includes the costs of the trial, which vary due to the nature of a specific case. Here, costs are incurred due to: correspondence (flat-rate), escorting (flat-rate), fees of court experts, sworn translators and institutions designated to issue opinions, the travel expenses of judges, prosecutors and other persons due to procedural activities, bringing necessary participants to a hearing, fees for inspections, tests undertaken in the course of the proceedings, storage of the seized items, advertisements in the press, radio and television, costs of mediation proceedings, payments to witnesses (reimbursement of travel costs), ex officio defense, and costs of preparatory proceedings.[26]

The Survey Conducted in 2016 and 2018, with the So-Called Quasi-Delphi Method

In addition, as part of the research, a survey was conducted using the so-called quasi-Delphic method, in one round, among experts in law and economics. The surveyed persons were judges, prosecutors, academics in the field of law or economics, lawyers, employees of the Ministry of Justice, legislators and persons responsible for regulatory impact assessment (RIA), as well as the administrative employees of courts – directors and employees (heads) of criminal divisions and administrative, accounting and financial departments in the district courts in Poland where the case study was conducted. Only a selection of the most important results of the survey will be presented here. The analysis of the obtained data was oriented towards an attempt to establish the understanding of the efficiency of the criminal proceedings and their costs, as well as their mutual relations.

26 Orfin, *Sprawność*, 213.

First, the respondents were asked to define the efficiency of criminal proceedings. Among the most frequently indicated answers was the phrase that efficiency is an element of: 1) the principle of a fair (honest) trial – 72%, and 2) the principle of speed of criminal proceedings – 62%.

Moreover, the polled people were asked to evaluate the importance of the efficiency of the proceedings in a criminal trial. The vast majority – 83% of the respondents – considered the efficiency of criminal proceedings to be very important. Only 17% of experts considered it to be just important. Nobody indicated that it is unimportant. Another examined issue was the assessment of experts as to their opinion on whether criminal trials in Poland are conducted efficiently. Almost half of them, 48%, replied that they were not being run efficiently, whereas 37% of the respondents could not answer this question.

Factors particularly important from the point of view of experts for the efficient examination of cases are primarily the proper management of the secretariat by the chairperson or judge (77%) and an appropriate flow of information between employees of the department and the judges (assistants) conducting the case.

In opposition to the factors influencing the efficient examination of cases, the factors that have the greatest impact on their delay were taken into account. More than half – 66% of the respondents (all judges, prosecutors) were able to list the factors which, in their opinion, have the greatest impact on delays in examining cases. They included the following organizational issues: 1) poorly conducted proceedings, 2) too frequent adjournment of cases (often unjustified), 3) unpreparedness of judges for trials: superficial knowledge of cases, and 4) fear of passing sentences.

Further, it was necessary to analyze what, according to experts, adds to the cost of examining a criminal case. It was unanimously indicated (100%) that the costs of a criminal case should include court costs (the fees and expenses incurred by the State Treasury since the initiation of the proceedings). The vast majority of respondents (83%) also mentioned the parties' reasonable ex-

penses. In addition, 67% of the experts also indicated the administrative costs of the operation of the court.[27]

The most important issue here, however, was the definition of the relationship between the efficiency of criminal proceedings and their costs. At this point, it is worth noting that the vast majority of experts (74%) believed that case adjudication indeed depends on appropriate financial outlays. However, 26% of experts did not agree with such a statement. On this basis, it can be concluded that there is an undeniable relationship between the costs and efficiency of court proceedings.[28] Further analysis involved an issue similar to the previous one, with the difference that it concerned the relationship between the efficiency of proceedings and the way in which judicial bodies operate. All respondents – 100% – gave a positive answer: yes, such a relationship exists. Here, a particularly significant question concerned the costs specified by the judicial bodies (and recorded in the case files). Namely, could they differ from those that are actually incurred? Most respondents, 41%, selected the answer: yes, the actually incurred costs may be higher than those shown by the judicial bodies.[29] It was also important to obtain information on the factors that have the greatest impact on the generation of the unnecessary financial costs of the examined cases. There were two answers to choose from: "I do not know" and "Please list these factors." As many as 54% of experts decided that they did not know. Other respondents provided their own answers: the length of the proceedings, the need to use expert opinions in cases where it would be possible to replace them with other evidence, or the lack of appropriate office equipment in the courts. Therefore, it can be very firmly stated that the awareness of experts as to the costs of the proceedings is insufficient, which leads to inappropriate cost management.

In addition, experts unanimously agreed that there was a strong relationship between the efficiency of the proceedings and the way in which judicial

27 Orfin, *Sprawność*, 190.
28 Orfin, *Sprawność*, 192.
29 Orfin, *Sprawność*, 193.

bodies operate. The way in which they work, the number of people involved and the financial resources associated have a significant impact on the efficiency and costs of criminal proceedings. Such a conclusion confirms that the efficiency of criminal proceedings is determined by their costs.

Discussion and Conclusion

The most important conclusions from the conducted research are summarized below. Firstly, in none of the analyzed courts did the case study allow for indication of amounts of costs borne by the State Treasury. This can be related to the experts' answers regarding the question on how to record them; according to the respondents, the method is highly imprecise and hinders the work of judges and administrative staff. Therefore, it is worth considering whether such costs are counted at all.[30]

Another conclusion could be made on the basis of factors determining the efficiency of the procedure which were analyzed during the documentary research, i.e.: 1) the procedure, 2) the manner of ending the proceedings, 3) the number of accused persons, 4) the number of hearings, 5) adjournments in total, 6) the circumstance of pre-trial detention or imprisonment in a given or another case before a court, 7) the number of experts, 8) the number of summoned witnesses, 9) both private and ex officio defense, and 8) the duration of the proceedings before the court of first instance.

The basic factors (circumstances) determining the amount of the costs in criminal proceedings are both the administrative and operational costs of courts and the trial costs, which vary according to the nature of a particular case. Here, costs are incurred due to: correspondence (flat-rate), escorting (flat-rate), the fees of court experts and sworn translators, the travel expenses of judges, prosecutors and other persons due to procedural activities, bringing necessary participants to a hearing, fees for inspections, tests undertaken in the

30 Orfin, *Sprawność*, 258–259.

course of the proceedings, storage of the seized items, advertisements in the press, radio and television, costs of mediation proceedings, payments to witnesses (reimbursement of travel costs), ex officio defense, costs of preparatory proceedings.

It is worth noting here that the unit cost of a case should always be the result of the quotient of the total costs and the number of calculation units. The total costs would be the sum of the direct and indirect costs of the court case divided by the average number of cases completed per year. However, it is extremely difficult to determine by what average number of cases in a year the total costs should be divided (should completed criminal cases be included, those that have begun, or those that are still pending?). Additionally, despite the legal provisions, each case is simply different, and the random and human factors should be taken into account.[31]

It has become possible to establish mutual relationships between the efficiency of criminal proceedings and their costs. First and foremost, these are: 1) high efficiency is related to the optimal level of costs, 2) low efficiency (lengthiness) is related to a high level of costs, 3) striving for high efficiency while optimizing costs results in the court fulfilling its social role. The abovementioned interdependencies are probably not the only ones that occur between the efficiency of criminal proceedings and their costs. There are more of them and they are accompanied by derivatives.[32]

On the basis of the above considerations, analysis of the literature and conducted empirical research, it can be stipulated that a specialized computer program would offer more details regarding the relationships, as it would enable: 1) evaluation of the efficiency of the proceedings, and 2) precise calculation of the costs (*case accounting* using computer technology). The use of such a program would certainly allow for a more sensible use of funds and a more prudent planning of their spending. It should, in particular, make it possible to

31 Orfin, *Sprawność*, 222.
32 Orfin, *Sprawność*, 250–253.

enter information concerning the duration of the case and the manner in which it is conducted, the participants in the proceedings and related costs, e.g. fees from court experts. Every single piece of information should be highlighted in the computer program used in a given court. Then, the final amount should be automatically counted, at each stage of the investigation and court proceedings, in each instance of the proceedings. In this way an integrated computer program (system) could be created and operated.[33]

In conclusion, it should be said that the nature of the efficiency of criminal proceedings affects the level of generated costs. Moreover, the total costs of criminal proceedings are determined by factors such as the number of accused persons and the form of the adjudication (consensual or ordinary mode), the number of witnesses and court experts and the fact of providing legal aid ex officio. It should be added here that the quality of examination of cases depends on financial outlays. The larger they are, the more efficient the process is. Moreover, the costs indicated by the judicial bodies do not coincide with those actually incurred; to be precise, the actual costs may be higher than those indicated by the bodies.

It should also be emphasized that, according to more than half of the respondents (52%), determining the relationship between the efficiency and costs of criminal proceedings is important both in the practical (including legislative work) and theoretical sense (for research objectives).

Moreover, in order to be able to improve the efficiency of (criminal) proceedings, it is necessary to have sufficient and in particular statistical data on the conducted cases, regarding the nature of the activities performed, their duration, and the procedure of examining cases (100% of experts' votes). Furthermore, in order to be able to reduce the costs of conducted proceedings, it is necessary to possess knowledge of their level and actual amounts.

Finally, it should be emphasized that, according to more than half of the respondents (52%), determining the relationship between the efficiency and

33 Orfin, *Sprawność*, 259.

costs of criminal proceedings is important both in practical terms (including legislative work) and in a theoretical sense (for research objectives).[34]

References

Apanowicz, Jerzy. *Metodologiczne uwarunkowania pracy naukowej. Prace doktorskie. Prace habilitacyjne*. Warszawa, 2005.

Cooter, Robert, and Thomas Ulen. *Ekonomiczna analiza prawa*. Warszawa, 2011.

Frankfort-Nachmias, Chava, and David Nachmias. *Metody badawcze w naukach społecznych*. Poznań, 2011.

Klejnowska, Monika, and Hofmański, Piotr et. al. *System prawa karnego procesowego. Tom XVIII. Koszty procesu w sprawach karnych*, edited by Monika Klejnowska, chief editor Piotr Hofmański. Warszawa, 2018.

Kulesza, Cezary. *Efektywność udziału obrońcy w procesie karnym w perspektywie prawnoporównawczej*. Warszawa, 2005.

Momot, Stanisław, and Andrzej Ważny. "Postępowanie przyspieszone w praktyce." *Prokuratura i Prawo*, no. 11–12. 2009: 110–126.

Orfin, Agnieszka. "Czy polski proces karny jest kosztowny? Kilka uwag o sprawności postępowania karnego i jego kosztach." In *Proces karny w dobie przemian. Przebieg postępowania*, edited by Sławomir Steinborn, and Krzysztof Woźniewski. Gdańsk, 2018: 539–548.

Orfin, Agnieszka. "Should Money Be the Issue in Criminal Proceedings? Some Remarks from the Perspective of Law and Economics." *Polish Yearbook of Law & Economics* 6. 2015: 131–151.

Orfin, Agnieszka. *Sprawność postępowania karnego a jego koszty*. Warszawa, 2020.

Pikulski, Stanisław, and Jarosław Szczechowicz. "Ludzki wymiar prawa a przewlekłość postępowania sądowego." In *Księga jubileuszowa Profesora Ta-*

34 Orfin, *Sprawność*, 257–261.

deusza Jasudowicza, edited by Jan Białocerkiewicz, Michał Balcerzak, and Anna Czeczko-Durlak. Toruń, 2004.

Rosiek, Ksymena. "Skuteczność – przegląd definicji." *Zeszyty Naukowe Uniwersytetu Ekonomicznego w Krakowie*, no. 771. 2008: 125–134.

Wiliński, Paweł. "Criminal procedure." In *Foundations of Law. The Polish Perspective*, edited by Wojciech Dajczak, Tomasz Nieborak, and Paweł Wiliński. Warszawa 2021: 417–468.

Wiliński, Paweł. "Koszty procesu." In *Polski proces karny*, edited by Paweł Wiliński. Warszawa 2020: 775–784.

Witczak, Hubert. "Problemy naukowe." In *Podstawy metodologiczne prac doktorskich w naukach ekonomicznych*, edited by Maria Sławińska, and Hubert Witczak. Second updated edition. Poznań, 2012.

