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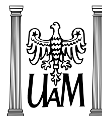

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Contents

Editor's Introduction 7

Zygmunt Ziembiński
The Structure of a Legal Norm System 9

Denisa Skládalová, Sára Hrubešová, Tomáš Svoboda
Access to Czech Administrative Courts – Bottlenecks in Access to Justice 37

Anna Podolska, Olga Śniadach, Krystyna Warylewska-Kamuś
The rule of law "on the ground". The Polish courts' perspective 59

Maciej Pisz
Standard of protection of property rights of owners of residential premises in a democratic country – selected problems considered in the light of Polish constitutional law 93

Adrianna Szczygieł
The role of the public policy clause in the Polish legal system on the example of cases concerning the conclusion and dissolution of marriage 105

Tomasz Sokołowski
The Model Family Code and the regulation of Polish Family Law 125

Katarzyna Szczepańska
How to understand the principle of non-splitting of shares in Polish and German company law – a tale of historical equivalence and comparative importance 153

Aneta Skorupa-Wulczyńska
The Status of English in the European Union after Brexit 175

Dominika Kuźnicka-Błaszkowska
The data subject's right to access to information under GDPR and the right of the data controller to protect its know-how 195

Anna Popowicz-Pazdej
Why the generative AI models do not like the right to be forgotten: a study of proportionality of identified limitations 217

Boubacar Sidi Diallo
The Protection of Fundamental Human Rights in the context of the Global Fight against Terrorism 241

Andrzej Gadkowski
Notes on the inherent powers of international organizations.......261

Samanta Kowalska
Natural law and the rights of nature – in search of more effective environmental protection 273

Editor's Introduction

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 Zygmunt Ziembiński's text entitled *The structure of a legal norm system*, originally published as a part of *Problemy podstawowe prawoznawstwa* in 1982.

Professor Ziembiński, 1920–1996, was one of the most influential representatives of Polish legal scholarship, a lawyer and sociologist who went down in history as the founder of the Poznań School of Legal Theory. The original contribution of Professor Ziembiński to the development of legal theory is embodied in his conceptions, among which the most significant are: an elaborated normative conception of the sources of law, the conceptual distinction between a legal provision and a legal norm, and his work on the typology of norms. These innovations are part of his academic achievements, presented in 20 monographs, 20 handbooks and 150 articles, which include both linguistic legal analysis and considerations on the methodology of legal studies.

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

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Zygmunt Ziembiński

The Structure of a Legal Norm System*

Abstract: The paper is an English translation of a part of *Problemy podstawowe prawoznawstwa* published originally in 1982. 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: theory of law, legal norms, system of norms

Two Kinds of Connection Between Legal Norms

That which in Hans Kelsen's theory has become a permanent feature of general legal studies is his observation that twofold connections may exist between norms of conduct: content (static) and competence (dynamic).[1] However, what has to be considered misguided in Kelsen's conceptions is, firstly, the excessive stress placed on the fact that legal norms create a system based on competence connections, and, secondly a failure to give sufficient attention to the role of the content connections in the structure of a system of legal norms in a given country in a given period.[2]

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* Translated from: Zygmunt Ziembiński, *Problemy podstawowe prawoznawstwa*. Warszawa, 1982 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.

1 Hans Kelsen, *General Theory of Law and State*. Cambridge, 1945, 113–114.

2 Jerzy Wróblewski, "Stosunki między systemami norm", *Studia Prawno-Ekonomiczne* 6. 1971: 21.

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We can speak of the system of statements of some kind (sentences, judgmental pronouncements or norms) when they form a whole ordered in a certain specific way. How they are ordered is only generally analogous for various kinds of statements. The ordering, specifically, involves some basic statements used to include further statements of a given kind in a given system according to some or other rules of inference. A system is thus characterised among others by the fact that it is made up of some statements and properly inferred consequences of these. A system, or at least a properly built system, is characterised by the fact that the statements included in it are not inconsistent with one another in some or other understanding of this inconsistency; they are appropriate for their type; and that there are appropriate rules for eliminating inconsistencies that arise and are considered as not belonging to the system. All systems of statements interconnected in this way may be called static in the sense that since basic statements, rules of inference and possibly collision rules have beenadopted, then from that moment on the entire system is given *in nuce*. It is rather a matter of chance whether a given fragment of the system is formulated and elaborated on in a given moment (we are talking here of a fragment because it is hardly imaginable that somebody would exhaustively elaborate on a system of sentences, norms or judgmental pronouncements).

A peculiarity of norms is the fact that they can be connected not only by content (static) ties, but also by ties of competence capacity, or competence connections for short. That is to say, a norm may command specific people to conduct themselves in a manner determined by some norm that will be enacted (by a specific entity, in a specific manner and in a specific scope), or obey norms that will be recognised as binding in a given system by an appropriate procedure. In this case, a system is not given from the outset, but rather develops through successive enactments or recognitions of further norms by an entity granted the competence to do so pursuant to an appropriate norm of competence. Therefore, a system based on this kind of connection is called dynamic. Of course, there is a greater danger in the case of such a sys-

tem that norms inconsistent with one another will be included in it because norms granting norm-giving competence, especially to various entities, can hardly be expected to be designed in such a way that any inconsistency between norms enacted in the future will be eliminated.

The fact that a legal system is comprised of norms on account of their being enacted pursuant to appropriate law-making competence norms does not prevent the system from encompassing not only norms enacted by a specific act, but also any other norms being the consequences of the latter. Hence, the use of a dynamic connection to develop a fragment of the system does not prevent the system of norms from being reconstructed, taking into account a static connection at a further stage.

The Content (Static) Connection Between the Norms of a Legal System

The Concept of a Statement System

A description of a system of norms based on a static connection calls for a comparison of the system of norms with a system of statements, i.e. sentences considered true in a logical sense. For in the sphere of building sentence systems, certain basic concepts characterising the system construction have been developed which might possibly be applied *mutatis mutandis* to the construction of a system of norms, with major differences being identified in the process.

Actually, sentence systems do not necessarily have to be systems of the sentences that have definitively been recognized as true (i.e. systems of statements). Contemporary logic, while designing hypothetical-deductive systems, does not claim that the axioms of such systems are true sentences, in particular, that they are self-evident axioms. The empirical sciences, which formulate theories of phenomena, present sentence systems consisting of principal hypotheses, then hypotheses of a lower order which follow from them, then laws recording the regularities occurring in a given field, and finally sentences ascer-

taining individual facts. The hypotheses of the empirical science are by definition revocable in the event that facts are discovered which cannot be explained, and which would suffice to falsify the hypothesis in question.[3]

In principle, in the formal sciences, such as logic and mathematics, a deductive system of sentences is given if system axioms are formulated, and the system language (relying on primary terms and related definitions) and inference rules are specified according to which successive sentences may be added to the system. Axioms are required to meet a number of formal requirements, such as the postulate of consistency (no contradicting sentences can be derived from the axioms of a given system), the postulate of completeness (every sentence formulated in the system language may be predicated if it is a system statement), the postulate of adequacy (every true sentence of the system can be derived from the axioms), the postulate of independence (no axiom can be derived from another), etc. Known to every Polish lawyer, the classical sentential calculus in formal logic may be expressed as this kind of system. The inference rules will usually include rules for variable substitution, the substitution of some expressions with equivalent ones, and the detachment of the antecedent of an implication accepted to the system.[4]

The Concept of a System of Norms on Account of a Static Connection

If we consider a body of norms and only take into account content (static) connections, such a system would include some principal norms and those norms that are considered consequences of the principal norms or norms previously included in the system. A crucial question arises as to what will be considered the consequences of other norms, such as those inferred, i.e. inferentially derived, using a body of accepted inference rules (of course other than inference rules for deriv-

3 For more on the topic, in an accessible manner, v. Zygmunt Ziembiński, *Metodologiczne zagadnienia prawoznawstwa*. Warszawa, 1974, 29–53.

4 For more information v. “System dedukcyjny” in *Mała Encyklopedia Logiki*. Wrocław, 1970, 284–287.

ing sentences from sentences). Depending on what inference rules are admissible in designing a system of this kind, different norms-consequences can be derived from the same principal norms.

The choice of inference rules, however, is not entirely arbitrary. The rules must be chosen so as to make norms included in the system form a sensible whole and enable rational management of human deeds. If, for instance, a rule is adopted, which could be called a normative *dictum de omni*, namely that if it is believed that all entities having property *P* should under specific circumstances do *C*, then it must be also believed that entity *x* having property *P* should under such circumstances do *C*, we will have an example of an inference rule that is absolutely necessary in designing any system of norms. After all, it is necessary to move from general norms to the recognition of individual norms for particular persons. If, however, a rule is adopted stating that if it is believed that every *x* with properties *P* should do *C*, then it must be believed that every *x* with properties *P* should not do *C*, we will have an example of a totally absurd rule, a rule that would lead to a system that would be absolutely unfit to manage human actions.[5]

Obviously, it is hard to specify what degree of logical or praxeological inconsistency of the norms derived from principal norms justifies the opinion that a system is defective or that it is not a system of norms at all. The latter opinion would be justified if an inference rule is adopted that is totally absurd, like the example given above.

If by the rationality of somebody's behaviour is understood the consistency of this person's behaviour with their knowledge and judgments (preferences), setting the goal for their conduct, then, assuming the rationality of the entity choosing the inference rules which would serve the purpose of building a system of norms which would be socially useful, it would be necessary to distin-

5 Cf. Zdzisław Ziemba, and Zygmunt Ziembiński, "Uwagi o wynikaniu norm prawnych", *Studia Filozoficzne*, no. 4. 1964: 113–114.

guish between inference rules which refer to the assumed knowledge, and others which refer to the judgments of the person who would accept such rules.

In the former case, we would be dealing with inference rules which refer to a certain state of knowledge on the connections between the fulfilment of particular norms (a state of logical and extra-logical knowledge), which enables the formulation of rules based on connections that can be conventionally called norm implication connections. Apart from these kinds of rules, which can be considered peremptory, like deductive inference rules in relation to sentences, there are also rules based on the assumption that norms included in a legal system should have an appropriate axiological justification in some ordered set of preferential judgments.[6]

The point of departure for a static system of norms is some principal norms adopted independently of system construction rules.

There is an understandable temptation, to which lawyers are particularly prone because of their only superficial knowledge of the problems of formal logic, to treat a system of legal norms in its entirety as a system of norms inferred according to certain rules from the principal norms of the system, let us say, from constitutional norms. However, the temptation is doubly illusory. First, the implications between norms are much more complex than such connections between sentences, while inference rules are also based on some other specific assumptions. Second, in order to reconstruct a contemporary system of legal norms by inferences from some principal assumptions, it would be necessary to adopt a very great number of such principal norms, the consequences of such principal norms would be inconsistent with one another and these mental acrobatics would, on the whole, do more harm than good.

If one encounters systems of moral norms or systems of natural law, which allegedly assume the form of a system of norms inferred (or to put it even more incautiously: ‘deduced’) from several principal assumptions, it is easily noticed

6 For a broader but elementary approach, v. Zygmunt Ziembiński, *Logika praktyczna*. Warszawa, 1977, 252–262.

that in these *quasi*-deductive operations, which would supposedly produce a legal system or a moral system designed *more geometrico*, so many successive diverse enthymematic premises are added that the 'geometric structure' of such a system is largely illusory (especially if those enthymematic premises are not fully realised).

The construction of a legal system, as shall be demonstrated below, cannot rest on only connections of one kind.

The Contentiousness of the Logic of Norms

If between norms making up the legal system of a country a static connection is to hold in some cases, in particular the connection of 'one norm following from another' as a foundation for the use of appropriate inference rules, the logic of norms must have central importance for the construction of the legal system. The logic of norms therefore is to be understood as a logic ascertaining the formal connections between norms, connections arising pursuant to the very structure of these norms, especially such as the those between a norm and its negation, connections of implication, connections of conjunction and of an alternative, etc.

At this juncture, however, major difficulties arise. Norms do not describe reality (they may be only a sign of a certain state of reality), hence, they are neither true nor false. All these concepts, therefore that in a sentential logic invoke the concepts of truth and falsity—as in the case of the truth functor matrix as the signs of negation, conjunction, alternative, implication, etc.—cannot simply be transferred to the logic of norms, as they call for some reinterpretation. If, thus, norm logic calculi are constructed using the signs of sentential logic, it has to be noted that a similarity will be merely apparent, or respective signs will be used properly from the point of view of the syntax and semantic rules hitherto associated with them.

Until this very day, a dispute continues whether a logic of norms is possible and, in particular, if a logic of norms in some way analogous to sentential logic is possible. A way out may be to construct a logic of deontic sentences,

that is, a logic of sentences determining the qualification of specific deeds on account of a given norm or, which is far more complex, a specific set of norms. The latter, for simplicity, may be initially assumed not to include norms inconsistent with one another.[7] This is a convenient way out of trouble, as much as the calculus in this case concerns sentences in a logical sense, albeit of a specific kind: pronouncing a given action or a action of a given kind, to be prohibited, prescribed, indifferent, etc. on account of some norm. Hence, we can speak without reservation of the truth or falsity of these sentences, associate them with truth functors, etc. From a practical point of view, only rarely is a difference noted between a norm of conduct and a sentence saying that (on account of a given norm) somebody is prescribed to act or prohibited from acting in this way or that.[8] Of course, various kinds of problems will arise in this context related to referring the prescription or prohibition not to a single simple norm of conduct but rather to a set of norms. However, any major difficulties in this case shall certainly be overcome. There are also some problems with the quantification of this kind of calculi, which is important for lawyers because of their interest chiefly in general and abstract norms.[9] In relatively simple cases, in calculi of this kind applicable to legal norms, it would be necessary to allow for a great number of relativizations of this or that kind, as for instance relativizations to time. Therefore, there will be still a lot of problems to solve, which call for intensive studies.

7 For a broader treatment, v. Zdzisław Ziemba, *Logika deontyczna jako formalizacja rozumowań normatywnych*. Warszawa, 1969, 114.

8 Georg Henrik von Wright, *Norm and Action*. London, 1963, 132 claims that using the same symbols, respective inscriptions may be interpreted ‘prescriptively’ as ‘norm-formulation’ or ‘descriptively’ as ‘norm-proposition’.

9 The best-known, already ‘classic’ today, systems of deontic logic, such as, for instance, von Wright’s, were calculi of deontic sentences formulated on account of individual and concrete norms. These systems, however, are too deficient to satisfy the needs of legal studies. For more on the subject v. Georges Kalinowski, *La logique des norms*. Paris, 1972, 79 ff. Cf. also doubts on the iteration of deontic functors raised by Ota Weinberger, “Die Struktur der rechtlichen Normenordnung” in *Rechtstheorie und Rechtsinformatik*, ed. G. Winkler. Wienna, 1975, 126.

Another solution might be to reinterpret appropriately sentential logic concepts into norm logic concepts, in particular the concepts of norm negation and of implication between norms. However, negation already poses significant difficulties.[10] Usually, putting negation before a norm: 'It is not so that *x* should do *C*' produces an utterance that is not a norm but a sentence ascertaining the absence of the norm '*x* should do *C*' or the invalidity of the norm '*x* should do *C*' in a given system (similarly '*x* should not do *C*' if literally understood). Introducing negation into the middle of the norm: '*x* should not do *C*' changes the norm into a prohibitive one or creates further problems with the interpretation of the utterance: '*x* should do non-*C*', because a norm prescribing the performance of all other acts than act *C* is absurd if taken literally. For it would prescribe at the same time to do *D* and non-*D*, if act *D* and acts consisting in doing something other than *D* (e.g. mowing a meadow and not-mowing a meadow) are the acts that do not coincide with the class of act *C*, e.g. with ploughing – as mowing is not ploughing and most cases of non-mowing are not ploughing. The sense of the negation is probably such that in the narrower class of acts of some significance for the realisation of act *C*, an indication is made of a class, complementing up to the class of acts classified as the execution of act *C*. For the class of omissions of act *C* is considerably narrower than the class of all other acts than act *C*. This issue shall be discussed further together with the major varieties of the inconsistency of legal norms.

The concept of implicating with respect to norms, and even more so the concept of implying, pose even more difficulties and misunderstandings, examples of which are not lacking from legal discussions either. The connective 'if … then …' from Polish may have multiple meanings in relation to norms. It may be used to indicate the grounds for norm validity: (1) 'If *y* is so enacted, then *x* should do *C*'. It may be used to formulate a norm indicating the scope of its application in the antecedent of the conditional: (2) 'If circumstances

10 Cf. Alf Ross, *Directives and Norms*. London, 1968, 150–158 and the literature quoted therein.

W occur, then *x* should do *C*', it may be used to indicate a connection between norms of the kind that if the first is to be binding, then we believe that the second would have, 'out of necessity', to be binding too, e.g.: (3) 'If *x* should do (separately) *C* and *D* and *E*, then *x* should do *C*'. The connective 'if… then …' may be used to formulate a teleological directive, specifying what should be done to achieve a desired state of affairs: (4) 'If you want to achieve *A*, you should *C*', etc. In a single utterance, various senses of 'if… then…' may be intertwined, e.g. 'If: if *y* is so enacted that if circumstances *W* or *Z* hold, then *x* should do *C*, then by enactment of *y*, if circumstances *W* hold, then *x* should do *C*'.

If it is said that 'one norm implies another', it must be remembered that this term is used in a different meaning than the usual one that serves the purpose of specifying the connection between the logical value—truth or falsity—of some sentences. For norms (unlike deontic sentences and sentences about the validity of a norm) are considered to be pronouncements fulfilling a persuasive function and not a descriptive one, at least not directly.

The relation of the implication holding between sentences consists in an objective connection between the logical value of these sentences (in the case of formal implications—a connection between the logical value of all sentences of an appropriate structure). In the case of connections between norms, 'implication' is most often taken to mean that there is a 'necessity', making one recognise a norm as valid since another norm has been recognised as valid from a certain point of view. In other words, it would be somehow at odds with common sense if the first norm were to be binding while the second were not. If there is a norm in force that a person should shovel snow off the street throughout the winter, then a norm is in force that they should do it in January on account of the uncontested fact that January is a winter month in our country. If a person is obliged to deliver ordered bread and milk every morning, then they should not hesitate to deliver ordered bread on account of the fact that the delivery of bread is a necessary component act of acts consisting in the delivery of both bread and milk.

If a person is to appear in an office in the morning, they should leave home early enough, because if they do not live in the office, leaving home early enough is a necessary condition of appearing on time.

Reconstructing popular intuitions related to one norm ‘implying’ another, it can be said that norm N2 is implied by norm N1 when, generally, without the fulfilment of norm N2, the fulfilment of norm N1 is impossible in one sense or another, and the fact of fulfilling norm N1 predetermines the fulfilment of norm N2 (if the person delivered bread and milk, they delivered bread, if they shovelled off snow all winter, they shovelled it off in January, if they appeared on time, then they left home early enough).

If the impossibility of fulfilling norm N1 without fulfilling norm N2 is ascertained on account of knowledge that the scope of application and the scope of regulation directly specified by norm N2 are contained, respectively, in the scope of application and the scope of regulation of norm N1, we speak of norm N2 being logically implied by norm N1, on account of this kind of knowledge on relations between the scopes of application and, respectively, the scopes of regulation of these norms. This is a logical implication based on extra-logical knowledge (that January is a winter month) or logical knowledge (that the class of events A and B is at the same time contained in class A, hence the absence of A predetermines the absence of A and B).

If the impossibility of fulfilling N1 without fulfilling N2 arises on account of appropriate causal connections between the performance of acts prescribed by these two norms, norm N2 is said to be instrumentally implied by norm N1 on account of the ascertained causal connection.

Adopting this understanding of the relation of implication between norms, we can formulate appropriate inference rules, prescribing, on account of recognising one norm as binding in a given system, that another must be recognized as binding in the same system. At this juncture, it is necessary to observe that there are inference rules that are not based on any implication between legal norms, hence, if a logic of norms in the strict meaning of this term could be

built, it would, admittedly, be necessary but insufficient to explore the structure of a legal system. What is more, by an explicit enactment, the legislator who enacted the norm-reason may enact a norm prohibiting what the norm-consequence prescribes. This would be usually considered a modification of the original enactment and not an irrational enactment, since the way that 'one norm implying another' is understood is actually an outcome of specific assumptions about the rationality of the legislator.

Next to the debatable problems related to implication between norms, misunderstandings may easily arise in connection with the use of other typical sentence connectives to join norms. In part, such misunderstandings are analogous to confusing truth functors in a descriptive language with roughly corresponding sentence connectives from colloquial language; often, however, these are particular misunderstandings.

If, for instance, a conjunction of norms is mentioned of which one prescribes a person to do *C* and the other to do *D*, doubts may arise as to whether they prescribe to do each act separately (e.g. to destroy files and light a fire in a stove) or perform such an act that would combine the characteristics of both prescribed acts (to destroy files by using them to light a fire in a stove). If we have norms prescribing a person to do *C* and/or do *D*, a doubt arises as to whether they prescribe the performance of at least one of the acts according to their choosing, or at least one of these acts, namely, an act indicated regardless of the choice made by the addressee of the norm (which forms the crux of the so-called Ross's paradox, which used to be much discussed at one time), etc.[11]

Norm Connections Relying on Common Axiological Grounds

The logical connections between norms discussed in the previous section rested on specific logical or extra-logical knowledge on the relations between the scopes of application and, respectively, scopes of regulation of these norms.

11 For a broader treatment, see Zygmunt Ziembiński, "O warunkach zastosowania logiki deontycznej we wnioskowaniach prawniczych", *Studia Filozoficzne*, no. 2. 1972: 201–215 and the basic literature quoted therein.

In addition, instrumental connections may hold between the fulfilment of these norms. There are also such connections between norms that provide grounds for formulating appropriate inference rules, taken into account while designing a system of legal norms, that are based on a different kind of assumptions concerning these norms.

These connections involve the axiological grounds of norms. Whether a norm is a valid part of a legal system is decided first of all by its proper enactment by a state body wielding actual power. At the same time, however, it is assumed that the body endowed with power to enact legal norms is a rational body, being guided not only by specific knowledge, but also by specific values. From the assumption of the rational legislator (the assumption is crucial, which shall be discussed below, for solving dogmatic problems), an argument is derived that norms enacted by the legislator have axiological grounds in a specific system of values. Thus, if it is found by interpreting a legislative text that the legislator enacted a specific norm, there are grounds—albeit shaky—to believe that enacting this norm the legislator envisaged some axiological grounds for it (on the other hand, sometimes it is known that the legislator made a given decision in a rather random way, for instance, to make proceedings in a given area somewhat more uniform). Therefore, without being overly strict, it may be concluded that another norm, having suitably similar axiological grounds (*analogia iuris*) or even more convincing axiological grounds (*a fortiori—a minori ad maius, a maiori ad minus* argumentation) in such judgments, is binding 'at the behest of the legislator' as well. For if a rational legislator 'willed' the first norm to be binding, then it also 'willed' a norm of analogous or stronger still axiological grounds to be binding.

Without going into details, it must be noted that inference rules based on the assumption that the legislator's judgements are consistent are not peremptory but rather argumentative.

If, thus, we look at the elements of the content (static) connection of a system of legal norms, the connection, in the case of inference rules based on logi-

cal or instrumental implication of norms, is clearly stronger than the connection based on the assumption of the consistency of the legislator's values. If the legal literature stresses the latter more often, it must be because the connection of 'implication' seems at times so obvious as to be ignored. This stance is to the extent that when formulating the calculi of norm logic or deontic logic, it turns out that starting with various 'obvious' intuitions, paradoxical rules from the point of view of these popular intuitions are arrived at more than once.

The Polish juristic literature is quite aware of the fact today that it is not possible to reconstruct the system of legal norms of a country through relying solely on the content connection. These issues were dealt with in particular by Opałek and Woleński.[12]

The Competence (Dynamic) Connection between System Norms

The Formal Nature of Competence Connection

The content (static) connections between system norms are called by some 'substantive' norm connections.[13] In turn, the connection between norms based on the fact that some are enacted relying on other norms that grant appropriate norm-giving competence, could be called 'formal' by analogy. A norm granting norm-giving competence to some entity prescribes that norm addressees, that is, persons subject to the enacted competence, to fulfil such norms that will be enacted by the entity granted competence. The duty may be doubly potential because, first, it depends on whether the entity granted competence to enact norms in a given field will make use of it; second, the entity granted compe-

12 Kazimierz Opałek, and Jan Woleński, "Problem aksjomatyzacji prawa", *Państwo i Prawo* 1. 1973: 3–14. J. Nowacki writes: "The finding that some legal norms show specific content relations by no means implies that the same relations hold between other or even all norms belonging to a given set of norms". Józef Nowacki, "'Materialna' jedność systemu prawa", *Zeszyty Naukowe Uniwersytetu Łódzkiego: Nauki Humanistyczno-Społeczne* 108. 1976.

13 This is, similarly to the term 'content connection', an awkward term as much as the strongest connection of this kind is the connection of logical implication.

tence will enact such a norm that will prescribe some conduct in the circumstances that have not occurred yet.

A norm of norm-giving competence prescribing obedience to a norm of a precisely specified content, which the entity granted competence would have otherwise a duty to enact under strictly defined circumstances, would be as a matter of fact socially redundant. Unless its purpose would be to grant a given entity competence to officially ascertain that the anticipated circumstances (e.g. a natural disaster) have occurred and, therefore, a norm is enacted that would have to be enacted in such circumstances. If, however, there was no such a purpose, the enacting of a competence norm to enact a norm of a precisely specified content would be complicating matters unnecessarily. The social sense of granting norm-giving competence instead of enacting a substantial norm right away lies in postponing the decision on the contents of the substantial norm and passing it to the executor of a policy that is outlined only in general terms in a law-making act of a higher order. The granting of norm-giving competence is thus enacting a formal duty, the exact content of which is yet to be specified. It will be specified only in an appropriate act of enacting a norm in a prescribed manner by the entity granted competence.

It would be wrong, however, to see only the formal aspect of the competence connection between legal norms. First of all, a competence norm enacted in a given system never grants any entity competence to enact any and all norms that it thinks fit in a manner binding on all entities subject to a given jurisdiction. As a rule, the principle *nemo plus iuris transferre potest quam ipse habet* applies. However, even a norm of norm-giving competence granted to a sovereign parliament or a head of state by a revolutionary constituent assembly does not empower the sovereign to enact any norms as legal norms, but at best empowers it to enact norms within the framework of socio-political assumptions of a written or unwritten constitution.

Only fundamental law-making acts are binding on all entities subject to a jurisdiction, while others usually rest on norm-giving competence to enact norms for only a limited group of entities.

The content of norms enacted in pursuance of the law-making competence an entity enjoys is, as a rule, defined by the requirement of consistency (absence of inconsistency) of these norms with the norms of a higher order—in particular constitutional norms. What is more, the postulates of substantive legality in a socialist legal system should include the postulate of making norm-giving competence norms, stipulated in a statute, grant administrative bodies the competence that would be substance-oriented and not a blanket one, giving a free hand to its executor, restrained only by the statutes in force. This postulate is supplemented by another of keeping the number of such delegations down.[14]

Whereas the content connection between legal norms requires the compilation of a catalogue of inference rules which will serve to derive the consequences of fundamental norms, the discussion of the competence connection between legal system norms needs a certain set of rules for enacting competence norms, specifying what use is to be made of the norm-giving competence granted and when norm enacting acts are 'valid' or 'invalid'. There are well-known ambiguities and differences in conceptions in this area, even in countries where governance is organised along stable principles and the sources of law are specified in detail, in a constitution. Even greater difficulties and disputes in this area must arise in the legal systems of countries where state organisation is unfledged and of a revolutionary origin, and the constitution is short on detailed juristic elements.

However, even where legal provisions on law-making are relatively detailed, one has to allow for the inability to reconstruct in detail norms granting law-making competence from a legislative text alone, even by a person having a perfect command of a given ethnic language. The exact meaning of such legal provisions is comprehensible only to a person well-versed in the authoritative juristic literature on law-making competences, while the opinions found in it are only fragmentarily reflected in legislative texts. From the point of view of

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14 Cf. Józef Nowacki, *Praworządność. Wybrane zagadnienia*. Warszawa,1977, 74–75; Henryk Rot, *Problemy kodyfikacji prawa PRL*. Wrocław, 1978, 134.

a lawyer trained in accordance with the precepts of a specific legal culture, the inclusion of some elements commonly adopted in the authoritative juristic literature in a legislative text may seem unnecessary. For instance, in our legal culture it may seem unnecessary to give expression to the assumption that statutory provisions may contain only general and abstract norms and not individual and specific ones[15] and that the rights, and duties of all citizens may be enacted only by Act or regulation based on a clear statutory delegation, and not by other acts of state administration, etc. This issue is relatively simple when the political and legal cultures of a given country evolve slowly. Major difficulties arise when changes are revolutionary or an existing legal system undergoes a major overhaul. The elements of the authoritative juristic literature, determining the content of norms of law-making competence alongside the provisions of law, are related to diverse factors. The opinions of the juristic literature on these matters are shaped by political and legal ideology shared by a given socio-economic formation, e.g. the ideology preaching the sovereignty of the people or the sovereignty of specific bodies of the state. Moreover, such opinions are moulded by the membership in a given realm of legal culture, specific historical traditions, advancement of law studies, impact of foreign legislation, etc. No mean role is played by the customs of legal practice, the previous state of law and seemingly third- or fourth-rate acts relating to the organisation of statecraft that build the actual mechanisms of law-making.

This 'indefiniteness' of both legal provisions and the authoritative juristic literature on this issue is of great socio-political relevance. Namely, without amending principal legislative texts, by changes to the state apparatus, it is possible to make actually applied norms of law-making competence substantially change their political character.[16] It is enough to hedge about the exercise

15 Cf. Stefan Rozmaryn, *Ustawa w Polskiej Rzeczypospolitej Ludowej*. Warszawa, 1964, 47 ff., where the author believes that a general and abstract character of statutory norms (which he calls 'generality') is part of being a statute, irrespective of the absence of an explicit provision in this respect.

16 Cf. Stefan Rozmaryn, *La Pologne*, *Comment ils sont gouvernés*. Paris, 1963, 42.

of granted competence with a suitable set of instructions on how bills are to be drafted, or to actually prevent the execution of certain initiatives, or to treat statutory reservations liberally, in order for the political effect of exercising law-making competence norms to be substantially changed.

Problems of Further Competence Delegation

If a norm of law-making competence prescribes the performance of what is indicated by a norm enacted in a given area by a given body under a specific procedure, it may in particular prescribe that a norm prescribing conduct consistent with a norm enacted in a given area by some other body should be followed. It could thus be accepted that granting competence to enact legal norms in a given area naturally entails granting the competence to subdelegate this wcompetence. This would be a very simple mental construct, opportunistically convenient for bodies equipped with norm-giving competence, but involving grave risks. With the unlimited subdelegation of law-making competence, society could find itself in such an undesirable situation as that of a litigant who is approached by the substitute of the substitute of their attorney a minute before a hearing. Often, there would then be no way to find out who is responsible for the direction of legislation and the distortion in detailed regulations of the overall direction of statutory regulations. A subdelegation, even if it is a useful law-making tool in certain cases (e.g. the setting of dates for crop treatment operations that are obligatory under a given statute), can easily lead to the enactment of such statutes the entire content of which 'will be specified by regulation'.

It would be thus advisable to adopt a different mental construct. The enactment of legal norms, as we all know, is a certain kind of conventional act, which can be performed only when we rely on peculiar rules that prescribe that an act performed in this or that way be assigned the sense of performing a conventional act. In the absence of rules of this kind, a conventional act simply does not exist as such. In a country in which all organs are supposed to act 'on the basis of the law', in the absence of a clear provision for a subdelegation, there is simply no

possibility of one unless it is believed that a subdelegation is permitted in a given case by a sufficiently clear opinion expressed in the authoritative juristic literature. However, such an opinion, should it cohere, can be either tolerated or opposed.

This mental construct allowing for the possibility of an express subdelegation but precluding a norm-giving subdelegation by the operation of law may be considered more convenient if one wishes to rein in a notorious subdelegating of norm-giving competence.

Attention should be drawn to the fact that different views can be held with regard to, on the one hand, general and abstract legal norms (in accordance with the dominating opinion of the juristic literature) and, on the other, a system of legal norms if viewed as including individual and concrete norms, for instance, those established in a court judgment. It is understandable that substantial norms, e.g. in the field of civil law, usually form grounds for formulating appropriate norms granting the competence to establish individual and concrete norms in a judgment which prescribes a certain kind of performance.

Generally speaking, it does not appear that the pyramid of norms of norm-giving competence which is discussed in normativistic conceptions was supposed to consist of too many tiers. Indeed, judging by the changes to the organisational structure of our country, it could be argued that there is a tendency today to simplify the chain of competence norms including those based on express successive delegations of competence. Normativistic conceptions can be charged with devoting too much attention to the role of the competence connection in the structure of a legal norm system without developing a theory of competence norms that would be specific enough.