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The Illegal Wildlife Trade in Poland – Crime Control Models[1]

Abstract: Wildlife traffickindg of endangered species is an international crime that is increasing in in terms of its significance and position in the global crime hierarchy. This phenomenon is a significant subject of research for both traditional and green criminology. The representatives of green criminology, when discussing the criminal policy in matters related to green crimes, refer to its broad meaning. From this perspective, "green criminal policy" includes: a) the legal and social approach, b) a regulatory system that emphasizes social arrangements, norms and reforms in the production and consumption system; and c) a system of social interactions. Each of these models is presented in the article. In this context, the results of qualitative research on the state of the social control of illegal trade in wild fauna and flora in Poland will also be cited.

Keywords: illegal wildlife trade, green criminology, social control models, crime control.

Introduction

Wildlife trafficking of endangered species is an international crime that is increasing in in terms of its significance and position in the global crime hier-

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archy. This phenomenon is a significant subject of research for both traditional and green criminology. First, the extent and the scale of its negative consequences for the protection of biodiversity are difficult to predict. These crimes can lead to the extinction of entire species, and their impact on the population has long-term effects on entire ecosystems. Second, it is a specific sphere in which non-governmental organizations exert a significant influence on legislation and criminal policy.[2] Third, there is evidence of organized crime groups involvement in wildlife crime, which is seen as safe and easy-to-profit from.[3] Fourth, it is a class of phenomena that provides a rare opportunity to study informal social crime control.[4] Representatives of green criminology, thanks to their research, highlighted the problem of the huge qualitative and quantitative differentiation of the phenomenon.[5] Both the demand side and the supply side are diversified, not only with regard to the species of animals being the object of trade, but also the taking into account motivations of those involved in this phenomenon. Four categories distinguished due to their characteristic features may be the subject of demand. These are: (a) processed products derived from animals; b) collectors or connoisseurs; (c) products of animal origin used in traditional Asian medicine; and d) food.[6]

2 See: Wiesław Pływaczewski, "Organizacje pozarządowe na tle problematyki nielegalnego handlu chronionymi gatunkami dzikiej fauny i flory", *Studia Prawnoustrojowe*, no. 13. 2011.

3 See Petrus C. van Duyne, "The Phantom and Threat of Organized Crime", *Crime, Law & Social Change*, no. 24. 1996: 341–377; Moisés Naim, *Illicit: How smugglers, traffickers and copycats are hijacking the global economy*. London, 2005; Dee Cook, Martin Roberts, Jason Lowther, *The international wildlife trade and organized crime: A review of the evidence and role of the United Kingdom*, <https://www.academia.edu/8178488/The_International_Wildlife_Trade_and_Organised_Crime_a_review_of_the_evidence_and_the_role_of_the_UK>, accessed 13.02.2022.

4 See Edyta Drzazga, "Kontrola społeczna nielegalnego obrotu dziką fauną i florą Polsce" in *Prawo publiczne i prawo karne w XXI wieku. Wybrane zagadnienia*, ed. Ł. Pilarz. Lublin, 2019, 104–107.

5 Angus Nurse, *Animal Harm. Perspectives on Why People Harm and Kill Animals*. London, and New York, 2013, 169–185.

6 Tanya Wyatt, *Wildlife Trafficking A Deconstruction of the Crime, the Victims and the Offenders*. London, 2013, 17–22. Also see: Anh Cao Ngoc, and Tanya Wyatt, "A Green Criminological Exploration of Illegal Wildlife Trade in Vietnam", *Asian Journal of Criminology* 8, no. 1. 2013: 129–142.

Just as there is no single pattern for the phenomenon of illegal wildlife trafficking, it is also impossible to maintain that the perpetrators of wildlife trafficking correspond to a single profile. In the literature on the subject, attempts are made to categorize them, taking into account the motivation to undertake such activity.[7] The following categories of people on the supply side of wildlife trafficking can therefore be distinguished: a) people whose involvement is due to desperation or poverty. As a rule, these are perpetrators who live in close proximity to places where wild animals live. Therefore, those belonging to this category can capture them themselves and use them for their own consumption or further sale. Although it seems that they constitute a significant proportion of the category of perpetrators, and hence it is burdensome to counteract the phenomenon, it is emphasized that it is not poverty but wealth that is the main cause of the loss of biodiversity in the world, since it results in the growing demand for luxury goods; (b) people who perform other work in parallel, which allows them to exploit the environment with a low risk of their illegal activities being revealed, i.e. trappers who acquire skins; and (c) people who are specially recruited for this purpose i.e. helicopter gangs hunting rhinoceros in Africa or ornithologists in Russia and Central Asia who acquire eggs and young birds for sale, often on request, also fall into this category.

CITES

Trade in wild fauna and flora was for some time outside the sphere of legal regulations, including criminal law, but the progressive exploitation of nature has necessitated changes in this respect. The legal foundations of the modern system of global protection of endangered species of animals and plants are based on the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (also known as the Washington Convention, or in

7 Wyatt, *Wildlife*, 36–37.

short – CITES[8]). CITES is a solution based partly on the ecocentric model, as its purpose is to support, to a certain extent, a phenomenon that is beneficial from the point of view of human interests. Therefore, this model allows the trade in plants and animals for commercial purposes, but with the exception of species threatened with extinction. The updated lists of these species are provided in Appendices I, II and III to the Convention.

Green Criminal Policy

When discussing criminal policy in matters related to green crimes, the representatives of green criminology refer to its broad meaning. From this perspective, "green criminal policy" includes:[9]

- a legal and social approach, in which legal and criminal regulations and various attempts to increase the effectiveness and efficiency of the law are of leading importance;
- a regulatory system that emphasizes social arrangements, norms and reforms in the production and consumption system;
- a system of social interactions – in which attempts to introduce fundamental social changes and striving to initiate transformation at the level of social awareness by supporting deliberative democracy,[10] social movements and civil society, get the priority.

Each of the models listed will be presented below. In this context, the results of qualitative research on the state of social control of illegal trade in wild fauna and flora in Poland will also be cited.[11]

8 Convention on International Trade in Endangered Species of Wild Fauna and Flora, CITES (Journal of Laws 1991, no. 27, item 112).

9 Angus Nurse, *Policing Wildlife. Perspectives on the enforcement of wildlife legislation*. Basingstoke, 2015, 94.

10 Deliberative democracy — the idea that citizens or their representatives owe each other mutually acceptable reasons for the laws they enact. See Amy Gutmann, Dennis Thompson, *Why Deliberative Democracy?*. Princeton, 2004, 7.

11 See Drzazga, *Kontrola*, 103–113.

Methodology

20 anonymous in-depth interviews conducted with various experts dealing with the problem of illegal trade in wildlife in Poland will be presented as a form of commentary. In order to obtain the widest possible range of expert opinions, the selection included: representatives of the customs and tax service, police officers who are CITES coordinators, representatives of the Department of Customs of the Ministry of Finance, the State Council for Environmental Protection, and representatives of "Salamandra" – the National Society for Nature Conservation as well as WWF Poland.

The interviews were partially categorized, a form which, unlike categorized interviews, gives the person conducting much greater room for maneuver. The interview research tool was an interview scenario developed on the basis of well-thought-out research goals and the recognition of the phenomenon based on the so-called analysis of existing data and dogmatic and legal analysis. It contained a list of obligatory questions, but both the form and the order in which they were asked was discretionary. Each interview was preceded by a short so-called briefing, i.e. introducing the respondent to the subject of the interview and ensuring anonymity. When the interview was finished, a debriefing in the form of a summary was performed. Expert interviews were recorded in an electronic medium. Then, they were transcribed and carefully analyzed, including the following stages: selection and ordering of data, creating a set of analytical categories, assigning data to appropriate categories, analyzing and interpreting data, and presenting conclusions. For this purpose, the qualitative data analysis program MAXQDA was used. The analysis process included the following stages: 1. Inductive code creation and pre-coding of two selected interviews. 2. Creation of a codebook. 3. Coding the entire material to be analyzed. 4. Creation and analysis of case representations. 5. An attempt to answer research questions.

Legal and Social Model

The legal and social model seems to correlate with the traditional concept of criminal policy. This model emphasizes the special role of establishing and applying legal regulations to expose green crimes and bring the perpetrators to justice. This solution dominates the world. At the same time, researchers draw attention to the fact that the application of the law in cases related to illegal trade in wildlife encounters problems in the practice of its application, making it ineffective.[12]

The main difficulty is the ineffective enforcement of the applicable legal provisions. The literature emphasizes that, in terms of social perception, crimes against the natural environment are seen as less serious than other crimes, both in terms of the value of the protected property and the scale and intensity of the phenomenon. Accordingly, these acts are not considered to merit intensive control efforts on the part of formalized control agencies[13]. In the opinion of police officers, they should rather be of interest to informal social groups. An additional problem with the legal and social model consists in the phenomenon of illegal trade in wildlife being perceived as so-called "victimless crimes." This is invariably related to the anthropocentric vision of justice and the definition of a crime as a prohibited act that primarily harms human interests. Although green crimes are increasingly attracting media attention, mainly due to measures taken by NGOs, these acts are still given low priority by control agencies. Reiner pointed out that police officers classify crimes based on their compliance with the currently accepted image of the role of a policeman.[14] The approved and reproduced "cop stereotype" is associated with the assessment of certain crimes as meaningless or insignificant, in which disclosure and detection is not worth investing time and effort, in contrast to "real" crimes,

12 Melanie Wellsmith, "Wildlife Crime: The Problems of Enforcement", *European Journal on Criminal Policy and Research*. 2011: 125–148; Angus Nurse, "Repainting the Thin Green Line: The Enforcement of UK Wildlife Law", *Internet Journal of Criminology* 2012: 1–20.

13 See Bilal Muhhamad, *Rural Crime and Rural Policing Practises (Multicultural Law Enforcement*). Detroit, 2002.

14 See Robert Reiner, *The Politics of the Police*. Oxford, 2000.

i.e. those that deserve such involvement from the police. In line with this way of thinking, combating homicide and other crimes against life and health is considered to be both a demanding and rewarding task.[15] Against this background, there are a lot of difficulties related to the actual inclusion of green crimes in the spectrum of prohibited acts that require decisive action on the part of institutions established for this purpose. Thus, in this approach, problems related to the issue of legal effectiveness emerge. These, in relation to green crimes, cannot be considered separately from the anthropocentric view of the idea of justice and a particularly defined vision of criminal law.[16]

The anthropocentric argument prevails in the debate on how to stop the destructive exploitation of nature – a debate that has so far been unable to penetrate the collective consciousness. However, the problem related to such an anthropocentric impulse to counteract the phenomenon boils down to the cyclical, ill-considered and, therefore, ineffective nature of the response to it – this time at the legislative stage.[17] One of the traditionally cited arguments in favor of the need to undertake research on illegal wildlife trade concerns the negative consequences of this phenomenon for human life and health. This phenomenon contributes to the spread of dangerous diseases transmitted by animals to people, the so-called zoonoses.[18] The threat to public health that appears from time to time on their part lead to a series of events that turn out to be unfavorable from the point of view of the effectiveness of the control of illegal trade in wild fauna and flora. As long as the public health emergency persists, a pressure on policymakers to introduce changes at the normative level is exerted. Introduced in a hurry, not preceded by an in-depth diagnosis of the problem

15 Robert Reiner, *The Politics of the Police*. Oxford, 1992, 118.

16 Adam Weitzenfeld, and Melanie Joy, "An Overview of Anthropocentrism, Humanism, and Speciesism in Critical Animal Theory", *Defining Critical Animal Studies*. 2014: 3–27.

17 Rob White, "Ecocentrism and criminal justice", *Theoretical Criminology* 22, iss. 3. 2018: 345; Rob White, Diane Heckenberg, *Green Criminology. An introduction to the study of environmental harm*. London, and New York, 2014, 66.

18 See more: Marcos A. Bezerra-Santos, Jairo A. Mendoza-Roldan, R.C. Andrew Thompson, Filipe Dantas-Torres, and Domenico Otranto, "Illegal Wildlife Trade: A Gateway to Zoonotic Infectious Diseases", *Trends in Parasitology* 37, iss. 3. 2021.

and its causes, actions on the part of the authorities take the only possible form under these conditions – a reaction (not supplemented by prevention), which is destructive (in the form of a new ban or increased punitiveness for breaking existing legal provisions) and temporary in its nature – it lasts until the threat to human interests ceases to exist.