The Problem of the First Competence Norm and Revolutionary Changes of a Legal System

If a system of legal norms is viewed as a system of norms tied only by the connection of competence descendance, questions arise as to the character of norms constituting the ends of this chain (which only has a few links at most). The ends,

of course, are made up of some substantial norms that prescribe certain types of conduct that is defined differently than the conduct consisting in obeying a norm enacted in some way. The matter, in this case, is more complex, inasmuch as the substantial norms of judiciary law grant the competence to issue such and such judgments, and not others, in cases of a given kind. In any event, however, successive grants of competence to enact general norms or ultimately an individual norm leads to the enactment of a non-competence norm.

What does, however, the chain of competence norms 'begin with'? In normativistic conceptions, the basic competence norm is to play an equivalent role in the dynamic system, *mutatis mutandis*, of the principal norm of the static system (the specificity lies in the completely way that derivative norms are derived from principal norms). The question arises of what ground the validity of the 'first' competence norm is based on, since *vi definitionis* it is not a norm whose validity is based on another competence norm. Normativism adopted the mental construct of a 'basic competence norm' as a kind of fiction, one necessary for explaining what the source of the binding force of the constitution of a given country is (if this is not a constitution whose legitimacy derives from a previous constitution).[17] It appears that this construct is unnecessary. It is enough to assume that a set of law-making competence norms included in some non-octroyed constitution (as this is what actually is meant) is 'valid at law' in another sense than the other legal norms whose legitimacy stems from a constitution. Constitutional norms can be viewed as signs of the sovereign authority of the body politic making up a constituent assembly. Its authority derives from the actual readiness of members of society to obey the norms laid down in the constitution.

This actual readiness is usually motivated, on the one hand, by ideology connected to a constitution and, on the other, by fear of physical force which the leaders of any viable state organisation have at their disposal. A strong ideological motivation may sometimes suffice even where little force is avail-

17 Kelsen, 115 ff.

able to coerce people into obedience. If the state has ruthless physical force at its disposal, it would be unreasonable to defy its authority. Between these extremes, ideological arguments may to a degree be substituted by the threat of force and vice versa. Reasonable management of social life first seeks to convince people to obey legal norms and only considers the use of force as an argument of last resort.[18] Of course, a reverse order of arguments is also possible: beginning with *argumentum baculinum* and ending with a suitable ideology to supplement it. What elements will dominate in a given case—a parade of well-armed troops or an ideological justification, especially one bearing a relation to the legal culture hitherto shared by the people of a given country and the legal culture of its civil servants and public officials—depends on the specific political situation. In any event, it would be difficult to support the 'first' norm of law-making competence solely with the arguments of bayonets and pistols, or only by disseminating a specific political ideology. These two kinds of arguments may only substitute for each only partially.

It is thus necessary, bearing in mind the dynamic connection between the norms of a legal system, to highlight the fact that out of conceptual necessity, the system of norms viewed from this angle comprises not only norms enacted pursuant to law-making competence, but also norms enacted in a sovereign manner, without any competence authorisation. The latter have only political authorisation and are 'valid at law' in a different meaning of this phrase from that used in respect of the other norms of the system viewed from this perspective.

When deriving legal norms from some basic competence norms, it is important to recall that they may grant the competence not only to enact, but also to recognise norms, for instance customary ones, as legally binding. Admittedly, this problem is only of minor importance in our legal system, but may be vital for the legal systems of other countries, even socialist ones.

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18 Vładimir Iljicz Lenin, *Dzieła*, vol. 32. Warszawa, 1972, 214.

The issue of the legal system's derivation from the 'basic competence norm' is related to many problems discussed in jurisprudence. One such problem is the continuity of a legal system viewed from the perspective of the dynamic connection with an appropriate basic competence norm or, to put it more realistically, with the basic competence norms of a given legal system. Two extreme situations can be imagined here. For instance, a new regime coming to power in a manner not anticipated by the provisions of the existing law declares itself to be a supreme law-giver and at the same time, for some tactical reasons, announces that it will honour the legal norms hitherto in force. What we are dealing with in this case is the change of the 'basic competence norm' without any content modification whatsoever of the norms included at this moment in the set of derivative competence norms and substantial norms. In the other situation, which is perhaps more fantastical, on the basis of the same basic competence norm, all the legal norms of a given system would be changed on a single day. Of course, such a situation can arise only in the narrow mind of the person who does not realise that certain legal norms are practically indispensable for a society to function, irrespective even of its class organisation. Moreover, although their function changes in the context of various systems, they cannot be changed in a completely arbitrary manner. In the first situation, a normativist would be prepared to speak of a radical change of the legal system, although a jurist following a sociologically-oriented approach would be prepared to speak of the continuity of the legal system. In support of the latter stance, it could be said that 'nothing has actually changed' in the behaviouristic picture if, apart from the change of the very apex of the system competence pyramid, the set of norms continues to function as before. In the second situation, a sociologically-oriented jurist would see that there has been a radical change of the system, although for a normativist, it would be only the evolution of the system in agreement with its principles. Accidentally, the evolution would be extraordinary, as it would be very quick.

The Interdependence of Content and Competence Connections in a System of Norms

The Uselessness of a System of Norms Founded Solely on a Competence Connection for Managing Society

The legal-theory conceptions that take a legal system to be composed of norms tied by competence connections, and that point to 'the gradual construction of a legal system', usually underestimate content connections between system norms. If it so happened that substantial norms enacted pursuant to lower-order competence norms would be, in agreement with common intuitions, consequences of substantive norms enacted pursuant to higher-order competence norms, a radical normativist would consider this an accidental matter. For such a theorist is not interested (at least apparently) in the praxeological cohesion of a system and, consequently, is not sufficiently aware of the fact that every substantive norm properly enacted in a legal system has its consequences, derivable according to specific inference rules accepted in a given community. The consequences, too, are taken to be norms belonging to the system.

This element of legal system design may be passed over in the cases when it suffices to refer to otherwise obvious inference rules based on the logical implication of norms or on instrumental implication when appropriate causal connections are widely known and uncontested. Then, it can be accepted that 'it goes without saying' that in a legal system there are norms in force, alongside norms enacted pursuant to law-making competence or enacted in a sovereign manner, that are recognised as the undeniable consequences of the latter. However, when we pass from the simplest and practically uncontested inference rules to such rules that provide only inconclusive arguments, when the precise import of an inference rule is muddied in paroemias simplifying the matter, then it can be seen that the problem of the validity of norms-consequences compared to expressly enacted legal norms is by no means trivial.

The question arises of whether it would be at all possible to speak of a socially viable legal system, were it comprised only of the norms that have been

expressly enacted or officially recognised. First, it must be noted that usually we do not see a norm of conduct being formulated *expressis verbis* but rather we see provisions being issued from which appropriate norms of conduct are reconstructed, following adopted interpretation rules. The reconstruction involves dozens of assumptions about the legislator's 'will', 'goals' and 'aspirations'. Second, even if it were difficult to elude the norm that is an obvious logical consequence of a generally formulated norm (e.g. you should support your offspring, you should support your great-grandparents), it would be possible to try to elude such norms the fulfilment of which is instrumentally necessary to fulfil the norm that has been expressly enacted by claiming that the statute does not prescribe it. However, it would be absolutely impossible to draft a statute that would list all the actions that are instrumentally necessary to execute expressly enacted commands for the simple reason that it is impossible to foresee what actions would be instrumentally necessary in this or that situation to carry out expressly formulated commands.

Out of necessity then, a system of legal norms must be viewed as one whose norms are tied by two types of connections. Only in part can it be reconstructed relying on the facts of enacting specific norms (either competent or substantive ones) in a manner specified in appropriate norm-giving competence norms, beginning with those laid down in a sovereignly established constitution. As a rule, a norm-giving competence norm does not serve to derive some other norms but is used to enact further norms of the system. However, in reliance on the substantive norms of the system, following the inference rules adopted in it, appropriate norms-consequences are included, independently of any acts of the entity equipped with law-making competence.

Thus, a system of legal norms has the structure of a dynamic system 'from the top', while 'from the bottom', in increasingly detailed expansions, its structure is static. If substantive norms enacted pursuant to competence norms of various degrees could be considered in some case as tied by a content connection, then enacting norms-consequences would be in principle redundant,

but this is a matter of secondary importance. If, however, these substantive norms were inconsistent, the system would have to be considered faulty, unless system design rules included suitable collision rules.

The Inefficiency of a System Tied Solely by Content Connections

Since a dynamic system of norms, not supplemented by other norms which are their logical and instrumental consequences, would be impractical, the question arises of whether a system of legal norms would be practical if, from a single or several principal norms, all other system norms would be derived pursuant to inference rules based on norm 'implication' or the connection of a common axiological justification. In other words, if a legal system, as the ancient proponents of natural law imagined, was made up of norms derived from a number of principal norms, would it be a set of norms suitable for use in a modern state?

This question, which of course is not posed here in earnest, is formulated to highlight certain major practical faults of such a system allegedly designed *more geometrico*. Allegedly—because the language of socially relevant norms is not and cannot be a language of geometry, an artificially designed language, referring to the world whose (without going into ontological deliberations) only an approximate equivalent is what we see as plane figures, polyhedrons, spheres, etc. The language in which the principal system norms would have to be formulated may not be a sufficiently explicit language, while the right sense of principal norms can be seen only when their further consequences are being formulated (and on many an occasion, these principal norms are formulated in such general terms in order that, when appropriately interpreted and after adopting suitable additional assumptions, desired consequences of detail can be derived from them).

Due to the vagueness of principal norms (e.g. 'It is not permitted to block natural aspirations of man', 'A social order relying on agreeable cooperation of all interested parties is to be implemented', etc.) and inference rules, especially those which invoke common axiological assumptions, and due to the contentiousness of these axiological assumptions and the enthymematic

premises of the conclusions in this respect, the system of norms tied solely by static connections may point only to a general direction of conduct in a given field. It cannot, however, provide grounds for rigorous decisions which the acts of a person are legally prohibited or prescribed, or are legally indifferent.

In particular, if we invoke the axiological justifications of some norms to include some other norms in the system, in order to make such inferences more specific, relying on some logic of norms or logic of preferences, it would be advisable to be able to invoke sufficiently precise evaluative judgements. They should indicate what state of affairs we value higher than others.[19] Invoking an ordered catalogue of such preferences can be assumed, but nobody compiles such a catalogue, because they articulate preferences in practice only when faced with the necessity of making a choice, and in casuistically given situation for that matter.

For this reason, the contemporary versions of traditional conceptions of natural law speak of natural law norms as of certain general moral principles and avoid compiling detailed codes, which are necessary for the practice of managing society with the use of law.[20] At the same time, the need for 'positive law' is acknowledged, which is indispensable for deciding more particular cases. 'Positive law' must make final decisions in these cases in which some activity should be uniformly regulated and which lack judgmental grounds for choosing this or that option (e.g. Is the time limit for filing an appeal to be 14 or 15 days?). 'Positive law' becomes in a sense a component of the 'nature of society' assumed by these conceptions.

Norms Granting Norm-Giving Competence vs. Substantial Norms in the Legal System Structure

To present graphically the structure of a legal system, it could be compared to a huge bunch of grapes in which norm-giving competence norms of various

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19 Cf. Aleksander Archipowicz Iwin, *Osnovaniya logiki ocenok*. Moskva, 1970.
20 Cf. Konstanty Grzybowski, "Katolicka doktryna prawa natury", *Etyka* 6. 1970: 106–110.

rank would play an analogous role to ever thinner stalks while substantive norms, drawing juices through them from the grapevine, could be likened to grapes (anyway of a sour taste). Every substantive norm (except for those substantive norms that are laid down in a constitution adopted sovereignly and not octroyed) is justified by being enacted or officially recognised as valid pursuant to a specific norm-giving competence norm or, possibly, several chains of interrelated norm-giving competence norms. A substantive norm does not provide any grounds for justifying a further norm-giving competence norm; except that a factual state involving a breach of a substantive norm is a state of affairs belonging to the scope of application of norms granting competence to enact individual sanctioning norms.

While on the topic of substantive norms, they have been juxtaposed, by way of a temporary terminological convention, with norm-giving competence norms. From this point of view, norms granting competence to update somebody's potential legal duty by an act of a different kind than enacting a norm of conduct (e.g. by choosing alternative performance or by administering a declaration of entering into marriage with numerous legal effects following from it) would be counted among substantive norms. It is debatable whether all norms granting competence can be reduced to norms granting norm-giving competence. Perhaps norms granting competence to perform an act updating a previously assigned legal duty (other than a blanket duty to obey norms enacted in a certain way) can be reduced to some supplements of a norm-giving competence norm. This appears, however, to be too complicated a mental construct which is inconsistent with the practice of juristic thinking on these matters.

The more we view the structure of a system of legal norms from 'top' to 'bottom', the more restricted, of course, will be the scope of application and regulation of norm-giving competence norms and the greater the share of norms will be which have been called substantive. The excess of competence norms on the lower tiers of the system structure may be otherwise a symptom of the excessive bureaucratisation of the state organisation.

References

Grzybowski, Konstanty. "Katolicka doktryna prawa natury." *Etyka* 6. 1970: 106–110.

Iwin, Aleksander Archipowicz. *Osnovaniya logiki ocenok*. Moskva, 1970.

Kalinowski, Georges. *La logique des normes*. Paris, 1972.

Kelsen, Hans. *General Theory of Law and State*. Cambridge, 1945.

Lenin, Władimir Iljicz. *Dzieła*, vol. 32. Warszawa, 1972.

Nowacki, Józef. "'Materialna' jedność systemu prawa." *Zeszyty Naukowe Uniwersytetu Łódzkiego: Nauki Humanistyczno-Społeczne* 108. 1976.

Nowacki, Józef. *Praworządność. Wybrane zagadnienia*. Warszawa, 1977.

Opałek, Kazimierz, and Jan Woleński. "Problem aksjomatyzacji prawa." *Państwo i Prawo* 1. 1973: 3–14.

Ross, Alf. *Directives and Norms*. London, 1968.

Rot, Henryk. *Problemy kodyfikacji prawa PRL*. Wrocław, 1978.

Rozmaryn, Stefan. *La Pologne, Comment ils sont gouvernés*. Paris, 1963.

Rozmaryn, Stefan. *Ustawa w Polskiej Rzeczypospolitej Ludowej*. Warszawa, 1964.

Weinberger, Ota. "Die Struktur der rechtlichen Normenordnung." In *Rechtstheorie und Rechtsinformatik*, edited by Günter Winkler. Wienna, 1975: 110–132.

Wright von, Georg Henrik. *Norm and Action*. London, 1963.

Wróblewski, Jerzy. "Stosunki między systemami norm." *Studia Prawno-Ekonomiczne* 6. 1971: 7–34.

Ziemba, Zdzisław. *Logika deontyczna jako formalizacja rozumowań normatywnych*. Warszawa, 1969.

Ziemba, Zdzisław, and Zygmunt Ziembiński. "Uwagi o wynikaniu norm prawnych." *Studia Filozoficzne*, no. 4. 1964: 111–122.

Ziembiński, Zygmunt. *Logika praktyczna*. Warszawa, 1977.

Ziembiński, Zygmunt. *Metodologiczne zagadnienia prawoznawstwa*. Warszawa, 1974.

Ziembiński, Zygmunt. "O warunkach zastosowania logiki deontycznej we wnioskowaniach prawniczych." *Studia Filozoficzne*, no. 2. 1972: 201–215.

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Access to Czech Administrative Courts – Bottlenecks in Access to Justice*

Abstract: The right of access to a court is subject to certain limitations. While a number of these limitations may be created deliberately, in line with the function of the administrative justice system (e.g. restrictions on review by the higher courts, others may be more or less unintended consequences of the design of the administrative justice system (or application of relevant rules or case law). The article attempts to present possible forms of these limitations and tries to outline some of the main "bottlenecks" in the access to judicial protection in the context of Czech administrative justice. These limitations can be regarded mainly as formal and informal, and their recognition can result in increasing the efficiency of the functioning of judicial protection, in particular by simplifying procedural regulation in relation to the ongoing societal and technical changes.

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Introduction

The right of access to a court is one of the key elements of the rule of law. However, it is not (and probably cannot[4]) be an absolute right. The path to a decision on the merits is typically conditioned by the fulfilment of a number of different requirements imposed on the applicant by the legislation. These requirements serve as limitations on access to a court, but in the real world the courts' capacities are limited as well. Such restrictions are therefore permitted assuming they are *reasonable*. This means, in particular, that they have a legitimate aim, are proportionate, and do not impair the very essence of the right of access to court. However, that does not mean that *all* the requirements meet the following criteria. Some of the limitations may appear to be substantiated, but a closer look may reveal the opposite is true.

Likewise, and more importantly, some of the limitations may not appear to be limitations on access to justice at all. In this sense, these limitations can be *formal* but also *informal* (and difficult to identify). Some of these limitations may be a result of the (inadequate) functioning of the administrative justice system, others may be a manifestation of its (inadequate) organisation.

Some restrictions can create unintended "bottlenecks" in access to administrative courts. While a number of these bottlenecks may be created deliberately, in line with the function of the administrative justice system (e.g. restrictions on review by the Supreme Administrative Court, which fulfils a specific

4 At the very least, there is a risk of *abuse* of the right of access to the courts; e.g., in the Czech justice system, one person has 1,500 court cases pending (!), but the courts refuse to grant him free legal aid on this basis (see judgment of the SAC of 23 February 2023, No. 2 As 9/2023–10).

role), other may be more or less unintended consequences of the design of the administrative justice system (and/or application of relevant rules in case law).

The aim of this paper is to outline the basic limitations on access to Administrative Courts (which may constitute unreasonable "bottlenecks") that, from our perspective, create, co-create or pose a risk in the context of administrative justice in the Czech Republic.

Formal Limitations

Today, more than twenty years after the Czech Code of Administrative Justice (CAJ)[5] entered into force, we believe that applicants should not have to face major problems on their way to judicial protection. Only exceptionally is access to the court unlawfully denied. That does not mean, however, that the applicants' journey to the judicial review is always smooth, simple, predictable and efficient.

As the European Court of Human Rights (ECtHR) case-law suggests, some rules and legal institutions (such as time constraints, court fees, access to legal aid, rules regulating standing, etc.) can be applied in various ways, meaning they can be either legitimate or unreasonably restrictive. However, the fact that in the vast majority of cases the legislation does not impose illegitimate obstacles (resulting in denial of access to justice) does not preclude that there are no opportunities for improving the effectiveness of the administrative court proceedings' legal framework.

When it comes to limitations of access in the *formal sense*, they can be understood as a variety of procedural rules (see above) as well as the overall legal set-up of the system of administrative justice (in terms of the forms of protection provided). As far as the overall set-up is concerned, its attributes may be the relationship of administrative justice to public administration (e.g. the extent to which an administrative court can correct administrative decisions or *de facto* decide instead of administrative authorities) or the concept of a system of means of protection of rights - actions in administrative justice.

5 Act No. 150/2002 Coll., Code of Administrative Justice.

In the Czech Republic, as a result of the Austrian administrative tradition, the courts are *strictly separated* from the public administration and their role is exclusively to control the public administration, not to exercise it. For this reason, the Czech administrative courts never rule *ex officio*, but always on the basis of a motion (an action, proposal, complaint, etc.). However, this traditional paradigm can be problematic when the rights of vulnerable individuals who are unable to defend their rights themselves (or their representatives) are affected. As the Czech ECtHR judge K. Šimáčková aptly points out, "the most unjust judgments are those that could not have been delivered."[6]

Therefore, Czech Administrative Courts cannot be fully described as "an ally of the individual against the state", in the way that, for example, the ombudsperson institution could.[7] Nevertheless, we do not consider this arrangement to be a major shortcoming, as it can be corrected by some of the elements of the administrative justice, especially by an elaborate system of free legal aid. Whether such a system exists, however, is another matter (see below).

Formal Requirements

T. Mullen points out that an individual has access to justice when there are effective remedies available for them to vindicate their rights and advance their legally recognised interests. In a narrow sense, access to justice can be identified with the existence of remedies and an individual's ability to use them. Mullen, however, identifies more with the broader notion that an individual should be able to make practical use of the remedies without undue difficulty. This means that it is necessary to consider the cost or other possible obstacles to effective use of remedies.[8]

6 <https://jinepravo.blogspot.com/2011/06/nejnespravedlivejsi-rozsudky.html>.

7 As the Czech variant of this institution – the Public Defender of Rights – can act on its own and is generally much less formalised and more accessible for vulnerable individuals, but unsurprisingly has much less powers than administrative courts.

8 Tom Mullen, "Access to justice in administrative law and administrative justice" in *Access to Justice: Beyond the Policies and Politics of Austerity*, eds. Ellie Palmer et. al. Oxford, Portland 2016, 70.

But at the same time, as already stated above, the right of access to a court is not absolute and may be subject to legitimate restrictions. Generally, these restrictions will not be incompatible with international fair trial standards as long as they do not impair the very essence of the right, it pursues a legitimate aim, and there is a reasonable relationship of proportionality between the means employed and the aim to be achieved.[9] In this respect, states may enjoy a margin of appreciation.[10] If the restrictions become disproportionate, they may create barriers to access to justice.

For the purposes of this paper, we divide the procedural rules concerning access to a court into two "phases". The first consists of *drafting a petition* (mostly an administrative action or a cassation complaint), the second of *communicating* with the court until the final decision is issued. Naturally, a third (or fourth) phase can also be considered, which refers to the actual decision on the merits (and, if necessary, to its execution). These stages are basically the same for the proceedings before the regional courts and for the proceedings on the cassation complaint as an extraordinary appeal, which is decided by the SAC. Proceedings differ in a number of sub-aspects, but in both cases, applicants may face problems in formulating the application, communicating with the court or accessing legal aid, etc. In terms of the focus of this paper, however, the first two phases are relevant, as they relate to the applicant's interaction with the court, which may or may not result in a decision on the merits.

The applicant's aim is to obtain a decision on the merits as quickly, efficiently and inexpensively as possible. There are also other subjects (stakeholders) whose position can be examined, such as the administrative authority or even the legislator. However, the mission of the administrative justice system (as is understood in the Czech law) is to primarily protect the public subjective rights of individuals. There are two "main actors" in this relation-

9 *Waite and Kennedy v. Germany*, Application no. 26083/94, Judgment of the ECtHR of 18 February 1999, para 59; *Kart v. Turkey*, Application no. 8917/05, Judgment of the ECtHR of 3 December 2009, para 79.

10 OSCE Office for Democratic Institutions and Human Rights (ODIHR) and the Folke Bernadotte Academy (FBA), *Handbook for Monitoring Administrative Justice*. Warsaw, 2013, 47, <https://www.osce.org/files/f/documents/1/3/105271.pdf>.

ship – the applicant and the administrative court; the quality of their interaction is therefore essential. Or, in other words, it is the *user perspective* that is critical to redesigning unsatisfactory procedural regulations.[11]

Drafting a Petition

When it comes specifically to the phase of case initiation, the OSCE Handbook for Monitoring Administrative Justice suggests several criteria. These include reasonable time to initiate proceedings, effective and equal access to a court or accessibility of legal assistance and legal aid.[12]

We must also take into account that court proceedings are not free. However, the question is whether administrative court proceedings are expensive to the extent that judicial protection is becoming unavailable. We believe that this is not the case in the Czech administrative justice. The cost of court proceedings (Article 57(1) CAJ) includes the court fee and the rest of the costs (in particular the costs of legal assistance and legal aid). The entire cost of the legal proceedings after the end of the proceedings shall be paid by the losing party (penalty function). However, at the beginning of the proceedings, the obligation to pay the court fee lies with the applicant.

First, attention will be focused on the court fees. In addition to the above-mentioned penalty function, the purpose of court fees is to prevent court overloading, by filtering out frivolous litigation, and to pay for court operating costs (fiscal function).[13] The court fee is currently CZK 3 000 (aprox. 120 EUR) for an administrative action and CZK 5 000 (aprox. 200 EUR) for a motion to annul an act of a general measure or part thereof.[14] The court fee even for a cassation complaint (extraordinary appeal) is the same the court fee for a motion to annul an act of a general measure. This rate has been the same since 2011. We *do not*

11 As, e.g., Margaret Hagan points out: <http://www.openlawlab.com/2015/11/18/the-legal--system-needs-to-be-redesigned-by-normal-people-for-normal-people/>.

12 Cf. *Handbook for Monitoring Administrative Justice*.

13 Robert Waltr, "§ 1, Subject of court fees" in Robert Waltr et. al., *Zákon o soudních poplatcích. Komentář*, 2nd ed. Praha, 2012, 1.

14 See item 18(2) of the Annex to Act No. 549/1991 Coll., on Court Fees.

see such fees as discouraging. Firstly, the fees are set at a fixed amount, which is often lower than the average court fee in the civil court proceedings, which is set as a percentage (usually 5% of the amount sued for). Secondly, potential applicants may benefit from the institution of exemption from court fees (so-called "right of the poor"). Generally, the cumulative effects of recent inflation in the Czech economy made the fixed court fees lower. However, we believe that introducing an increase during the unfavourable economic situation would be unwise.

An important factor that has an impact on the entire procedure and can influence it from the outset is the precise and comprehensible wording of the proposal (see below). As regards the precision of the proposal, mention may be made of the issue of the choice of the type of action.

From this point of view, we consider the setting of individual types of actions in the CAJ to be rather problematic. On the one hand, from its reform in 2003, it operates with a presumption of a protection against potentially all forms of exercise of public authority within the public administration[15] (with the exception of administrative sub-statutory rule-making, which is subject to review by the Constitutional Court). This system therefore distinguishes between the *decision* of administrative authorities, their *inaction*, unlawful *interference*, and *act of a general measure*.[16]

This system works reliably in the case of administrative acts the nature of which is straightforward, thus the majority of cases. However, this is not always the case of "atypical" administrative acts. We consider it generally problematic when the person affected by such an act is *de facto* confronted with the question of its qualification for the purpose of administrative justice proceedings. Meanwhile, in the earlier case law, it was held that the choice of the wrong type of action led to the denial of judicial protection.[17]

15 Cf. Articles 65 to 87 and 101a to 101d CAJ.

16 As specific act standing on the borderline between individual and normative acts, which is inspired, in particular, by the German category of administrative acts known as "general measures" (*Allgemeinverfügung*).

17 For more details, see Tomáš Svoboda, and Denisa Skládalová, "The Qualification of Action in Administrative Justice and its Perils – the Czech Experience", *Adam Mickiewicz University Law Review*, no. 14. 2022: 281–295.

Fortunately, subsequent case law of the Constitutional Court (CC) and the Supreme Administrative Court (SAC) has led to the conclusion that choosing the wrong type of action does not lead to the rejection of the application (and denial of justice) anymore, since the court must inform the applicant of the wrong type of action and give them the opportunity to amend the application.[18] However, we do not consider this to be an ideal solution, as the unclear definition of the types of action leads to inefficiencies on the part of both applicants and administrative courts. At the very least, amending the application leads to a prolongation of the proceedings.

In our opinion, particularly the SAC case law seems to have (more or less) failed to set clear boundaries between the types of action (in particular between an action against a decision and an unlawful interference, which in both cases may constitute formalised acts of authority differing only in some formal characteristics). The greater degree of difficulty in initiating administrative court proceedings is also acknowledged by the CC, which considers that the initiation of proceedings before administrative courts is currently more difficult than in other types of judicial proceedings.[19]

From our point of view, this problem may represent a limit on access to the administrative courts. It will be a limit affecting a smaller number of persons, but which is nonetheless significant. This is particularly relevant in the case of vulnerable individuals, such as in pension or other social agendas. Moreover, we believe that the number of atypical administrative acts in the Czech administrative procedure is rather *increasing*. This is partly a manifestation of the legislator's efforts to avoid standard procedures (which are often slow) and partly a result of, for instance, simplistic implementation of EU law.

Communicating with the Court

The drafting of the application to initiate proceedings is followed by a phase in which the applicant communicates with the court with varying intensity until the final decision is issued. In this phase, the court firstly reacts to any defects

18 Svoboda, and Skládalová.
19 Resolution of the CC of 14 August 2019, No. II. ÚS 2398/18.

in the application, provides the applicant with information about the proceedings and advises them of their procedural rights. In proceedings before regional courts, the possibility of a court hearing is added. The applicant may request access to the file or request information on the state of the proceedings. The common denominator of these actions is the interaction between the applicant (or their representative) and the court.

The applicant does not have to be represented by an attorney in the proceedings before a regional court, unlike in the proceedings before the SAC. If the applicant is not represented in the proceedings and does not have legal training or previous relevant experience, they are likely to find it more difficult to interact with the court. However, many of the mentioned examples are also relevant for legal professionals, as they do not always specialise in administrative law. However, we believe that problems are more likely to arise during drafting of the petition itself.

Proceedings before administrative courts (with the exception of hearings, which are not as widely used in practice) consist of written pleadings. An important role is therefore played by the delivery of documents (its promptness and efficiency), clarity of the information provided (whether the applicant is able to understand the information communicated to them by the court) and extent of the duty to instruct (whether the court's procedure in the proceedings is transparent and predictable for the applicant, whether the applicant understands how to remedy any defects in the pleadings or to comply with other obligations imposed on them). Generally, we could ask how to make these steps easier and more convenient for applicants (simplify them or even eliminate the redundant ones).

Physical Accessibility

The foundation of access to the courts can be considered to be the setting of the relevant procedural rules and their application, but at the same time it is a complex *socio-legal issue*. It is certainly not sufficient to analyse the applicable legis-

lation; also relevant are the various practical obstacles that those applying to the courts have to overcome. We refer to these restrictions as *informal limitations*.

In this sense, Halliday and Scott[20] distinguish between 'practical' barriers to the use of administrative justice mechanisms, such as cost, procedural complexity, ignorance, and physical accessibility (further referring to Adler and Gulland, 2003) and 'attitudinal' barriers such as scepticism, fatigue, faith in the rectitude of rules, and satisfaction (Cowan and Halliday, 2003). An inherent part of the right of access to a court is the physical accessibility of court buildings and the availability of information about court hearings. Unjustified restrictions on access to court premises, lack of publicity of hearings, inaccessible venues, insufficient courtroom space or unreasonable conditions of entry into the courtroom have been said to hinder physical access to the court and violate the requirements of Article 6(1) of the European Convention on Human Rights.[21]

We believe that the Czech administrative justice system generally meets the requirements for physical accessibility. Access to the court is guaranteed constitutionally not only in the sense of the establishment of judicial bodies (mainly in the form of the *right to enforce their rights in accordance with a prescribed procedure before an independent and impartial court and*, or in specified cases, before another body[22]) but also, for example, by a constitutional requirement that their proceedings be made public, or at least that the judgments be delivered in public.[23] However, the territorial distribution of the courts as well as the physical accessibility of buildings for people with disabilities may be matters for debate.[24]

20 Simon Halliday, and Colin Scott, "Administrative Justice" in *The Oxford Handbook of Empirical Legal Research*, eds. Peter Cane, and Herbert Kritzer. Oxford, 2010.

21 <https://www.osce.org/files/f/documents/1/3/105271.pdf>.

22 Article 36(1) of the (Czech) Charter of Fundamental Rights and Freedoms.

23 According to Article 96(2) of the (Czech) Constitution, "proceedings before the court are oral and public; exceptions are provided for by law. The judgement shall always be delivered in public".

24 Cf. Eliška Mocková, "Přístup ke spravedlnosti podle článku 13 Úmluvy o právech osob se zdravotním postižením. Lépe už to nejde?" in: *Lidé s postižením jako „nová menšina" – právní výzvy a souvislosti*, eds. H. CH. Scheu, and Z. Durajová. Praha, 2021.

There are no specialised administrative courts in the Czech Republic; instead, regional courts exercise the agenda of the administrative courts through specialised chambers or single-judge benches. Surprisingly, however, these regional courts are not organised at the level of Regions as territorial self-governing entities in the Czech Republic. There is therefore a *disproportion* between the number of regional courts (8) and the number of regions (14). This problem is, however, satisfactorily solved by the offices of the regional courts in regions where regional courts are not situated. The regional courts are therefore generally present in the regional capitals. The aforesaid is an older problem of the organisation of the judiciary and some other agencies, which was taken over from the communist state (pre-1989) and has not yet been reformed. Nevertheless, the definition of the local jurisdiction of the regional courts and self-governing regions is somewhat misleading.

The only specialised administrative court in the Czech Republic is the SAC (with its seat in the second largest city, Brno). This court did not originate unproblematically. Despite the constitutional presumptions of 1993, it was not created until 2002, together with the reform of the procedural regulation of administrative justice. However, since its creation, the functioning of the SAC can be considered successful, perhaps even too successful.

Capacity Issues

One of the informal bottlenecks of administrative justice could also be its capacities, which do not correspond to the actual "demand". The SAC is sometimes described as a "victim of its own success,"[25] since during the twenty years of its functioning the number of cases brought before the court has risen

25 As J. Baxa, the former SAC president and current CC president, described the situation in 2019: "We are a bit of a victim of our own success, of the public's trust in our decision-making. Unfortunately, we are forced to deal with often very trivial cases that we have solved repeatedly in the past, but we are asked to make the same decision again and again."(<https://advokatnidenik.cz/2019/10/01/spravni-soud-resi-i-banalni-pripady-je-tak-pretizeny-rika-baxa/>).

sharply (from approx. 2000 cases in early 2010s to more than double in late 2020s). However, this judicial body is still the same in terms of its basic parameters. It is made up of roughly the same number of judges (10 chambers consisting of usually three judges each, plus some judges on temporary assignment) and operates in the same premises, which do not allow for an easy increase in its capacity.

This has led to a gradual overburdening of the SAC. In this context, some organisational measures have been taken (e.g. increasing the number of law clerks) and some legislative changes have been made to restrict access to the SAC.[26] Overall, however, there is a clear disproportion between the number of judges in the Czech Republic. While the total number of judges in 2022 reached approx. 3000, the number of judges assigned to the regional courts' administrative sections is (long-term) approx. 150. This is clearly less than in, e.g., Austria, which is comparable in population size.[27]

This also corresponds to the prolongation of proceedings before administrative courts, which are the slowest in the Czech justice system. This can be illustrated again by the data from the SAC. While the average length of proceedings before this court was 195 days in 2019, it was 243 days in 2020 and 277 days in 2021.[28] It should be added, however, that this result was also influenced by the specific agenda that this court has dealt with during the COVID-19 pandemic. Nevertheless, this confirms the general conclusion that the workload of the administrative courts in the Czech Republic is exceeding their capacity.

26 For more detail, see Lukáš Potěšil, "Restriction of access to the Supreme Administrative Court to reduce its burden (via expanding the institution of inadmissibility of a cassation complaint in the Czech Republic)", *Institutiones Administrationis. Journal of Administrative Sciences* 1, no. 1. 2021: 74–81.

27 <https://www.justiz.gv.at/file/8ab4ac8322985dd501229d51f74800f7.de.0/cover_und%20text_the%20austrian%20judicial%20system_neu.pdf?forcedownload=true>.

28 <https://www.nssoud.cz/informace-pro-verejnost/poskytovani-informaci/poskytnute-informace/detail/informace-poskytnuta-28–3-2022>.

Knowledge of Availability

As an informal limitation of the administrative justice system, we also consider the awareness of those affected by public administration about the availability of judicial protection, or more precisely, its absence. While this awareness cannot be truly estimated without empirical research, it can be pointed out that the administrative authorities in the Czech Republic are not obliged to advise that protection against their decisions or other acts is provided by the administrative courts. In the case of such instructions, the administrative courts have held that *redundancy does no harm*;[29] thus, advising about the possibility of judicial review is permissible. However, it is not legally required.

This may, however, create inequality between the persons affected, where some of them will be encouraged to bring an administrative action, but some will not. At the same time, there is no connection between the optional advice of the administrative authority and the time limits in administrative justice. Thus, if there is an incorrect instruction, which is trusted by the person affected, this does not extend the availability of judicial review (the result can therefore only be a compensation claim). We do not consider this to be ideal, or rather, we believe that the availability of judicial review should be subject to the duty to instruct by the administrative authorities. A possible counter-argument, however, is that it may be difficult for the administrative authorities to give the correct instructions as to the type of action that can be used as a defence (as this is sometimes difficult even for the courts).

In general, however, the Czech Republic does not clearly communicate the availability of the protection provided by the administrative courts. This is reflected, e.g., in the poor quality of the websites of the general judiciary (including the administrative judiciary – *www.justice.cz*) and the generally lower levels of digitalisation of governance (which is perceived by many as inadequate).

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29 Judgement of the SAC of 12 January 2006, No. 1 As 3/2005–45.

Potential for Simplification

We believe that the rules governing proceedings before administrative courts should be *as simple, clear and user-friendly as possible*. Individuals must have a clear and practical opportunity to challenge an act affecting their rights. In particular, in administrative court proceedings, the applicant is required to qualify the contested act of the administrative authority in order to choose the appropriate type of action.

However, the shortcomings in access to justice can serve as an indicator of the potential for simplification. The academic literature has so far focused primarily on simplification in the field of administrative proceedings,[30] but the concept of simplification as such can also be applied to proceedings before administrative courts. As was mentioned above, the Czech administrative courts are rather slow, the search for solutions that will speed up and simplify the process is therefore substantiated.

According to G. F. Ferrari, simplification represents the *balance* between constitutional principles and values and can be described as repositioning various principles and values without modifying the underlying method resulting from modern legal culture. In other words, to simplify means to rethink the relationship[31] – in this case, (mainly) between the citizens and the administrative courts.

The aim of simplification strategies should be to minimise costs while maximising access to courts. In other words, if the regulation is simple enough to navigate without legal representation, it is unnecessary to spend significant amounts of money on attorney services. Speed of the proceedings plays an important role and can be seen as another way of minimising the costs. However, speediness is not the only goal. A simplified procedure should result in

30 See, e.g., special issue of the journal Administrative Sciences (Polonca Kovač, and Dacian C. Dragos, eds., *Administrative Sciences*, special issue – *Simplification of Administrative Procedures – in Search of Efficiency, Public Interest Protection and Legitimate Expectations*. 2022).

31 Giuseppe Franco Ferrari, “Simplification and Consent in Administrative Action: A Comparative Perspective”, *Bocconi Legal Studies Research Paper Series*, no. 3126763. 2018.

fair rulings, while being transparent for all stakeholders. It can be expected that simplification for one group of stakeholders may introduce additional complexity for another.[32] For example, the introduction of a specific type of duty to instruct (e.g. on the choice of the type of administrative action) places the burden on administrative court judges. In addition, they must assess, on initial acquaintance with the application, whether the applicant is pursuing their objective with the correct procedural instrument. If necessary, the judge has to be proactive and *de facto* provide the applicant with legal aid.

As R. Zorza points out, when considering simplification one must first take stock of existing efforts.[33] It has be acknowledged that the current rules on proceedings before administrative courts already contain some simplifying elements. These include priority of delivery via data-mailboxes (not ordinary mail), *de facto* limitation of the ordering of hearings, introduction of the digital court file, etc. The use of single-judge adjudication and the recent extension of the institution of inadmissibility of a cassation complaint in the context of the reduction of SAC overburdening can also be seen as a simplification strategy. On the other hand, in the CAJ there are no specific simplified types of court proceedings, unlike in civil or criminal court proceedings in the Czech legal system.

Zorza suggests that the complexity of procedure is often driven by underlying substantive complexity. The adjudication process is even more complicated when the legislature or appellate courts add sub-rights.[34]

But possibilities for simplifying administrative court proceedings are somewhat limited compared to administrative proceedings, as the courts must guarantee an independent and impartial review (therefore the constitutional limits for simplification are generally higher). The point of judicial review is to protect the (public) subjective rights of the applicant, and any potential limita-

32 Richard Zorza, "Some First Thoughts on Court Simplification: The Key to Civil Access and Justice Transformation", *Drake Law Rev.*, no. 879. 2013.

33 Zorza.

34 Zorza.

tions to these rights in judicial proceedings must be considered with the utmost caution. We therefore see potential for simplification in the following three areas: 1. *streamlining processes within the court*, 2. *streamlining communication with applicants*, 3. *establishing uniform and clear rules for the formulation of pleadings*.

In respect of the first area, in particular, the practice of courts using templates for simple writs or procedural resolutions could be mentioned. However, there is still room for simplification. For example, this could be done by using software or even AI to generate these simple documents automatically. However, while private sector lawyers are eager to incorporate AI into their practice, there are no official efforts to use AI in the Czech judiciary yet. The Ministry of Justice has pointed out that AI systems could perhaps significantly improve the efficiency and quality of court proceedings. At the same time, they pose risks to the rights of individuals, whose protection is the main focus of those proceedings.[35] These opportunities are therefore still remote.

When it comes to *streamlining communication with applicants*, another aspect that can be broadly classified as simplification is the simplification of language. A movement advocating simpler and more comprehensible language, the use of which would lead to the creation of more accessible legal texts, is on the rise in the Czech Republic. The topic of legal writing is popularised by both the SAC judges and authors focusing on this area.[36] The ombudsperson institution also addresses the issue. However, the vast majority of legal texts are written in a standard style and therefore there is great potential for simplification of the language used. This is not, of course, specific to the administrative judiciary – quite the contrary.

It is for the applicant to formulate the points of an action with sufficient precision because the definition of the points of action predetermines the judicial review. An administrative act challenged by an action cannot be re-

35 <https://advokatnidenik.cz/2021/10/06/umela-inteligence-v-justici-nejvyssi-prioritou-je-ochrana-prav-jednotlivce/>.

36 See, e.g., Bryan A. Garner, *Legal Writing in Plain English*, 3rd ed. Chicago, 2023.

viewed on the basis of either overly general points of appeal[37] or on the basis of more detailed points of appeal which are, however, incomprehensible.[38] We believe that the administrative courts should treat incomprehensible and unrelated points of appeal as the so-called *rudiment* of points of appeal. They should therefore invite the applicant to remove the defect of incomprehensibility and to strip the claim of the parts that are not relevant.[39] Or, more generally, the courts should not be formalistic.

Another step to streamline communication between the court and the party could be the introduction of a QR code payment of court fee. The replacement of stamps with electronic stamps is being considered. Electronic stamps should also allow instant payments using QR codes.[40] We believe that payment by QR code could become the most common way of paying court fees (today the most common is payment to a bank account).

We can also mention the possibility of holding court hearings online. The legislation today allows the use of videoconferencing equipment in court hearings, in particular in relation to ensuring the presence of a party or an interpreter at the hearing or to conduct the examination of a witness, expert or party.[41] However, in this respect, the current legislation anticipates the participation of one particular person in court by means of a videoconferencing device, rather than the conduct of the entire court session remotely. At present, we are still a long way from the concept of "online justice".

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37 Judgment of the SAC of 20 December 2005, No. 2 Azs 92/2005–58, or judgment of the SAC of 14 February 2006, No. 1 Azs 244/2004–49.

38 Judgment of the SAC of 8 March 2021, No. 5 As 113/2020–36.

39 It is only at the pre-decision stage that the administrative court is concerned with whether the action is admissible as a whole. It is not obliged to examine whether the pleas in law are also sufficiently specific, elaborate or convincing. It is the applicant's task and, above all, their interest to ensure the quality of the pleading. If the application is argumentatively poor (incapable of rebutting the conclusions of the contested administrative act), the court is not obliged to inform the applicant of that fact, but is obliged to reject their application and, where appropriate, to declare it inadmissible in some part (see judgement of the SAC of 15 November 2021, No. 10 Afs 124/2021–42).

40 <https://www.mfcr.cz/assets/cs/media/2023–05–19_Kolky-zprava-RIA-priloha.pdf>.

41 See Article 102a of Act No. 99/1963 Coll., the Code of Civil Procedure.

In the case of *establishing uniform and clear rules for the formulation of pleadings* it can be considered problematic that some aspects of administrative justice are constructed essentially by case law. This means that knowledge of the text of the law (CAJ) may not always be sufficient, which again somewhat weakens the position of the applicants. These situations do not occur very often, but some are significant.[42] In these cases, the solution probably cannot be simplification, but rather an adequate addition of a case law conclusion to the text of the legislation.

However, simplification could be achieved, e.g., by the introduction of form filing, which can be found, for example, in ECtHR proceedings. Its guidelines include rules on both form and content of pleadings, including set structure or maximum length.[43] This can be partly achieved by the court inviting the applicant to shorten or rephrase their disproportionately lengthy submissions or rephrase them in order to make them more intelligible. Some SAC judges make use of this procedure, but it is done rather exceptionally and without explicit support in the law.

Conclusions

Access to court is a fundamental aspect of the rule of law, although not an absolute right. The process leading to a judgment involves meeting various requirements set by the law, which act as restrictions on court access. These constraints are allowed as long as they are reasonable, proportional, have a valid purpose, and do not undermine the core essence of court access. However, not all requirements meet these criteria. Some restrictions might seem justified but reveal the opposite upon closer inspection.

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42 One such example is the so-called subjective admissibility of cassation complaints to the SAJ. While the CAJ provides for “objective inadmissibility”, this has not been sufficient in judicial practice. Therefore, case law has also deduced some other “subjective inadmissibility” conditions arising from the general parameters of judicial review or the role of the SAC. For more detail, see Lukáš Potěšil, *Kasační stížnost*. Praha, 2022, 87 et. seq.

43 <https://www.echr.coe.int/documents/d/echr/Guidelines_pleadings_communication_ENG>.

These can be formal or informal. Some of these limitations arise from how the administrative justice system functions or how it is organised. Unintentional obstructions of access can emerge, causing "bottlenecks" in reaching protection by administrative courts. While some of these bottlenecks might be intentional and aligned with the administrative justice system's role (e.g., SAC's review restrictions), others result from the unintended consequences of the system's design or the application of relevant legal rules. We believe two categories of limitations can be recognised – formal and informal.

With *formal* access-related criteria, the drafting of a petition is crucial. Court fees, although not excessively high, should not unduly inhibit access. Yet, the selection of action types for specific administrative acts poses challenges, creating inefficiencies in court initiation. Communication with the court is also important, and the provision of clear information, transparency in procedures, and practical guidance is pivotal for applicants, impacting the efficiency and fairness of proceedings. These challenges in court access necessitate empirical research to identify and rectify bottlenecks, ultimately aiming to simplify and enhance the process, guided by the user's perspective.

Informal limitations affecting court access include both practical and awareness-related challenges. Practical barriers including costs, procedural complexity, ignorance, and physical accessibility, along with attitudinal barriers like scepticism and lack of faith in rules, can impede access. While the Czech system generally upholds physical access requirements, regional court distribution and the absence of specialised administrative courts present organisational disparities. The SAC has seen a surge in cases, potentially straining its capacity. Lengthened proceedings before administrative courts possibly indicate their expanding responsibilities exceeding capacity. On the other hand, administrative authorities lack the legal obligation to inform individuals about court protection possibilities, potentially leading to inequality.

The *simplification potential* in Czech administrative court proceedings encompasses three key areas. Firstly, processes within the court could be

streamlined, leading to time and money savings. Secondly, language simplification could improve the accessibility of legal texts and instructions for applicants. Lastly, establishing uniform rules for the formulation of application could enhance clarity and structure. Whether and when these changes will be reflected in proceedings before the Czech administrative courts remains a question.

One thing is certain, there is a need to respond to societal and technological changes. As R. Pomahač illustrates, "[t]he ideal picture of the administrative justice system used to be painted as a beautiful villa in a park, with lots of flowers and thick grass, untrampled by the footsteps of those heading to the courthouse. It's a picture laden with nostalgia for the old days. The trial of simplification today often leads to proceedings without oral hearings and in many places are experimenting with electronic proceedings."[44]

References

Ferrari, Giuseppe Franco. "Simplification and Consent in Administrative Action: A Comparative Perspective." *Bocconi Legal Studies Research Paper Series*, no. 3126763. 2018.

Garner, Bryan A. *Legal Writing in Plain English*, 3rd ed. Chicago, 2023.

Halliday, Simon, and Colin Scott. "Administrative Justice." In *The Oxford Handbook of Empirical Legal Research*, edited by Peter Cane, and Herbert Kritzer. Oxford, 2010: 469–491.

Kovač, Polonca, and Dacian C. Dragos, eds. *Administrative Sciences*, special issue – *Simplification of Administrative Procedures – in Search of Efficiency, Public Interest Protection and Legitimate Expectations*. 2022.

Mocková, Eliška. "Přístup ke spravedlnosti podle článku 13 Úmluvy o právech osob se zdravotním postižením. Lépe už to nejde?" In *Lidé s postižením jako*

44 Richard Pomahač, "Patnáct let inovovaného správního soudnictví – je čas na změnu?", *Správní právo*, no. 1–2. 2018: 80.

„nová menšina“ – právní výzvy a souvislosti, edited by Harald Christian Scheu, and Zuzana Durajová. Praha, 2021: 216–230.

Mullen, Tom. “Access to justice in administrative law and administrative justice.” In *Access to Justice: Beyond the Policies and Politics of Austerity*, edited by Ellie Palmer et. al. Oxford, Portland, 2016: 69–104.

Pomahač, Richard. “Patnáct let inovovaného správního soudnictví – je čas na změnu?” *Správní parvo*, no. 1–2. 2018: 72–85.

Potěšil, Lukáš. *Kasační stížnost*. Praha, 2022.

Potěšil, Lukáš. “Restriction of access to the Supreme Administrative Court to reduce its burden (via expanding the institution of inadmissibility of a cassation complaint in the Czech Republic).” *Institutiones Administrationis. Journal of Administrative Sciences* 1, no. 1. 2021: 74–81.

Svoboda, Tomáš, and Denisa Skládalová. “The Qualification of Action in Administrative Justice and its Perils – the Czech Experience.” *Adam Mickiewicz University Law Review*, no. 14. 2022: 281–295.

Waltr, Robert. “§ 1, Subject of court fees.” In Robert Waltr et. al., *Zákon o soudních poplatcích. Komentář*, 2nd ed. Praha, 2012.

Zorza, Richard. “Some First Thoughts on Court Simplification: The Key to Civil Access and Justice Transformation.” *Drake Law Rev.*, no. 879. 2013: 845–881.

<https://advokatnidenik.cz/2021/10/06/umela-inteligence-v-justici-nejvyssi-prioritou-je-ochrana-prav-jednotlivce/>

<https://advokatnidenik.cz/2019/10/01/spravni-soud-resi-i-banalni-pripady-je-tak-pretizeny-rika-baxa/>

<https://jinepravo.blogspot.com/2011/06/nejnespravedlivejsi-rozsudky.html>

<https://www.echr.coe.int/documents/d/echr/Guidelines_pleadings_communication_ENG>

<https://www.justiz.gv.at/file/8ab4ac8322985dd501229d51f74800f7.de.0/cover_und%20text_the%20austrian%20judicial%20system_neu.pdf?forcedownload=true>

<https://www.nssoud.cz/informace-pro-verejnost/poskytovani-informaci/poskytnute-informace/detail/informace-poskytnuta-28–3-2022>
<http://www.openlawlab.com/2015/11/18/the-legal-system-needs-to-be-redesigned-by-normal-people-for-normal-people/>
<https://www.osce.org/files/f/documents/1/3/105271.pdf>

Waite and Kennedy v. Germany, Application no. 26083/94, Judgement of the European Court for Human Rights of 18 February 1999.
Kart v. Turkey, Application no. 8917/05, Judgement of the European Court for Human Rights of 3 December 2009.
Resolution of the Constitutional Court of the Czech Republic of 14 August 2019, No. II. ÚS 2398/18.
Judgment of the Supreme Administrative Court of the Czech Republic of 23 February 2023, No. 2 As 9/2023–10.
Judgment of the Supreme Administrative Court of the Czech Republic of 15 November 2021, No. 10 Afs 124/2021–42.
Judgment of the Supreme Administrative Court of the Czech Republic of 8 March 2021, No. 5 As 113/2020–36.
Judgment of the Supreme Administrative Court of the Czech Republic of 14 February 2006, No. 1 Azs 244/2004–49.
Judgment of the Supreme Administrative Court of the Czech Republic of 12 January 2006, No. 1 As 3/2005–45.
Judgment of the Supreme Administrative Court of the Czech Republic of 20 December 2005, No. 2 Azs 92/2005–58.

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The rule of law "on the ground". The Polish courts' perspective

Abstract: The aim of this article is to demonstrate how often and in what ways the concept of the rule of law is utilised by the Polish courts. The authors examined the case law of the Constitutional Tribunal, the Supreme Court, but above all, of the common courts, published after 1997 (the year in which the Constitution of the Republic of Poland entered into force) with regard to how often judges invoke the concept of the rule of law and how they explain it. The main idea was to capture certain tendencies, in an attempt to take a wider view rather than analyse individual rulings. It is a look "from above" adapted to determine if and how often courts refer to the concept of the rule of law and what changed in this regard after 2015, when the systematic and consistent destruction of the judicial system began. Analysis of the judicial decisions of the common courts, whose actions are especially important for the individual, are the focal point. It is in these courts that majority of cases are settled, as they are the closest to the citizen. Of course, the common courts do not act in isolation and so the judicial activity of the Constitutional Tribunal and the Supreme Court was also examined. However, rulings of those entities are frequently subject to in-depth analysis, so

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the focus was placed only on examining regularities in their invoking the concept of the rule of law. Since the Constitutional Tribunal and – to a certain degree – the Supreme Court have been captured by the ruling political group, entailing that the authorities have destroyed judicial independence, it is worthwhile to concentrate on the common courts, as they could possibly be representing the last bastions of an independent justice system.
Keywords: Rule of Law, Democracy, Constitution, European Union law, national law, constitutional law, legal order, judiciary, common courts, Constitutional Tribunal.

Introduction

The "rule of law" is one of the constitutional principles of the European Union. In the 2014 Communication "A new EU framework to strengthen the Rule of Law"[1] the European Commission not only articulated a definition of the rule of law but for the first time presented the core meaning of the rule of law within EU legal order.[2] The rule of law is understood as a "constitutional principle with both formal and substantive components" but also the view that "the rule of law is intrinsically linked to respect for democracy and for fundamental rights."[3] The idea of the rule of law which has emerged from the common law system overlaps and corresponds with the concept of a democratic state ruled by law developed from continental law, with the latter arising out of the rule of law concept.

In Poland discussion on the democratic state ruled by law has been held since the early 1990s. It intensified in recent years since the democratic state ruled by law was being dismantled by the "reforms" of the justice system intro-

1 COM(2014) 158 final/2 (n 2) 3–4.
2 Amichai Magen, and Laurent Pech, "The rule of law and European Union" in *Handbook on the Rule of Law*, eds. Ch. May, and A. Winchester. Cheltenham, Northampton, 2018, 243.
3 COM(2019) 163 final (n 40) 4.

duced by the governing Law and Justice Party.[4] In the public sphere, it has been accepted that there existed a discrepancy between the expectations entailed by the avowed role and function of a democratic state ruled by law and its actual operation in the lived experience of the citizenry.[5] The chasm between the proclamation of the rule and its realization grew and led to public resentment and fear of the judiciary.[6] For years, the prevailing view was that the community shows no understanding of this concept whatsoever and there was no public debate that could help understand what the rule of law is. Wonicki even pointed to this sphere as being a sort of specific legal and political culture, or even constitutional patriotism.[7] Unfortunately, it took the destruction of what was developed after the year 1997 to trigger mechanisms that contributed to raising and broadening of the level of knowledge and awareness of the idea of a democratic state ruled by law.

Unquestionably, a huge role has been played here by the judges who through their rulings and statements had a chance to become real educators

4 To learn more about the so-called reforms in Poland see: Patryk Wachowiec, Marek Tatała, and Eliza Rutynowska, *Rule of Law in Poland. How to Contain the Crisis and Reform the Justice System?*. Warsaw, 2020, <https://for.org.pl/>; Laurent Pech, Patryk Wachowiec, and Dariusz Mazur, “Poland’s Rule of law Breakdown: A Five-Year Assessment of EU’s (In)Action”, *Hague Journal on the Rule of Law* 13. 2021 and visit the page: <https://www.iustitia.pl/en/>.

5 Rafał Wonicki, *Spór o demokratyczne państwo prawa. Teoria J. Habermasa wobec liberalnej, republikańskiej i socjalnej wizji państwa*. Warszawa, 2007, 185.

6 This discrepancy is highlighted in a series of publications on the state of the Polish judiciary. Ewa Łętowska (w rozmowie z Krzysztofem Sobczakiem), *Rzeźbienie państwa prawa. 20 lat później* [Sculpting the state governed by the rule of law. 20 years later]. Warszawa, 2012, 149, 165. It is a must-read for anyone interested in finding out *what* and *why* went wrong with Polish courts and *how* to move forward and more recently “Orzekł jak orzekł a nikomu nic do tego” [The judge decided and it is nobody’s business], *Dziennik Gazeta Prawna Prawnik*, 29–31 August 2014 . See also Tomasz Tadeusz Koncewicz, “Prawo i niesprawiedliwość” [Law and Injustice], *Gazeta Wyborcza*, 11 September 2012; “Sądzie sądź”, *POLITYKA* no. 50, 12 December 2012; “Jaka interpretacja w polskim sądzie?” [What kind of interpretation in the Polish court?], *Rzeczpospolita*, 8 November 2013; “Sędziów polskich trzeba uczyć” [Polish judges must be taught], *IN GREMIO* 3/2013; “Nie(ludzki) polski sąd” [(In) human Polish Court], *IN GREMIO* 4/2013. For a theoretical analysis see also Zdeněk Kühn, *The Judiciary in Central and Eastern Europe. Mechanical jurisprudence in Transformation?*. Leiden, Boston, 2011, 67–77.

7 Wonicki, 186.

in the domain of the rule of law. For many years, though, the judges had been working in "isolation" from society. As Bodnar (the former Commissioner for Human Rights) put it, their judgments in certain cases were legally sustainable, albeit divorced from life and practice.[8] The first obstacle was the absence of communication, which engendered strong hostility towards people pursuing this profession and that expressed itself through, among other things, malignant campaigns against judicial environments. The second being the fact that any jurisprudence which misconstrues the context and fails to tailor its message to the environment will be short-lived. The events after the year 2015 awakened the judicial environment to engage in the process of building society's consciousness from the bottom up. A change in the judges' approach has been detected, manifested by unprecedented activation in the mass media and participation in a variety of social actions.[9] Additionally, individual judges like Tuleja, Juszczyszyn and others began their own crusades in defence of values present in Art. 2 and Art. 7 of the Constitution of the Republic of Poland. This activism and individual judges' bravery offer some hope. Polish judges act in an extremely hostile environment, in which the executive might interfere in any specific case, either directly or indirectly. In the opinion of Pech and Wachowiec, justice cannot be done in such a situation.[10] The aim of this article is to demonstrate how invoking the "rule of law", expressed directly in Art. 2 and Art. 7 of the Constitution, functions in the everyday practice of the judiciary.

8 "Commissioner for Human Rights Adam Bodnar: On the Anatomy of the Crime Against the Polish Judiciary", Rule of Law, 20 February 2020, <https://ruleoflaw.pl/commissioner-for-human-rights-adam-bodnar-on-the-anatomy-of-the-crime-against-the-polish-judiciary/>, access: 16.04.2021.

9 For more detailed discussion, see: Barbara Grabowska-Moroz, and Olga Śniadach, "The Role of Civil Society in Protecting Judicial Independence in Times of Rule of Law Backsliding in Poland", *Utrecht Law Review* 17, no. 2. 2021: 56–69.

10 Pech, Wachowiec, and Mazur, 37.

Constitutional framework

Along with the commencement of political changes, the principle of the rule of law was introduced to the Polish legal system with the Act of 29 December 1989 on the amendment to the Constitution of the People’s Republic of Poland to amend the substance of Art. 1 of the Constitution.[11] The constitutional amendment also provided a revised version of Art. 3, whose acquired wording read: “1. The observance of law of the Republic of Poland shall be a primary duty and obligation of each and every public authority. 2. All state and public administration authorities shall act pursuant to the rules of law.” Interestingly enough, the Act of 1989 also contained the concept of the “rule of law,” however attaching solely to the operation of the public prosecution. Under Art. 64(1), “The Prosecutor’s Office shall safeguard the rule of law and ensure the prosecution of crimes.”

The Constitution of the Republic of Poland of 2 April 1997[12] relies on two concepts associated with the rule of law – the principle of a democratic state ruled by law[13] and the principle of legality.[14] Under Art. 2, the Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice, whereas, under Art. 7, public authorities shall function in reliance upon and within the limits of law.[15] Emphasis in the Constitution on dem-

11 Journal of Laws of 1989, no. 75, item 444.

12 The Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws of 1997, no. 78, item 483 as amended), hereinafter: the Polish Constitution.

13 Art. 2 of the Polish Constitution.

14 Art. 7 of the Polish Constitution.

15 The rule of law is the subject of numerous doctrinal studies, which intensified especially after 2015. E.g.: Adam Bodnar, and Adam Ploszka, eds., *Wokół kryzysu praworządności, demokracji i praw człowieka. Księga jubileuszowa Profesora Mirosława Wyrzykowskiego*. Warszawa, 2020; Łukasz Bojarski, Krzysztof Grajewski, Jan Kremer, Gabriela Ott, and Waldemar Żurek, eds., *Konstytucja, praworządność, władza sądownicza. Aktualne problemy trzeciej władzy w Polsce*. Warszawa, 2019; Wojciech Sadurski, *Poland’s Constitutional Breakdown*. Oxford, 2019; Karol Kiczka, Tadeusz Kocowski, and Witold Małecki, eds., *Praworządność, decentralizacja, przedsiębiorczość. Księga jubileuszowa profesora Leona Kieresa*. Wrocław, 2018; Jan Zimny, ed., *Praworządność w dobie XXI wieku*. Stalowa Wola, 2016; Tomasz Pietrzykowski, *Ujarzmianie Lewiatana. Szkice o idei rządów prawa*. Katowice, 2014; Krzysztof Sobczak, and Andrzej Zoll, *Państwo prawa jeszcze w budowie. Andrzej Zoll w rozmowie*

ocratic state ruled by law (Article 2) and on the principle of legality (Article 7) has existed in the constitutional law since 1989.

As the doctrine puts it, Article 2 of the Constitution of the Republic of Poland clearly sets forth the principle of a democratic state ruled by law and the principle of social justice, which are functionally and substantively related.[16] The principle of a democratic state ruled by law can be described as a set of different values directly and indirectly defined in the Constitution of the Republic of Poland pertaining to the state policy, law, system and relationships between the state and an individual.[17] Since its introduction into Polish legal system, the underlying principle has been viewed as a source from which subsequent principles of a more specific nature have evolved.

The principle of legality is one such rule laid down in Art. 7 of the Constitution.[18] In Leszek Garlicki's view, "in respect of a democratic state ruled by law, the rule of law overlaps the principle of legality (Art. 7) extended by the principle of the Constitution's supremacy (Art. 8) and by the principle of the respect for international law (Art. 9). Further, it might be concluded that legality constitutes the very core of the rule of law, originally being considered even as equivalent to the rule of law".[19] The principle of legality related to the so-called rule of good legislative design derives from and is inferred from Art. 2 of the Constitution. In M. Sajan's and L. Bosek's opinion: "Expressed in Art. 7 of the Polish Constitution, the principle is an element of the rule of law. The relationship between the principle of legality and the rule of law is complex: firstly, the rule of law principle justifies the principle of legality, in particular, indicating the values constituting the ratio of Art. 7; secondly, it serves as the foundation for determin-

z Krzysztofem Sobczakiem. Warszawa, 2013; Iwona Wróblewska, *Zasada państwa prawnego w orzecznictwie Trybunału Konstytucyjnego RP*. Toruń, 2010.

16 Monika Florczak-Wątor, "Art. 2" in *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, ed. P. Tuleja. Warszawa, 2019.

17 Judgment of the Constitutional Tribunal of 25 November 1997, K 26/97.

18 Florczak-Wątor.

19 Marek Zubik, and Wojciech Sokolewicz, "Art. 2" in *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. 1, ed. L. Garlicki, 2nd ed. Warszawa, 2016.

ing the consequences of the public authorities violating Art. The principle of legality is linked to the principle of the supremacy of the Constitution of the Republic of Poland (Art. 8) and the principle of favouring the Polish law to the international law (Art. 9).”[20]

Notwithstanding the fact that it was in the Constitution of 1997 that the rule of law found its reflection, thereby setting some form of a meta standard, it warrants nothing that had been applied in the Polish legal system much earlier.[21] The principle of the rule of law does not appear literally in the current Constitution – the concept of the rule of law results from Art. 2 and Art. 7 of Constitution. But the concept itself is not only an expression of Art. 2 or Art. 7, thirst of which constitutes a norm of a material nature with the latter being its procedural aspect. Both are crucial for ensuring the standards of the rule of law. The following analysis of jurisprudence takes into account the fact that both Articles are related but, in practice, can be applied independently. Furthermore, the practice has invariably referred to the application of the “principle of a democratic state ruled by law”, the “principle of a formal rule of law” and the “concept of the rule of law,” thereby producing terminological confusion that is noticeable not only on the doctrinal level but also, and above all, in the case law. The study of the courts’ case law has allowed the authors to shed light on the broader context and highlight the dilemmas that arise in understanding and applying the above listed rules and principles.

Case law

Judiciary system in Poland

In Poland, justice is administered through the common courts of law (in Polish *sądy powszechne*), specialized courts (pl. *sądy szczególne*) and the Supreme

20 Piotr Tuleja, “Art. 7” in *Konstytucja RP. Komentarz*, vol. 1, eds. M. Safjan, and L. Bosek. Warszawa, 2016.

21 More on the genesis of the principle of a democratic state ruled by law see: Florczak-Wątor; Zubik, and Sokolewicz.

Court (pl. *Sąd Najwyższy*).[22] Judgments in the name of the Republic of Poland may also be issued by the Constitutional Tribunal (in Polish "Trybunał Konstytucyjny").[23]

The analysis of the case law embraces the case law of the Constitutional Tribunal, the Supreme Court, and the common courts, and presents the understanding and application of the rule of law and associated standards.[24]

The role of the Constitutional Tribunal is for the most part to decide on the constitutionality of legal acts, their compatibility with international treaties, with a statutory consent to ratification thereof, and the compliance of such acts with laws.[25] Such review may assume an abstract or concrete form, although in the latter case the judgment may result in the derogation from the state's system of law of a given or literally interpreted the provision of law. The Constitutional Tribunal does not directly determine the merits of the case in respect of which doubts have arisen. Thus, its role tends to differ in comparison with the objectives of the common courts of law and the Supreme Court, which led to bypassing its work in this regard.