Polish respondents were also skeptical about this model, indicating its excessive restrictiveness. According to experts, the CITES regulations implemented in Poland are considered the strictest in Europe, and generate disturbing phenomena. This is especially the case when a small quantity of a CITES specimen is transported (e.g. seaweed ointment or 3.5 cm of coral reef found on the beach) without meeting the legal conditions. Such an act is a criminal offense punishable by the same statutory penalty as smuggling in bulk. As a consequence of the existence of such a provision, which qualitatively equates, in terms of the statutory penalty, two extreme phenomena, the authorities of the broadly understood administration of justice make the following decisions. Customs Service representatives often "turn a blind eye" to petty smuggling, trying to avoid initiating a procedure that, in their opinion, is unnecessary, taking into account the gravity of the act. However, when proceedings are commenced, judges usually dismiss them in similar cases. This means that social control agendas correct the flawed criminal policy in terms of the legally regulated degree of repression, which is still not differentiated in relation to various categories of acts and perpetrators.

This, in turn, generates another disturbing phenomenon. The persistent lack of response to such "lightweight" cases makes the entire control system leaky. This, in turn, influences the phenomenon itself, encouraging a group of determined perpetrators to exploit such gaps, which proves that the priority is given to the problem of illegal trade in wildlife. As a result, it is difficult to counteract this phenomenon effectively. It happens despite the proposals for changes to the aforementioned legal regulations, submitted by experts (mainly Salamandra representatives), consisting in shifting cases of minor importance to the category of offenses.

Therefore, also in Poland, the control of illegal trade in wildlife is not free from inadequate criminalization and excessive punitiveness.

Regulatory System

Characteristic for the regulatory model of the response to illegal trade in wildlife is the regulation of the phenomenon with the use of the administrative system for monitoring trade and setting limits.[19] In this model, trading is allowed under certain conditions. Such a solution is supposed to lead to a state of equilibrium in which animal populations will be preserved and people will be able to benefit from the natural environment. This model is close to the principles underlying the CITES system, i.e. the International Convention on Trade in Endangered Species of Wild Fauna and Flora. Non-compliance may result in sanctions, but this is rare in this regulatory system. Generally, the described model is based on cooperative methods such as persuasion, negotiation, and compromises in order to obtain consensus from interested parties (e.g. convention signatories on the scope of protection of individual species).

It is characteristic of the regulatory model to prioritize and protect only certain species in the process of finding compromises while marginalizing others. Another problem concerns negotiating the conditions of protection of a given species. The failure of a country to introduce such protection, even if it is a species on the verge of extinction, could undermine efforts to internationalize trade controls. This is especially true when the country is the beneficiary of the status quo that is harmful to animals.

In the course of the analysis of the regulatory model, the question of its effectiveness arises again. According to J. Stelmach, in order for the law to be considered effective, it should meet several conditions.[20] First, effective law must have real results. This means that the law should operate in a real

19 Nurse, *Policing*, 94.

20 Jerzy Stelmach, Bartosz Brożek, and Wojciech Załuski, *Dziesięć wykładów o ekonomii prawa*. Warszawa, 2007, 25–26.

socio-economic space; otherwise it will have the character of lex imperfecta – imperfect or unfinished law. Further conditions state that law should be created and applied in such a way as to maximize social and individual wealth. Moreover, the law should assume that its addressees are economically rational entities; the law should allow for the proper allocation of goods, the law should aim at self-limitation; the law should take into account the tradition, already developed habits, accepted principles and generally accepted standards; and science should focus its attention on the study of "effective law." The paradox related to the so-defined conditions for the effectiveness of the law in the case of the control of illegal trade in wildlife – as well as many other so-called green crimes – boils down to the fact that their fulfillment, at best, neither reduces the scale of the phenomenon nor prevents the negative consequences mentioned above. In the worst case, the guarantee of the legal effectiveness of the law will perpetuate and deepen the problems related to this crime.

Again, the core of this contradiction can be found in the dominant anthropocentric vision of justice that underlies most legal systems. As already mentioned in the anthropocentric perspective, the superiority of people over other living and inanimate entities is getting conspicuous. Human interests are subordinated to the interests of the natural environment, and its instrumental value is determined by the possibilities of satisfying changing social needs. This is the perspective underlying most criminological considerations (excluding green criminology) and criminal law regulations aimed at maximizing the benefits obtained from the natural environment. The axis of this idea of justice in the modern world is to prioritize production and consumption processes over long-term benefits for the entire ecosystem. The difficulty arising from social systems based on the idea of anthropocentrism lies in its inevitable tendency to self-destruct over time and thus reduce the possibility of benefiting from the natural world – a world that is mistakenly perceived as a whole, but not encompassing the human species.[21]

21 White, *Ecocentrism*, 345; Also see White, and Heckenberg, *Green*, 66.

Of a slightly different nature, but also related to the anthropocentric vision of justice, is the consistent implementation of another condition for the effectiveness of law. It refers to the assumption that the law should take into account the tradition, already developed social habits, accepted principles and generally accepted standards in a given society. The uncompromising pursuit of this condition makes it impossible to counteract the crime of illegal trade in wild fauna and flora. This is due to the fact that its sources should be sought in certain established patterns of behavior which, due to cultural norms, often become components of "normal" life, even if they are contrary to the applicable national and international legal regulations. In certain socio-cultural systems, such a situation can lead to a real impasse. On the one hand, it is impossible to completely ignore the cultural background of a given country when making law. Its compliance with the system of values and norms of a given social group is considered a condition of its observance. On the other hand, a problem arises when there are existing and culturally legitimate behaviors that fit into the tradition of a given society or its social groups, and at the same time stand in clear contradiction to the good of the natural environment and its components.

The experts' assessment of the effectiveness of the legislation on wildlife marketing in the internal market was strict. The respondents emphasized that in Poland there are EU regulations that include solutions for internal trade that do not have appropriate equivalents in Polish legal regulations. Although the Polish act on nature protection was considered proper at the time of its adoption, after the changes introduced to it without expert consultations it became incomprehensible. According to the respondents, the terms contained in it are used with very different meanings. In addition, there is often a reference to concepts that do not have any legal definition, and the use of a dictionary definition completely distorts the meaning of individual regulations. As a result – as respondents claim – the normative state of species protection is ambiguous and there is no political will to change this reality.

The adopted model of animal registration was unambiguously and critically assessed.[22] According to experts, it does not comprise a good solution, because it is a technical activity, during which the local veterinary doctor only confirms the fact that the animal was born in captivity, without verifying its origin in any way. Therefore, from the point of view of actions taken by the Police and the Customs and Tax Service, this document has no meaning. In addition, the Minister of the Environment, in consultation with the State Council for Nature Conservation, is the only authority that decides whether a specimen can be considered to have been born in captivity. However, there are no system solutions. Currently, the registration obligation rests with the final buyer of the specimen, i.e. the one who is at the very end of the distribution chain and for whom it is most difficult to prove the legal origin of the animal. The final buyer, even if they wanted to, cannot present the relevant documents (including permits) and such a person is exempt from this obligation as those who first place the specimen on the market. When animals are born through breeding, the easiest way to prove their legal origin is through registration. Therefore, as indicated by the respondents, each farm should be registered after checking whether it owns legally obtained animals or not. It should receive a number, and the animals should be chipped and receive a document with its number and / or photo. It would be necessary, at the same time, to introduce periodic control on registered farms in order to verify whether they still breed animals from a legal source. Such a solution would definitely reduce the benefit of the perpetrator from the committed crime. In order to optimize the functioning of such a system, it would be necessary to introduce a single general register for invasive, dangerous, protected and so-called "Cites." Moreover, such a solution would entail much lower costs than at present.

Apart from mentioning the above-described problems related to informal, permanent mechanisms of opportunism, the experts also indicated a number of other difficulties that can be divided into at least 2 groups of related problems, such as: 1) the control agendas; 2) logistics and financing.

22 See Drzazga, *Kontrola*, 109–110.

In the context of the first group of problems, it is necessary to briefly explain what formalized control agendas involved in counteracting illegal trade in wildlife are. The Minister of Justice acts as the governing body of CITES. The scientific body is the Polish Society for Nature Conservation (PROP). The control over compliance with the provisions of the Washington Convention and the corresponding regulations is exercised by the Police (primarily responsible for controlling domestic trade) and the Customs and Tax Service (responsible for international trade). Both of these institutions have CITES coordinators at voivodship levels. Since 2006, the Working Group for CITES has also operated in Poland, which is a platform for the exchange of information and cooperation of all the most important bodies, institutions and non-governmental organizations. This group presented proposals for the improvement of regulations, however, as yet they have not been taken into account. The organizational structure, management, financing and quantitative composition comprise extremely important variables that have a direct impact on the effectiveness of an institution's control. Therefore, it is not surprising that serious organizational changes that the Customs Service underwent resulted in the weakening of the effectiveness of this control agenda. In 2017, the Customs Service was combined with the fiscal control and tax administration. The main task of the new customs and tax office has become the fight against tax fraud and the collection of customs fees. On the other hand, the priority given to the control of the illegal transportation of CITES specimens has become exceptionally low in this organizational setting. As a result, the emphasis on training for officers of the Customs and Tax Service has also decreased. Along with the organizational change, several experienced CITES coordinators were removed from the service. It is to them that customs officials address their doubts regarding the qualification of fauna or flora specimen to the CITES specimen category. The respondents clearly emphasized that the effectiveness of social control of the phenomenon largely depends on the continuity of the employment of experts.

The above dependence also extends to CITES coordinators employed in the Police. Appointing them in departments for the purpose of combating economic crime meant imposing on them an additional obligation not related to the scope of their previous duties and competences. It also led to the problem of the protection of endangered species being pushed to the last place in this organizational system. In addition, the interviews show that the system of awarding promotions to experienced CITES coordinators, which is based on transferring them to other cases, additionally weakens the control of the Police over the discussed phenomenon. The replacement of experienced officers by inexperienced ones who, as in the case of CITES coordinators in customs and tax chambers, do not have sufficient knowledge of the phenomenon makes the matters worse. The remedy indicated by experts would rely inter alia on maintaining the continuity of the employment of coordinators and introducing a promotion system within the same formation.

Another group of problems mentioned – namely those pertaining to infrastructure - concerns the lack of places for live animals to be transferred to after detention. Most zoos refuse to accept such animals, which is why the Police often do not take any action despite receiving information on the functioning of illegal farms. As a result, legislation on live animals is often not enforced. Therefore, there is a need to create a central asylum and guarantee financial resources for its functioning, and to keep such a center ready to accept wild animals.

Model of Social Interactions

In the case of crime against wildlife, it is non-governmental organizations that largely shape the criminal policy and the state's response to this phenomenon.[23]

This interesting issue of the role of non-governmental organizations in controlling the phenomenon also arose during the interviews. The analysis of the interviews with experts led to the conclusion that the burden of making the repre-

23 Nurse, *Policing*, 94.

sentatives of the judiciary aware of the phenomenon of illegal trade in wildlife in Poland rested on the shoulders of non-governmental organizations. An example of such activities is WWF Polska[24] that provides training in the so-called CITES crimes for approx. 900 people from the Police and the Public Prosecutor's Office. In addition, WWF was the first organization in Poland to issue a publication for more than 120 prosecutor's offices containing tips on conducting preparatory proceedings in cases of illegal trafficking in endangered species of fauna and flora. Then PTOP Salamandra started cooperation with WWF in order to focus also on monitoring trade, initially in traditional distribution channels such as shops, exchanges, and the Internet.[25] In addition, a CITES Working Group in PL, coordinated by PTOP Salamandra, was established, including the Minister of the Environment, representatives of the Ministry of Finance, the Customs Service, the Police and non-governmental organizations. However, despite the promising beginning, this organization has not been working for a few years, because – as the majority of respondents emphasized – it has no interest in cooperating with non-governmental organizations. This is one of the greatest difficulties that needs to be overcome in order to strengthen the control of the illegal wildlife trade of fauna and flora in Poland.

Conclusions

In conclusion, the narrowly understood concept of criminal policy corresponding to the legal and social model of reaction to crime against the natural environment, including illegal trade in wildlife, does not meet expectations, especially at the stage of applying the law. The main difficulty associated with this approach is founded on the anthropocentric idea that is central to it, thus, invariably classifying green crime in the category of acts which the organs of formal social control give one of the lowest priorities to.

24 World Wildlife Fund; hereinafter: WWF.

25 See Andrzej Kepel, Anna Grebieniow, and Borys Kala, *Ginące gatunki w sieci – raport. PTOP „Salamandra"*. Poznań, 2004.