The underlying research encompasses the case law of the Supreme Court. This results from the fact that the Supreme Court, in the Polish system of law, exercises judicial supervision over the common and military courts. The Supreme Court primarily determines, under statutorily defined circumstances, extraordinary appellate remedies, which renders the study of its authorities indispensable to discern the approach Polish courts tend to assume in the un-

22 Art. 175(1) of the Polish Constitution.

23 Art. 174 of the Polish Constitution.

24 The common courts' case law is accessible via the Government Common Courts Case Law Portal, albeit limited to selected cases. Equally popular are the Lex and Legalis case law bases which offer access to a miscellany of selected judgments, or the Supreme Court Case Law Base containing the Supreme Courts' decisions and the Constitutional Tribunal Case Law Base. The authors have decided to rely on Lex and the Constitutional Tribunal Case Law Base since it attracted a comprehensive collection in comparison with the one proposed by the competitive system of legal information. The public base, in turn, is not equipped with an adequate browser that could enable effective examination of the issue under survey.

25 Art. 188–190 of the Polish Constitution.

derstanding and implementation of the rule of law principle. It warrants mentioning that the Act of 8 December 2017[26] on the Supreme Court led to the introduction of a new instrument to the Polish legal regime – an extraordinary appeal which enables rebuttal of valid court decisions. Art. 89(1) Act on the Supreme Court states: “If it is necessary in order to ensure compliance with the principle of a democratic state ruled by law and implementing the principles of social justice, an extraordinary appeal may be lodged against a final ordinary court or military court ruling closing proceedings in the case provided that: (1) the ruling violates the principles or the rights and freedoms of persons and citizens enshrined in the Constitution; or (2) the ruling is a flagrant breach of the law on the grounds of misinterpretation or misapplication; or (3) there is an obvious contradiction between the court’s findings and the evidence collected; and the ruling cannot be repealed or amended by way of other extraordinary remedies”. This new ‘remedy’ has been criticised by both the EU Commission[27] and the Venice Commission.[28]

Pursuant to the Polish law in force, the system of common courts of law consists of:

- district courts (which hear the cases in the first instance; the cases not referred to regional courts for review; with the presumption of the district court’s jurisdiction);
- regional courts (which review appellate remedies against district court decisions and determine the first instance cases in situations prescribed

26 Act of 8 December 2017 amending the Law on the National Council of the Judiciary and certain other laws (Journal of Laws of 2018, item 3). The Law entered into force on 17 January 2018 (Journal of Laws of 2018, item 5, as amended).

27 Commission Recommendation (EU) 2018/103 of 20 December 2017 regarding the rule of law in Poland complementary to Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520, OJ L 17, 23.1.2018, 50–64, available on: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018H0103>.

28 Opinion on the Draft Act amending the Act on the National Council of the Judiciary; on the Draft Act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts, adopted by the Commission at its 113th Plenary Session (Venice, 8–9 December 2017), available on: <https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)031-e>.

by law; with the Regional Court in Warsaw functioning as the Court of Competition and Consumer Protection);
- courts of appeal (which review appellate remedies against rulings issued in the first instance by regional courts).

The common courts of law, in reliance on presumption, hear the cases not referred to other courts for review. In Poland, as of 31 December 2018, there were as many as 11 courts of appeal with 426 judges, 45 regional courts with 2,515 judges and 318 district courts with 6,356 judges. The number of courts of respective instances translates distinctly into the number of cases examined on the foregoing levels. In 2018, as many as 14,915,000 cases were resolved, 13,933,800 of which were heard by the district courts, 868,300 by regional courts and 112,900 cases decided by the courts of appeal.[29]

The case law of specialized – military and administrative – courts has been left aside. The jurisdiction of military courts carries both objective and subjective limitations. The administrative judiciary has been delimited under the principle of objectiveness, with the system built by the regional administrative courts and the Supreme Administrative Court. Their fundamental role lies in a broadly understood supervision of public administration. Systemic isolation of specialized courts allowed the authors to focus on the operation of the common courts of law and the Supreme Court.

The Constitutional Tribunal

The Constitutional Tribunal's jurisprudence has made a significant contribution to clarifying the meaning of the rule of law and as such contains an important source of inspiration and guidance for the day-to-day build-up of the rule of law standards in the case law of ordinary courts. In the Polish legal system, the Constitutional Tribunal has a precisely defined role, beginning with it being the only body in the legal system with the authority to challenge

29 Statistical Yearbook of the Republic of Poland 2019, available on: <https://stat.gov.pl/obszary-tematyczne/roczniki-statystyczne/roczniki-statystyczne/rocznik-statystyczny-rzeczypospolitej-polskiej-2019,2,19.html>, access: 10.03.2021.

the legality of legal provisions with binding effect. Secondly, it examines the constitutionality of legal provisions that operate under domestic law. Thirdly, in practice, the interpretation of regulations by the Tribunal, due to the authority of judges, has had a significant impact on the understanding of regulations by other state authorities. The Polish reality after 2015 is characterised by a complete absence of independent constitutional judiciary. In essence, as pointed out by Koncewicz, the Polish Constitutional Tribunal "once a proud institution and an effective check on the will of the majority, is now a shell of its former self."[30] Regrettably, changes made at the Constitutional Tribunal after 2015 have shifted the perspective on how the Tribunal's activities should be evaluated. The legal basis for the Tribunal's operation, as well as its actual activities raise a lot of questions and often undermine the purpose of the existence of such a body. The Constitutional Tribunal's capture has, in effect, led to the actual depravation of its role. In a time of scattered constitutionality, the role of the common courts takes on a new meaning and for that reason their rulings were examined in-depth instead of that of the Constitutional Tribunal.[31]

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30 Tomasz Tadeusz Koncewicz, "No more 'Business as Usual'", VerfBlog, 24 October 2020, <https://verfassungsblog.de/no-more-business-as-usual/>.

31 For more on the case law of the Constitutional Tribunal: Lech Garlicki, "Disabling the Constitutional Court in Poland?" in *Transformation of Law Systems in Central, Eastern and Southeastern Europe in 1989–2015. Liber Amicorum in Honorem Prof. dr. dres. H. C. Rainer Arnold*, eds. A. Szmyt, and B. Banaszak. Gdańsk, 2016, 63–69; Mirosław Wyrzykowski, "Bypassing the Constitution or Changing the Constitutional Order outside the Constitution" in *Transformation of Law Systems in Central, Eastern and Southeastern Europe in 1989–2015. Liber Amicorum in Honorem Prof. dr. dres. H. C. Rainer* Arnold, 159–179; Tomasz Tadeusz Koncewicz, "Of Institutions, Democracy, Constitutional Self-Defence and the Rule of Law: The Judgments of the Polish Constitutional Tribunal in Cases K 34/15, K 35/15 and Beyond", *Common Market Law Review* 53, no. 6. 2016: 1753; Tomasz Tadeusz Koncewicz, "The Capture of the Polish Constitutional Court and Beyond: Of Institution(s), Fidelities and the Rule of Law in Flux", *Review of Central and East European Law* 43, no. 2. 2018: 116; Tomasz Tadeusz Koncewicz, "Unconstitutional Capture and Constitutional Recapture: Of the Rule of Law, Separation of Powers and Judicial Promises", *Jean Monnet Working Paper*, no. 3. 2017, <https://jeanmonnetprogram.org/paper/unconstitutional-capture-and-constitutional-recapture-of-the-rule-of-law-separation-of-powers-and-judicial-promises/>. For more recent and exhaustive analysis of the developments and the examples of the abuse of judicial review, consult the comprehensive report *Narzędzie w rękach władzy. Funkcjonowanie Trybunału Konstytucyjnego w latach 2016–2021* [The tool in the hands of the political

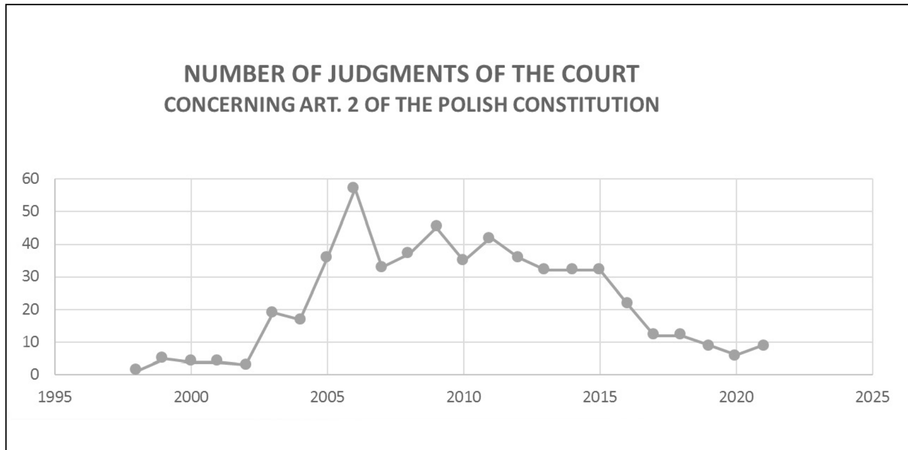

Chart 1: The number of judgments of the Tribunal concerning Art. 2 of the Polish Constitution. Source: the authors' own study.

The Constitutional Tribunal issued 1,439 judgments between the Constitution's entry into force (October 16, 1997) and the end of 2021. The control model in 540 decisions was, among other things, Article 2 of the Constitution. There were 68 judgments based on Article 7 of the Constitution.

Article 2 of the Constitution establishes the principle of a democratic state and the principle of social justice, according to the Tribunal's jurisprudence. It is seen as the foundation for principles such as legal certainty, protection of acquired rights, protection of legitimate expectations, proportionality, non-retroactivity, and sufficient *vacatio legis*,[32] the principle of legal certainty and

power. The functioning of the Constitutional Tribunal 2016–2021] available at: <https://www.hfhr.pl/wp-content/uploads/2021/08/TK-narzedzie-w-rekach-wladzy-FIN.pdf>. For analysis, see also Tomasz Tadeusz Koncewicz, "From Constitutional to Political Justice: The Tragic Trajectories of the Polish Constitutional Court", VerfBlog, 27 February 2019, <https://verfassungsblog.de/from-constitutional-to-political-justice-the-tragic-trajectories-of-the-polish-constitutional-court/>; and the most recent Tomasz Tadeusz Koncewicz, "When Legal Fundamentalism Meets the Political Justice: The Case of Poland", *Israel Law Review* 55, no. 3. 2022: 302–359 with further references.

32 Judgment of the Constitutional Tribunal of 27 February 2002, K 47/01, OTK ZU no. 1/A/2002; judgment of the Constitutional Tribunal of 10 December 2002, K 27/02, OTK ZU no. 7/A/2002, item 92; judgments of the Constitutional Tribunal of 16 September 2003, K 55/02, OTK ZU no. 7/A/2003, item 75; judgments of the Constitutional Tribunal of 15 December 2005, K 48/04, OTK ZU no. 2/A/2005; judgments of the Constitutional Tribunal of 6 and 12 December 2012, K 1/12, OTK ZU no. 11/A/2012; judgments of the

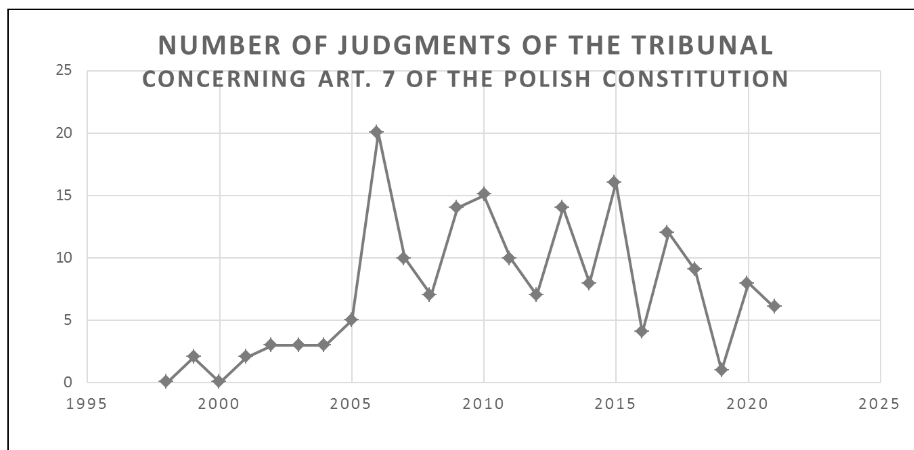

Chart 2: The number of judgments of the Tribunal concerning Art. 7 of the Polish Constitution. Source: the authors’ own study.

citizens’ trust in the state and the laws it enacts, the principle of unambiguity (specificity) of the law, the principle of ensuring public participation in state decisions, in particular in law-making, including the principle of all public institutions having a democratic mandate, as well as the principle of the judiciary’s and judges’ independence.[33] It also includes the proper correctness, precision, and clarity of legal provisions (principles of legislative technique)[34] and

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Constitutional Tribunal of 2 December 2014, P 29/13, OTK ZU no. 11/A/2014, item 116. See also: Stanisław Biernat, and Monika Kawczyńska, “The Role of the Polish Constitution (Pre-2016): Development of Liberal Democracy in the European and International Context” in *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law*, eds. A. Albi, and S. Bardutzky. Berlin, 2019, 759.

33 See: judgment of the Constitutional Tribunal of 20 December 1999, K 4/99, OTK ZU no. 7/1999, item 165; judgment of the Constitutional Tribunal of 27 May 2002, K 20/01, OTK ZU no. 3/A/2002, item 34; judgment of the Constitutional Tribunal of 31 January 2005, P 9/04, OTK ZU no. 1/A/2005, item 9; judgment of the Constitutional Tribunal of 16 March 2011, K 35/08, OTK ZU no. 2/A/2011, item 11; judgment of the Constitutional Tribunal of 18 November 2014, K 23/12, OTK ZU no. 10/A/2014, item 113; judgment of the Constitutional Court of 3 December 2015, K 34/15; judgment of the Constitutional Tribunal of 14 November 2018, Kp 1/18, OTK ZU no. A/2019, item 4.

34 One of the first rulings in which the Constitutional Tribunal expressed a broader than ever understanding and construction of the principle of legality was the ruling U 11/97. The Tribunal took the view that the infringement of the principle of legality may consist in making law so imprecise for it not only to become the ground for an unreasonable infringement of the right of an individual, but also to become the requirement (in the positive sense) to

the prohibition of excessive interference (proportionality principle), which apply in relationships between the individual and the authorities.[35]

Principles which the Tribunal derives or reconstructs are fully in line with the operationalization of the principle of the rule of law by the constitutional courts of the other Member States. For instance, in several Member States such as France, Italy, Belgium and the Netherlands, a lack of formal constitutional enshrinement of the rule of law principle can be found. However, the key elements of this concept have been provided in the constitutions and developed by the case law of the constitutional courts.[36]

According to the Tribunal's jurisprudence, Article 7 of the Constitution requires the public authorities to act on the basis of and within the bounds of the law.[37] The powers of the public authorities must be specified in regulations in a precise and unambiguous manner, according to this interpretation of the principle. The competence of government officials cannot be assumed. This rule applies to all bodies and there are no exceptions to it. The principle of legality, according to the Tribunal, is a refinement, if not the core, of the rule of law's formal dimension.

Statistics show that, despite some fluctuations, the Constitution's Articles 2 and 7 serve as a common higher-level norm for review. What is worth noting is that this happens after 2015, too, also in highly contentious cases like the performance of the Ombudsman's duties after his term ends until the new Om-

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make law comprehensible to an individual. The judgment of the Constitutional Tribunal of 27 November 1997, U 11/97. See also: the judgment of the Constitutional Tribunal of 21 March 2001, K 24/00, OTK ZU no. 3/2001, item 51; the judgment of the Constitutional Tribunal of 22 May 2002, K 6/02, OTK ZU no. 3/A/2002, item 33; the judgment of the Constitutional Tribunal of 7 October 2015, K 12/14; judgment of the Constitutional Tribunal of 2 April 2015, P 31/12.

35 The judgment of the Constitutional Tribunal of 18 February 2003, K 24/02, OTK ZU no. 2/A/2003, item 11; the judgment of the Constitutional Tribunal of 4 May 2004, K 40/02, OTK ZU no. 5/A/2004, item 38; the judgment of the Constitutional Tribunal of 25 May 1998, U 19/97, OTK ZU no. 4/1998, item 47.

36 For further analysis of the understandings of the "Rule of Law" principle in the EU see: Unity and Diversity in National Understandings of the Rule of Law in the EU, available on: <https://reconnect-europe.eu/wp-content/uploads/2020/05/D7.1–1.pdf>.

37 The judgment of the Constitutional Tribunal of 27 May, K 20/01, OTK ZU no. 3/A/2002.

budsman takes office;[38] electing members of the National Council of the Judiciary from among judges by the Sejm; appealing against a resolution of the National Council of the Judiciary concerning a judge’s appointment,[39] or an act’s entry into force before the deadline for the President of the Republic of Poland to decide on its signing expires.[40] Currently, the Tribunal invokes Articles 2 and 7 of the Constitution to take a position that is in violation of constitutional standards.

The concept of the rule of law was also mentioned in the ruling on the constitutionality of an EU Member State’s obligation to exercise provisional measures relating to the shape of the system and functioning of the constitutional organs of that state’s judiciary.[41] “Article 4 sec. 3, second sentence, of the Treaty on European Union (…) in connection with Art. 279 of the Treaty on the Functioning of the European Union (…) is incompatible with Art. 2, art. 7, art. 8 sec. 1 and art. 90 sec. 1 in connection with Art. 4 sec. 1 of the Constitution of the Republic of Poland and to that extent shall not be subject to the principles of primacy and direct applicability set out in Article 91 sec. 1–3 of the Constitution,” the Tribunal concluded. Furthermore, the Tribunal notes that Art. 2 of the Constitution “is identical in content to the legal and democratic state principles established – as common values of the member states – in Art. 2 TEU.”[42] Art. 7 of the Constitution, on the other hand, is in line with the Art. 2 formal principle of the rule of law. The findings of the analysis of judgments from before and after 2015 show that its understanding has not changed, in the sense that it is still treated as a guiding principle for the system; however, it is now being used to justify illegal activities, which are in violation of the principles derived from Articles 2 and 7 of the Constitution. A politicized Constitutional Tribunal serving as a standard of control over Art. 2 and Art. 7 of

38 The judgment of the Constitutional Tribunal of 15 April 2021, K 20/20.

39 The judgment of the Constitutional Tribunal of 25 March 2019, K 12/18.

40 The judgment of the Constitutional Tribunal of 17 July 2019, Kp 2/18.

41 The judgment of the Constitutional Tribunal of14 July 2021, P 7/20.

42 According to the Tribunal, the shape of Article 2 TEU was influenced by Poland’s “centuries-old legal culture”.

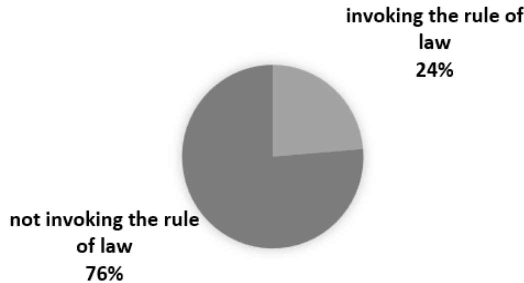

Chart 3: Case law concerning Art. 2 of the Polish Constitution.
Source: the authors' own study.

the Constitution creates a pretence of the rule of law principle being applied, which is an extremely dangerous phenomenon. Only after consideration of the broader context of dismantling the Polish constitutional judiciary, as well as the changes to legislation in regards to the justice system, is one able to appreciate that the principle is absent from the prevailing practice.[43] For instance, the position of the Constitutional Tribunal in case Kp 2/18 exemplifies the hypocrisy of justifying the failure to follow Union law by invoking the rule of law principle. It should be demonstrated that the Constitutional Tribunal's referring to Art. 2 and Art. 7 of the Constitution stems from the applicant's indication of the Articles (the Constitutional Tribunal is related to the scope of control indicated by the applicant) and in the case of the applicant's association with the ruling political party the Court supports the applicant's vision.

The Supreme Court

The Supreme Court exercises judicial supervision over the common courts, determines cassations, cassation appeals and extraordinary appeals. The role of the Supreme Court is to ensure judicial control and uniform application of

43 Koncewicz, "No more 'Business as Usual'".

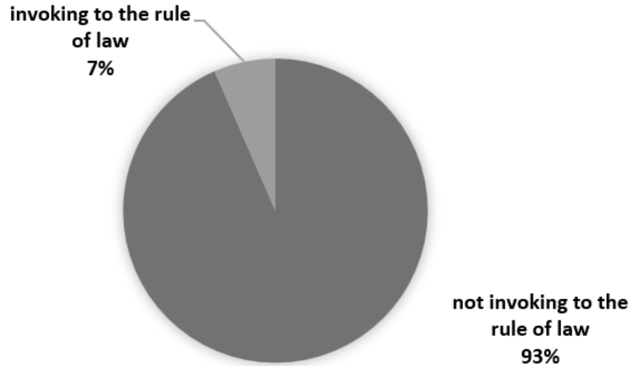

Chart 4: Case law concerning Art. 7 of the Polish Constitution.
Source: the authors’ own study.

the law, which determines the key importance of the Supreme Court in creating the concept of the rule of law. The authors selected the judgments of the Supreme Court in which the parties – litigants or the court invoked Art. 2 of the Constitution (131 judgments). In respect of Art. 7 of the Constitution, 168 rulings of the Supreme Court were subject to study.

Therefore, within the meaning of the judgment of I NSNc 9/19 (Supreme Court of 24 July 2019), there is an explanation of the substance of the law stemming from the wording and systematics of Art. 2 of the Constitution – a principle of trust in the state and its law.[44] It is for this reason that a reconstruction of the judgment under appeal is necessary to ensure compliance with the principle of a democratic state ruled by law implementing the rules of social justice. Thus, in the operative part of the judgment, the Supreme Court explains, in reference to the Judgment of the Constitutional Tribunal of 7 February 2001,[45] the meaning of the principle derived from Art. 2 of the Polish Constitution, the prin-

44 The judgment of the Supreme Court of 24 July 2019, I NSNc 9/19, see also: the judgment of the Supreme Court of 11 March 2019, IV CO 50/19; judgment of the Supreme Court of 20 August 2013, I UK 100/13; the judgment of the Supreme Court of 17 October 2008, II UK 62/08; the judgment of the Supreme Court of 11 March 2004, II UK 285/03.

45 The judgment of the Constitutional Tribunal of 7 February 2001, K 27/2000.

ciple of protecting an individual's trust in the state and the law it implements requires that the law be enacted and applied in such a way that it does not entrap citizens and that they can arrange their affairs in confidence; that they do not expose themselves to legal consequences which they could not have foreseen at the time of making decisions and actions; and in the belief that their actions undertaken in accordance with applicable law would also be recognized by the legal system in the future. Ensuring legal security for citizens is a necessary requirement for implementing the principle of trust.

Pursuant to the judgment of the Supreme Court of 28 July 2020,[46] Art. 7 of the Constitution delimits a minimum standard within the governance system, in pursuance of which the actions of public authorities, the grounds and boundaries of said actions should be strictly determined by law.[47] Hence, arbitrary and legally unsubstantiated actions that go beyond said boundaries are inadmissible. What also transpires from the underlying principle is that the public authorities are obliged to duly perform the assigned tasks. This specifically pertains to judicial authorities.[48]

The latest case law of 2020 and 2021 regarding the constitutional elements of Art. 2 and Art. 7 of the Constitution relates to the interpretation and scope of application of the "rule of law principle" in the context of both national and European Union law. The Supreme Court's ruling practice exhibits an interrelation between the rule of law and the fundamental values of the European Union.[49] Thus, in respect of doubts on the construction of the EU provisions of law (Art. 19(1)(2) in tandem with Art. 4(3)(3) and Art. 2 of TEU, Art. 267 of

46 The judgment of the Supreme Court of 28 July 2020, IV CO 55/20, see also: the judgment of the Supreme Court of 9 July 2008, II KK 92/08; judicial decision of the Supreme Court of 13 August 2013, III SK 65/12.

47 See: the judgments of the Constitutional Tribunal of: 14 June 2000, P 3/00; 12 June 2002, P 13/01.

48 The judgment of the Constitutional Tribunal of 12 June 2002, P 13/01.

49 See also: Sylwia Majkowska-Szulc, "Safeguarding European Union's core values, The Rule of Law mission in Poland" in *Rule of Law, Common Values, and Illiberal Constitutionalism Poland and Hungary within the European Union*, eds. T. Drinóczi, and A. Bień-Kacała. London, 2020, 174–194.

TFEU, and Art. 47 of the Charter of Fundamental Rights) in conjunction with national law provisions on the principle of irremovability of judges, which is an element of the principle of effective judicial protection and of the principle of the rule of law, the Supreme Court found it reasonable to refer for preliminary ruling the questions pertaining to the principle of the independence of the judiciary as the principles of the EU law and of the Union’s prohibition of age discrimination.[50] Raising preliminary questions, the Supreme Court was driven by its conviction as to the gravity of a currently strict correspondence and correlation between proper understanding and application of the rule of law in the national legal system and compliance with the values upon which the European Union is founded.

In response to the CJEU preliminary ruling issued on the 19th of November 2019 in the joined cases C-585/18, C-624/18 and C-625/18 A.K[51] concerning the National Council of the Judiciary and the Supreme Court, the Supreme Court adopted the resolution on the 23rd of January 2020[52] regarding the criteria and standards of the independence of judges as one of the key elements of the rule of law principle, in terms of Art. 47 Charter of Fundamental Rights and Art. 19 of Treaty on European Union provisions on the national level. Therefore, the main objective of this resolution is to provide the cohesion of the national law derived from Art. 2, Art. 45 and Art. 183 of the Polish Constitution in terms of the rule of law principle and its understanding together in compliance with EU law, in order to unify the national practice of interpretation of the “rule of law principle” of all common courts.

With the regard to the Resolution of the 23rd of January 2020, it is important to note that only judgments issued after the 23rd of January 2020, by the courts

50 Judicial decision of the Supreme Court of 2 August 2018, III UZP 4/18 and the judgment of the Supreme Court of 18 December 2019, V CSK 347/19.

51 The judgment of the Court (Grand Chamber) of 19 November 2019. *A. K. and Others v. Sąd Najwyższy*, *CP v. Sąd Najwyższy* and *DO v. Sąd Najwyższy* in the joined cases C-585/18, C-624/18 and C-625/18A.K, ECLI:EU:C:2019:982.

52 Resolution of the joint Chambers: Civil, Criminal and Labour Law and Social Security, of the Supreme Court of 23 January 2020, ref. no. BSA I-4110–1/20.

composed of judges elected by the new National Council of the Judiciary, were to be rebuttable, and that the Disciplinary Chamber of the Supreme Court was exempted from the latter limitation, thus, regardless of the date, the decisions of the Disciplinary Chamber are invalid, and the judges of these Chambers cannot adjudicate anymore from the date that the resolution was adopted. In practice, all rulings of the Disciplinary Chamber of the Supreme Court issued both before and after the resolution of the Supreme Court will be affected.

The common courts

Understanding how the courts of lower instance, which adjudicate cases closest to the citizen, relate to the rule of law is critical. Courts, as M. Safjan pointed out, are the final and definitive mediators of disputes in the modern state of law, becoming the ultimate instance of truth and oracle.[53] Courts, through their decisions, and therefore judges, through their actions, should create and deliver the complex concepts of law which is understandable.

Having regard to the fact that the principle of a democratic state ruled by law, as well as legality or the rule of law, derive from Art. 2 or Art. 7 of the Constitution, the authors have investigated the system of legal information and invoked judgments where courts referenced the foregoing provisions of the Constitution. In selecting this as the object of research, regard has been given to the rulings, where the parties – litigants or the court invoked Art. 2 of the Constitution:

- 303 rulings of regional courts (incl. 20 decisions of the Court of Competition and Consumer Protection);
- 100 rulings of the courts of appeal;
- 41 rulings of the district courts.

In addition, emphasis has been placed on the rulings pertinent to Art. 2 of the Constitution:

- 72 rulings of the regional courts (incl. 13 rulings of the Court of Competition and Consumer Protection);

53 Marek Safjan, *Wyzwania dla państwa prawa*. Warszawa, 2007, 67.

- 19 rulings of the courts of appeal;
- 2 rulings of the district courts,

where there was an express reliance on the rule of law, with this principle treated as a synonym of the principle of a democratic state ruled by law (look at the Chart 1). Both concepts were applied alternately in the ruling, however, at times, the reference was made exclusively to the rule of law.

In respect of Art. 7 of the Constitution, the following were subject to study:

- 372 rulings of regional courts (incl. 51 rulings of the Court of Competition and Consumer Protection);
- 100 rulings of the courts of appeal;
- 66 rulings of the district courts (look at the Chart 2).

From this group, 82 rulings were selected where the courts relied on the underlying principles more specifically rather than merely providing a relevant provision of law (see Figure 1).

Individual examples of referring to the constitutional principles expressed in Article 7 can be found in district court jurisprudence. The District Court in Brzesko linked Art. 7 to the principle of citizens’ trust in state bodies.[54] In the opinion of the court, the task of state organs (including courts) is to execute their duties in such a way that citizens have faith in them, which is essential in a democratic state governed by law. Regional court jurisprudence based on Article 7 of the Constitution emphasizes the obligation of public authorities, including judges to act on the basis of and within the boundaries of the law. A good example is a judgment of the Regional Court in Czestochowa,[55] in which judge Marek Przysucha, in a dissenting opinion, denied the possibility of the President of the Social Insurance Institution (ZUS) to create the position of acting director of the ZUS branch on a discretionary basis. From Article 7 of the Constitution, judge Przysucha derived the injunction for the state authorities to act on the basis and within the boundaries of the law. On the

54 The judgment of the District Court in Brzesk of 15 February 2017, I C 391/16.
55 The judgment of the Regional Court in Częstochowa of 21 July 2018, IV Ua 9/18.

Chart 5: Case law concerning Art. 2 of the Polish Constitution.
Source: the authors' own study.

same grounds, regional Courts underlined in the case law that the rule of law requires the transparency and predictability of legislation.[56] Art. 2 and Art. 7 of the Constitution and the EU rule of law are construed as asserting the necessity of making law predictable, non-volatile and.

Another such demonstration can be found in the judgment of the Regional Court in Suwałki – III U 789/19 – in the lawsuit of J.M. against the Director of the Pension Office of the Ministry of Internal Affairs and Administration in Warsaw over the number of benefits for the uniformed services, with regard to J.M's appeal against the decision made by the Director of the Pension Office of the Ministry of Internal Affairs and Administration.[57] In

56 The judgment of the Regional Court in Częstochowa of 12 April 2019, IV U 1371/18, see also: the judgment of the regional Court in Częstochowa of 8 June 2018, IV U 156/18; the judicial decision of the regional Court in Kraków of 14 July 2016, II Ca 1121/16; the judgment of the regional Court in Piotrków Trybunalski of 29 June 2017, II Ca 403/17; the judgment of the regional Court in Słupsk of 19 February 2016, IV Ca 621/15; the judgment of the regional Court in Częstochowa of 25 May 2017, IV Pa 9/17; the judgment of the regional Court in Częstochowa of 6 April 2017, IV Pa 90/16; the judicial decision of the regional Court in Częstochowa of 12 November 2014, IV U 515/14.

57 The judgment of the Regional Court in Suwałki of 29 October 2019, III U 789/19, see also: the judgment of the regional Court in Częstochowa of 21 October 2016, IV U 1608/15; the

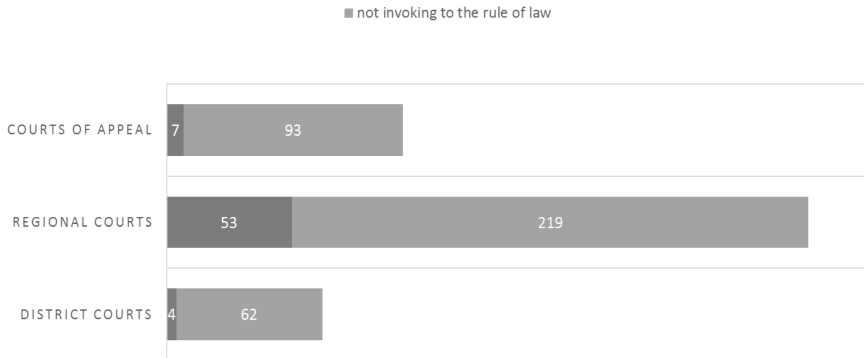

Chart 6: Case law concerning Art. 7 of the Polish Constitution.
Source: the authors' own study.

said proceeding, the applicant alleged that the contested decisions were in breach of the substantive law provisions, i.e. Art. 2 of the Constitution of the Republic of Poland, since the pension entitlement had been arbitrarily decreased, which violates the principle of the protection of vested rights, the principle of social justice, as well as the principle of citizens' trust in the state and its legislation, and its non-retroactivity, which stem from the principle of a democratic state ruled by law.

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judgment of the regional Court in Częstochowa of 27 July 2012, IV U 1820/11; the judgment of the regional Court in Gliwice of 17 May 2018, III Ca 1953/17; the judgment of the regional Court in Gliwice of 19 October 2017, III Ca 610/17; the judgment of the regional Court in Gliwice 23 January 2014, III Ca 1295/13; the judgment of the regional Court in Szczecin of 22 May 2015, II Ca 1355/14; the judgment of the regional Court in Gliwice of 5 June 2014, III Ca 188/14; the judicial decision of the regional Court in Szczecin of 21 December 2012, VIII Ga 392/12; the judgment of the regional Court in Sieradz of 15 July 2016, I Ca 260/16; the judgment of the regional Court in Konin of 30 October 2015, III I 752/15; the judgment of the regional Court in Sieradz of 10 April 2013, I Ca 107/13; the judicial decision of the regional Court in Szczecin of 9 September 2016, II Ca 205/16; the judicial decision of the regional Court in Szczecin of 14 January 2016, II Ca 856/15; the judgment of the regional Court in Szczecin of 30 July 2015, II Ca 193/15; the judgment of the regional Court in Warszawa of 29 January 2015, IV C 117/13; the judicial decision of the regional Court in Kraków of 14 July 2016, II Ca 1121/16.

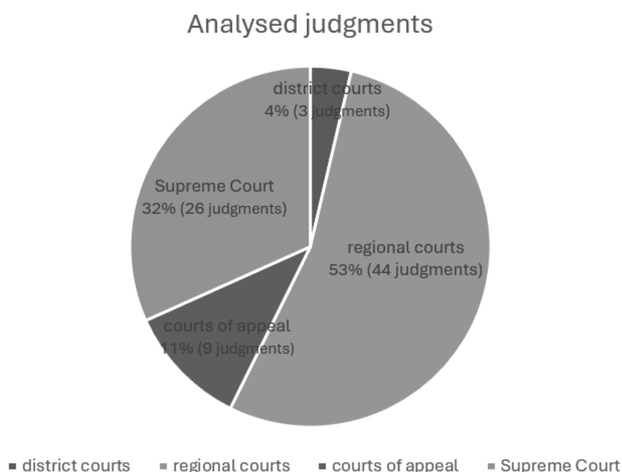

Figure 1: Analysed judgments. Source: the authors' own study.

Such a stance resulted in the Court ruling in favour of the applicant, pointing out that the essence of the concept of a democratic state ruled by law, the rule of law and the clause of social justice is that everybody is treated by the state and law with fairness, i.e., in the manner that is adequate and proportionate to their actions. In its reasoning, the Court cited the judgment of the Constitutional Tribunal where it outlined certain obstacles the implementation of the rule of law might meet in the face of decommunization processes.[58]

Looking further still, in the case law of the courts of appeal, one may clearly notice, as in the case of the regional courts, increased activity in the matter of adjudication in relation to the constitutional foundations of democratic governance again at the turn of 2014 and 2015.[59]

58 The judgment of the Constitutional Tribunal of 11 May 2007, K 2/07, item 48.

59 The judgment of the Court of Appeal in Szczecin of 13 November 2017, I ACa 501/17; the judgment of the Court of Appeal in Warszawa of 4 November 2016, VI ACa 1140/15; the judgment of the Court of Appeal in Katowice of 5 February 2016, III AUa 556/15; the judgment of the Court of Appeal in Łódź of 7 July 2015, III AUa 1296/14; the judgment of the Court of Appeal in Szczecin of 23 December 2014, I ACa 680/14; the judgment of the Court of Appeal in Szczecin of 23 July 2014, III AUa 1190/13; the judgment of the Court of Appeal in Szczecin of 23 July 2014, III AUa 1191/13; the judgment of the Court of Appeal in Białystok of 20 May 2014, III AUa 30/14.

A number of the court judgments point to derivative rights and elements of the principle of a democratic state ruled by law. In light of the judgment of the Court of Appeal in Kraków (13th of October 2015, II AKa 168/15), in a democratic state ruled by law embodying social justice, the principle of citizens’ trust in the state and its law applies in compliance with Art. 2 of the Constitution.[60] What this apparently means is that the protection of citizens’ trust in law is not only ensured by the letter of law, but also by its interpretation adopted by the state authorities in the practice of applying law, especially when this practice is uniform and permanent. Addressees of legal norms may assume that the substance of applicable law is exactly as established by the courts, the more so when it was practised and performed by the Supreme Court.

Conclusion

The study of the Polish courts’ rulings has led to a number of conclusions. The first that suggests itself is that Polish courts refer somewhat interchangeably to the concept of a democratic state ruled by law, the rule of law, and the principle of legality. In their rulings, the courts invoke either the principle of the protection of respect for the state and law or the principle of a democratic state ruled by law, which is to complete and effectuate the principle of social justice. Yet, the reference to said fundamental principles does not entail any notably deeper reflection. Rarely have the Art. 2 or Art. 7 constituted an autonomous or independent ground for a judgment. In fact, they were an additional argument raised in the courts’ statement of reasons for a judgment. This seems quite

60 The judgment of the Court of Appeal in Kraków of 13 October 2015, II AKa 168/15, see also: the judgment of the Court of Appeal in Warszawa of 15 June 2015, II Aka 82/13; the judicial decision of the Court of Appeal in Łódź of 22 January 2010, III AUa 423/09; the judgment of the Court of the Appeal in Warszawa of 11 April 2018, I Aca 66/18; the judgment of the Court of the Appeal in Katowice of 8 December 2015, I Aca 655/15; the judgment of the Court of Appeal in Kraków of 13 October 2015, II Aka 168/15; the judgment of the Court of Appeal in Szczecin of 23 April 2015, I Aca 1003/14; the judgment of the Court of Appeal in Białystok of 27 March 2015, I Aca 978/14; the judgment of the Court of Appeal in Warszawa of 26 November 2016, III AUa 2335/13.

an interesting observation, considering the fact that both provisions are broadly discussed in the doctrine.[61] It has been relatively uncommon for the judges to have recourse to the foregoing references in their daily practice. The provision of Art. 2 of the Constitution is treated as *lex generalis*, and in most cases, the courts invoke more specific provisions aimed at the protection of rights and freedoms.[62]

A large disproportion is seen in the courts referring to constitutional standards – Art. 2 and Art. 7, with the regional courts being the most active, and district courts being the least active. The division of rulings also looks specific with regard to the type of a case heard. With regional and appellate courts, the cases predominantly concern public administration, labour law or social security. In addition, the courts of appeal invoked the rule of law in deciding on reversing the arbitral award (under Art. 1206(2) of the Code of Civil Procedure, an arbitral award shall be set aside if the award is contrary to the fundamental principles of the legal order of the Republic of Poland [public policy clause]). In district courts, however, reference to the foregoing principles is often made in criminal cases. The majority of rulings exhibited reference by a party-litigant or the court to Art. 7 of the Constitution in tandem with the reference to Art. 2 of the Constitution.

The subsequent conclusion that arises from the statistics is that there has been a considerable rise in the number of references to the rule of law since the year 2015, i.e., since the very moment the demolition of a democratic state ruled by law began. A certain dormancy of the courts, lack of understanding, and sense of a shared responsibility for forming an awareness of their rights in society, facilitated the capture of the justice system in Poland. It may appear, however, that even though, depending on the type of case, the elements that encourage reference to said principles vary and their meaning is

61 See: Marcin Wiącek, "Constitutional Crisis in Poland 2015–2016 in the Light of the Rule of Law Principle" in *Defending Checks and Balances in EU Member States: Taking Stock of Europe's Actions*, eds. A. von Bogdandy, P. Bogdanowicz, I. Canor, C. Grabenwarter, M. Taborowski, and M. Schmidt. Berlin, 2021; Petra Bárd et al., "Rule of Law in Constitutional Principle in Poland" in *Unity and Diversity in National Understandings of the Rule of Law in the EU*, eds. L. Pech, and J. Grogan. 2020, available on: <https://reconnect-europe.eu/wp-content/uploads/2020/05/D7.1–1.pdf>.

62 Biernat, and Kawczyńska, 762.

emphasised differently, they in fact lead to a common vision of the shape that an ideal democratic state ruled by law should assume.

These are broadly known postulates of foreseeable standards governing social life in compliance with the principle of equality of all, including the authorities, before the law. The principle of a democratic state ruled by law has derived from the concept of the rule of law[63] which is strictly associated with specific values, beyond which it has no sense whatsoever, and its significance carries more weight than the principles laid down in Art. 2 and 7 of the Polish Constitution. The rule of law’s significance is dictated by how it is understood by society and this largely depends on how it is explained on the courtroom floor by judges. Therefore, it is absolutely vital for judges to remember, paraphrasing Dworkin, that the rule of law is something more than the principle of legality. It is a genuine obligation to obey the law, and the rule of law is something more than the rule of texts of law.[64] This finding is more relevant than ever to the European public space, especially in terms of application.[65] The rule of law has become one of the First Principles of the European legal order.[66] It must be now practised and lived through to build habits of heart. This is the existential challenge that the Polish courts now face.[67]

63 Andrzej Pułło, “Państwo prawne (uwagi w związku z art. 1 Konstytucji RP)” in “Z teorii i praktyki konstytucjonalizmu. Prace ofiarowane Profesorowi Andrzejowi Gwiżdżowi”, *Studia Iuridica* 28. Warszawa, 1995, 127.

64 Ronald Dworkin, *Taking Rights Seriously*. Harvard, Cambridge, 1986, 338.

65 Consult Gianluigi Palombella, “The EU’s Sense of the Rule of Law and the Issue of its Oversight”, *Robert Schuman Centre for Advanced Studies Research Paper*, no. 125. 2014, available at SSRN : <https://ssrn.com/abstract=2538086> and his “Beyond Legality – Before Democracy Rule of Law Caveats in the EU Two-Level System” in *Reinforcing Rule of Law Oversight in the European Union*, eds. C. Closa, and D. Kochenov. Cambridge, 2016.

66 Laurent Pech, and Dimitry Kochenov, *Respect for the Rule of law in the Case Law of the European Court of Justoice: A Casebook Overview of Key Judgments since the Portuguese Cas*. Stockholm, 2021, 208; Tomasz Tadeusz Koncewicz, “The Supranational Rule of Law as First Principle of the European Public Space – On the Journey in Ever Closer Union among the Peoples of Europe in Flux”, *Palestra* 5. 2020: 167.

67 <https://verfassungsblog.de/the-court-is-dead-long-live-the-courts-on-judicial-review-in-poland-in-2017-and-judicial-space-beyond/>.

References

Bárd, Petra et al. "Rule of Law in Constitutional Principle in Poland" in *Unity and Diversity in National Understandings of the Rule of Law in the EU*, eds. Laurent Pech, and Joelle Grogan. 2020: 24–26.

Biernat, Stanisław, and Monika Kawczyńska. "The Role of the Polish Constitution (Pre-2016): Development of Liberal Democracy in the European and International Context." In *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law*, edited by Anneli Albi, and Samo Bardutzky. Berlin, 2019: 745–793.

Bodnar, Adam, and Adam Ploszka, eds. *Wokół kryzysu praworządności, demokracji i praw człowieka. Księga jubileuszowa Profesora Mirosława Wyrzykowskiego*. Warszawa, 2020.

Bojarski, Łukasz, Krzysztof Grajewski, Jan Kremer, Gabriela Ott, and Waldemar Żurek, eds. *Konstytucja, praworządność, władza sądownicza. Aktualne problemy trzeciej władzy w Polsce*. Warszawa, 2019.

Dworkin, Ronald. *Taking Rights Seriously*. Harvard, Cambridge, 1986.

Florczak-Wątor, Monika. "Art. 2." In *Konstytucja Rzeczypospolitej Polskiej. Komentarz.*, edited by P Tuleja. Warszawa, 2019.

Garlicki, Lech. "Disabling the Constitutional Court in Poland?" In *Transformation of Law Systems in Central, Eastern and Southeastern Europe in 1989–2015 Liber Amicorum in Honorem Prof. dr. dres. H. C. Rainer Arnold*, edited by Andrzej Szmyt, and Bogusław Banaszak. Gdańsk, 2016, 63–69.

Grabowska-Moroz, Barbara, and Olga Śniadach. "The Role of Civil Society in Protecting Judicial Independence in Times of Rule of Law Backsliding in Poland." *Utrecht Law Review* 17, no. 2. 2021: 56–69.

Kiczka, Karol, Tadeusz Kocowski, and Witold Małecki, eds. *Praworządność, decentralizacja, przedsiębiorczość: księga jubileuszowa profesora Leona Kieresa*. Wrocław, 2018.

Koncewicz, Tomasz Tadeusz. "From Constitutional to Political Justice: The Tragic Trajectories of the Polish Constitutional Court." VerfBlog, 27 Febru-

ary 2019, <https://verfassungsblog.de/from-constitutional-to-political-justice-the-tragic-trajectories-of-the-polish-constitutional-court/>.

Koncewicz, Tomasz Tadeusz. “No more ‘Business as Usual’.” VerfBlog, 24 October 2020, <https://verfassungsblog.de/no-more-business-as-usual/>.

Koncewicz, Tomasz Tadeusz. “Of Institutions, Democracy, Constitutional Self-Defence and the Rule of Law: The Judgments of the Polish Constitutional Tribunal in Cases K 34/15, K 35/15 and Beyond.” *Common Market Law Review* 53, no. 6. 2016: 1753–1792.

Koncewicz, Tomasz Tadeusz. “The Capture of the Polish Constitutional Court and Beyond: Of Institution(s), Fidelities and the Rule of Law in Flux.” *Review of Central and East European Law* 43, no. 2. 2018: 116–173.

Koncewicz, Tomasz Tadeusz. “The Supranational Rule of Law as First Principle of the European Public Space – On the Journey in Ever Closer Union among the Peoples of Europe in Flux.” *Palestra* 5. 2020: 167–216.

Koncewicz, Tomasz Tadeusz. “Unconstitutional Capture and Constitutional Recapture: Of the Rule of Law, Separation of Powers and Judicial Promises.”, *Jean Monnet Working Paper*, no. 3. 2017, <https://jeanmonnetprogram.org/paper/unconstitutional-capture-and-constitutional-recapture-of-the-rule-of-law-separation-of-powers-and-judicial-promises/>.

Koncewicz, Tomasz Tadeusz. “When Legal Fundamentalism Meets the Political Justice: The Case of Poland.” *Israel Law Review* 55, no. 3. 2022: 302–359.

Kühn, Zdeněk. *The Judiciary in Central and Eastern Europe. Mechanical jurisprudence in Transformation?*. Leiden, Boston, 2011.

Łętowska, Ewa (w rozmowie z Krzysztofem Sobczakiem). *Rzeźbienie państwa prawa. 20 lat później* [Sculpting the state governed by the rule of law. 20 years later]. Warszawa, 2012.

Magen, Amichai, and Laurent Pech. “The rule of law and European Union.” In *Handbook on the Rule of Law*, edited by Christopher May, and Adam Winchester. Cheltenham, Northampton, 2018: 235–256.

Majkowska-Szulc, Sylwia. “Safeguarding European Union’s core values, The Rule of Law mission in Poland.” In *Rule of Law, Common Values, and Illiberal Constitutionalism Poland and Hungary within the European Union*, edited by Tímea Drinóczi, and Agnieszka Bień-Kacała. London, 2020: 174–191.

Palombella, Gianluigi. “Beyond Legality – Before Democracy Rule of Law Caveats in the EU Two-Level System.” In *Reinforcing Rule of Law Oversight in the European Union*, edited by Carols Closa, and Dimitry Kochenov. Cambridge, 2016: 36–58.

Palombella, Gianluigi. “The EU’s Sense of the Rule of Law and the Issue of its Oversight”, *Robert Schuman Centre for Advanced Studies Research Paper*, no. 125. 2014, available at: <https://ssrn.com/abstract=2538086>.

Pech, Laurent, Patryk Wachowiec, and Dariusz Mazur, “Poland’s Rule of law Breakdown: A Five-Year Assessment of EU’s (In)Action.” *Hague Journal on the Rule of Law* 13. 2021: 1–43.

Pech, Laurent, and Dimitry Kochenov. *Respect for the Rule of law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments since the Portuguese Cas*. Stockholm, 2021.

Pietrzykowski, Tomasz. *Ujarzmianie Lewiatana. Szkice o idei rządów prawa*. Katowice, 2014.

Pułło, Andrzej. “Państwo prawne (uwagi w związku z art. 1 Konstytucji RP)” in “Z teorii i praktyki konstytucjonalizmu. Prace ofiarowane Profesorowi Andrzejowi Gwiżdżowi”, *Studia Iuridica* 28. Warszawa, 1995: 121–130.

Sadurski, Wojciech. *Poland’s Constitutional Breakdown*. Oxford, 2019.

Safjan, Marek. *Wyzwania dla państwa prawa*. Warszawa, 2007.

Sobczak, Krzysztof, and Andrzej Zoll. *Państwo prawa jeszcze w budowie. Andrzej Zoll w rozmowie z Krzysztofem Sobczakiem*. Warszawa, 2013.

Tuleja, Piotr. “Art. 7” in *Konstytucja RP. Komentarz*, vol. 1, eds. Marek Safjan, and Leszek Bosek. Warszawa, 2016: 327.

Wachowiec Patryk, Marek Tatała, and Eliza Rutynowska. *Rule of Law in Poland. How to Contain the Crisis and Reform the Justice System?*. Warsaw 2020, <https://for.org.pl/>.

Wiącek, Marcin. "Constitutional Crisis in Poland 2015–2016 in the Light of the Rule of Law Principle." In *Defending Checks and Balances in EU Member States: Taking Stock of Europe's Actions*, edited by Armin von Bogdandy, Piotr Bogdanowicz, Iris Canor, Christoph Grabenwarter, Maciej Taborowski, and Matthias Schmidt. Berlin, 2021: 15–33.

Wonicki, Rafał. *Spór o demokratyczne państwo prawa. Teoria J. Habermasa wobec liberalanej, republikańskiej i socjalnej wizji państwa*. Warszawa, 2007.

Wróblewska, Iwona. *Zasada państwa prawnego w orzecznictwie Trybunału Konstytucyjnego RP*. Toruń, 2010.

Wyrzykowski, Mirosław. "Bypassing the Constitution or Changing the Constitutional Order outside the Constitution." In *Transformation of Law Systems in Central, Eastern and Southeastern Europe in 1989–2015. Liber Amicorum in Honorem Prof. dr. dres. H. C. Rainer Arnold*, edited by Andrzej Szmyt, and Bogusław Banaszak. Gdańsk, 2016, 159–179.

Zimny, Jan, ed. *Praworządność w dobie XXI wieku*. Stalowa Wola, 2016.

Zubik, Marek, and Wojciech Sokolewicz. "Art. 2." In *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. 1, edited by Lech Garlicki, 2nd ed. Warszawa, 2016.

Judgments

Judgment of the District Court in Brzesk of 15 February 2017, I C 391/16.

Judgment of the District Court in Gryfin of 9 December 2015, II K 570/14.

Judgment of the District Court in Warszawa of 30 March 2015, II K 784/10.

Judgment of the Regional Court in Częstochowa of 6 July 2012, IV U 1746/11.

Judgment of the Regional Court in Częstochowa of 27 July 2012, IV U 1820/11.

Judicial decision of the Regional Court in Szczecin of 21 December 2012, VIII Ga 392/12.

Judgment of the Regional Court in Sieradz of 10 April 2013, I Ca 107/13.

Judgment of the Regional Court in Świdnica of 16 July 2013, IV Ka 461/13.

Judicial decision of the Regional Court in Szczecin of 14 December 2013, II Cz 1952/13.
Judgment of the Regional Court in Gliwice of 23 January 2014, III Ca 1295/13.
Judgment of the Regional Court in Gliwice of 5 June 2014, III Ca 188/14.
Judicial decision of the Regional Court in Częstochowa of 12 November 2014, IV U 515/14.
Judgment of the Regional Court in Warszawa of 29 January 2015, IV C 117/13.
Judgment of the Regional Court in Szczecin of 22 May 2015, II Ca 1355/14.
Judgment of the Regional Court in Szczecin of 30 July 2015, II Ca 193/15.
Judgment of the Regional Court in Konin of 30 October 2015, III I 752/15.
Judicial decision of the Regional Court in Szczecin of 14 January 2016, II Ca 856/15.
Judgment of the Regional Court in Słupsk of 19 February 2016, IV Ca 621/15.
Judicial decision of the Regional Court in Kraków of 14 July 2016, II Ca 1121/16.
Judgment of the Regional Court in Sieradz, 15th of July 2016, I Ca 260/16.
Judicial decision of the Regional Court in Szczecin of 9 September 2016, II Ca 205/16.
Judgment of the Regional Court in Częstochowa of 21 October 2016, IV U 1608/15.
Judgment of the Regional Court in Częstochowa of 6 April 2017, IV Pa 90/16.
Judgment of the Regional Court in Częstochowa of 25 May 2017, IV Pa 9/17.
Judgment of the Regional Court in Piotrków Trybunalski of 29 June 2017, II Ca 403/17.
Judgment of the Regional Court in Gliwice of 6 July 2017, III Ca 101/17.
Judgment of the Regional Court in Gliwice of 19 October 2017, III Ca 610/17.
Judgment of the Regional Court in Rzeszów of 9 November 2017, VI GC 34/16.
Judgment of the Regional Court in Gliwice of 17 May 2018, III Ca 1953/17.
Judgment of the Regional Court in Częstochowa of 8 June 2018, IV U 156/18.

Judgment of the regional Court in Częstochowa of 4 July 2018, VII Ka 276/18.
Judgment of the Regional Court in Częstochowa of 21 July 2018, IV Ua 9/18.
Judgment of the Regional Court in Częstochowa of 12 April 2019, IV U 1371/18.
Judgment of the Regional Court in Suwałki of 29 October 2019, III U 789/19.
Judgment of the Regional Court in Częstochowa of 2 December 2019, IV 485/1.
Judgment of the Regional Court in Częstochowa of 2 December 2019, IV U 579/19.
Judgment of the Regional Court in Częstochowa of 2 December 2019, IV U 499/19.
Judgment of the Regional Court in Częstochowa of 6 December 2019, IV 564/19.

Judicial decision of the Court of Appeal in Łódź of 22 January 2010, III AUa 423/09.
Judgment of the Court of Appeal in Białystok of 18 March 2010, II AKa 18/10.
Judgment of the Court of Appeal in Białystok of 20 May 2014, III AUa 30/14.
Judgment of the Court of Appeal in Szczecin of 23 December 2014, I ACa 680/14.
Judgment of the Court of Appeal in Szczecin of 23 July 2014, III AUa 1190/13.
Judgment of the Court of Appeal in Szczecin of 23 July 2014, III AUa 1191/13.
Judgment of the Court of Appeal in Białystok of 27 March 2015, I Aca 978/14.
Judgment of the Court of Appeal in Szczecin of 23 April 2015, I Aca 1003/14.
Judgment of the Court of Appeal in Warszawa of 15 June 2015, II Aka 82/13.
Judgment of the Court of Appeal in Łódź of 7 July 2015, III AUa 1296/14.
Judgment of the Court of Appeal in Kraków of 13 October 2015, II Aka 168/15.
Judgment of the Court of the Appeal in Katowice of 8 December 2015, I Aca 655/15.
Judgment of the Court of Appeal in Katowice of 5 February 2016, III AUa 556/15.
Judgment of the Court of Appeal in Warszawa of 4 November 2016, VI ACa 1140/15.

Judgment of the Court of Appeal in Warszawa of 26 November 2016, III AUa 2335/13.
Judgment of the Court of the Appeal in Białystok of 10 May 2017, III AUa 1019/16.
Judgment of the Court of the Appeal in Białystok of 10 October 2017, III AUa 175/17.
Judgment of the Court of Appeal in Szczecin of 13 November 2017, I ACa 501/17.
Judgment of the Court of the Appeal in Warszawa of 11 April 2018, I Aca 66/18.

Judgment of the Supreme Court of 11 March 2004, II UK 285/03.
Judgment of the Supreme Court of 9 July 2008, II KK 92/08.
Judgment of the Supreme Court of 17 October 2008, II UK 62/08.
Judicial decision of the Supreme Court of 13 August 2013, III SK 65/12.
Judgment of the Supreme Court of 20 August 2013, I UK 100/13.
Judicial decision of the Supreme Court of 2 August 2018, III UZP 4/18.
Judgment of the Supreme Court of 24 July 2019, I NSNc 9/19.
Judgment of the Supreme Court, 11th of March 2019, IV CO 50/19.
Judgment of the Supreme Court of 18 December 2019, V CSK 347/19.
Judgment of the Supreme Court of 28 July 2020, IV CO 55/20.

Judgment of the Constitutional Tribunal of 25 November 1997, K 26/97.
Judgment of the Constitutional Tribunal of 27 November 1997, U 11/97.
Judgment of the Constitutional Tribunal of 14 June 2000, P 3/00.
Judgment of the Constitutional Tribunal of 7 February 2001, K 27/2000.
Judgment of the Constitutional Tribunal of 12 June 2002, P 13/01.
Judgment of the Constitutional Tribunal of 11 May 2007, K 2/07.

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Standard of protection of property rights of owners of residential premises in a democratic country – selected problems considered in the light of Polish constitutional law

Abstract: The article focuses on presenting key issues revealed in the context of the standard of protection of property rights of owners of residential premises in a contemporary democratic state governed by the rule of law. The considerations presented take into account the perspective of Polish constitutional law and the guarantees of protection of ownership and other property rights as regulated in the Constitution of the Republic of Poland of April 2, 1997 (with particular emphasis on Article 21 and Article 64). The issue addressed in this paper of particular importance from the Polish perspective because, on the one hand, Polish constitutional law formulates relatively broad guarantees for the protection of ownership and other property rights (including those rights of owners of residential premises and tenants – as outlined in Article 21 and Article 64 of the Polish Constitution). On the other hand, there are several practical problems in Poland in this context, including a very significant systemic issue related to the lack of any systemic solutions in the regulation of the short-term rental market by the Polish legislator.

Keywords: property rights, ownership, residential premises, Constitution of the Republic of Poland of April 2, 1997, short-term rental

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Introduction

The general aim of this paper is to present key issues revealed in the context of the standard of protection of property rights of owners of residential premises in a contemporary democratic state ruled by law. The presented considerations will take into account the perspective of Polish constitutional law and the guarantees of protection of ownership and other property rights as regulated in the Constitution of the Republic of Poland of April 2, 1997.

In particular, this paper will address the following problems: (1) the scope of legal protection of owners of residential premises; (2) the issue of legal protection of tenants in the context of protecting the rights of owners of residential premises; (3) the challenge of legal protection of a housing community and owners of neighbouring premises in a situation where the owner uses the premises in a way that violates the interests of neighbours (4) the matter of permissible limitations of the ownership right of the owner of residential premises concerning the possibility of organizing short-term rentals, which may interfere with the use of neighboring properties.

The Main Assumptions Associated with the Scope of Legal Protection of Owners of Residential Premises in a Democratic State

At the outset, we can posit the thesis that in a modern democratic state, there generally exists legal protection for owners of residential premises. Additionally, it is worth noting that legal protection of owners of residential premises is usually derived in legal systems from the guarantee of protection of ownership and other property rights. This guarantee is often directly outlined in the constitutional provisions of many countries. This generally stems from the regulation of human and citizen rights and freedoms outlined in the constitutions of modern countries.

At the same time, it should be emphasized that in a modern democratic state governed by the rule of law, the protection of the ownership of residen-

tial premises is, of course, extensive and unquestionable. However, it is not absolute and may be limited for, among others, tenants of residential premises (in Poland the legislator introduced in this respect, among others, provisions in acts on the protection of tenants' rights[2]). Moreover, the scope of legal protection of the owner of residential premises may also be limited in favour of the entity managing a multi-unit building (e.g. a housing community) and owners of neighbouring premises. Additionally, one can argue in this context that potentially the scope of permissible restrictions on the ownership of the owner of a residential premise extends also to the possibility of arranging short-term rentals, which could interfere with the use of neighbouring properties. These issues will be explored in more detail later in the article.

The Scope of Legal Protection of Owners of Residential Premises in Polish Constitutional Law

This legal issue discussed in this paper is particularly important from the perspective of Poland, as Polish constitutional law formulates *expressis verbis* guarantees for the protection of ownership and other property rights, including the rights of owners of residential premises. Moreover, the abovementioned guarantees are relatively broad.

Referring to the standard of ownership protection in the Constitution of the Republic of Poland, it is crucial to emphasize that under this Constitution, the constitution-framer regulated ownership in various sections (from the point of view of the structure of the Constitution), presenting at the same time different approaches in its individual provisions.[3] In this context, the following provisions should be noted in particular:

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2 Act of 21 June 2001 on the protection of tenants' rights.

3 Cf. Leszek Garlicki, "Uwaga 4 do art. 21" in *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. 3, ed. L. Garlicki. Warszawa, 2005, 4; Ewa Łętowska, "Własność i jej ochrona jako wzorzec kontroli konstytucyjności. Wybrane problemy", *Kwartalnik Prawa Prywatnego* 18, no. 4, 2009: 889 et seq; Maciej Pisz, *Ograniczenia własności i gwarancje jej ochrony w polskim prawie konstytucyjnym*. Warszawa, 2016, 11 et seq; Maciej Pisz, "Formy własności

1) Article 21, section 1 of the Constitution of the Republic of Poland, which defines ownership in a broad manner, encompassing all property rights (ownership and other property rights), and establishes the principle of ownership protection (constituting one of the basic political principles contained in Chapter I of the Constitution),[4]
2) Article 64, sections 1–3 of the Constitution of the Republic of Poland, which pertains to the subjective right to ownership and other property rights (understood as one of the freedoms and rights of humans and citizens contained in Chapter II of the Constitution).[5]

Article 21, section 1 of the Constitution of the Republic of Poland declares: "The Republic of Poland shall protect ownership and the right of succession". In turn, Article 64, section 1 Constitution of the Republic of Poland states: "Everyone shall have the right to ownership, other property rights and the right of succession".

It is also noteworthy that the relatively broad guarantees of property protection for owners of residential premises, as stipulated in the Constitution of the Republic of Poland, establish a similar standard of protection in relation to the regulations of European law binding on Poland. This includes the regulations on property outlined in the European Convention on Human Rights (ECHR) – and, more specifically, in Additional Protocol No. 1 to the ECHR.[6]

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w Konstytucji Rzeczypospolitej Polskiej", *Państwo i Prawo*, no. 3. 2020: 119–129; Sylwia Jarosz-Żukowska, *Konstytucyjna zasada ochrony własności*. Kraków, 2003, 32; Paweł Sarnecki, "Referat wygłoszony na seminarium zorganizowanym 11.05.1997 r. przez Ośrodek Studiów Społeczno-Ekonomicznych w Krakowie. Prawo własności w Konstytucji", *Zeszyty Fundacji Międzynarodowego Centrum Rozwoju Demokracji*, no. 18. 1997: 21.

4 Cf. Kamil Zaradkiewicz, *Instytucjonalizacja wolności majątkowej. Koncepcja prawa podstawowego własności i jej urzeczywistnienie w prawie prywatnym*. Warszawa, 2013, 176 et seq; Sylwia Jarosz-Żukowska, "Prawo do własności – własność jako prawo podmiotowe" in *Prawa i wolności obywatelskie w Konstytucji RP*, eds. B. Banaszak, and A. Preisner. Warszawa, 2002, 251; Maciej Pisz, "Formy własności w Konstytucji Rzeczypospolitej Polskiej".

5 Cf. Leszek Garlicki, "Uwaga 6 do art. 64" in *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. 3, ed. L. Garlicki. Warszawa, 2005, 5–6; Maciej Pisz, "Formy własności w Konstytucji Rzeczypospolitej Polskiej".

6 Cf. Ewa Łętowska, "Konstrukcja gwarancji własności w europejskiej konwencji z 1950 r." in *Rozprawy z prawa cywilnego i ochrony środowiska ofiarowane profesorowi Antoniemu Agopszowiczow*i, ed. E. Giszter. Katowice, 1992, 155 et seq; Cezary Mik, "Prawo własno-

The Problem of Legal Protection of Other Entities: Tenants, Housung Communities and Owners of Neighboring Premises

However, despite the relatively broad guarantees of protection for owners of residential premises in Polish constitutional law, it should be highlighted that protection of owners of residential premises – which is not absolute – faces some limitations due to the protection of the property rights of other entities. Specifically, these entities include: (1) tenants of residential premises, (2) owners of other neighbouring residential premises (in multi-family residential buildings), and (3) those managing a multi-unit residential building (e.g. housing communities). Such restrictions appear admissible, particularly when the owner uses the residential premises in a way that violates neighbourly interests.