Each of the distinguished models has certain weaknesses and none of them used in isolation from the others can achieve the goals desired from the point of view of green criminology. What deserves consideration is such a modification of thinking about criminal policy that on the one hand will be supported by a solid diagnosis of green crime (which in traditional considerations on crime against the natural environment was rather on the research periphery), and on the other hand will seek appropriate methods departing from the idea of anthropocentrism. Thus, "green criminal policy" would then be inclusive in the scope of the used models of response to green crime and social actors involved in the implementation of its goals.

References

Bezerra-Santos, Marcos A., Jairo A. Mendoza-Roldan, R. C. Andrew Thompson, Filipe Dantas-Torres, and Domenico Otranto. "Illegal Wildlife Trade: A Gateway to Zoonotic Infectious Diseases." *Trends in Parasitology* 37, iss. 3. 2021: 181–184.

Cao Ngoc, Anh, and Tanya Wyatt. "A Green Criminological Exploration of Illegal Wildlife Trade in Vietnam." *Asian Journal of Criminology* 8, no. 1. 2013: 129–142.

Cook, Dee, Martin Roberts, and Jason Lowther. *The international wildlife trade and organized crime: A review of the evidence and role of the United Kingdom*. <https://www.academia.edu/8178488/The_International_Wildlife_Trade_and_Organised_Crime_a_review_of_the_evidence_and_the_role_of_the_UK>, access: 13.02.2022.

Drzazga, Edyta. "Kontrola społeczna nielegalnego obrotu dziką fauną i florą Polsce." In *Prawo publiczne i prawo karne w XXI wieku. Wybrane zagadnienia*, edited by Łukasz Pilarz. Lublin, 2019: 104–107.

van Duyne, Petrus C. "The Phantom and Threat of Organized Crime." *Crime, Law & Social Change*, no. 24. 1996: 341–377.

Gutmann, Amy, and Dennis Thompson. *Why Deliberative Democracy?*. Princeton, 2004.

Kepel, Andrzej, Anna Grebieniow, and Borys Kala. *Ginące gatunki w sieci – raport. PTOP „Salamandra”*. Poznań, 2004.

Muhhamad, Bilal. *Rural Crime and Rural Policing Practises (Multicultural Law Enforcement*). Detroit, 2002.

Naim, Moisés. *Illicit: How smugglers, traffickers and copycats are hijacking the global economy*. London, 2005.

Nurse, Angus. *Animal Harm. Perspectives on Why People Harm and Kill Animals*. London, and New York, 2013.

Nurse, Angus. *Policing Wildlife. Perspectives on the enforcement of wildlife legislation*. Basingstoke, 2015.

Pływaczewski, Wiesław. “Organizacje pozarządowe na tle problematyki nielegalnego handlu chronionymi gatunkami dzikiej fauny i flory.” *Studia Prawnoustrojowe*, no. 13. 2011: 265–288.

Reiner, Robert. *The Politics of the Police*, Oxford, 1992.

Reiner, Robert. *The Politics of the Police*, Oxford, 2000.

Stelmach, Jerzy, Bartosz Brożek, and Wojciech Załuski. *Dziesięć wykładów o ekonomii prawa*. Warszawa, 2007.

Wellsmith, Melanie. “Wildlife Crime: The Problems of Enforcement.” *European Journal on Criminal Policy and Research*. 2011: 125–148.

Weitzenfeld, Adam, and Melanie Joy. “An Overview of Anthropocentrism, Humanism, and Speciesism in Critical Animal Theory.” *Defining Critical Animal Studies*. 2014: 3–27.

White, Rob. “Ecocentrism and criminal justice.” *Theoretical Criminology* 22, iss. 3. 2018: 342–362.

White, Rob, and Diane Heckenberg. *Green Criminology. An introduction to the study of environmental harm*. London and New York, 2014.

Wyatt, Tanya. *Wildlife Trafficking A Deconstruction of the Crime, the Victims and the Offenders*. London, 2013.

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Data Altruism or Voluntary Data Sharing in the Economy

Abstract: Along with technological progress, one can observe socio-economic changes taking place, and the transformation of the EU economy into a digital economy is an eloquent example. The scope of this transformation includes data, which plays an important role in the economy. This may be readily inferred from the European Strategy for Data published by the European Commission, which envisages a data-driven economy. The transformation towards a data-agile economy results in certain modification in the legal space. For instance, the proposal for a data governance regulation introduces an entity referred to as a data altruism organisation. The proposed act also requires EU Member States to designate a competent authority. This paper examines the functioning of said organisations and attempts to define their status, and discusses the duties of competent authorities which may possibly supervise the activities of data altruism organisations.

Keywords: data-driven economy, data altruism organisations, competent authorities, social organisations, non-governmental organisations.

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Introduction

Technological progress goes hand in hand with socio-economic shifts, and the digital transformation of the EU economy can serve as a telling example.[1] The European Union[2] has taken a number of steps to build a Digital Single Market, manifesting in its *Digital Single Market Strategy for Europe*.[3] Naturally, data falls within the scope of the transformation,[4] as asserted in the *European Data Strategy* promulgated by the European Commission[5] on 19 February 2020,[6] which sets out a novel, unprecedented approach to development.[7] The transformation towards an economy based on data processing[8] demonstrates its important role in the global,[9] EU and national economies:[10] it is the

1 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions *Towards a thriving data-driven economy* {SWD(2014) 214 final}. Brussels, 02.07.2014. COM(2014) 442 final., Document 52014DC0442. Hereinafter: *Towards a thriving data-driven economy*.

2 Hereinafter: EU.

3 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions *A Digital Single Market Strategy for Europe* {SWD(2015) 100 final}. Brussels, 06.05.2015. COM(2015) 192 final., Document 52015DC0192.

4 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions *A European strategy for data*. Brussels, 19.02.2020. COM(2020) 66 final, Document 52020DC0066, 1. Hereinafter: *A European strategy for data*.

5 Hereinafter: EC.

6 *A European strategy for data*. The strategy was presented concurrently with:
- Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions *Shaping Europe's digital future*. Brussels, 19.02.2020. COM(2020) 67 final, Document 52020DC0067.
- *White Paper On Artificial Intelligence – A European approach to excellence and trust*. Brussels, 19.02.2020. Document 52020DC0065, COM(2020) 65 final.

7 In the EU strategy EUROPA 2020, the development agenda envisaged an economy based on knowledge and innovation, which is how smart development was conceptualized. At present, *A European strategy for data* is informed by a new approach to development, i.e. data-driven economy. Concerning the knowledge-based economy, see Communication from the Commission *EUROPE 2020 A strategy for smart, sustainable and inclusive growth*. Brussels, 03.03.2010. KOM(2010) 2020 final, Document 52010DC2020, 13 ff.

8 *Towards a thriving data-driven economy*, 5.

9 *A European strategy for data*, 4.

10 On the impact of data on economic development, see Grzegorz Koloch, Karolina Grobelna, Karolina Zakrzewska-Szlichtyng, Bogumił Kamiński, Daniel Kaszyński, *Analiza*

"lifeblood of economic development."[11] The aforementioned strategy aims at building a data-driven economy.[12] Within the framework of the Single Data Market, it anticipates the creation of nine European Common Data Spaces in strategic sectors and areas of public interest,[13] specifically:

- A Common European industrial (manufacturing) data space,
- A Common European Green Deal data space,
- A Common European mobility data space,
- A Common European health data space,
- A Common European financial data space,
- A Common European energy data space,
- A Common European agriculture data space,
- A Common European data spaces for public administration,
- A Common European skills data space.[14]

Furthermore, in the addendum to *A European strategy for data*, the European Commission announced that work will continue on a European Open Science Cloud [15] to ensure "(…) the basis for a science, research and innovation data space that will bring together data resulting from research and deployment

diagnostyczna – Intensywność wykorzystania danych w gospodarce a jej rozwój. Analiza na zlecenie Ministerstwa Cyfryzacji. Appendix no. 4 *Raport_dane_prezentacja*. <https://mc.bip.gov.pl/rok-2017/analiza-diagnostyczna-intesywnosc-wykorzystania-danych-w-gospodarce-a-jej-rozwoj.html> , access: 04.04.2022.

11 *A European strategy for data*, 3.

12 Hereinafter: DDE. See *A European strategy for data*. The EC Communication *Towards a thriving data-driven economy* asserts that "the data economy measures the overall impacts of the data market – i.e. the marketplace where digital data is exchanged as products or services derived from raw data – on the economy as a whole. It involves the generation, collection, storage, processing, distribution, analysis, elaboration, delivery, and exploitation of data enabled by digital technologies (European Data Market study, SMART 2013/0063, IDC, 2016)", see Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions *Building a European data economy*, {SWD(2017) 2 final}. Brussels, 10.01.2017. COM(2017) 9 final, Document 52017DC0009, 2 note 1.

13 *A European strategy for data*, 12, 23.

14 APPENDIX to the Communication 'A European strategy for data' Common European data spaces in in strategic sectors and domains of public interest. Hereinafter: Appendix to the Communication *A European strategy for data*.

15 Appendix to the Communication *A European strategy for data*, 36.

programmes and will be connected and fully articulated with the sectoral data spaces."[16] Although the concept of the data-driven economy does not possess a legal definition, it has penetrated into the legal language [17] and the idiom of soft law[18] Put in the most straightforward fashion, the DDE denotes the exploitation of the potential of data[19] from the private and public sectors,[20] which has been made available for the sake of economic growth,[21] in accordance with European values, laws and fundamental rights.[22] It must be emphasized that this vision is to be implemented in the EU Member States within the next 5 years.[23]

The transformation towards a data-agile economy[24] is going to proceed following EU legislation and, subsequently, laws adopted at the national level.[25] It involves social and economic change, but it also results in modifications

16 Appendix to the Communication *A European strategy for data*, 36.

17 See esp. Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information, Official Journal of the European Union of 26.06.2019, L 172/56, Document 32019L1024, hereinafter: Directive (EU) 2019/1024; Regulation (EU) 2018/1807 of the European Parliament and of the Council of 14 November 2018 on a framework for the free flow of non-personal data in the European Union, Journal of the European Union of 28.11.2018, L 303/59, Document 32018R1807, and Proposal for a Regulation of the European Parliament and of the Council on European data governance (Data Governance Act). Brussels, 25.11.2020. COM(2020) 767 final, 2020/0340(COD), Document 52020PC0767, hereinafter: proposal for Data Governance Act.

18 See primarily *A European strategy for data* and other selected EU documents cited in this paper. The notion also penetrates into domestic sources of law, see esp. Resolution no. 28 of the Council of Ministers of 18 February 2021 on the Data Opening Programme for 2021–2027. Monitor of Poland 2021, item 290.

19 Commission Staff Working Document: Guidance on sharing private sector data in the European data economy accompanying the document Communication from the Commission to the European Parliament, the Council, the European economic and social Committee and the Committee of the Regions "Towards a common European data space" {COM(2018) 232 final}. Brussels, 25.04.2018. SWD(2018) 125 final, 1, hereinafter: *Guidance on sharing private sector data*.

20 *A European strategy for data*, 7 ff.

21 *Guidance on sharing private sector data*, 1.

22 *A European strategy for data*, 1.

23 *A European strategy for data*, 2.

24 The data-driven economy is also referred to as the data-agile economy, see *A European strategy for data*, 4.

25 See e.g. Act of 11 August 2021 on open data and the reuse of public sector data, Journal of Laws 2021, item 1641, whose scope implements the provisions of the Directive (EU) 2019/1024.

within the legal domain. For instance, the *Proposal for a Regulation of the European Parliament and of the Council on European data management (Data Governance Act)*[26] introduces the so-called altruistic approach to data, whereby organizations engaging in data altruism[27] will share data in the general interest.[28] The scope of the proposed regulation also requires EU Member States to designate a competent authority (at least one) in charge of a register of such organizations and responsible for monitoring their compliance with the provisions set out in the proposal.[29]

This paper will therefore outline how organisations engaging in data altruism operate, attempt to define their status, and discuss the functioning of designated authorities whose competence encompasses the activities of data altruism organisations, with the author presenting her observations and viewpoint on the matter. Due to the vastness of the issue in question, the enquiry will be carried out to the extent which permits the essentials to be conveyed, drawing attention to selected provisions of the proposed act. It is worth noting that the intention of the EU legislator in the process of building a data-driven economy, expressed in the proposal for the Data Governance Act (in addition to the *Proposal for a Regulation of the European Parliament and of the Council on harmonised rules on fair access to and use of data (Data Act)*[30]) is of crucial importance at this point in time.