In the light of the Constitution of the Republic of Poland, limitations on the ownership of owners of residential premises are determined by limitation clauses contained in Article 31 section 3 and in Article 64, section 3 of the Constitution of the Republic of Poland.

As stated in Article 31, section 3 of the Constitution of the Republic of Poland: "Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary, in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights". In turn, Article 64, section 3 of the Constitution of the Republic of Poland states: "The right of ownership may only be limited by means of a statute and only to the extent that it does not violate the substance of such right".

ści w Europejskiej Konwencji Praw Człowieka", *Państwo i Prawo*, no. 5. 1993: 25 et seq; Michał Balcerzak, "Prawo do poszanowania mienia" in *Prawa człowieka i ich ochrona*, ed. T. Jasudowicz. Toruń, 2005, 373 et seq; Cezary Mik, "Ochrona prawa własności w prawie europejskim" in *O prawach człowieka w podwójna rocznicę Paktów. Księga pamiątkowa w hołdzie profesor Annie Michalskiej*, eds. T. Jasudowicz, and C. Mik. Toruń, 2006, 227 et seq; Roman Wieruszewski, "Prawo własności" in *Ochrona praw podstawowych w Unii Europejskiej*, ed. J. Barcz. Warszawa, 2008, 126 et seq; Łukasz Duda, and Jakub Kociubiński, "Realizacja ochrony własności w EKPC na podstawie orzeczenia *Lithgow i inni*", *Wrocławskie Studia Erazmiańskie*, no. 3. 2009: 234 et seq.

As a consequence, restrictions on the rights of owners of residential premises must adhere to precisely defined conditions for the admissibility of restrictions on constitutional rights and freedoms, i.e. the requirement to comply with the form of a statute, at least one of the six substantive conditions (state security, public order, protection of the environment, health, public morals, and the rights and freedom of other persons), and two premises determining the scope of interference with property: the necessity for restrictions in a democratic state (which is related to the principle of proportionality) and the prohibition of violating the essence of ownership. From the perspective of these premises, each specific case of restricting the ownership of residential owners in the Polish legal system must be considered.

It should also be noted that there are several practical problems in Poland in this context, including, for example, the question of how far tenants should be protected at the expense of landlords and when evictions should perhaps be allowed.

Certainly, for the Polish legislator the initial consideration should be to uphold the statutory scope when restricting the rights of owners of residential premises (e.g. at the expense of tenants), as well as meeting other conditions for the admissibility of rights and freedoms, including the substantive premise and the requirement of proportionality. Regarding the limitation of the rights of owners of residential premises at the expense of tenants, housing communities or owners of neighbouring residential premises, such a material premise is the protection of the rights and freedoms of other persons.

Nevertheless, it is important to note that a distinct value protected under the Polish legal system is the safeguarding of tenants, perceived as one of the "other property rights" within the meaning of Article 64 of the Constitution of the Republic of Poland. This is determined by the perspectives of legal doctrine[7] and the Constitutional Tribunal.[8] In this context, the Constitutional Tri-

7 Cf. Sylwia Jarosz-Żukowska, "Gwarancja ochrony własności i innych praw majątkowych" in *Realizacja i ochrona konstytucyjnych wolności i praw jednostki w polskim porządku prawnym*, ed. M. Jabłoński. Wrocław, 2014, 531 et seq.

8 Cases file no. SK 34/07, P 11/98, K 48/01.

bunal has expressed, among other views, the following: “Article 64 of the Constitution protects both the right to property within the meaning of civil law and other property rights. These include in particular property rights arising from concluded civil law contracts”.

In this context, it should be emphasized that limiting the rights of owners of residential premises in each case necessitates public authorities to balance these two values. In such a situation, it seems reasonable to enact laws that, in specific cases, would temporarily restrict the possibility of terminating lease agreements between owners and tenants (e.g. in the winter and with tenants who deserve special state protection, such as single parents).

A similar balance of values in the Polish legal system is, of course, also required for other issues arising in the context of legal protection of owners of residential premises. In the case of multi-family residential buildings there is, among other considerations, a need to balance how far the scope of powers of housing communities and other entities managing real estate should extend, and how broad the powers of such entities should be towards owners of residential premises (and therefore how much they can interfere with the rights of owners). Additionally, there is a need to balance the extent to which the rights of owners of residential premises may be limited by the rights of owners of other premises – neighbouring premises (which can be perceived from the point of view of the grounds for material constitutional restrictions on the rights and freedoms of owners of residential premises, as a protection of the rights and freedoms of other persons). This poses a huge challenge for the public authorities, which shape the rights of owners of residential premises through legislation.

Specifically, there is an issue of interference by the housing community and the owners of neighbouring properties in how owners exercise their ownership rights to the premises in a way that causes burdens for the residents of neighbouring premises. Certainly, such statutory regulations – adopted by public authorities in the Polish legal system, determining the scope of interference with the property rights of owners of residential premises – are the norms outlined in the Polish legal system defining the limits of property rights and pertaining to the institution

of immission (Articles 140 and 144 of the Civil Code). Pursuant to Article 144 of the Civil Code (which regulates the institution of immission): “When exercising his right, the property owner should refrain from actions that would disturb the use of neighbouring properties beyond the average limit resulting from the socio-economic purpose of the property and local relations”.

I assert that this satisfies the conditions for limiting the property rights of owners of residential premises and, consequently, should be deemed an acceptable limitation of the property rights of such owners.

The Issue of Short-Term Rental in the Context of Legal Protection of Owners of Residential Premises

Simultaneously, it can be argued in this context that potentially the scope of permissible restrictions on the ownership of the owner of a residential premise also extends to the possibility of arranging short-term rental, which could interfere with the use of neighbouring properties.

It is important to emphasize that short-term rental offers the owner of a residential premises above-average profitability compared to the to the rental of residential premises used as a permanent residence. On the other hand, it may be associated with above-average use of common ownership. It is also important that in recent years in Poland the issue of the widespread use of residential premises for short-term rental via internet platforms has gained significant importance.

This issue – as noticed by Polish courts in their jurisprudence – has led to tensions in the real estate market, especially in large cities and regions that are intensively used for tourists. This is due to the unavailability of residential premises for long-term rental, an increase in housing prices, and significant inconvenience for permanent residents of such areas, generating numerous neighbour disputes (explicitly mentioned in one of the judgments of the Polish Supreme Court[9]).

9 Cf. the judgment of the Polish Supreme Court of 12 January 2021, case file no. IV CSKP 20/21.

It is also worth emphasizing that concerns related to short-term rental have already led to prohibition regulations in several European Union countries, for example France and Spain. Moreover, concerns have already captured the attention of the Court of Justice of the European Union, particularly concerning the compliance of administrative restrictions on both professional and non-professional activities. This includes the repeated, short-term, paid rental of furnished residential premises to customers who are passing through (in accordance with Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market) in connection with counteracting the problem of shortage of apartments for long-term rental.

From the perspective of the standard of protection for owners of residential premises in Polish constitutional law, a very significant systemic problem becomes apparent in this context. This problem is linked to the absence of any systemic solutions in the regulation of the short-term rental market by the Polish legislator.

Certainly, the lack of systemic regulations should be considered undesirable and as a *de lege ferenda* postulate it should be recommended that the Polish legislator engage in legislative work to comprehensively regulate the institution of short-term rental. This is, of course, a substantial challenge for the Polish public authorities, as it requires balancing the interests of the owners of residential premises, who benefit from short-term rentals, and the interests of inhabitants of neighbouring properties (who may experience great inconvenience related to such a lease and suffer significant damages as a result, e.g. related to a decrease in the value of real estate).

The above is confirmed in the judgment of Supreme Court in case file no. IV CSKP 20/21: “The popularization of the use of apartments on a rental basis short-term via online platforms causes tensions on the real estate market – especially in large cities and regions intensively used for tourism – related to the unavailability of premises satisfying long-term rental needs, increase in housing prices, and significant nuisance for permanent residents of such towns, generating numerous neighbourhood disputes. These conflicting interests, re-

quiring compromises in the sphere of neighbourly relations cannot be resolved by resolutions of housing communities, due to their lack of competence. The use of regulations on general principles of neighbourhood law (…) as well as the implementation of supervision by the relevant administrative authorities in the scope of monitoring rental services offered by online portals may not be a possible, adequate instrument for solving such often escalated social problems. They require – as aptly exposed by the Courts of both instances – systemic solutions in the regulation of the short-term rental market, which can only be introduced by the legislator".

Conclusion

In summary, it should be acknowledged Polish constitutional law has established a relatively extensive standard of protection of property rights of owners of residential premises. This is confirmed by the relatively broad protective guarantees outlined in the Constitution of the Republic of Poland concerning the safeguarding of property and other property rights.

However, this does not imply that there are not numerous problems with this standard. Undoubtedly, a huge challenge for Polish public authorities is to appropriately balance the property rights of owners of residential premises with other legally protected values and with the protection of the rights and freedoms of other people (such as owners of other neighbouring residential premises or housing communities). Moreover, in recent years, Polish public authorities have encountered another problem, as yet unresolved, related to the need for systemic legal regulations concerning short-term rentals.

References

Balcerzak, Michał. "Prawo do poszanowania mienia." In *Prawa człowieka i ich ochrona*, edited by Tadeusz Jasudowicz. Toruń, 2005.

Duda, Łukasz, and Jakub Kociubiński. "Realizacja ochrony własności w EKPC na podstawie orzeczenia *Lithgow i inni*." *Wrocławskie Studia Erazmiańskie*, no. 3. 2009: 234–252.

Garlicki, Leszek. "Uwagi do art. 21." In *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. 3, edited by Leszek Garlicki. Warszawa, 2005.

Garlicki, Leszek. "Uwagi do art. 64." In *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. 3, edited by Leszek Garlicki. Warszawa, 2005.

Jarosz-Żukowska, Sylwia. "Gwarancja ochrony własności i innych praw majątkowych." In *Realizacja i ochrona konstytucyjnych wolności i praw jednostki w polskim porządku prawnym*, edited by Mariusz Jabłoński. Wrocław, 2014: 531–559.

Jarosz-Żukowska, Sylwia. *Konstytucyjna zasada ochrony własności*. Kraków, 2003.

Jarosz-Żukowska, Sylwia. "Prawo do własności – własność jako prawo podmiotowe." In *Prawa i wolności obywatelskie w Konstytucji RP*, edited by Bogusław Banaszak, and Artur Preisner. Warszawa, 2002.

Łętowska, Ewa. "Konstrukcja gwarancji własności w europejskiej konwencji z 1950 r." In *Rozprawy z prawa cywilnego i ochrony środowiska ofiarowane profesorowi Antoniemu Agopszowiczow*i, edited by Elżbieta Giszter. Katowice, 1992.

Łętowska, Ewa. "Własność i jej ochrona jako wzorzec kontroli konstytucyjności. Wybrane problemy." *Kwartalnik Prawa Prywatnego* 18, no. 4. 2009: 889–919.

Mik, Cezary. "Ochrona prawa własności w prawie europejskim." In *O prawach człowieka w podwójna rocznicę Paktów. Księga pamiątkowa w hołdzie profesor Annie Michalskiej*, edited by Tadeusz Jasudowicz, and Cezary Mik. Toruń, 2006.

Mik, Cezary. “Prawo własności w Europejskiej Konwencji Praw Człowieka.” *Państwo i Prawo*, no. 5. 1993: 25–34.

Pisz, Maciej. “Formy własności w Konstytucji Rzeczypospolitej Polskiej.” *Państwo i Prawo*, no. 3. 2020: 119–129.

Pisz, Maciej. *Ograniczenia własności i gwarancje jej ochrony w polskim prawie konstytucyjnym*. Warszawa, 2016.

Sarnecki, Paweł. “Referat wygłoszony na seminarium zorganizowanym 11.05.1997 r. przez Ośrodek Studiów Społeczno-Ekonomicznych w Krakowie. Prawo własności w Konstytucji.” *Zeszyty Fundacji Międzynarodowego Centrum Rozwoju Demokracji*, no. 18. 1997.

Wieruszewski, Roman. “Prawo własności.” In *Ochrona praw podstawowych w Unii Europejskiej*, edited by Jan Barcz. Warszawa, 2008.

Zaradkiewicz, Kamil. *Instytucjonalizacja wolności majątkowej. Koncepcja prawa podstawowego własności i jej urzeczywistnienie w prawie prywatnym*. Warszawa, 2013.

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The role of the public policy clause in the Polish legal system on the example of cases concerning the conclusion and dissolution of marriage

Abstract: The article aims to demonstrate the role of the public policy clause in the Polish legal system in the context of matrimonial relations, with a particular emphasis on the institution of the conclusion and dissolution of marriage. As a part of the discussion, the analysis reconstructs the essence of the public policy clause, while demonstrating the most important principles of family law and conflict-of-law rules concerning matrimonial matters. The author examines the relationship between the public policy clause and family law by emphasising differences in legal systems amongst different nations and specifying the authorised and prohibited implementation of the public policy clause regarding marriage conclusion and dissolution. It is also pointed out that child marriage, polygamy, and divorce through unilateral declaration of will, cannot be reconciled with Polish public order; and attention is drawn to the inadmissibility of establishing restrictions on the freedom to marry on the basis of racial, religious and social criteria. The author's evaluation utilises case law, academic literature, and opinions from doctrinal representatives on this issue. The conclusion emphasises the significance of the public policy clause in preserving the consistency and uniformity of the Polish legal system as a tool to fight discrimination and gender inequality.

Keywords: public policy clause, conflict-of-law rules, international family law, family law, marriage, conclusion of marriage, dissolution of marriage

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Introducion

The International Private Law Act[2] became effective on 4th February 2011. While reviewing the IPL, it is noteworthy that the conflict-of-law rules outlined therein pertain not only to private law relations but also serve as guidepost indicating the required course of action for state judicial authorities and the administration.[3] It is the IPL which is the definitive source for determining which State's law should form the basis for resolving a particular case.[4]

Amongst the other national regulations in the realm of private international law, the IPL undoubtedly merits the title of the most all-encompassing legislation, not solely due to its sheer volume, but also thanks to its provisions that bear a general character. This primarily applies to the provisions numbered 1 to 10 of the Act, which constitute principles relating to the entirety of national private international law provisions. However, amongst these general rules, Article 7 of the IPL states: "If applying foreign law would run contrary to the fundamental legal principles of the Republic of Poland, it shall not be applied".

The above-mentioned article comprises a public policy clause, which constitutes a perpetually and extensively used element of the conflict of laws system, aimed at safeguarding the fundamental principles of the national legal framework. Scientific studies on the public policy clause frequently make allusions to family law cases as instances of its application, specifically regarding the institution of marriage conclusion and dissolution.[5] This is a matter touching upon sensitive topics, related to cultural, social, and political factors which, as is well-known, differ across countries around the globe. Therefore, the distinctions between the legal systems of countries in the realm of marriage laws

2 Hereinafter: IPL (Polish: Ustawa z dnia 4 lutego 2011 r. – Prawo prywatne międzynarodowe. Journal of Laws of 2011, no. 80, item 432).

3 Jerzy Poczobut, "Art. 1" in *Prawo prywatne międzynarodowe. Komentarz*, ed. J. Poczobut. Warszawa, 2017, LEX/el.

4 Maksymilian Pazdan, *Prawo prywatne międzynarodowe*. Warszawa, 2017, 23.

5 Ewa Kamarad, "Zastosowanie klauzuli porządku publicznego w sprawach dotyczących zawarcia małżeństwa – wybrane zagadnienia", *Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego* 10. 2012: 106.

are incontrovertible and perceptible even to an individual unacquainted with this field.

In light of the above, it is on the example of cases related to the institution of marriage that the importance of the public policy clause and its role in preventing institutions that conflict with the moral principles of the legal system from operating is exemplified. Therefore, the objective of this investigation is to examine the relationship between the public policy clause and the family law of Poland, while emphasising the disparities that arise in the legal frameworks of various countries and the extent to which the public policy clause applies to cases relating to the conclusion and dissolution of marriage.

Public Policy Clause – The Most Important Issues

The primary purpose of the public policy clause is to safeguard the legal system of a state from the detrimental and unacceptable effects of implementing foreign law, according to the legal order of the forum state (*lex fori*). This is done by excluding the provisions of foreign law designated by the conflict rule as applicable if the application would result in consequences that contradict public policy.[6] Similarly, the clause may also be a basis for rejecting the recognition or enforcement of a foreign judgment if it would not be acceptable in the point of view of the relevant state's interests.[7] In the Polish legal system, the public policy clause serves a dual objective, and it is possible to refer to it as both a conflict-of-laws clause and a procedural public policy clause.[8] However, it is worth keeping in mind that the public policy clause is aimed at opposing foreign substantive law that claims to be the applicable law but never at foreign conflict-of-law rules.[9]

6 Witalis Ludwiczak, *Międzynarodowe prawo prywatne*. Warszawa, 1990, 74.

7 Małgorzata Gocek, "Podstawowe zagadnienia zastosowania klauzuli porządku publicznego w orzecznictwie Sądu Najwyższego", *Rejent*, no. 6. 2005: 57.

8 Ewa Przyśliwska, "Kolizyjna i procesowa klauzula porządku publicznego", *Metryka*, no. 1. 2017: 69.

9 Pazdan, 77.

Thus, Article 7 of the IPL serves as a “safety valve” against the consequences of using foreign law in a scenario that would violate the essential principles of the domestic legal system.[10] The final determination of the aforementioned inconsistency is the responsibility of the court, which identifies and applies the appropriate law in a specific case. The concept of public policy is comprehensive, pliable, and simultaneously variable term in both space and time. M. Sośniak has observed that the public policy clause is as elusive as the atmosphere and that, to some, it eludes any attempt at doctrinal clarifications.[11] Furthermore, the inconsistency in question does not indicate non-compliance with any laws of the deciding jurisdiction, but rather conflicts with its most fundamental ones. Public policy, when understood in this manner, must always be viewed dynamically. Therefore, the analysis or effect of applying foreign law must be based on the fundamental principles of the legal order in effect at the time of the court decision.[12] However, the Polish doctrine maintains that the instrument in question should be used wisely, and courts may resort to it exceptionally, without exceeding the boundaries of essential needs.[13]

It is worth emphasising that a mere statement regarding the differing regulation of a given issue by foreign law is insufficient to invoke the public policy clause.[14] This is because despite the differences in wording or formulation of provisions, the application of the foreign law may still result in equivalent or similar outcomes to that of Polish law. According to the Supreme Court’s ruling on 11 October 2013: “the mere disparity of foreign law, even far reaching or blatant, is inadequate grounds to reject its application or to deny its effectiveness or the enforceability of a judgement based on it, invoking the public policy

10 Aurelia Nowicka, “Art. 7” in *Prawo prywatne międzynarodowe. Komentarz*, ed. J. Poczobut. Warszawa, 2017, LEX/el.

11 Mieczysław Sośniak, *Klauzula porządku publicznego w prawie międzynarodowym prywatnym*. Warszawa, 1961, 77–80, 133.

12 Mieczysław Sośniak, and Bronisław Walaszek, *Międzynarodowe prawo prywatne. Część ogólna*. Kraków, 1965, 119.

13 Pazdan, 106.

14 Sośniak, and Walaszek, 114–115.

clause. What is required is a contradiction as an obvious, blatant incompatibility of the application of that law or the recognition of the effectiveness or enforceability of a foreign judgement with the fundamental principles of the legal order of the state applying the law or the state of recognition or enforcement."[15]

Concerning the outcomes of the public policy clause application, they may be described considering both the legal status of the party involved in the relationship and the legal systems implicated.[16]

Regarding the parties' perspective, the court's invocation of the public policy clause and the simultaneous inapplicability of the relevant foreign law can have permissive as well as prohibitive effect. A permissive effect of the clause arises when excluding the application of foreign law results in an improvement of the party's position compared to the application of the relevant provision of foreign law.[17] The prohibitory effect arises when – as a result of not applying the foreign law – the party's situation worsens, for example, due to the exclusion of provisions providing certain privileges for the party.[18]

The second approach, regarding the impact of the public policy clause's application from the point of view of the legal systems involved, identifies the norms that can replace the excluded provision. In this regard, a differentiation is drawn between the negative effect of simply excluding the application of a foreign law provision and the positive effect of filling the resulting gap by substituting a corresponding foreign law provision other than the one excluded or a provision from its own legal system (*legis fori*).[19]

Thus, the application of a public policy clause does not necessarily result in the determination of the jurisdiction of its own law, leading to complete exclusion of the applicable law under the IPL. The doctrine unanimously accepts

15 Decision of the Supreme Court of the Republic of Poland of 11 October 2013, I CSK 697/12, LEX/el.

16 Katarzyna Bagan-Kurluta, *Prawo prywatne międzynarodowe*. Warszawa, 2021, 146–148.

17 Przyśliwska, 76.

18 Mieczysław Sośniak, "Skutki zastosowania klauzuli porządku publicznego w prawie międzynarodowym prywatnym", *Studia Cywilistyczne,* no. 1. 1961: 196.

19 Nowicka, Art. 7.

that by invoking Article 7 of the IPL, the adjudicating court should contemplate the possibility of limiting the clause's effects to negative consequences. In the event when a satisfactory solution cannot be achieved through this approach, it is permissible to resort to Poland's own substantive law.

Principles of Family Law as a Part of Public Policy

In the light of the above, invoking of the public policy clause can only be justified when the application of foreign law would be inconsistent.[20] This raises the question of which principles of family law fall under public policy. Unfortunately, the Family and Guardianship Code[21] does not offer a straightforward response to this question. This arises from the fact that the principles of family law belonging to the public policy have not been expressly stated in the provisions, and for this reason, they need to be reconstructed by referring to the *ratio legis* that guided the legislator when creating specific regulations concerning the institution of marriage.[22] The legal doctrine sets out several principles of this kind, with particular focus on monogamy in marriage, the social value of marriage, spouse equality, marital stability, and freedom of marriage.

Initially, the assessment of the capacity of foreign nationals to acknowledge or enter into marriage from a different jurisdiction is required, through the lens of the principle of monogamy prevailing in Poland. The prohibition of entering into marriage by a person who is already in a marital relationship arises from Article 13 of the FGC. The impediment of bigamy itself is absolute in nature and represents one of the earliest impediments to marriage in Poland.[23]

20 Kamarad, Zastosowanie klauzuli porządku publicznego w sprawach dotyczących zawarcia małżeństwa – wybrane zagadnienia, 109.

21 Hereinafter: FGC (Polish: Ustawa z dnia 25 lutego 1964 r. – Kodeks rodzinny i opiekuńczy. Journal of Laws of 2021, no. 9, item 59).

22 Mieczysław Sośniak, Bronisław Walaszek, and Eustachy Wierzbowski, *Międzynarodowe prawo rodzinne*. Wrocław, Warszawa, Kraków, 1969, 32.

23 Anna Stawarska-Rippel, "Art. 13" in *Kodeks rodzinny i opiekuńczy. Komentarz,* eds. M. Fras, and M. Habdas. Warszawa, 2021, LEX/el.

The principle of the social importance of marriage comprises necessary conditions for prospective spouses to meet, alongside with impediments to avoid in order for a marriage to be valid.[24] Within the Polish legal framework, there exist requirements detailing the potential age of each prospective spouse (Article 10 FGC), prohibiting close familial ties between them (Articles 14 and 15 FGC), and specifying illnesses and impairments considered as impediments to marriage (Article 12 FGC).

The principle expressed in Article 23 FGC, which ensures equality of rights and obligations for spouses, coincides with the marriage protection outlined in Articles 18 and 71 of the Constitution of the Republic of Poland.[25] The duties and conduct of spouses outlined in Article 23 of the FGC express the fundamental essence of the marriage model adopted by Polish law, according to which neither of the spouses holds the authority to act in a dominant or autonomous manner towards the other.

In my assessment, attention should be given to the principles of family law that, although not directly arising from any provision of the FGC, are pointed out by legal scholars in all studies regarding that matter[26] and have their origins in the Constitution of the Republic of Poland or binding international legal acts applicable to Poland. One of these principles is the permanence of marriage, which indirectly stems from the formality of entering into a marital union, the manner of regulating Polish family maintenance and inheritance law, and the definition of negative grounds for divorcing spouses.[27]

Undoubtedly, a fundamental but implicitly expressed principle forming part of the public policy shall also be the right to enter into marriage, which

24 Jacek Ignaczewski, *Kodeks rodzinny i opiekuńczy. Komentarz*. Warszawa, 2010, 75–76.

25 Hereinafter: CRPD (Polish: Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. Journal of Laws of 1997, no. 78, item 483).

26 In this regard, the following have commented: Marek Andrzejewski, *Prawo rodzinne i opiekuńcze*. Warszawa, 2010, 96 et seq.; Jerzy Ignatowicz, and Mirosław Nazar, *Prawo rodzinne*. Warszawa, 2010, 85 and Tadeusz Smyczyński, *Prawo rodzinne i opiekuńcze*. Warszawa, 2009, 25–26.

27 Małgorzata Łączkowska, "Zasada trwałości małżeństwa w polskim prawie rodzinnym – aspekty materialne i procesowe", *Studia Prawnoustrojowe* 24. 2014: 66–70.

the Polish law essentially grants to all individuals, regardless of their gender, race, religion, or social background. This emerges indirectly from Article 151 FGC, which amongst the grounds for nullifying marriage, identifies the statement of intent to marry being made under duress or in a jurisdiction that does not allow a conscious expression of free will. Moreover, this principle is reflected in Article 47 CRPD, which states that "everyone has the right to decide about their personal life", including the decision to enter into marriage. It is worth emphasising that the principle of freedom of marriage has been frequently invoked in international instruments, such as Article 12 of the Convention for the Protection of Human Rights and Fundamental Freedoms[28] or Article 9 of the Charter of Fundamental Rights,[29] both of which Poland has ratified.

Rules on Conflict of Laws Regarding the Conclusion and Dissolution of Marriages

Since marriage requires both material prerequisites, concerning the ability to marry, and formal prerequisites, related to the ability to conclude a marriage, separate conflict-of-law regulations have been enacted for both issues (Articles 48 and 49 of the IPL).[30] According to Article 48 of the IPL, the ability to conclude a marriage is determined by each party's national law at the time of the marriage. Therefore, for a Polish citizen's ability to enter into marriage (even if they are also a citizen of a foreign country – as stated in Article 2(1) of the Polish People's Republic), Polish law will be decisive. However, if an individual intending to marry in Poland is a foreign national, the ability to enter into marriage is determined by their national law, which is the law of the country of which they are a citizen. On the other hand, the ability for an individual whose citizenship is uncertain or who is stateless to enter into marriage

28 Journal of Laws of 1993, no. 61, item 284.

29 Official Journal of the European Communities of 18 December 2000, C 364/1.

30 Filip Nowak, "Kolizyjnoprawna problematyka zawarcia małżeństwa", *Metryka*, no. 1. 2019: 19–32.

in Poland is evaluated in accordance with the laws of the country where they have their place of residence. In the absence of it, the laws of the country of habitual residence shall apply.[31]

This is exemplified through the following illustration. If a Polish citizen marries a German citizen in Poland, their ability to marry will be evaluated according to Polish law for the Polish spouse and German law for the German spouse.[32]

Additionally, the term "ability to conclude a marriage", as mentioned in the aforementioned provision, refers to all the prerequisites that potential spouses must fulfil (e.g., attaining a specific age) and the disqualifying factors that neither party can meet (e.g., mental illness). In addition, legal capacity must be assessed separately for each of the prospective spouses according to their national law. In the course of this assessment, it must be determined – for each prospective spouse separately – whether he or she can enter into marriage with a specific other prospective spouse.[33]

As for the form of marriage, Article 49 of the IPL states that it is primarily subject to the law of the country where it is formally concluded. Consequently, if a marriage is concluded in Poland, Polish law oversees the marriage's form. Therefore, the principle of *legis loci celebrationis* expertise is applicable.[34] In contrast, if a marriage is conducted outside of Poland, it will suffice to abide by the formality prerequisites mandated by the respective native laws of the married couple or the customary law of their place of residence or habitual residence at the time of marriage conclusion. Nevertheless, the term "form of marriage", as mentioned in Article 49 IPL, should be interpreted expansively. Among other things, this covers questions of how state authorities take part in receiving declarations of intent, the involvement of witnesses, the specific ways in which the prospective spouses declare their intent and the necessary documentation.

31 Krzysztof Pietrzykowski, "Art. 48" in *Prawo prywatne międzynarodowe. Komentarz*, ed. J. Poczobut. Warszawa, 2017, LEX/el.

32 Pazdan, 235.

33 Sośniak, Walaszek, and Wierzbowski, 13 et seq.

34 Pazdan, 237.

Article 54(1) and (2) of the IPL regulates the dissolution of marriage, stating that it will be governed by the domestic law of the couple at the time of the dissolution request. In the absence of a shared domestic law between spouses, the law of the state where both reside at present shall apply. However, if the spouses are not domiciled in the same state, then the law of the state where they last had their common habitual residence shall be applicable if one of them still resides in that state. Only in the absence of circumstances determining the competence of law as per the above regulations, does Polish law govern the process of marriage dissolution (Article 54, § 3 of the IPL).

The term "dissolution of marriage" utilised by the legislator is noteworthy. In the Polish legal system, under Article 56 § 1 FGC, "divorce" refers to a constitutive court verdict that leads to the dissolution of marriage, and this expression is similarly comprehended in many other legal systems. However, there are also systems that permit the jurisdiction of a state authority other than a court, or even a non-state authority operating solely under state authority, in this regard. Additionally, certain states authorise the dissolution of marriage through a unilateral or bilateral legal act performed by the spouses themselves, for instance, through repudiation in Islamic law.[35] Therefore, to draw attention to the fact that the conflict-of-law rule extends beyond divorce under Polish law to include other forms of marriage dissolution, the legislator defined the scope of this provision using the term "dissolution of marriage."[36]

The Permissive Direction of the Public Policy Clause in Matters Concerning Marriage

In cases concerning marriage, the permissive effect of the public policy clause occurs when the party, by invoking the clause, achieves more than they would have if the appropriate foreign law had been applied. The clause disregards any

35 Mirosław Sadowski, "Rozwód według procedury *khula* w prawie egipskim", *Acta Universitatis Wratislaviensis*, no. 3978. 2020: 502.

36 Pazdan, 242.

restrictions and thus grants the foreigner, for instance, the capacity to marry. The permissive direction of the public policy clause is primarily associated with the principle of the freedom to marry, classified as one of the principles of family law public order. This principle is most commonly applied when a law, which is deemed applicable for assessing a foreign national's capacity to marry, imposes restrictions that violate the Polish public order, contrary to the principle outlined.[37]

A restriction on the freedom to marry that validates the use of the public policy clause arises when the foreign national's domestic legislation prohibits marriage based on race, social status, nationality, or religion.[38]

While legal systems that differentiate subjective rights based on social origin are now rare, they persist in some countries, such as the caste system in India.[39] Restrictions on marrying based on race are now relegated to history. If, however, a restriction pertains to religious criteria, an issue arises when the national law of the prospective spouse does not permit concluding a marriage with individuals of other religions or only allows marriage in a particular religious ceremony.[40] For example, according to Islamic law, a Muslim man is not permitted to marry a woman who is not Muslim, unless she is Jewish or Christian and considered as belonging to the "people of the Book". Similarly, a Muslim woman is prohibited from marrying a man who is not Muslim.[41]

Restrictions on marrying a foreign national that are present in some legal systems may be handled similarly, as cautiously indicated by the Supreme Court's resolution from the panel of seven judges dated 20th January 1983, reference number ref. III CZP 37/82 which states that "the prohibition on marriage with foreign nationals, as stated in the applicant's national law, does not

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37 Kamarad, Zastosowanie klauzuli porządku publicznego w sprawach dotyczących zawarcia małżeństwa – wybrane zagadnienia, 112.

38 Sośniak, Walaszek, and Wierzbowski, 33.

39 Roman Tokarczyk, *Współczesne kultury prawne*. Warszawa, 2008, 218–219.

40 Kamarad, 113.

41 Mateusz Tubisz, "Prawne aspekty instytucji małżeństwa w islamie" in *Prawo małżeńskie i jego relacje z innymi gałęziami prawa*. Olsztyn, 2017, 115.

necessarily impede the court's exemption from submitting evidence of their capacity to marry under that law to the head of the registry office."[42]

Additionally, it is worth noting that there exist other marriage institutions not recognized by Polish law that are nonetheless not in violation with the Polish public order. These include the "widow's interval", which prohibits women from marrying within a certain time after the end of their previous marriage, impediments to marriage of individuals who were ordained as priests or took religious vows in the past, and the requirement for parental or guardianship consent for marriage. There is no justification for regarding posthumous marriage, which is permitted in France only by virtue of Article 171 of the Code Civil (French Civil Code), as conflicting with the fundamental tenets of our legal system.[43]

Direction Prohibiting the Public Policy Clause in Marriage Cases

The prohibiting impact of the public policy clause involves imposing a limitation which is not recognized in the foreign governing law, and this simply disadvantages one of the parties involved. If a foreign law provides a party with certain privileges or institutions detrimental to the public policy of Poland, it will be excluded from application.

Polygamy, recognized as legal in many Middle Eastern countries, some Asian countries, and in the majority of African countries, whether based on statutory law or customary law, is irreconcilable with the Polish public order.[44] Thus, if a Polish citizen intends to marry an Iranian who is already in another marriage, they will not be able to do so in Poland. Furthermore, if they decide

42 Mączyński, "Działanie klauzuli porządku publicznego w sprawach dotyczących zawarcia małżeństwa z cudzoziemcem" in *Proces i prawo. Rozprawy prawnicze. Księga pamiątkowa ku czci profesora Jerzego Jodłowskiego*, ed. E. Łętowska. Wrocław, Warszawa, Kraków, Gdańsk, Łódź, 1989, 161 et seq.

43 Pazdan, 240.

44 Kamrad, 114–115.

to marry in a state that permits polygamy, the foreign marriage certificate will not be transcribed. On the other hand, there is no basis for refusing to authorise the marriage if the foreigner's national law allows polygamy, provided that the person is unmarried.

The topic of "child marriage" and its alignment with the principle of the social value of marriage, which is part of the fundamental principles catalogue, is extensively debated in the doctrine. Defining the prerequisites for the prospective spouse and identifying impediments to ensure a successful marriage serve as means to uphold this principle. In the present day, the majority of European nations establish a minimum age for an individual to attain entitlement for marriage. Furthermore, it is necessary to establish a minimum age for prospective spouses due to the New York Convention of 10 December 1962 on the consent to marry, the lowest age for marriage and the registration of marriages, which has been adopted by Poland. In accordance with Article 2 of the Convention "States parties to the present Convention shall take legislative action to specify a minimum age for marriage". In accordance with Polish law, Article 10 of FGC sets the minimum age limit for marriage at 18 years, with exceptions allowing for a lower limit of 16 years for women. The mere difference in defining the minimum age for marriage in the legal systems of the prospective spouse's state of origin and the state in which the marriage is to be concluded, is not sufficient to invoke the public policy clause.[45] There is indeed scientific evidence that physical and mental maturity for marriage varies according to race and latitude.[46] Intervention of the public order clause will be justified when the application of foreign law would result in the conclusion of a marriage by a person who, according to Polish law, has not reached the minimum age required to engage in intimate relationships, like a person under 15 years of age. In addition, if the foreign law does not establish any age limits for the future spouses, which would enable the marriage of children, Article 7

45 Kamarad, 116.

46 Ewa Wiśniowska, *Znaczenie wieku przy zawarciu małżeństwa według kodeksu rodzinnego i opiekuńczego*. Wrocław, 1986, 42–43.

of the IPL will be invoked.[47] However, "child marriage" violates not only the principle of the social importance of marriage but also the principle of freedom to marry, which grants each person the right to decide whether to enter into marriage, including the choice of the spouse.

Controversies have also been stirring for years regarding same-sex marriages and their permissibility under Polish law. In making determinations in this matter, one must consider Article 1 FGC and Article 18 CRPD. These provisions specifically define marriage as a union between a woman and a man, thereby establishing the principle that only heterosexual unions are to be recognized as marriages in Poland.[48] The necessity of the prospective spouses being heterosexual is undoubtedly a substantive prerequisite of marriage. The permissibility, according to the domestic law of only one of the parties, of the absence of a gender distinction can be treated either as a kind of mutual hindrance or, perhaps more appropriately, can potentially trigger the application of a public policy provision to the party whose domestic law does not mandate a gender distinction.[49] Undoubtedly, both the Constitution of the Republic of Poland and the Family and Guardianship Code present obstacles to the introduction of same-sex marriage into Polish law. Given this, the intervention of the public policy clause, in the event of applying foreign substantive rules concerning such unions, is at least highly probable.

The public policy clause may not only apply to cases involving marriage, but also to the cases regarding its dissolution. Dissolution of marriage through the husband's unilateral declaration (known as dissolution of marriage by rejection – "talaq") is recognized by the laws of Muslim countries, but widely viewed as incompatible with the legal culture of the West.[50] The

47 Ewa Kamarad, "Kolizyjnoprawne aspekty małżeństw dzieci", *Problemy Prawa Prywatnego Międzynarodowego* 24. 2019: 77–80.

48 Judgment of the Supreme Administrative Court of the Republic of Poland of 25 February 2020, II OSK 1059/18, LEX no. 3022170.

49 Mateusz Pilich, "Związki quasi-małżeńskie w polskim prawie prywatnym międzynarodowym", *Państwo i Prawo*, no. 2. 2011: 84–94.

50 Sadowski, 502.

use of the “talaq” method of marriage dissolution is contrary to the principle of equal rights for spouses, as it can only be invoked by the man, thus discriminating against women. Essentially, “talaq” is a unilateral decision made predominantly at the husband’s discretion. The woman has either no right at all to resist such a divorce or her rights are severely limited. Furthermore, the unilateral and unrestricted nature of divorce by rejection and its extrajudicial nature are also questionable.

The sole published judgement of a Polish court addressing the issue of recognising a one-sided divorce carried out under Islamic law within Poland pertains to the court decision delivered by the Court of Appeal in Katowice on the 20th of August 2009.[51] Based on the facts of the case, a Moroccan-Polish individual has submitted an application for the recognition of a notarized certificate of unilateral divorce issued by a notary of the Office of Personal Affairs Notarial Bureau in Egypt, confirming the dissolution of his marriage to a French citizen, who has also been a citizen of Poland since 2007. The Court of Appeal pointed out three factors that, in its opinion, justify the refusal to recognize the divorce certificate presented by the man in Poland. The most relevant factor, considering the deliberations conducted here, was the inconsistency of its recognition with the public policy clause. The court unequivocally stated that the dissolution of marriage through the unilateral declaration of the husband without consideration of the wife’s position contradicts the principles of the permanence of marriage and the equality of spouses, protected constitutionally in Article 18 CRPD. The “talaq” divorce, as a method exclusively available to men, is offensive due to its discriminatory nature, and the ease of its implementation undermines the principle of the permanence of marriage.[52]

51 Maciej Zachariasiewicz, “Odmowa uznania w Polsce rozwodu *talaq* na tle prawnoporównawczym”, *Problemy Prawa Prywatnego Międzynarodowego* 27. 2020: 21–30.

52 Mieczysław Sośniak, “Zasada równorzędności płci w zakresie zawarcia, unieważnienia i rozwiązania małżeństwa w socjalistycznych systemach prawa międzynarodowego prywatnego ze szczególnym uwzględnieniem prawa polskiego”, *Studia Prawnicze*, no. 3(57). 1978: 22 et seq.

Summary

The public policy clause is, in my opinion, a unique and an essential conflict rule that protects the coherence and uniformity of the Polish legal system. Its primary objective is to prohibit institutions that fundamentally oppose the axiological principles of our legal system from operating within the Polish legal framework. The public policy clause is an all-encompassing term, and its normative content is to be determined by the adjudicating authority. Ascertaining what constitutes a breach of public policy is solely at the discretion of the court, and therefore the implementation of the clause is never automatic or guaranteed. It is not feasible to create or organise a directory of public policy principles. Moreover, it would not be advisable, considering the changes in society. One should acknowledge that the meaning of a clause is influenced by the time and place, which supports this argument.

The connection between the public policy clause and international family law has always been specifically close. It is the interconnection of this matter with cultural, social, sociological, and political factors that influences the significant differences in the legal systems of various countries within the marriage law field. Moreover, legal systems and underlying principles contain contradictions so significant as to warrant the application of Article 7 of the IPL. Nevertheless, it should be noted that the permissibility of safeguarding one's own public order constitutes an exception to the principle of equal treatment of legal systems of all states. The clause is invoked exceptionally, only in specific circumstances, where the intention is to safeguard principles that are indisputably recognised as public policy principles.

To summarise, based on my own conclusions, I consider it legitimate to invoke the public policy clause in situations that impede marriages that contravene the fundamental principles of family law. Child marriages under the age of 15 or polygamous marriages cannot meet the necessary requirements. Moreover, it would be inconsistent with the legal framework in Poland to acknowledge unilateral 'talaq' divorce, particularly since it constitutes a clear

instance of discrimination towards women. I can acknowledge the beneficial effects of the enabling operation of the clause, as this allows for the disregard of harmful and discriminatory limitations, ultimately granting foreigners the ability to marry someone of a different religion or nationality.

References

Andrzejewski, Marek. *Prawo rodzinne i opiekuńcze*. Warszawa, 2010.

Bagan-Kurluta, Katarzyna. *Prawo prywatne międzynarodowe*. Warszawa, 2021.

Gocek, Małgorzata. "Podstawowe zagadnienia zastosowania klauzuli porządku publicznego w orzecznictwie Sądu Najwyższego." *Rejent*, no. 6. 2005.

Ignaczewski, Jacek. *Kodeks rodzinny i opiekuńczy. Komentarz*. Warszawa, 2010.

Ignatowicz, Jerzy, and Mirosław Nazar. *Prawo rodzinne*. Warszawa, 2010.

Kamarad, Ewa. "Kolizyjnoprawne aspekty małżeństw dzieci." *Problemy Prawa Prywatnego Międzynarodowego* 24. 2019: 77–107.

Kamarad, Ewa. "Zastosowanie klauzuli porządku publicznego w sprawach dotyczących zawarcia małżeństwa – wybrane zagadnienia." *Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego* 10. 2012: 106–118.

Ludwiczak, Witalis. *Międzynarodowe prawo prywatne*. Warszawa, 1990.

Łączkowska, Małgorzata. "Zasada trwałości małżeństwa w polskim prawie rodzinnym – aspekty materialne i procesowe." *Studia Prawnoustrojowe* 24. 2014: 61–81.

Mączyński, Andrzej. "Działanie klauzuli porządku publicznego w sprawach dotyczących zawarcia małżeństwa z cudzoziemcem." In *Proces i prawo. Rozprawy prawnicze. Księga pamiątkowa ku czci profesora Jerzego Jodłowskiego*, edited by Ewa Łętowska. Wrocław, Warszawa, Kraków, Gdańsk, Łódź, 1989.

Nowak, Filip. "Kolizyjnoprawna problematyka zawarcia małżeństwa." *Metryka*, no. 1. 2019: 19–32.

Nowicka, Aurelia. "Art. 7." *Prawo prywatne międzynarodowe. Komentarz*, edited by Jerzy Poczobut. Warszawa, 2017, LEX/el.

Pazdan, Maksymilian. *Prawo prywatne międzynarodowe*. Warszawa, 2017.

Pietrzykowski, Krzysztof. "Art. 48." In *Prawo prywatne międzynarodowe. Komentarz*, edited by Jerzy Poczobut. Warszawa, 2017, LEX/el.

Pilich, Mateusz. "Związki quasi-małżeńskie w polskim prawie prywatnym międzynarodowym." *Państwo i Prawo*, no. 2. 2011: 84–94.

Poczobut, Jerzy. "Art. 1." In *Prawo prywatne międzynarodowe. Komentarz*, edited by Jerzy Poczobut. Warszawa, 2017, LEX/el.

Przyśliwska. Ewa. "Kolizyjna i procesowa klauzula porządku publicznego." *Metryka*, no. 1. 2017: 69–84.

Sadowski, Mirosław. "Rozwód według procedury *khula* w prawie egipskim." *Acta Universitatis Wratislaviensis*, no. 3978. 2020: 499–510.

Smyczyński, Tadeusz. *Prawo rodzinne i opiekuńcze*. Warszawa, 2009.

Sośniak, Mieczysław. *Klauzula porządku publicznego w prawie międzynarodowym prywatnym*. Warszawa, 1961.

Sośniak, Mieczysław. "Skutki zastosowania klauzuli porządku publicznego w prawie międzynarodowym prywatnym." *Studia Cywilistyczne*, no. 1. 1961.

Sośniak, Mieczysław. "Zasada równorzędności płci w zakresie zawarcia, unieważnienia i rozwiązania małżeństwa w socjalistycznych systemach prawa międzynarodowego prywatnego ze szczególnym uwzględnieniem prawa polskiego." *Studia Prawnicze*, no. 3(57). 1978: 13–25.

Sośniak, Mieczysław, and Bronisław Walaszek. *Międzynarodowe prawo prywatne. Część ogólna*. Kraków, 1965.

Sośniak, Mieczysław, Bronisław Walaszek, and Eustachy Wierzbowski. *Międzynarodowe prawo rodzinne*. Wrocław, Warszawa, Kraków, 1969.

Stawarska-Rippel, Anna. "Art. 13." In *Kodeks rodzinny i opiekuńczy. Komentarz*, edited by Mariusz Fras, and Magdalena Habdas. Warszawa, 2021, LEX/el.

Tokarczyk, Roman. *Współczesne kultury prawne*. Warszawa, 2008.

Tubisz, Mateusz. “Prawne aspekty instytucji małżeństwa w islamie.” In *Prawo małżeńskie i jego relacje z innymi gałęziami prawa*. Olsztyn, 2017: 113–120.
Wiśniowska, Ewa. *Znaczenie wieku przy zawarciu małżeństwa według kodeksu rodzinnego i opiekuńczego*. Wrocław, 1986.
Zachariasiewicz, Maciej. “Odmowa uznania w Polsce rozwodu *talaq* na tle prawnoporównawczym.” *Problemy Prawa Prywatnego Międzynarodowego* 27. 2020: 7–37.

Decision of the Supreme Court of the Republic of Poland of 11 October 2013, I CSK 697/12, LEX/el.
Judgment of the Supreme Administrative Court of the Republic of Poland of 25 February 2020, II OSK 1059/18, LEX no. 3022170.

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The Model Family Code and the regulation of Polish Family Law

Abstract: The paper presents the comparison between the principles of Model Family Code and the regulations Polish family Law. The main questions are connected with the sources of Family Law, the recognition of the clause on "a child's welfare", the scope of State's protection of families and family life and the influence of the European Court of Human Rights' jurisprudence. In addition, the analyse takes into account the definitions of marriage, concubinage and partnership in connection with the protection of privacy and family life. On the area of divorce regulation the main analyse are connected with the alternative dispute resolution (ADR), parental authority, joint custody and contacts with common child, and financial consequences of dissolution of marriage. At last are analysed the descent of a child, alimentation, adoption the new institution of child's advocate.

Keywords: adoption, alimentation, alternative dispute resolution, child welfare, code, concubinage, contacts, custody, divorce, human rights, family, jurisprudence, marriage, maternity, parental authority, paternity, property.

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Sources of Polish family law

The starting point of the comparison between the Model Family Code[2] and Polish family Law is connected with the structure of the system of the sources of this regulation. The basic source of family law is the Constitution of the Republic of Poland of 1997.[3] The Family and Guardianship Code of 1964[4] regulates family law in detail. The FGC was amended in 1975 and subsequently more than 20 times between 1995 and 2018, at which time the amendments encompassed over half of the provisions. However, the interpretation of the provisions of the FGC has to take into account not only the Constitution but also the large group of different legal acts, such as the legal acts of Human Rights.

Since Poland has ratified many international treaties which refer to family law matters and is a member of the European Union (EU), proper international agreements and other applicable statutory instruments, especially decrees creating European law currently constitute elements of the Polish legal system, and therefore are also recognized as sources of family law. Although the European integration processes first and foremost concentrate on the integration of economic legal relations, the issues of family law (being especially difficult and controversial, and having widespread moral and religious consequences) are slowly and gradually recognized in practice as the subject of same harmonization efforts. Consequently, from a longer perspective, (crossing treaty frames) the foundations of "European family law" are being laid "in practice."[5]

What is important is that there are numerous legal instruments regulating mainly civil procedure, as it is now a priority to strive to tighten and facilitate efficient cooperation between courts and other bodies dealing with the legal protection of the family. But a thorough analysis of the issues included in those

2 Hereinafter: MFC. The principles of MFC was prepared on the base of research of Committee on European Family Law (CEFL). See: Ingeborg H. Schwenzer, and Mariel Dimsey, *Model Family Code: From Global Perspective*. Antwerp, Oxford, 2006.

3 Hereinafter: Constitution.

4 Hereinafter: FGC.

5 Tomasz Sokołowski, "The Concept of European Family Law" in *Selected Problem in the Area of Family Law and Civil Status Registration*, ed. P. Kasprzyk. Lublin, 2007, 13–22.

instruments indicates that they introduce, even now, new categories constituting direct elements of substantive law without sufficient backgrounds of empirical scientific research. First of all appear the ideological definitions of the "new concept of marriage", rather than scientific ones, as well as the new approach to the relation between child and parents. In that way they have a sort of "a side effect", but crucially they also affect the substantive institutions of family law. However this "circumlocutory" activity produced strictly inappropriate effects: for example the Decree 1259/2010 of 20.12.2010, relating to applicable law of divorce ("Roma III") is not binding for some EU states, including Poland.

The clause on "a child's welfare" and State's protection of families and family life

Numerous general clauses are characteristic of family law, in particular the clause on 'a child's well-being', which constitutes an "optimal configuration of elements of the state of affairs regarding a child, i.e. a child's interest". The protection of the child's well-being constitutes the most important principle of Polish family law (similar to Article 3.1 and 3.2 MFC) and both the well-being of the family as well as the interest of other persons (and legal persons, even the State) must constantly give way to a child's welfare. Usually, in a typical well-functioning family, the child's well-being remains in a harmonious relationship with the interests of other persons, and the parents themselves protect the well-being of their child. A conflict of personal interests appears only in dysfunctional families.

The state's protection of families and family life is expressed in Article 18 of the Constitution, which stipulates that marriage and the family, motherhood and parenthood, are to be placed under the protection and care of the State.

Article 71 of the Constitution states that the State, in its social and economic policy, must take into account the well-being of the family. In compliance with that provision, a mother, both before and after giving birth, has the

right to special assistance from public authorities. The protection of a child's well-being as an obligation of the State is regulated by Article 72. Under this Article the institution of the Commissioner for Children's Rights has been established to protect children.

Article 33 of the Constitution expresses the principle of equality between men and women, whereas Article 47 of the Constitution regulates the right to legal protection of one's family life or privacy.

The influence of the European Court of Human Rights' jurisprudence

However, the influence of the European Court of Human Rights[6] jurisprudence would be more significant if only the Court would recognize the priority of the protection of child welfare, in connection with the protection of the child's human rights, over the protection of the human rights of an adult person. It is high time to recognize a child as a subject of his or her own human rights, benefitting from protection equal to that granted to adult persons. What is more, a child is also subject to another system of protection: the protection of child welfare. As a result, three adequate spheres of child protection can be recognized.

A child, even when very small, is entitled to full-scale protection of his or her private and family life. Most importantly, from the moment a child is born, these two spheres of the child's protection – that of privacy and that of family life – overlap in practice. Over time, as the child grows, these two areas will gradually start to differentiate. The most significant feature of today's family law institutions is that they apply to or influence the present as well as the future situation of a given child.

As a matter of fact, some judicial decisions of the ECtHR seem to be only in the early stages of theoretical reflection, and are therefore too one-sided.[7] In

6 Hereinafter: ECtHR.

7 S. Chloudrhry and J. Herring note that the Strasbourg jurisprudence is not developed in the careful analytical style of the common law jurisprudence (Shazia Chloudrhry, and Jonathan Herring, *European Human Rights and Family Law*. Oxford, 2010, 39).

family law cases, the Court is inclined to give precedence to the protection of the human rights of an adult individual, without sufficiently addressing the welfare of an affected child. But a child must be protected both as an individual subject of human rights and as a child involved in family relationships.[8] If and when all of the above factors are combined and taken into consideration by the ECtHR, its jurisprudence may turn out more beneficial for child welfare. In any deliberations in family law cases, each of three factors – the child's welfare, the child's human rights, and the human rights of the adults involved – should be addressed. As it happens, it is currently the protection of the rights of adults which seems to be the only one of these three that is taken into account in these cases.

Marriage and partnership. Marriage and Family

Article 1.1 of MFC declares: "Partnership include marriages. Partnerships include non-marital relationships if (a) they have lasted more than three years, (b) there is common child, or (c) one of each of the partners has made substantial contributions to the relationship or in the sole interests of the other partner."

This approach is not at all consistent with the Polish legal system, because of the division between private life and family life, which has crucial importance. Family life is a social situation between spouses or relatives caused exclusively by coital (copulatory) interactions between spouses or partners, or by adoption which eventually resulted in maternity, paternity and kinship between the relatives. On the other hand the private life is a social situation caused broadly by various personal interaction which effected only personal relations. Private life has a broader range, always containing family life. The fundamental two categories of this division are the sexual interactions (as the broad group of per-

8 In addition, another problem is connected with the issue of the protection of the welfare of the entire family in relation to the ECtHR system and the Charter of Fundamental Rights: Helen Stalford, "EU Family Law: A Human Rights Perspective" in *International Family Law for the European Union*, eds. J. Meeusen, M. Pertegás, G. Straetmans, and F. Swennen. Antwerp, 2007, 103.

sonal behaviors) and the coital interactions (conjugal interaction) as exclusively the behavior which appears between two adult persons of different sex. The coital interactions constitutes the different and only one kind of the social unit , which is open for maternity, paternity and kinship between the relatives.

These legal differences between private life and family life are broad. Because family life is a special category of private life, it has all the features of private life and, in addition, a many of its own features.

In consequence the Polish legal system refuses the concept expressed in Article 1.3 MFC. The provisions of Article 18 of the Constitution state that marriage is a union of a woman and a man. In consequence under Article 23 FGC, the family is based on a marriage, which is a permanent legal union of a man and a woman. Consequently each marriage has to be: monogamous, equal, conjugal, contractual[9] and dissolvable. In particular the equality of spouses is a cornerstone of democracy. Constitutional equality of citizens, which is a foundation of democracy is impossible and unattainable when any considerable inequality appears between spouses inside the family home: both in terms of privacy and of matrimonial property relations.

Concubinage or other unions and protection of privacy and family life

The family may be also composed of a mother, a father and a child without marriage. Contrary to Article 1.1 a MFC, conjugal unions of persons who have not contracted a marriage are treated as concubinage. Concubinage (in some way similar to unregistered partnership) as a union between a woman and a man has only a private character, but it can be transferred into a family situa-

9 There is no doubt that Article 1.4 MFC followed this strengthened contractual nature of marriage. The age requirement of FGC is 18 years, similar to Article 1.5 MFC, however under the provision of Article 10 FGC a woman who has reached her sixteenth birthday can, in exceptional cases, be granted permission to marry by a court. The impediments which occur in Article 13, 14, 15 FGC are similar to those expressed in Article 1.6 and 1.7 MFC. The family name is regulated in Article 25 § 2 and 3 FGC, similar to Article 1.8 MFC.

tion because of maternity and paternity, connected with the arrival of the common child of the partners. From this point of view, it is indispensable to divide all the private phenomena into two groups: the **transformable phenomena** and the **nontransferable phenomena**.[10]

If a concubinage is transformed into a family it receives the full scale protection from the State in accordance with the model described above in points 2 and 3.

Though all conjugal (coital) interactions have a sexual character, a large group of sexual interactions have no conjugal character at all and are recognized as nontransferable private phenomena. Also other unions without any sexual bonds have nontransferable nature.

Looking at other unions than marriage and concubinage, we meet Article 1.1 MFC, which does not deliver any leading feature (*differentia specifica*) of the key category of "partnership". The sentence: "Partnerships include marriages. Partnerships include non-marital relationships…" has mixed completely different categories: "marriage" (which is a legal institution and a social group with strengthened connotation from ages) and non-marital relationships (which is only a relation, not a group). Because of this gap it is impossible to recognize the scope of regulation of the entire MFC. One may assume that Article 1.1. MFC concerns any social units, despite its structure (dual or multilateral) and the nature of interactions between partners. In the light of the theory of law and the rules of logic, the meaning of this provision is not sufficiently clear and the MFC deserves rejection in its entirety.

However we can assume that among various possible groups, Article 1.1 MFC concerns two groups: the group of two persons connected by only sexual, not conjugal relationships, and secondly the group of two persons connected by other bonds than sexual. All these other unions of persons cannot be treated as marriages because of the lack of the essential feature of the presence of con-

10 Tomasz Sokołowski, and Andrzej Mączyński, "Ways of family life." In *Rapports Polonais. XXth Congress of Comparative Law, AIDC/IACL, Fukuoka, Japan, July 2018*, ed. B. Lewaszkiewicz-Petrykowska. Łódź, 2018, 27–56.

jugal interactions, and have a nontransferable nature. As a result these units are recognized by the Polish legal system as having only a private character because of the impossibility of maternity and paternity of a common child.

It is necessary to underline that Poland has a very long tradition of entirely legal homosexual relations, which have been fully allowed without of any punishment since 1932. This high level of tolerance was only reached in many of other European countries in the last decades of the 20th century. As a great number of various social units having only a private character, homosexual units have the complete legal protection of the Civil Code through the construction of substantive personal rights of privacy.

Since 1932, the Polish legal system has had a long time to elaborate the regulation of some detailed issues connected with this legal situation. From this perspective, the attempt of the regulation contained in the MFC in this area seems to be rather immature.

Divorce

Divorce is granted only by a court[11] upon petition of one spouse, despite some procedural details quite similar to those expressed in Article 1.9 MFC. However the conception of a mandatory "period of six months" specified in Article 1.10 is definitely rejected as too old-fashioned. There is in Article 56 FGC only one positive premise for a decree of divorce, i.e. permanent and irretrievable breakdown of marriage. The breakdown of marital cohabitation takes place when one of the spouses ceases to fulfil marital functions, in other words there is a breakdown of emotional, physical and economic bonds between the spouses.

There are also three negative premises for divorce and they constitute obstacles to having a decree of divorce issued. The court may not dissolve the mar-

11 The competence of administrative body foreseen in Article1.12 and 1.13 MFC would be recognized by Polish family law as unconstitutional.

riage if: (1) the divorce conflicts with the interest of the child, (2) the divorce conflicts with social coexistence principles (public policy), and (3) the petitioner is fully at fault for the breakdown of cohabitation (however, there are some cases in which the divorce may be decreed in this case).

Because the detailed provision of Article 58 FGC obliges the court which issues a divorce decree (or separation decision) to decide upon parental authority, each divorce (or separation) decree contains a decision concerning the child's housing as an obligatory element. Also the amended Article 58 FGC in the new § 1a decides that the court can leave the whole parental authority to both parents only if they present an agreement on the exercise of their parental authority. However, even if both parents are granted the whole parental authority, only one of them has the basic right and duty of "executing the regular care upon the child" (similar to Article1.19 MFC). This means that the dwelling of such a parent is the place of housing of the child (*domicilium necessarium*). It is necessary to underline that the meaning and scope of the term of "executing the regular care upon the child" is the subject of very wide discussion. In addition, Article 58 § 1 FGC states that the court has a duty to take into account the parental agreement about the method of executing parental authority and provide the contacts with the child after divorce, if it is harmonious with child's welfare.

Alternative Dispute Resolution (ADR)

Very similar to Article 11.14 MFC, in Polish divorce law the court can direct spouses to professional mediation if in the course of the proceedings it recognizes that there still exist a possibility that the marriage may function correctly (Article 436 § 1 Civil Procedure Code[12]). The court also has the duty of suspending the proceedings if it is convinced that there still exists a possibility to maintain conjugal life (Article 440 § 1 CPC). Such a suspension can happen only once in the course of the entire divorce proceedings. However,

12 Hereinafter: CPC.

a suspension of the proceedings is not allowed if marital cohabitation has already stopped. Mediation must be fully voluntary, both at the moment when it starts, and throughout its process (Article 1831 § 1 CPC). No penalty clause is allowed.

Out-of-court mediation is also applied. The court can direct spouses to mediation in every phase of the proceeding. The aim of the mediation is to obtain amicable settlement of all controversial issues (Article 4452 § 1 CPC). The institution of mediation is generally (in the civil law mode) regulated in the CPC in Articles 1831–18315 CPC, and the provisions of the divorce procedure (Article 436 § 2 CPC) make reference to these general provisions of mediation, accordingly. However, the different character of family matters must be preserved.

The mediation is organized out of court. Pursuant to Article 1832 § 3 CPC, non-governmental organizations, acting within the scope of their statutory tasks, as well as universities, can keep registers of mediators and create centers for mediation.

Family mediation concerns all matters relating to the fulfillment of the maintenance or future alimentation for the child or spouse, if applicable.[13] Mediation can also concern different issues, especially housing. The basic aim of mediation is to create sufficient room for reaching an agreement, in which spouses can either achieve reconciliation or at least agree on a solution for controversial post-divorce matters.

It also includes parental agreement on parental authority and contacts, as well as all property matters. The method of building this parental agreement is strictly contractual: the parties have to bargain or discuss each element of the exercise of parental authority. This is the same scope of issues which are decided in a divorce judgment. Usually the court scrutinizes the parental agreement aiming to support it if it is compatible with the best interests of the child.

13 Tomasz Sokołowski in *System Prawa Prywatnego*, vol. 11, *Prawo rodzinne i opiekuńcze*, ed. T. Smyczyński. Warszawa, 2014, 730 et seq.

However, the court is never formally bound by such agreement of spouses; the only exception concerns the division of common property.

Subsequently to divorce the **annulment of marriage** is regulated in case of violation of impediments. In same situation that is indicated in Article 1.11 sentence 1 MFC, the FGC applies the institution of annulment of marriage in Article 17. For the situation indicated in Article 1.11 sentence 2 MFC, the FGC applies a similar regulation in Article 17.

Shared custody after divorce

After divorce, the court regulates the issue of the sole custody or joint custody of the common child (Article 58 FGC). Under Article 95 § 3 FGC, parental authority is established to protect the child's welfare and the interests of society; the interests of the parents are not mentioned at all in the FGC. In recent times researchers have gradually begun to take the ECtHR jurisprudence of Article 8 ECHR into consideration,[14] clearly documenting the disputable conception of the necessity of finding a more proper balance between the protection of the child's welfare and the protection of the parents' right to respect for family life.

As a result of this new approach, the very doubtful idea of pure shared care (alternate care, symmetric care) by divorced parents for their child has

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14 Tadeusz Jasudowicz, "O potrzebie upodmiotowienia rodziny" [The Family as the Subject of Rights] in *Księga Jubileuszowa Profesora Tadeusza Smyczyńskiego* [Jubilee Book for Professor Tadeusz Smyczyński], eds. M. Andrzejewski, M. Łączkowska, L. Kociucki, and A. N. Schulz. Toruń, 2008, 204 et seq.; Piotr Mostowik, "Brak "strasburskiego" bądź "brukselskiego" obowiązku", in *Związki partnerskie: Debata na temat projektowanych zmian prawnych*, ed. M. Andrzejewski. Toruń, 2013, 221 et seq.; Tomasz Sokołowski, "Dobro dziecka wobec rzekomego prawa do adopcji" [The Welfare of the Child in Face of the Alleged Right of Adopting Persons] in *Związki partnerskie: Debata na temat projektowanych zmian prawnych*, 103 et seq.; Anna Natalia Schulz, "Ustalenie ojcostwa i utrzymywanie kontaktów z dzieckiem – niektóre prawa ojca w świetle orzecznictwa Europejskiego Trybunału Praw Człowieka" in *Księga Jubileuszowa Profesora Tadeusza Smyczyńskiego*, eds. M. Andrzejewski, M. Łączkowska, L. Kociucki, and A. N. Schulz. Toruń, 2008: 343–357; Anna Śledzińska-Simon, "Rozwód czy prawne uznanie płci? Glosa do wyroku ETPCz z 13.11.2012 r. w sprawie H. przeciwko Finlandii" [Gloss to the Judgment of the ECtHR of 13 November 2012, 37359/09, H. v. Finland], *Europejski Przegląd Sądowy*, no. 7. 2013: 40–45.

become the subject of discussion in the Polish doctrine. Some researchers recognize the idea of shared care, (which shall be granted to both parents in equal level), as the optimal basic solution.[15] This idea is based on the principle of equal protection of the human and constitutional rights of both parents.[16] Other researchers underline the priority of the principle of the child's welfare over the protection of parents' rights, and generally recognize the idea of symmetric care as conflicting with the best interests of minor children.[17] While critics of shared care do not directly cite the jurisprudence of the ECtHR as yet, judgments such as *Y.C. v. the United Kingdom*[18] or *Johansen v. Norway*[19] will undoubtedly be widely discussed in the publications in the near future.

Doubtless the quite new concept of shared custody is connected to a new conception of private way of life of divorced persons.

Financial consequences upon dissolution of marriage

The rights and duties of spouses are regulated in comparable ways: in Article 23 FGC nearly the same regulation appears as in Article1.15 MFC. Simi-

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15 Shared care is a new and very disputed idea. In practice shared care (as symmetric care) is not granted to both parents in half of all cases. Currently, as a rule in the majority of cases asymmetric care is granted by the courts.