Organisations Engaging in Data Altruism. Analysis of the Provisions of the Proposal for EU Regulation

As defined in the proposal for the Data Governance Act, engaging in data altruism, i.e. the voluntary sharing of data by natural persons or enterprises in the general

26 Hereinafter: proposal for Data Governance Act, draft Act.
27 Art. 15 of the proposal for the Data Governance Act.
28 Art. 16 of the proposal for the Data Governance Act.
29 Art. 20(1) of the proposal for the Data Governance Act.
30 Regulation of the European Parliament and of the Council on harmonised rules on fair access to and use of data (Data Act), Brussels, 23.02.2022, COM(2022) 68 final, 2022/0047(COD).

interest,[31] "means the consent by data subjects to process personal data pertaining to them, or permissions of other data holders to allow the use of their non-personal data without seeking a reward, for purposes of general interest, such as scientific research purposes or improving public services."[32]As previously noted, the provisions of the proposed act introduce data altruism organisations[33] into the legal space, whereby such entities are subject to registration.[34] Having submitted an application, an entity is subsequently entered in the pertinent register and may refer to itself as a "data altruism organisation recognised in the Union."[35] However, those seeking to obtain this designation are required to satisfy certain general requirements, i.e. have to function with a view to achieving objectives of general interest, engage in non-profit activities (including independence from profit-oriented entities) and to "perform the activities related to data altruism take place through a legally independent structure, separate from other activities it has undertaken perform altruistic data practices through a legally independent structure, distinct from other [activities undertaken] (…)."[36] The information to be included in the application is specified in Article 17(4) of the proposal.[37] The EU legislator stipulates that data altruism organisations must appoint a legal representative. Pursuant to Article 17(3), "[a]n entity that is not established in the Union, but meets the requirements in Article 16, shall appoint a legal representative in one of the Member States where it intends to collect data based on data altruism. For the purpose of compliance with this Regulation, that entity shall be deemed to be under the jurisdiction of the Member State where the legal representative is located."[38] Such organisations shall keep complete and accurate records as well as draft annual reports concerning their activities; these constraints are posited under

31 Recital (35) of the proposal for the Data Governance Act the rationale to the proposal for Data Governance Act, 9.
32 Art. 2 (10) of the proposal for the Data Governance Act.
33 Art. 15 of the proposal for the Data Governance Act.
34 Art. 17 of the proposal for the Data Governance Act. Registration is valid in all Member States of the EU, see Art. 17(5) of said proposal.
35 Art. 15(3) and Art. 17(1) of the proposal for the Data Governance Act.
36 Art. 16 of the proposal for the Data Governance Act.
37 Art. 17(4) of the proposal for the Data Governance Act.
38 Art. 17(3) of the proposal for the Data Governance Act.

the heading of transparency.[39] The records kept by data altruism organisations concern "all natural or legal persons that were given the possibility to process data held by that entity; the date or duration of such processing; the purpose of such processing as declared by the natural or legal person that was given the possibility of processing; the fees paid by natural or legal persons processing the data, if any."[40] The annual report, on the other hand, should contain "a description of the way in which the general interest purposes for which data was collected have been promoted during the given financial year; a list of all natural and legal persons that were allowed to use data it holds, including a summary description of the general interest purposes pursued by such data use and the description of the technical means used for it, including a description of the techniques used to preserve privacy and data protection; a summary of the results of the data uses allowed by the entity, where applicable; information on sources of revenue of the entity, in particular all revenue resulted from allowing access to the data, and on expenditure."[41] Importantly, data altruism organisations are required to inform data holders "about the purposes of general interest for which it permits the processing of their data by a data user in an easy-to-understand manner; about any processing outside the Union."[42] It may be noted at this juncture that, for the purposes of data altruism, the EC may develop a European-wide consent form by means of an implementing instrument, thus ensuring uniformity in this regard.[43]

Competent Authorities to Supervise the Activities of Data Altruism Organisations

Besides provisions applicable to such organisations, an obligation arises under the proposed regulation, specifically under Article 20(1), for the EU Member States to designate a competent authority (at least one) to maintain a national

39 Art. 18 of the proposal for the Data Governance Act.
40 Art. 18(1) of the proposal for the Data Governance Act.
41 Art. 18(2) of the proposal for the Data Governance Act.
42 Art. 19(1) of the proposal for the Data Governance Act.
43 Art. 22 of the proposal for the Data Governance Act.

register of recognised data altruism organisations. The competent authority is also tasked with monitoring and supervising whether the organisations in question fulfil pertinent requirements (as laid down in the proposal).[44] Furthermore, the competent authority is entrusted with processing submissions from entities seeking to become "data altruism organisation recognised in the Union" as well as entering such entities in the national register.[45] Should the information relating to the data altruism organisation provided in the application change, the organisation concerned is obliged to notify the competent body of this fact.[46] Moreover, it is also obliged to submit the aforementioned annual activity report to the competent authority.[47] In the proposal for regulation, the competent authority is mandated to request necessary information (in a manner which is proportionate and reasonable) from the data altruism organisations in order to verify their compliance with the provisions applicable to their activities.[48] If, on the other hand, a competent authority determines that that an entity "does not comply with one or more of the requirements of this Chapter it shall notify the entity of those findings and give it the opportunity to state its views, within a reasonable time limit."[49] The competent authority may also require that such breaches cease[50] and, furthermore, it is empowered to take certain measures (appropriate and proportionate) to ensure conformity on the part of data altruism organisations. If an organisation fails to comply with the requirements set out in the proposed regulation (at least one) it may no longer be entitled to be referred to as a "recognised data altruism organisation" and may be struck from the register.[51] The European Commission maintains the EU-wide register of recognised data altruism organisations, therefore information on the registration of a new

44 Art. 20(1) and Art. 21 of the proposal for the Data Governance Act.
45 Art. 17(5) of the proposal for the Data Governance Act.
46 Art. 17(7) of the proposal for the Data Governance Act.
47 Art. 18(2) of the proposal for the Data Governance Act.
48 Art. 21(2) of the proposal for the Data Governance Act.
49 Art. 21(3) of the proposal for the Data Governance Act.
50 Art. 21(4) of the proposal for the Data Governance Act.
51 Art. 21(4) and (5) of the proposal for the Data Governance Act.

entity is forwarded to the EC.[52] Member States are also obliged to provide the EC with identification data concerning the designated competent authorities.[53] As an aside, it is worth mentioning that the competent authorities must be "legally distinct from, and functionally independent of any provider of data sharing services or entity included in the register of recognised data altruism organisations."[54] In addition, the competent authorities must carry out their duties edition in an "impartial, transparent, consistent, reliable and timely manner."[55] Importantly, under Article 24(1) of the proposal, "natural and legal persons shall have the right to lodge a complaint with the relevant national competent authority against a provider of data sharing services or an entity entered in the register of recognised data altruism organisations."[56]

The Status of Data Altruism Organisations: A Tentative Determination

Recapitulating the above, data altruism organisations are subject to registration, pursue no profit, and operate with the intention of accomplishing objectives of general interest, doing so as legal entities,[57] while their activities are informed by voluntariness. The legal solutions contained in the proposed Data Governance Act compel one to consider the status of these organisations, in other words try determine the legal nature of these entities.

Within the Polish legal order, one distinguishes definitions of social organisations and non-governmental organisations (without considering their similarities or the equivalence of these terms). The very appellation, i.e. data altruism

52 Art. 17(5) and Art. 15(2) of the proposal for the Data Governance Act.
53 Art. 20(2) of the proposal for the Data Governance Act.
54 Art. 23(1) of the proposal for the Data Governance Act.
55 Art. 23(2) of the proposal for the Data Governance Act.
56 Art. 24(1) of the proposal for the Data Governance Act. Regrettably, the scope of this paper does not permit attempting to delineate the legal position of the competent authorities. Given how extensive the issue is, this qualifies as a matter to be explored in a separate text.
57 Art. 16(a) of the proposal for the Data Governance Act.

organisations, offers grounds to approach them from that particular standpoint. In the doctrine, social organisations are non-state entities possessed of organisational independence; they involve voluntary participation, pursue continual activity and play a role in the state.[58] Furthermore, under Article 5 § 2(5) of the Administrative Procedure Code, social organisations are "(…) construed as (…) professional, self-government, cooperative and other social organisations."[59] It would thus seem legitimate to conclude that the first two features of social organisations apply to data altruism organisations as well. Given the above analysis of the provisions of the proposed Data Governance Act, it may be asserted that these are non-state organisations functioning under organisational autonomy. In the author's opinion, it would be difficult to determine at the moment whether such organisations are characterised by sustained activity. There are no regulations which set out such a requirement explicitly, as e.g. in the case of associations; pursuant to Article 2(1) of the Act of 7 April 1989, Associations Law, "an association is a voluntary, self-governing, permanent union with non-profit purposes."[60] As already observed, data altruism consists in voluntary sharing of data by natural persons or enterprises in the general interest.[61] Therefore, the "voluntary" element is indeed in evidence but, based on the provisions of the proposed act, one cannot state the same about voluntariness of participation, since data altruism organisations will not have members as is the case with e.g. associations[62] or professional self-governance bodies.[63] Voluntariness manifests itself in the voluntary provision of data by natural persons or enterprises

58 Jolanta Blicharz, "Organizacja prawna administracji" in *Prawo administracyjne*, ed. J. Boć. Wrocław, 2005: 175; Jolanta Blicharz, "Organizacja prawna administracji" in *Prawo administracyjne*, ed. J. Boć. Wrocław, 2007: 165; Jan Zimmermann, *Prawo administracyjne*. Seventh edition. Warszawa, 2016: 208.

59 Art. 5 § 2(5) of the Act of 14 June 1960, Administrative Procedure Code, Journal of Laws 2021, item 735.

60 Art. 2(1) of the Act of 7 April 1989, Associations Law, Journal of Laws 2020, item 2261.

61 Recital (35) of the proposal for the Data Governance Act and the explanatory memorandum to the proposal for Data Governance Act, 9.

62 Blicharz. 2005, 177.

63 Blicharz. 2005,176.

in the general interest as well as in the very existence of such organisations. As previously noted, one of the vital aspects of their functioning is that they undertake activity with the intention of pursuing objectives of public interest. It may be added at this point that the relevant literature refers to an "open typology" of social organisations, which include: "political parties, associations, unions, self-governments, trade unions and cooperatives."[64]

One may also consider the Act of 24 April 2003 on public benefit activity and voluntary service, which sets out that "non-governmental organisations are legal persons or organisational units without legal personality, to which a separate act grants legal capacity, including foundations and associations, subject to Section 4, which are not units of the public finance sector (…) and which do not operate in order to achieve profit."[65] With this definition in mind and taking into account the above analysis of selected provisions in the proposed Data Governance Act, these characteristics may be attributed to a data altruism organisation, stressing once again that such organisations are legal entities which are not geared towards profit, as they engage in non-commercial undertakings.[66] The analysed normative substance does not indicate that entities referred to as "data altruism organisations" qualify as units of the public finance sector.

Conclusions

Data altruism certainly constitutes a new, previously unknown mechanism of data sharing. In the opinion of the author, the provisions of the current proposal for the Data Governance Act are not sufficiently specific to unequivocally determine the status of such organisations. It follows from this analysis that data altruism organisations display certain traits of social organisations and fall within the

64 Zimmermann, 208.

65 Art. 3(2) of the Act of 24 April 2003 on public benefit activity and volunteer service, Journal of Laws 2020, item 1057.

66 Art. 16(b) of the proposal for the Data Governance Act. However, one cannot fail to note Art. 18(1)(d) of the same, which after all refers to "the fees paid by natural or legal persons processing the data."

scope of the statutory definition of non-governmental organisations. Undoubtedly, the very notion that the entities engaging in data altruism are "organisations" suggests that they should be approached precisely in such a manner. It would also be advisable to consider one more aspect, namely whether an enterprise which voluntarily shares data (allows it to be used) in the general interest constitutes a data altruism organisation.[67] Perhaps the term "organisation" should not be exclusively attributed the meaning informed by the proposed context?

This raises another question concerning the functioning of the organisations in question, i.e. whether natural persons or enterprises will voluntarily supply data to data altruism organisations[68] to be subsequently made available to natural or legal persons in the general interest,[69] or whether this will be data that is already held by such entities/organisations.

The Data Governance Act is currently at the proposal stage, therefore it is likely that the provisions governing data altruism organisations will be made more specific and provide a clear answer to the concerns raised in the article.

References

Literature

Blicharz, Jolanta. "Organizacja prawna administracji." In *Prawo administracyjne*, edited by Jan Boć. Wrocław, 2005: 175–180.

Blicharz, Jolanta. "Organizacja prawna administracji." In *Prawo administracyjne*, edited by Jan Boć. Wrocław, 2007: 165–174.

Jan Zimmermann, *Prawo administracyjne*. Seventh edition. Warszawa, 2016.

67 <https://calg.pl/zarzadzanie-danymi/>, access: 22.04.2022 and the explanatory memorandum to the proposal for the Data Governance Act, 9.

68 <https://www.consilium.europa.eu/pl/press/press-releases/2021/10/01/eu-looks-to-make-data-sharing-easier-council-agrees-position-on-data-governance-act/> access: 22.04.2022.

69 Art. 18(1) of the proposal for the Data Governance Act.

EU and domestic normative act

Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information. Official Journal of the European Union of 26.06.2019, L 172/56, Document 32019L1024.

Proposal for a Regulation of the European Parliament and of the Council on European data governance (Data Governance Act). Brussels, 25.11.2020. COM(2020) 767 final, 2020/0340(COD), Document 52020PC0767.

Regulation (EU) 2018/1807 of the European Parliament and of the Council of 14 November 2018 on a framework for the free flow of non-personal data in the European Union. Journal of the European Union of 28.11.2018, L 303/59, Document 32018R1807.

Regulation of the European Parliament and of the Council on harmonised rules on fair access to and use of data (Data Act). Brussels, 23.02.2022. COM(2022) 68 final, 2022/0047(COD).

Resolution no. 28 of the Council of Ministers of 18 February 2021 on the Data Opening Programme for 2021–2027. Monitor of Poland 2021, item 290.

Act of 14 June 1960, Administrative Procedure Code. Journal of Laws 2021, item 735.

Act of 7 April 1989, associations law. Journal of Laws 2020, item 2261.

Act of 24 April 2003 on public benefit activity and volunteer service. Journal of Laws 2020, item 1057.

Act of 11 August 2021 on open data and reuse of public sector data. Journal of Laws 2021, item 1641.

EU and domestic documents

Appendix to the Communication ‘A European strategy for data’ Common European data spaces in in strategic sectors and domains of public interest.

Commission Staff Working Document: Guidance on sharing private sector data in the European data economy accompanying the document Communication from the Commission to the European Parliament, the Council, the

European economic and social Committee and the Committee of the Regions "Towards a common European data space" {COM(2018) 232 final}. Brussels, 25.04.2018. SWD(2018) 125 final.

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions *Building a European data economy*, {SWD(2017) 2 final}. Brussels, 10.01.2017. COM(2017) 9 final, Document 52017DC0009.

Communication from the Commission *EUROPE 2020 A strategy for smart, sustainable and inclusive growth*. Brussels, 03.03.2010. KOM(2010) 2020 final, Document 52010DC2020.

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions *A European strategy for data*. Brussels, 19.02.2020. COM(2020) 66 final, Document 52020DC0066.

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions *Shaping Europe's digital future*. Brussels, 19.02.2020. COM(2020) 67 final, Document 52020DC0067.

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions *Towards a thriving data-driven economy* {SWD(2014) 214 final}. Brussels, 02.07.2014. COM(2014) 442 final., Document 52014DC0442.

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions *A Digital Single Market Strategy for Europe* {SWD(2015) 100 final}. Brussels, 06.05.2015. COM(2015) 192 final., Document 52015DC0192.

Koloch, Grzegorz, Karolina Grobelna, Karolina Zakrzewska-Szlichtyng, Bogumił Kamiński, and Daniel Kaszyński. *Analiza diagnostyczna – Intensywność wykorzystania danych w gospodarce a jej rozwój.* Analiza na zlecenie Ministerstwa Cyfryzacji. Appendix no. 4 *Raport_dane_prezentacja*. <https://

mc.bip.gov.pl/rok-2017/analiza-diagnostyczna-intesywnosc-wykorzystania-danych-w-gospodarce-a-jej-rozwoj.html>, access: 04.04.2022.

White Paper On Artificial Intelligence – A European approach to excellence and trust. Brussels, 19.02.2020. Document 52020DC0065, COM(2020) 65 final.

Online resources

<https://www.consilium.europa.eu/pl/press/press-releases/2021/10/01/eu-looks-to-make-data-sharing-easier-council-agrees-position-on-data-governance-act/>

<https://calg.pl/zarzadzanie-danymi/>

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Some Legal Aspects of Plagiarism Among Students

Abstract: The paper describes the scope of the legal consequences of plagiarism among students in terms of copyright. The main question is connected with the scope and nature of the copyright protection against plagiarism. The issue is related to the specificity of the social role played by a student and to certain customs in the university community which enforce a certain behaviour and do not always require detailed references to the sources used. All university students have administrative and legal liabilities with regard to the university authorities, and in addition they bear full civil liability for their actions.

Keywords: creative activity, copyright, author, legal liability, plagiarism, plagiarised work, protection, university community, work.

Introduction

It can be said that student plagiarism does not seriously infringe the creator's interest because it occurs in a rather narrow university environment. However, the dishonest conduct of a student is assessed not only from the point of view of civil law and copyright law, but also in the light of the administrative law which regulates the operation of an institution of higher education and the rules to be observed by students to complete successive stages of education, and specifi-

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cally, obtain a degree or a certificate of graduation. All university students have administrative, disciplinary legal liability towards the university authorities.[1] In consequence, each graduate student's work is checked in detail by a special computerized system that searches for examples of plagiarism.[2]

General Remarks and Copyright Regulations

In order to analyse the legal aspects of student plagiarism, the basic conceptual categories associated with it must be examined. It is also essential to identify the scope of various legal regulations as well as concepts such as a "work," the "author," "plagiarism" and "plagiarised work." The way these terms are understood is of key importance when plagiarism is to be viewed from a legal perspective. In this paper, the sources which gave rise to the emergence of institutions established to protect authors against plagiarism, which in its essence constitutes an infringement of their rights, will also be highlighted.

What needs to be emphasised here is the dual role played by students involved in plagiarism in a university environment, since one may be the author of the work (intellectual content) which another student uses in its entirety or in part as his or her own.

Private law, both Polish and international law, among other provisions, refers to the Berne Convention of 1886 at the European level,[3] and the Geneva Convention of 1952 at the international level.[4] The provisions of the Berne Convention have been subsequently modified (some of its provisions have been applicable

1 Judgment of the Administrative Supreme Court of 7 April 2022, III OSK 49774/21, *Gazeta Prawna*, 5.05.2022.

2 Article 76.4 and Art. 351.1 of the Act on High Education of 20 July 2018, Journal of Laws of 2021, item 478. Art. 108.3 of the Act provides for punishment of relegation in the case of plagiarism.

3 Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886, ratified in accordance with the Act of 5 March 1934 – Journal of Laws, no. 27, item 213; Maksymilian Pazdan, *Prawo prywatne międzynarodowe*. Warszawa, 2012, 213 et seq.

4 Poland acceded to the Universal Convention in 1977 and is bound by the Paris text: Appendix to Journals of Laws of 1978, no. 8, item 28; Pazdan, 213 et seq.

in Poland since 1971 and the latest full version of the Convention has been in force since 1994).[5] Article 4(1) of the Convention stipulates that the works of nationals and residents of the States that have ratified the Convention enjoy protection prior to publication, for example from the time when a manuscript is created or a work is uploaded to the Internet.

However, the works of authors from countries that are not signatories to the Convention are protected only from the moment they are published. However, due to the fact that once a work (or its fragment) in put online it is available to the public, such a work is protected under the Berne Convention also when its author is not a citizen or resident of a signatory State. Article 4(2) of the Berne Convention also introduces a very important principle of territoriality, according to which copyright protection applies to the extent of protection adopted in the norms of a given country's legal system.

The EU copyright regulations are very precise and stipulated in many legislative acts on the protection of the intellectual content and, as J. Kępiński emphasised, "Polish copyright law is under a significant influence of European Union law. The harmonisation of legislation in this field required the adoption of eleven directives and two regulations."[6] Moreover, he also referred to

5 Journal of Laws of 1990, no. 82, item 474.

6 These are:

- Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (Satellite and Cable Directive; OJ L 248, 6.10.1993, 15);
- Directive 96/9/EC of 11 March 1996 on the legal protection of databases (Database Directive; OJ L 77, 27.3.199620);
- Directive 2001/29/EC of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society (Info Soc Directive; OJ L 167, 22.6.2001, 10);
- Directive 2001/84/EC of 27 September 2001 on the resale right for the benefit of the author of an original work of art (Resale Right Directive; OJ L 272, 13.10.2001, 32);
- Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights (IPRED; OJ L 195, 2.6.2004, 16);
- Directive 2006/115/EC of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (Rental and Lending Directive; OJ L 376, 27.12.2006, 28);

the case-law of the Court of Justice of the European Union[7] which **"**influenced the interpretation and manner of implementation of the above directives in the national law.**"**

Definitions of Creative Activity, a Work and the Author

Legal considerations concerning student plagiarism should first determine the subject of protection. Under Polish law, the subject of copyright protection clearly separates the creative activity from the work itself. According to Article 1 (1) of the Act of 1994 on copyright,[8] the subject of legal protection (copyright) is a work being "any manifestation of creative activity of individual character, established in any form, regardless of the value, purpose and manner of expres-

- Directive 2009/24/EC of 23 April 2009 on the legal protection of computer programs (Software Directive; OJ L 111, 5.5.2009, 16);
- Directive 2011/77/EU of 27 September 2011 on the term of protection of copyright and certain related rights amending Directive 2006/116/EC (Term Directive; OJ L 265, 11.10.2011, 1);
- Directive 2012/28/EU of 25 October 2012 on certain permitted uses of orphan works (Orphan Works Directive; OJ L 299, 27.10.2012, 5);
- Directive 2014/26/EU of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market (CRM Directive; OJ L 84, 20.3.2014, 72);
- Directive (EU) 2017/1564 of 13 September 2017 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled (Directive implementing the Marrakesh Treaty in the EU; OJ L 242, 20.9.2017, 6);
- Regulation (EU) 2017/1128 of 14 June 2017 on cross-border portability of online content services in the internal market (Portability Regulation; OJ L 168, 30.6.2017, 1);
- Regulation (EU) 2017/1563 of 13 September 2017 on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled (Regulation implementing the Marrakesh Treaty in the EU; OJ L 242, 20.9.2017, 1). Accessed from: <https://ec.europa.eu/digital-single-market/en/eu-copyright-legislation>; as in Jakub Kępiński, "Intellectual property law. Copyright law" in *Foundations of Law: The Polish Perspective*, eds. W. Dajczak, T. Nieborak, and P. Wiliński. Warszawa, 2021, 823, 824.

7 Hereinafter: CJEU.

8 Act on copyright and related rights (Copyright Act) of 4 February 1994, Journal of Laws of 2016, no. 666, item 1333.

sion." Human activity is creative only when it is independent and contains an element of novelty. This element contains several characteristic features. Firstly, it is gradual, secondly, it is diversified in kind, and thirdly, it results from the individual abilities of the creator. Finally, and fourthly, within a narrow group of creators there is a particular creative ability which is referred to as creative talent.[9] While a work, on the other hand, has the form of a generally tangible result and can always be described with the use of certain defined parameters. The issue of intangible works such as concerts, recitals, lectures and the like remains debatable, although the accepted practice is to make a recording of the content of such works and preserving it to allow their quality to be verified. A contract commissioning a specific work is always a contract for the creation of a measurable result that is essentially tangible in nature. It is distinguished from a contract of mandate, under which careful work is essential, but which for a number of reasons may not lead to a result.

The object of protection here is intellectual property. Intellectual property may be divided into: 1) works protected by copyright (creative works) and three groups protected in particular by industrial property law: 2) inventions, 3) solutions and utility or industrial designs, 4) signs and symbols, such as trademarks, company name or business designation.[10]

The law defines a work as subject to legal protection and its constitutive features. The work to which students mostly refer in the humanities and social sciences has the form of a text. There are, however, other forms of information contained in the form of tables, charts and diagrams, and students of other sciences also draw information from works of a different nature, such as pictures in the form of photographs, graphics, or sketches. Finally, works of another kind are databases organised in an original way, having the form of

9 Władysław Tatarkiewicz, *Dzieje sześciu pojęć. Sztuka, piękno, forma, twórczość, odtwórczość, przeżycie artystyczne*. Warszawa, 1982, 295 et seq.

10 Act of 30 June 2000, Industrial property law, i.e. patent law, journal of Laws of 2003, no. 119, item 117 as amended. Cf. the division in three groups: Wojciech J. Katner, "Dobra niematerialne" in *Prawo cywilne – część ogólna. System Prawa Prywatnego*, vol. I, ed. M. Safjan. Warszawa, 2007, 1237.

files described and operated by specialised computer programs. This last form of works has currently been increasingly, if not exponentially, widespread. Article 1 of the Copyright Act contains a sample list of works, including:

- works expressed in words, mathematical symbols, graphic signs (literary, journalistic, scientific and cartographic works and computer programs);
- artistic works, e.g. paintings or sculptures;
- photographic works, e.g. portrait photos, landscape photos;
- string musical instruments, e.g. violin, viola, cello, double bass;
- industrial design works, e.g. furniture, shapes of bottles, jewellery;
- architectural works, architectural and town planning works, and town planning works, e.g. buildings, city district development plans;
- musical works and textual and musical works, e.g. songs, melodies;
- stage works, stage and musical works, choreographic and pantomimic works, e.g. dance and movement systems;
- audiovisual works (including films), e.g. feature films, documentary films, serials, commercials.[11]

What is of importance from the point of view of student plagiarism, though, is that discoveries, ideas, procedures, methods, principles of operation or mathematical concepts are not protected by copyright.

The ruling of the Supreme Court regarding the condition necessary to grant a work copyright[12] has established that a copyright work must be of individual character and the individual character implies characteristics which sufficiently individualise the work, distinguishing it from other creations of a similar kind and purpose.[13]

Once the importance of the term "a work" has been established, the next step is to identify the person to whom authorship of the work should be attributed

11 Kępiński, 824. More about description of the diversity of various European definition of work: Dorota Sokołowska, "Omnis definition periculosa, czyli kilka uwag o zmianie paradygmatu utworu" in *Granice prawa autorskiego*, ed. M. Kępinski. Warszawa, 2010, 16–20.

12 Judgment of the Supreme Court of 24 July 2009, II CSK 66/09, LEX no. 794, 575.

13 Judgment of the Supreme Court of 13 January 2006, III CSK 40/05, LEX no. 176385.

(to be distinguished, however, from the person holding the copyright).[14] The author of a work may only be a natural person, or a team of co-creators.[15] Therefore a legal person (e.g. a university, enterprise, company, association[16]) may not be recognised as the author. A work therefore has the character of a legally protected intangible good considered independently of the medium or carrier (*corpus mechanicum*) on which it is recorded.[17] However, the copyright protection is granted to the author of a work from the moment of the emergence of the first creative results. This also applies to results not yet completed or unpublished, regardless of the fulfilment of any formalities by the author (Article 1(4) of the Copyright Act).

Plagiarism, Plagiarised Work and Students' Plagiarism

The third key term, besides the concept of a work and the creative process, is the concept of plagiarism in legal terms. However, this concept has not been defined in copyright law. The absence of a definition was also characteristic of the previous versions of copyright law of 1926 and 1952. Under these circumstances, determination of what plagiarism meant was left to the doctrine. In searching for a definition of plagiarism, attention was turned to sources of a linguistic or lexical nature. It has been established, based on etymology, that the term "plagiarism" is derived from the Latin word *plagiatus* meaning "stolen" and from the word *plagium*, meaning "theft."[18]

14 Copyright may be disposed of by e.g. the publisher to whom the author has transferred the right.

15 Issues of co-authorship are regulated by Articles 9–11 of the Copyright Act, see Mieczysław Szaciński, "Współautorstwo według ustawy z dnia 4 lutego 1994 r. – o Prawie autorskim i prawach pokrewnych", *Palestra* 39, no. 3–4. 1995: 41–43.

16 However, an association of authors may exercise authors' economic rights and protect their copyrights; see Article 104 and subsequent articles of the Copyright Act regulating the functioning of organisations for collective management of copyright or related rights.

17 Janusz Barta, and Ryszard Markiewicz, "Uwagi wstępne" in *Prawo autorskie i prawa pokrewne. Komentarz*, eds. J. Barta, and R. Markiewicz. Kraków, 2011, 18 et seq.

18 Jan Tokarski, ed., *Słownik wyrazów obcych PWN*. Warszawa, 1979, 575.

Also, *plagiator* in Latin literally means "plunderer" and has very clear connotations. A dictionary definition defines plagiarism as "appropriating someone else's work or creative idea," publishing someone else's work under one's own name, and "literally borrowing" from someone else's work and publishing it "as original and one's own."[19] While the adjective "plagiaristic" is "characteristic of the plagiarist" or has the "nature of plagiarism."[20] According to an English dictionary, the term to "plagiarise" means to "take and use somebody else's ideas, words etc. as if they were one's own," and "plagiarism" is an, instance of this.[21] An English dictionary of law contains a broader descriptive definition of plagiarism, as "the act of appropriating the literary composition of another, or parts or passages of his writings, or the ideas or language of the same, and passing them off as the product of one's own mind."[22] A distinction has also been made between plagiarism (*sensu stricto*) which involves copyright infringement, and plagiarism where no copyright infringement occurs. Plagiarism also occurs when, for example, the author's consent has been obtained, in return for payment, for the plagiarist to pass off the author's work as his or her own. The actual author's consent does not entitle the author to seek protection, but does not alter the fact of plagiarism (ghost writing).

This is an important distinction from the point of view of student plagiarism, because in the course of university education such qualified infringements of copyright, as well as actions performed outside the area of this protection, may take place.[23] The same applies in particular to "copying" or reproducing someone else's content and presenting it as one's own in works that are not intended to be made available to anyone other than the academic teacher evaluating them, let alone to be published. It is a peculiar paradox too that

19 Tokarski, 575.

20 Tokarski, 575.

21 Albert Sydney Hornby, and A.P. Crowie, *Oxford Advanced Learner's Dictionary of Current English*. Oxford, 1981, 635.

22 Henry Campbell Black, *Black Law Dictionary*. St. Paul, 1990, 1150.

23 For a broad description of empirical research on the pedagogical aspects of student plagiarism: Anna Sokołowska, *Zjawisko plagiatu a młodzież akademicka*. Poznań, 2020, 82–220.

a student who is awarded a high mark thanks to plagiarism is not interested in a reward or distinction in a form that would make the content of his work public, not even in making it public in the academic community.

Plagiarism may not only be an inaccurate or unfair duplication (copying) of another person's content, but it may also take the form of an alteration of someone else's content. It is important, however, that the fragment used be a part taken from the whole and not one that has already been extracted by another person in the form of an independent fragment not ascribed to any particular work.[24]

Polish doctrine also distinguishes between total plagiarism which is an appropriation of the entire work, and partial plagiarism.[25] Another distinction made is between open plagiarism and concealed plagiarism. In the case of open plagiarism, the work of another person is published unchanged while in the case of concealed plagiarism, the plagiarised work is "edited" to conceal its actual authorship (by way of paraphrasing, the use of synonyms, adding or changing stylistic connectors, the order of arguments, etc.). Still another form of plagiarism is co-authorship plagiarism, in which one of the co-authors appropriates (fully or only partially) as allegedly exclusively his or her own, the intellectual content of the work that has actually been created jointly.[26] In the latter case, however, plagiarism committed with the consent of the other members of the creative team will not constitute copyright infringement although it will still constitute plagiarism. A separate issue is a new co-author joining the subsequent editions of the work, and the "taking over" of the authorship of subsequent editions when the content and the opinions presented in them over time depart from the first editions the work by the original author. Plagiarism may also be divided according to the type of work plagiarised, and

24 Black, 1150.

25 Józef Górski, "O plagiatach i plagiatorach", *Zeszyty Naukowe UJ*, no. 1. 1974: 294.

26 Cf. judgment of the Supreme Court of 18 November 1960, Orzecznictwo SN 1961, no. 4, item 124.

consequently a distinction is made between literary plagiarism, artistic plagiarism, musical plagiarism, invention plagiarism, scientific plagiarism, etc.[27]

With the above in mind, a plagiarised work can be defined as a certain qualified state of affairs resulting from the arbitrary appropriation of another person's intellectual content constituting the results of another person's (or a group of persons') creative work.[28] Plagiarising, in turn, is a term describing a behaviour (an action or an omission to act)[29] leading to the emergence of a plagiarised work. Plagiarism is a phenomenon consisting in attributing to oneself the intellectual content of others, this content either being protected by copyright or, for some reason, not subject to protection.

Presumptions Protecting the Author

Attributing to oneself the authorship of a part or all of a work is related to the operation of the presumption under Article 8 of the Copyright Act, pursuant to which the creator is a person "whose name in that capacity is shown on copies of the work or whose authorship has been made public in any other way in connection with the distribution of the work." Therefore, the inclusion of someone else's intellectual content in a work signed as one's own already constitutes plagiarism. On the other hand, if a student's work is original and particularly exploratory, an important and wide-ranging issue is to ensure legal protection of that student's copyright.

As regards the attribution of authorship, it is extremely important to determine the creative character of the result (product).[30] The feature of a creative

27 More in: Grzegorz Sołtysiak, *Plagiat – Zarys problemu*. Warszawa, 2009, 11 et seq.

28 Sołtysiak, 11 et seq.

29 An example of such an omission is a deliberate failure to rectify a mistake made by the editor of a collective work who has wrongly attributed the authorship of a certain passage to another person.

30 Creativity is characterised by novelty, which is subject to gradation and generic differentiation, and by the intellectual energy required to produce such novelty, which is also evidence of the author's special abilities if not his or her talent: Tatarkiewicz, 295.

character applies only to "works" in the meaning of intellectual content, containing new and hitherto unknown artistic value (literary, musical, artistic) as well as "discoveries" containing new content that uncover hitherto unknown and intellectually or empirically accurate judgements about reality.[31] This applies to the social, natural, technical reality or to purely formal, logical or mathematical relationships.[32]

The creative character of a work is only reserved for human activity that has led to the creation of the work. Works created as a result of the operation of technological devices (mathematical machines or computers) do not have a creative character[33] as they only perform mathematical tasks set for them by computer programmers. However, the creation of programs for computers undoubtedly constitutes the work of their authors (Articles 74–771 of the Copyright Act).[34]

Effects of the Digitalisation of a Work and the Involuntary Adoption of Other People's Content

Today, the exploitation of other people's intellectual content disseminated in digital form is very easy. It may even be said that the majority of the digital information distribution system is geared towards such exploitation. A dilemma arises when it comes to the choice of a systemic reaction to this, and one way of addressing it is to pay authors the benefits due to them. Another way is to provide authors with significant non-remunerative benefits. These non-remunerative benefits are specific and difficult to define. They include, first of all: the author's popularity or (scientific) position) that may in turn lead to – or

31 New scientific theories are protected by copyright in Articles 1 and 28.

32 Janusz Barta, and Andrzej Matlak, eds., *Prawo własności intelektualnej wczoraj, dziś i jutro*. Kraków, 2007, 21 et seq.

33 Currently, computers making calculations in the sphere of electrical impulses are popular, but similar devices based on the flow of liquids or gases are also known.

34 More in: Aurelia Nowicka, *Prawnoautorska i patentowa ochrona programów komputerowych*. Warszawa, 1995.

be conducive to them being offered – good employment, or facilitate contacts with other authors and other similar benefits. Also, a benefit such as social advancement should not be overlooked.

It should be pointed out that sometimes, despite appearances, the author may be interested in others copying and disseminating his or her digitised work, but only on condition that his or her name is mentioned in the other work. Therefore, a failure to mention the authorship of another person's work is considered detrimental and harmful to the original author.

The construction of an audio-visual work and the legal consequences of its digitisation and placement on the internet for use by others was the subject of the judgment of the Court of Appeal in Warsaw of 7 May 2014,[35] in which the Court stated that "Interactivity and the possibility of deciding individually upon the time and object of reception mean that placing a work on a computer server for use online cannot be equated with broadcasting."

In this context, the specificity of didactic content, which is the content that should be incorporated into the student's own system, must be taken into account as it constitutes the purpose of the education process. For instance in certain situations footnotes may not be provided. Moreover, as may be clear from the context of the student's work, it is possible there was no intention at all to borrow certain content; the student may have simply referred to it believing it was public knowledge (known as Copernican content), as is in the case of recognized theories that are widely known to the public.

Different forms in which another's work has been used may also be distinguished and are worth considering from the point of view of copyright law. Work may be used in a legal way as permitted by the law, or illegally, as contrary to the law. Moreover, it is worth noting that between these two demarcation lines there is a wide margin for situations in between. There may be situations in which, for example, unauthorised use is made of someone else's

35 Judgment of the Appellate Court in Warszawa of 7 May 2014, I ACa 1663/13, LEX Ruling no. 1466985.

work, but at the same time the author will be voluntarily compensated later. For instance, someone deliberately (consciously) infringes someone else's rights, assuming "in advance" that afterwards appropriate compensation will have to be paid to the author. In such cases, an advanced agreement to compensation has to be secured.

Infringement of someone else's copyright to a work may also result in the plagiarist obtaining benefits of a very diverse nature. These may be tangible and financial benefits, as well as intangible benefits, but still measurable, e.g. professional benefits. The advantages flowing from them include the prospect of a better professional position, getting a degree, or admission to a competition, e.g. for the best dissertation or theses. Non-financial benefits also include a higher social rank, gaining popularity, better opportunities to obtain contracts, or being commissioned to perform work in a given field.

Another issue is the involuntary adoption of other people's content as one's own, when one is unaware of borrowing somebody else's content, or of other people's authorship. It is not uncommon that certain intellectual content is formulated in such a convincing or suggestive manner that it can be "absorbed," or "internalised," and thus unconsciously believed to be one's own.

Young academics should be made aware of the extensive and detailed regulations in this area and be able to refer to them in the event of irregularities that may occur.[36] First and foremost, there may be obstacles to the transmission of content and works across the national borders. On the other hand, there is also an increase in the illegal use of works obtained in this way, including plagiarism of other people's work.

The case law of the Supreme Court[37] contains a judicial opinion establishing the criterion which distinguishes between a work that has been inspired by another work and a derivative (dependent) work which is an adaptation. This criterion is a kind of a creative modification of the work, which determines its nature. In the

36 Aneta Krzewińska, and Ilona Przybyłowska, "Patologiczne zachowania studentów związane ze studiowaniem", *Normy, Dewiacje i Kontrola Społeczna*, no. 13. 2012: 314–335.

37 Judgment of the Supreme Court of 10 July 2014, I CSK 539/13, LEX no. 1532942.

case of a derivative (or dependent) work, its nature is constituted by elements taken over (from the original work), whereas an inspired work is constituted by its own individual elements. As far as the derivative work – also called an adaptation – is concerned, it should be emphasised that despite the lack of its own individual elements, it is subject to full legal protection because as a whole it is a separate work. From the point of view of external relationships, i.e. the relationships between the author of the adaptation and those who exploit it, the "derivative nature" of the work does not cause any limitations, because it is treated in the same way as the original work. Consequently, the author of the adaptation is entitled to all claims for copyright protection of the derivative work. It should be noted, however, that a derivative copyright can only be established if there is a prior and parallel "original" copyright, to the copyrighted work, as underlined by the Supreme Court in the judgment of 13 January 2006.[38] In the case of internal relationships between the authors of an original work and the adaptation, the "derivative nature" or its dependence on the original work is clearly seen (the judgment of the Appellate Court in Warszawa of 15 October 2010).[39]

The Nature of Copyright Protection and the Functions of the Sanctions for Copyright Infringement

Regarding the nature of copyright, it has to be pointed out that in its objective sense it is a system of norms regulating the legal situation of the author of a work and the ways of protecting the author's rights. However, in the subjective sense, copyright is a subjective right (a range of rights) enjoyed by a particular entity, namely the author of a given work. Such a right is considered in two basic aspects: intangible and tangible (economic) rights.[40]

38 Judgment of the Supreme Court of 13 January 2006, III CSK 40/05, LEX no. 176385.

39 Judgment of the Appellate Court in Warszawa of 15 October 2010, I ACa 604/10, LEX no. 1120158.

40 Dawid Kot, "Zabezpieczenie roszczeń z tytułu naruszenia autorskich praw majątkowych", *Monitor Prawniczy*, no. 23. 2003.

The first aspect includes the author's specific rights to decide on the shape and content of the work, its publication, or its adaptation in another field. It also concerns granting a licence to use this copyright (to dispose of the creative achievement and to decide on the content of the work, its elements and the creative process), or to transfer a part of the rights constituting this right to another entity (e.g. copyright). As far as the economic aspect is concerned, there are entitlements to remuneration (the fee, royalties, licence fees, the amount received as a result of transferring certain entitlements).

According to Polish legislation, the sanctions for plagiarism have various functions, primarily compensatory (by offsetting losses incurred by the author), preventive, i.e. deterring further potential infringements, and repressive, although the scope of this last function is debatable.

As has been pointed out, plagiarism may give rise to two types of sanction. There are sanctions provided for in civil law and criminal sanctions. The former are divided into pecuniary and non-pecuniary sanctions, whereas criminal sanctions may take the form of a fine, a restriction of freedom or even imprisonment for up to five years (Articles 115–122 of the Copyright Act). The question arises here of whether the fact that the Copyright Act contains criminal sanctions means that they should be considered a separate criminal law regulation. What may be assumed is that although they are penal and repressive, they are also applied within the framework of civil law.

Another problem is how to solve a certain contradiction arising between the author's desire to multiply the work in a digital form (wishing to disseminate information about the creation) and the expectation that the copyright will be effectively protected against infringements – both pecuniary and non-pecuniary – of the author's rights. In either case such dissemination may be for a fee or without remuneration.

One more division which also demonstrates certain problems arising in the event of dissemination of a work in a digital form distinguishes this being done with or without the author's consent. Following the previous division,

in the first situation we may speak about paid and unpaid dissemination. In the event that dissemination is without consent, it may still be done with or without respect for the personal aspect of copyright. Finally, an infringement made without the author's permission but with respect for the rights may also be without remuneration or for a fee. Infringement without remuneration is the most relevant for the situation discussed here.

Conclusions

Basically, all university students are adults, already of age,[41] which in addition to their administrative and legal liability towards the university authorities, makes them bear full civil liability for their actions, as well as, in principle, being subject to criminal liability.[42] Indeed, the Copyright Act provides for severe criminal sanctions as well.[43]

The key issue arising in connection with the deliberations presented here is to determine whether a student's behaviour amounts to plagiarism or whether it constitutes another type of infringement. It is worth dividing these behaviours into two categories. One category includes behaviours that have an external effect, for instance when somebody puts his or her own name on content which is the protected intellectual achievement of another person. The other type is behaviours with an internal effect, e.g. when a person uses somebody else's copied content for the purpose of his or her own education but fails to pay the creator or the organisations that represent the creator the due fees. The

41 Due to the fact that education may start at the age of 6, some high school graduates and first-semester university students are not yet adults within the understanding of the legal system, as they are under 18 years of age.

42 However, criminal law divides perpetrators into minors (aged between 15 and 17), underage offenders (aged between 17 and 18) and young offenders (aged up to 21 or up to 24 at the time of adjudication before the court of first instance – Article 115 § 10 of the Penal Code). Each of these groups is subject to certain mitigated penalties and proceedings according to their age and the type of offence committed.

43 For a detailed monographic discussion of criminal sanctions in copyright law see: Anna Gerecka-Żołyńska, *Ochrona praw autorskich i praw pokrewnych w polskim prawie karnym*. Toruń, 2002.

result of the latter behaviour is the acquisition of an ability to reproduce someone else's content and the acquisition of a new ability of one's own, although the intellectual content used is still someone else's.

What is worth attention here is students' blameworthy behaviour in general. The problem concerns the borders and relations between behaviours that are blameworthy but nevertheless tolerable and those which are blameworthy and prohibited. As has already been indicated, these may be behaviours related to the sphere of copyright in its civil law aspect or its criminal law aspect.

Specific behaviours may also be an element of the student's obligation connected with the preparation of a written assignment, and in such a case they are prescribed behaviours. For example, a student is ordered to research sources available online and to formulate synthetic conclusions. An assignment of this type arises from certain custom in the university community and the specificity of the social role played in it by a student, which enforces a certain behaviour, and does not always require detailed references to the sources used. Moreover, many resources found on the internet do not provide the names of the authors of the content made available there.

References

Barta, Janusz, and Ryszard Markiewicz. "Uwagi wstępne." In *Prawo autorskie i prawa pokrewne. Komentarz*, edited by Janusz Barta, and Ryszard Markiewicz. Kraków, 2011: 18–22.

Barta, Janusz, and Andrzej Matlak, eds. *Prawo własności intelektualnej wczoraj, dziś i jutro*. Kraków, 2007.

Black, Henry Campbell. *Black Law Dictionary*. St. Paul, 1990.

Gerecka-Żołyńska, Anna. *Ochrona praw autorskich i praw pokrewnych w polskim prawie karnym*. Toruń, 2002.

Górski, Józef. "O plagiatach i plagiatorach." *Zeszyty Naukowe UJ*, no. 1. 1974: 295–307.

Hornby, Albert Sydney, and A.P. Crowie. *Oxford Advanced Learner's Dictionary of Current English*. Oxford, 1981.

Katner, Wojciech J. "Dobra niematerialne." In *Prawo cywilne – część ogólna. System Prawa Prywatnego*, vol. I, edited by Marek Safjan. Warszawa, 2007: 1236–1254.

Kępiński, Jakub. "Intellectual property law. Copyright law." In *Foundations of Law: The Polish Perspective*, edited by Wojciech Dajczak, Tomasz Nieborak, and Paweł Wiliński. Warszawa, 2021: 789–838.

Kot, Dawid. "Zabezpieczenie roszczeń z tytułu naruszenia autorskich praw majątkowych." *Monitor Prawniczy*, no. 23. 2003.

Krzewińska, Aneta, and Ilona Przybyłowska. "Patologiczne zachowania studentów związane ze studiowaniem." *Normy, Dewiacje i Kontrola Społeczna*, no. 13. 2012: 313–337.

Nowicka, Aurelia. *Prawnoautorska i patentowa ochrona programów komputerowych*. Warszawa, 1995.

Pazdan, Maksymilian. *Prawo prywatne międzynarodowe*. Warszawa, 2012.

Sołtysiak, Grzegorz. *Plagiat – Zarys problemu*. Warszawa, 2009.

Sokołowska, Anna. *Zjawisko plagiatu a młodzież akademicka*. Poznań, 2020.

Sokołowska, Dorota. "Omnis definition periculosa, czyli kilka uwag o zmianie paradygmatu utworu." In *Granice prawa autorskiego*, edited by Marian Kępiński. Warszawa, 2010: 1–24.

Szaciński, Mieczysław. "Współautorstwo według ustawy z dnia 4 lutego 1994 r. – o Prawie autorskim i prawach pokrewnych", *Palestra* 39, no. 3–4. 1995: 40–45.

Tatarkiewicz, Władysław. *Dzieje sześciu pojęć. Sztuka, piękno, forma, twórczość, odtwórczość, przeżycie artystyczne*. Warszawa, 1982.

Tokarski, Jan (ed.). *Słownik wyrazów obcych PWN*. Warszawa, 1979.

Judgment of the Supreme Court of 13 January 2006, III CSK 40/05, LEX no. 176385.

Judgment of the Supreme Court of 24 July 2009, II CSK 66/09, LEX no. 794.

Judgment of the Appellate Court in Warszawa of 15 October 2010, I ACa 604/10, LEX no. 1120158.

Judgment of the Appellate Court in Warszawa of 7 May 2014, I ACa 1663/13, LEX Ruling no. 1466985.

Judgment of the Supreme Court of 10 July 2014, I CSK 539/13, LEX no. 1532942.

Judgment of the Administrative Supreme Court of 7 April 2022, III OSK 49774/21, *Gazeta Prawna*, 5.05.2022.