16 Robert Kucharski, "Wspólna władza rodzicielska nad małoletnim dzieckiem w USA w świetle prawodawstwa i badań specjalistycznych" [Joint Parental Authority over a Minor Child in the USA in Light of the Legislation and Professional Research], *Rodzina i Prawo* [Family and Law], no. 23. 2012: 35 et seq.; Jacek Wierciński, "Kilka uwag o władzy rodzicielskiej nad małoletnim dzieckiem w razie rozwodu rodziców w ujęciu porównawczym" [Comparative Analysis of Parental Authority with Respect to a Minor in Divorce Cases], *Studia Prawa Prywatnego* 24, no. 1. 2012: 24, strongly supports the concept of purely shared care on the one hand, he notes the necessity of protecting the best interests of the child on the other hand.

17 Wanda Stojanowska in *System Prawa Prywatnego*, vol. 12, *Prawo rodzinne i opiekuńcze*, ed. T. Smyczyński. Warszawa 2011, 777–782; Jacek Ignaczewski in *Komentarz do spraw rodzinnych*, ed. J. Ignaczewski. Warszawa, 2012, 201 et seq.; Bronisław Czech, in *Kodeks rodzinny i opiekuńczy. Komentarz* [FGC Commentary], ed. K. Piasecki. Warszawa, 2009, 500; Tomasz Sokołowski in *Kodeks rodzinny i opiekuńczy. Komentarz* [FGC Commentary], eds. H. Dolecki, and T. Sokołowski. Warszawa, 2013, 455.

18 *Y.C. v. the United Kingdom* (no. 4547/10), Judgment of 13 March 2012 (not reported), § 134.

19 *Johansen v. Norway* (no. 12750/02), Decision of 10 October 2002 (not reported).

larly, Article 1.16 MFC is comparable to Article 28 FGC and Article 1.17 and 1.18 MFC to Article 281 FGC.

As was indicated above, the financial consequences upon dissolution of marriage are regulated in the FGC in connection with a definite property regime, however the consequences upon dissolution of other unions are regulated in the Civil Code.

Despite the declarations, the regulation of MFC proposes to introduce a sort of separate property rights with equalisation. The scope of separated property is regulated in Article1.23 and the rules of this equalization are detailed described in Article 1.21–1.37. The regulation deserves criticism because, first of all, it avoids the effective protection of equality of spouses **before** the dissolution. Furthermore, on the one hand it establishes too narrow scope of effective final equalization, and on other hand, is far too complicated and imprecise precise because it "relies heavily on a wide discretion of the court".[20] Generally speaking, the attempt to transfer the balance of economical relation between spouses from the "period of living union " to the sphere of the consequences of dissolution is wholly unimpressive. Looking to the social practice we can say: "Lets deal with existing relationships".

The Polish legal system has reasonable experience with this model of regulation because we had a similar property regime after World War II, since 1950. After this period the system of community property was introduced and works very effectively until the present time. It must be underlined that in 2000 the Committee of Novelization of Civil Law submitted the project of new matrimonial property regulation with attempt to introduce as mandatory the system of separate property rights in marriage with equalisation of the property acquired during the course of the marriage (in part similar to the method of regulation of the MFC). However the vast majority of the General Assembly of judges and jurisprudence representatives rejected this project, because of the protection of the rule of equality between spouses. In the Polish legal

20 Schwenzer, and Dimsey, 43.

tradition, any concept of combining mandatory family inequality in the home's private internal sphere with the protection of the equality of citizens in the public space would have sounded schizophrenic. However, each couple can freely shape their relations within their family and the system of property relations inside the family may be modified according to the individual viewpoint of the spouses, which are conditioned by the personal character of family bonds.

In consequence, the Committee of Novelization of Civil Law modernized the previous project. In 2005 the amendment of the FGC introduced the system of separate property rights in marriage with equalisation only as the additional contractual system. Even so, after 15 years of legal practice this system is recognized as definitely unpopular and it is extremely rarely chosen by spouses.[21]

Lastly, the property regulation of the FGC refers to relations with third parties and property relations between the spouses, which encompass the system of matrimonial property rights, prenuptial agreements and marriage settlements, other contracts between spouses, and the right to live in the premises of the other spouse (Article 281 FGC, just like Article1.17 MFC). There are two systems of property rights in marriage: a statutory system of joint property of the spouses, and a contractual system of separate property rights in marriage.

In the case of statutory joint property, there are three properties: the joint property of spouses and two personal (individual, separate) properties of each of spouse. Each of them keeps his or her property acquired before the conclusion of marriage as well as any property inherited during the marriage. However, property acquired after the conclusion of marriage is treated as joint property of the spouses, with the exception of some objects which enrich the personal property of one of the spouses. The joint property of the spouses is established the moment the marriage is contracted, and ceases to exist, at the latest, the moment the marriage ceases. The joint property of spouses also includes the all remuneration of spouses and all income generated by their personal property. This scope of separate

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21 Błażej Bugajski, *Rozdzielność majątkowa z wyrównaniem dorobków* [Separate property rights in marriage with equalisation]. Warszawa, 2020.

property is different than the regulation of Article 1.23 MFC, because it recognises the income and proceeds as the element of separate property.

The system of joint property of spouses may, in turn, be divided into: 1. a statutory system of joint property, 2. contractual joint property, which may be further divided into extended joint property or restricted joint property.

The systems of separate property rights in marriage include three systems: 1. a simple contractual system of fully separate property rights, 2. a system of compulsory separation of property rights, and 3. a system of separate property rights in marriage with equalisation of the property acquired during the course of the marriage. The last system may be introduced as a result of a concluded prenuptial agreement or a marriage settlement.

Lastly, it is necessary to point that the MFC omits the very important subject of the regulation of civil liability of the spouses, especially the liability for the spouse's obligations and the protection of creditors (Articles 41, 47 § 2 and Article 50 FGC), which deserves detailed regulation.

In addition, in the case of division of common property, in general, at the moment of the termination of the existence of the joint property of spouses, the property is divided into two equal shares (which has in part a similar function to the regulations of 1.20, 1.21, 1.22 and 1.27 MFC). However, the court has the competence to establish unequal shares: Article 43 § 2 and 3 FGC regulates this matter in a quite similar was to Article 1.28 and 1.29 MFC. Also, Article 45 FGC regulates the legal consequence of abstained benefits and detriments in quite a similar way to Article 1.26 MFC (despite the general differences of the construction of the matrimonial property regime).

Descent of a child

Under Article 619 FGC a mother, under the law, is a woman who has given birth to a child (and not, e.g. the so-called genetic mother). This is similar to the regulation of Article 3.4 MFC.

This presumption of maternity or paternity, however, may be rebutted in the course of proceedings regarding denial of maternity or paternity: Article 6111 and 63 FGC are similar to 3.6 MFC. The child may challenge the legal parentage within three years of his or her age of majority: Article 6114 FGC is in part similar to Article 3.7 MFC. The birth mother may challenge the legal maternity of the legal mother: Article 6112 FGC is in part similar to Article 3.9 MFC.

The traditional construction of parentage by adjudication was rejected in 2008 because it was recognized as an old-fashioned institution, inharmonious with the fundamental rule of protecting a child's personal identity, expressed in Article 8.1–2, Article 11, Article 20.3 the UN Convention on the Rights of the Child[22] and, as well, in Article 50.1 of Constitution. Nowadays Article 73 and Article 74 FGC express the new institution of common declaration, given by both mother of the child and the father, of his biological paternity of the child, even unborn up till now (Article 75 FGC). This regulation is only partially similar to Article 3.10 MFC.

Recently under Article 751 FGC the legal consequences of agreements on artificial insemination of the wife are regulated and the husband is presumed to be the father if he agreed to assisted procreation. However, after his or her maturity the child has the right to access the medical data concerning the identity of the genetic parent (Article 38.2 of the Legal Act of the medical treatment of infertility of 25 of July 2015). There is quite a similar regulation in Article 3.5 MFC.

Parental authority

Article 48.1 of the Constitution regulates the right of parents to rear their children in accordance with their own convictions. This article also imposes on parents an obligation to respect the degree of maturity of a child in the course of such upbringing. Article 53.3 gives parents the right to ensure their children a moral and religious upbringing and teaching in accordance with their con-

22 Hereinafter: CRC.

victions. However, it also directs parents to respect a child's freedom of conscience and belief as well as his or her convictions in the case of an older child (Article 48.1 of the Constitution). Article 48.2 states that a limitation or deprivation of parental authority may be effected only in instances specified by statute and only on the basis of a final court judgment (not an administrative decision). The regulation of the FGC fulfils these main directives. Generally the FGC regulates this matter to a significantly greater than the MFC.

One of the main differences is that only parents are the subjects of parental authority. What is more, instead of the parental responsibility of third parties regulated in Article 2.28 MFC, in Polish family law there is extensive and detailed regulation of "foster care" in Article 112–1128 FGC. In addition the Legal Act of foster care of 2011 regulates this matter very extensively in more than 200 articles. In the main, the legal parents and the foster parents can execute some elements of parental authority jointly.

However the regulation of Article 3.37 MFC seems to be unconvincing for the reason that the process of decision regarding important matters must be executed quickly and skillfully. It truly hard to imagine that "several holders of parental responsibility" could effectively make a decision concerning the child's serious medical treatment in the event of personal conflict between them. The FGC regulation providing that the mother and father are the only two decision-makers is more convincing.

Generally in the FGC there are several similar detailed regulations which we can find in MFC. Parental responsibility is recognized in Article as "a duty and right" of parents. The general clause of child welfare is contained in Article 95 § 1, § 3 FGC and Article 3.1, Article 3.2, Article 3.25, Article 3.26 MFC. The hearing of the child is covered in Article 96 § 4 FGC and Article 3.3 MFC. The regulations of the child's care, support, protection of integrity, property administration and representation are very similar.

Child protection

The FGC recognizes child protection as a quite large part of the regulation of parental authority. Depending on the threat to the child's welfare, court intervention may take three forms: limitation of parental authority; suspension of parental authority; or deprivation of parental authority.

The most frequent methods of limiting parental authority are in part similar to Article 3.43 MFC. Article 109 FGC includes: (1) obliging the parents to behave in a specific manner under court supervision, (2) subjecting parents to the supervision of a court-appointed guardian, (3) sending the child to a centre that exercises partial care/custody over children, (4) placing the child with a foster family or in a care and educational facility. In the last of these cases, the guardianship court notifies the local family welfare centre run by the local administration at county or municipal level, which provides appropriate support to the minor's family and reports to the guardianship court on the family's situation. Therefore, this situation may be reversible and, after it improves, the child may return to his or her natural family, similar to Article 3.44 MFC.

Deprivation of parental authority may be obligatory or optional. It is obligatory in three strictly defined cases: (1) the appearance of a permanent obstacle to exercising parental authority, (2) the abuse of parental authority, and (3) gross negligence in the obligations of the parents with respect to the child. Optional deprivation refers to a situation where the family's situation does not improve significantly after the child has been removed from the family's care and placed outside the natural family, despite the support provided to the family. Parental authority may be restored if the reason for deprivation ceases to exist.

Child's advocate

In 2021 the new institution of curator to the child's case ("child's advocate") was introduced to the FGC. In consequence, an advocate or a legal counsel can be appointed by a court as a curator to represent incidentally the minor in a child's court case if neither parent may represent the child (Article 99 § 1 FGC). The

curator can perform any and all activities relating to the case, including the appeal and execution of a ruling (Article 99 § 2 FGC). By special recommendations of Article 991 § 1 FGC, the advocate or legal counsel has to have a special knowledge of the issues relating to the child, or of the same type or topically corresponding to a case, or has completed special training. The training concerns the principles of representing a child, and the rights or needs of a child.

If the complexity of the case does not require the same, the curator may also be a person holding a degree in law and exhibiting familiarity with the child's needs. However, this does not apply during criminal proceedings.

In accordance with Article 992 § 1 FGC appears the duty of informing of the parents. A "child's advocate" shall provide the parent of the child at their request, with information necessary for the proper exercise of parental authority regarding the course of the proceedings. In addition he has the duty of acquiring the information. The curator shall obtain information on the child, their health condition, family situation and environment from that parent. He may also apply for the information referred to authorities or institutions as well as associations and social organisations to which the child belongs or which provide aid thereto (Article 992 § 2 FGC).

Child's curator has as well the duty of informing of the child. If the mental development, health condition and the degree of maturity of a child so allows, the curator shall contact them and proper inform them about the actions taken, the course of the proceeding and their legal situation (Article 992 § 3 FGC).

The last issue is the advocate's secrecy. The curator shall keep the circumstances of the case secret (Article 992 § 4 FGC). However, exceptionally the duty does not apply if there is credible information about crimes committed to the detriment of the child.

Contact

The new separated institution of contact existing beyond the scope of parental authority since 2008 concerns that between the parents and child. Differently than

in Article 3.38 MFC, pursuant to Article 113–1136 FGC both parents and the child are obliged to and have a right to keep in touch with each other and their relatives. Those contacts include: (1) the contact with the child such as visits, meetings, taking the child outside the permanent residence, (2) getting in touch directly through physical conversations with specific persons, i.e. face to face contact (and not just by phone), (3) correspondence, (4) keeping in touch by using other methods of distance communication, including electronic methods (telephone), radio communication or talking via the Internet.

In the event that the parents, or one of the parents, must separate from their children, they should, together, decide about the mode of keeping in touch with the child. If they cannot arrive at a consensus, the guardianship court will settle the dispute.

Previously, before the amendment of 2008, a major part of the domestic jurisprudence recognized contacts as the object of parents' subjective rights. Also, nearly unanimously, the right of contact was considered separately from the institution of parental authority as protected by Article 48 of the Constitution, which grants parents "the right to rear their children in accordance with their own convictions".[23] The standpoint of the Polish Supreme Court[24] was much more diversified. First, the Polish SC shared the prevailing conception of jurisprudence.[25] This concept was subsequently supported in numerous judgments of the Polish SC, which underlined the necessity of removing parental authority before taking the more severe measure of banning contact.[26] This standpoint of the Polish SC was amended in 2006.[27] A substantial domestic discussion on the scope and legal character of contact rights had begun, and the judgments

23 Janusz Gajda, *Kodeks rodzinny i opiekuńczy: Komentarz* [FGC Commentary]. Warszawa, 1999, 365.

24 Hereinafter: SC.

25 The resolution of the Polish SC of 18 March 1968, III CZP 70/66, OSNCP 1968, no. 5, item 77 (known as the "SC Divorce Directive").

26 Judgment (resolution) of the Polish SC of 21 October 2005, III CZP 75/05, OSNC 2006, no. 9, § 142.

27 Resolution of the Polish SC of 8 March 2006, III CZP 98/05, OSNC 2006, no. 10, item 15.

of the ECtHR, including those in the cases of *Santos Nunes v. Portugal*[28] and *Dąbrowska v. Poland*, were especially influential.

In the context of a long discussion, the jurisprudence of the ECtHR was taken into account on the domestic level. After two very important Strasbourg judgments – *Hoffmann v. Germany* and *Schultz v. Poland* – contact rights were recognized alongside a subjective right of the child existing beyond the scope of parental authority. Despite the different concept of contact rights chosen by the Polish SC, the Polish Committee for the Novelization of Civil Law recommended a draft amendment which fully separated contact from parental authority. The Polish Parliament decided to amend the regulation of this issue following this project. As a result, currently, after the amendments in 2008 and 2011, contact has been recognized as a legal institution fully separate from parental authority (Articles 58, 107, 113, 1131–1136 FGC.). The Polish SC took the new regulation into account in its recent jurisprudence.[29] However, the jurisprudence does not approach the new regulation homogenously and remarked that the division between contact rights and parental authority is overly sophisticated and irrational from a procedural point of view,[30] or recognized it as eccentric. Others suggest that the removal of parental authority should affect contact rights, just as a ban on contact should affect parental authority.[31] The majority of the relevant Polish jurisprudence has agreed with the new concept of contact rights, but has underlined the influence of the UNCRC[32] and the European Convention on Contact concerning Children[33] as the basic source of the new regulation. Other authors underline the necessity of discuss-

28 *Santos Nunes v. Portugal* (61173/08), Judgment of 22 May 2012.
29 Judgment of the Polish SC of 23 May 2012, III CZP 21/12, LEX no. 1168215.
30 Jacek Ignaczewski, *Komentarz do spraw kontaktów z dzieckiem*. Warszawa, 2011, 24 et seq.
31 Tomasz Justyński, *Prawo do kontaktów z dzieckiem w prawie polskim i obcym*. Warszawa, 2011, 113 et seq.
32 In 1978, the Polish State put forward the very first draft of this Convention: Thomas Hammarberg. "The Best interest of the child – what it means and what it demands from adults" in *Children's Rights and Human Development*, ed. J. C. Willems. Antferp, Oxfort, Portland, 2010, 582.
33 European Convention on Contact concerning Children, Strasbourg, 15 May 2003.

ing the judgments of ECtHR, for example in the influential cases of *Santos Nunes v. Portugal* and *Schneider v. Germany*.[34]

Alimentation

Alimony and maintenance are legal relations as a result of which the obligation to provide means of support is created and the obligation may result from marriage, kinship and adoption. Maintenance of relatives refers to direct relatives and siblings. The obligations of a divorced spouse in this respect (Article 60 of FGC) constitute a sort of continuance of the obligation to support one's family (Article 27 of FGC). This regulation has a very similar function to Article 1.31 MFC and, secondly is quite similar to Article 1.24, 1.25 MFC and to some extent has a similar scope to Article 1.30 MFC.

A duty to maintain may also exist between an adopted child and adoptive parents bound by incomplete adoption (in the case of a complete adoption, the adopted child becomes a child), and between stepfather and stepchild, and it burdens a father of a child born out of wedlock on behalf of the child's mother (Articles 141–142 of FGC).

In the event that the execution of alimony and maintenance turns out to be ineffective, the benefit is paid out by the special Alimony Fund (Journal of Laws of 2019, item 670).

Adoption

The Polish regulation of adoption under the FGC is certainly different from regulation of the MFC. In Polish law, adoption is the creation of a legal bond, the content of which is basically the same as the bond that results from natural paternity. The adopted child becomes the child of adoptive parents by operation of law.

34 Sokołowski in *Kodeks rodzinny i opiekuńczy. Komentarz*, 799 et seq.

Upon Article 114 FGC, “adoption serves **only** to protect child welfare” but what is surprising is that the MFC regulation avoids a similarly clear declaration. Pursuant to Article 3.15 MFC, somebody could deduce that adoption protects not only the best interests of the child but as well the interest of adopter. Such an approach seems to be a reminder of former conceptions of adoption.

These differences affect all the legal constructions of adoption. According to the FGC, any reduction in the scope of the protection of child welfare to the advantage of the adopter is prohibited. This results in the rule of the protection of child identity, expressed in in Article 8.1–2, Article11, Article 20.3 CRC (indicated above).

From this reason in Polish family law the adoption can be established only: (1) for one person, who is recognized as “adoptive mother” or “adoptive father”, or (2) for spouses recognized as “adoptive mother and father” (Article 115 § 1 FGC). With regard to the protection of the welfare of the child, the adoption of “two adoptive mothers” or “two adoptive fathers” is not possible. It was introduced in the Legal Act on Adoption of 13 July 1939 and received in Article 115 § 1 FGC. First of all, the protection of the child’s biological, genetic identity, personal identity and the secret of the fact of adoption (as two of crucial elements of the child’s best interest) required the establishment of as similar a structure to the structure of a natural family as possible. It follows the rule: “*Adoptio naturam imitatutr*”.

The MFC regulation is undoubtedly inharmonious with this fundamental rule of the protection of the child’s personal identity regulated in CRC. Probably it creates the sphere of balancing between the protection of child welfare and the interest of adopters and deserves fundamental change.

It is worth noting that Article 20 of CRC, concerns the fate of children deprived of a family, and therefore also the case of the parents being detached. Such a child has the right to foster care. The CRC expresses the principle that a child has a right to continuity of the social environment. In addition, Article 14.1 of the CRC requires state-parties to respect the child’s right to

the freedom of thought, conscience and religion. It would therefore be erroneous practice to entrust a child to the care of those who cannot or do not ensure continuation of the previously implemented line of education.[35] Unfortunately, this principle has recently been much forgotten and is frequently breached in the practice of welfare law application. In consequence, a child is sometimes placed in an environment with different ideological views to those of his parents.[36]

However same details of adoption are regulated in the FGC in part or entirely in a similar way to MFC. The age of the adopter and age difference in Article 1141 FGC is defined as "adequate" (differently than under Article 3.12 MFC) but the functions are the same. The consent of the legal parent (3.13 MFC and Article 119 and 1191 FGC) is regulated in a very similar way. However, the consent of the child (3.14 MFC) is regulated in FGC much more broadly (Article 118 § § 1, 2, 3 FGC).

Parenthood by adoption, the child's right to know its origins, the revocation and its consequences, are regulated very similarly. However, completely anonymous adoption[37] is irrevocable (Article 1251 FGC).

References

Bugajski, Błażej. *Rozdzielność majątkowa z wyrównaniem dorobków* [Separate property rights in marriage with equalisation]. Warszawa, 2020.

Chloudrhry, Shazia, and Jonathan Herring. *European Human Rights and Family Law*. Oxford, 2010.

35 Tomasz Sokołowski, "Family Forms and Parenthood in Poland" in *Family Forms and Parenthood*, eds. A. Büchler, and H. Keller. Cambridge, Antwerp, Portland, 2016, 365 et seq.

36 Tomasz Sokołowski, "Защита прав ребенка как прав человека в ходе судопроизводства по делам усыновления" [Protection of child's rights as human rights in cases of adoption] in *Polish and Russian Law: Dilemmas new and old*, ed. L. Moskwa. Poznań, 2011, 23 et seq.

37 Under FGC are three forms of adoption: 1. full adoption, 2. complete anonymous adoption, 3. incomplete adoption.

Czech, Bronisław, in *Kodeks rodzinny i opiekuńczy. Komentarz* [FGC Commentary], ed. K. Piasecki. Warszawa, 2009, 348–624.

Gajda, Janusz. *Kodeks rodzinny i opiekuńczy: Komentarz* [FGC Commentary]. Warszawa, 1999.

Hammarberg, Thomas. "The Best interest of the child – what it means and what it demands from adults." In *Children's Rights and Human Development*, edited by Jan C. Willems. Antferp, Oxfort, Portland, 2010: 581–592.

Ignaczewski, Jacek. In *Komentarz do spraw rodzinnych*, ed. J. Ignaczewski. Warszawa, 2012: 201–236

Ignaczewski, Jacek. *Komentarz do spraw kontaktów z dzieckiem*. Warszawa, 2011.

Jasudowicz, Tadeusz. "O potrzebie upodmiotowienia rodziny" [The Family as the Subject of Rights]. In *Księga Jubileuszowa Profesora Tadeusza Smyczyńskiego* [Jubilee Book for Professor Tadeusz Smyczyński], edited by Marek Andrzejewski, Małgorzata Łączkowska, Lechosław Kociucki, and Anna Natalia Schulz. Toruń, 2008: 204–224.

Justyński, Tomasz. *Prawo do kontaktów z dzieckiem w prawie polskim i obcym*. Warszawa, 2011.

Kucharski, Robert. "Wspólna władza rodzicielska nad małoletnim dzieckiem w USA w świetle prawodawstwa i badań specjalistycznych" [Joint Parental Authority over a Minor Child in the USA in Light of the Legislation and Professional Research]. *Rodzina i Prawo* [Family and Law], no. 23. 2012: 35–49.

Mostowik, Piotr. "Brak "strasburskiego" bądź "brukselskiego" obowiązku." In *Związki partnerskie: Debata na temat projektowanych zmian prawnych*, edited by Marek Andrzejewski. Toruń, 2013: 221–240.

Schulz, Anna Natalia. "Ustalenie ojcostwa i utrzymywanie kontaktów z dzieckiem – niektóre prawa ojca w świetle orzecznictwa Europejskiego Trybunału Praw Człowieka." In *Księga Jubileuszowa Profesora Tadeusza Smyczyńskiego*, edited by Marek Andrzejewski, Małgorzata Łączkowska, Lechosław Kociucki, and Anna Natalia Schulz. Toruń, 2008: 343–357.

Schwenzer, Ingeborg H., and Mariel Dimsey. *Model Family Code: From Global Perspective*. Antwerp, Oxford, 2006.

Sokołowski, Tomasz. In *Kodeks rodzinny i opiekuńczy. Komentarz* [FGC Commentary], eds. Henryk Dolecki, and Tomasz Sokołowski. Warszawa, 2013: 796–820.

Sokołowski, Tomasz. In *System Prawa Prywatnego*, vol. 11, *Prawo rodzinne i opiekuńcze*, edited by Tadeusz Smyczyński. Warszawa, 2014 : 574–623; 710–735.

Sokołowski, Tomasz. "Dobro dziecka wobec rzekomego prawa do adopcji" [The Welfare of the Child in Face of the Alleged Right of Adopting Persons]. In *Związki partnerskie: Debata na temat projektowanych zmian prawnych*, edited by Marek Andrzejewski. Toruń, 2013: 103–116.

Sokołowski, Tomasz. "Family Forms and Parenthood in Poland" in *Family Forms and Parenthood*, edited by Andrea Büchler, and Helen Keller. Cambridge, Antwerp, Portland, 2016: 341–378.

Sokołowski, Tomasz. "The Concept of European Family Law." In *Selected Problem in the Area of Family Law and Civil Status Registration*, edited by Piotr Kasprzyk. Lublin, 2007: 13–22.

Sokołowski, Tomasz. "Защита прав ребенка как прав человека в ходе судопроизводства по делам усыновления" [Protection of child's rights as human rights in cases of adoption]. In *Polish and Russian Law: Dilemmas new and old*, edited by Leopold Moskwa. Poznań, 2011: 189–198.

Sokołowski, Tomasz, and Andrzej Mączyński, "Ways of family life." In *Rapports Polonais. XXth Congress of Comparative Law, AIDC/IACL, Fukuoka, Japan, July 2018*, edited by Biruta Lewaszkiewicz-Petrykowska. Łódź, 2018: 27–56.

Stalford, Helen. "EU Family Law: A Human Rights Perspective." In *International Family Law for the European Union*, edited by Johan Meeusen, Marta Pertegás, Gert Straetmans, and Frederik Swennen. Antwerp, 2007: 101–127.

Stojanowska, Wanda. In *System Prawa Prywatnego*, vol. 12, *Prawo rodzinne i opiekuńcze*, edited by Tadeusz Smyczyński. Warszawa, 2011: 777–782.

Śledzińska-Simon, Anna. "Rozwód czy prawne uznanie płci? glosa do wyroku ETPCz z 13.11.2012 r. w sprawie H. przeciwko Finlandii" [Gloss to the Judgment of the ECtHR of 13 November 2012, 37359/09, H. v. Finland], *Europejski Przegląd Sądowy*, no. 7. 2013: 40–45.

Wierciński, Jacek. "Kilka uwag o władzy rodzicielskiej nad małoletnim dzieckiem w razie rozwodu rodziców w ujęciu porównawczym" [Comparative Analysis of Parental Authority with Respect to a Minor in Divorce Cases], *Studia Prawa Prywatnego* 24, no. 1. 2012: 19–28.

H v. Finland, no. 37359/09, Judgment of 13 November 2012.

Johansen v. Norway, no. 12750/02, Decision of 10 October 2002.

Santos Nunes v. Portugal Santos Nunes v. Portugal, no. 61173/08, Judgment of 22 May 2012.

Y.C. v. the United Kingdom, no. 4547/10, Judgment of 13 March 2012.

Resolution of the Polish Supreme Court of 18 March 1968, III CZP 70/66, OSNCP 1968, no. 5, item 77.

Resolution of the Polish Supreme Court of 21 October 2005, III CZP 75/05, OSNC 2006, no. 9. § 142.

Resolution of the Polish Supreme Court of 8 March 2006, III CZP 98/05, OSNC 2006, no. 10, item 15.

Judgment of the Polish Supreme Court of 23 May 2012, III CZP 21/12, LEX no. 1168215.

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How to understand the principle of non-splitting of shares in Polish and German company law – a tale of historical equivalence and comparative importance

Abstract: The article examines the understanding of the principle of non-splitting, showcasing the historical and comparative equivalence of the German and Polish legal systems. It concerns the non-splitting of shares in Polish and German law, as applied to the limited liability company and the non-public joint-stock company. It is aimed at conceptualizing in a comparative manner the theoretical model of non-splitting, and encompasses discussions about its nature, content, and normative bases for its binding force. Under Polish law two different understandings of the principle of non-splitting of shares are distinguished: the principle of non-splitting in the strict sense, and the principle of non-splitting in the broad sense. It is argued that German law uses the concept of prohibition of splitting, while in the Polish legal system this concept has been further developed and is to be perceived as a principle of non-splitting of shares that is to be classified as general principle of company law.

Keywords: company law, share, limited liability company, non-public joint-stock company.

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Introduction

The inspiration for this article[2] is the view of S. Sołtysiński expressed in the Volume 17B of the Private Law System,[3] which covers specifically issues related to the law of companies in Poland. Sołtysiński proposed that the theory of the Polish commercial law (company law) should recognize the principle of non-splitting as one of the fundamental principles governing companies.

More importantly, Polish scholars, including the above-mentioned Sołtysiński, utilized the German theoretical and legal concept of "*Abspaltungsverbot*" ("the prohibition of splitting") as early as the 1990s, when it became apparent that such a formula, inspired from the German *Abspaltungsverbot*, has its place in the theory of company law in Poland and needs to play the important role of a systemic principle. Historically speaking, the theoretical and legal context of the Polish principle of non-splitting (previously also named by scholars in Poland as "prohibition of splitting") was heavily inspired by German law.[4] Indeed, the Polish principle of non-splitting has its comparable source equivalent in the German *Abspaltungsverbot*.

The juxtaposition of these two legal institutions – the Polish principle of non-splitting with the German "*Abspaltungsverbot*" (prohibition of splitting) – aims to help explain the meaning of this Polish systemic principle of company law. As explained in the article, the principle of non-splitting has not been comprehensively codified in the Polish Code of Commercial Companies, so this contribution aims to highlight its characteristics, the basis for its validity, and its practical value, thanks to the comparative analysis with the German counterpart.

Therefore, the choice of German law as a comparative equivalent for the purpose of this article seems clearly understandable. German company law

2 This paper is part of the research project funded by the National Science Center of Poland (Narodowe Centrum Nauki) UMO-2014/13/N/HS5/01442.

3 Stanisław Sołtysiński in *System Prawa Prywatnego*, vol. 17b, *Prawo spółek kapitałowych*, ed. S. Sołtysiński,1st ed. Warszawa, 2010, 18.

4 Stanisław Sołtysiński in Stanisław Sołtysiński, Andrzej Szajkowski, and Janusz Szwaja, *Kodeks handlowy. Komentarz*, vol. 1. Warszawa, 1994, 136.

is not only a commonly used inspiration for the Polish legislator in general, but the concept of *Abspaltungsverbot* has been specifically mentioned in the doctrinal works concerning the Polish principle of non-splitting. The comparative study could be very fruitful food for thought since the institution of *Abspaltungsverbot* has been quite widely described in German legal scholarship,[5] and in German jurisprudence.[6] This comparative approach therefore aims to provide a better, more in-depth understanding of the principle of non-splitting in the Polish company law system.

In this article, this comparison is based on the comparative studies of legal institutions understood as sets of legal norms,[7] as reflected by their functionality. This comparability related to the functions of the principle of non-splitting and *Abspaltungsverbot* concerns in particular the essence of share rights, as well as trading in share rights and its limitations.

The comparative method[8] is applied in such a way that a representative legal order was selected for the system (legal culture) of civil law: German law. The choice of German law as the subject of comparative analysis relates direct-

5 i.e.: Christoph H. Seibt, “Verbandssouveränität und Abspaltungsverbot im Aktien und Kapitalmarktrecht Revisited: Hidden Ownership, Empty Voting und Kleinigkeiten”, *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 39, no. 5. 2010: 795–800; Karsten Schmidt, *Gesellschaftsrecht*, 4th ed. Köln, Berlin, Bonn, München, 2002, 560–562; Hans-Joachim Fleck, “Stimmrechtsabspaltung in der GmbH?” in *Festschrift für Robert Fischer*, eds. Marcus Lutter, Walter Stimpel, and Herbert Wiedemann. Berlin, New York, 1979, 107–129; Harm Peter Westermann, *Vertragsfreiheit und Typengesetzlichkeit im Recht der Personengesellschaften*. Heidelberg, New York, 1970, 425; Herbert Wiedemann, *Die Übertragung und Vererbung von Mitgliedschaften bei Handelsgesellschaften*. München, Berlin, 1965, 282.

6 i.e.: judgment of BGH of 25 February 1965, II ZR 278/63 (Karlsruhe), NJW 1965, no. 30, p. 1378 – (NJW 1965, 1378); judgment of BGH of 10 November 1951, II ZR 111/50 (Celle), NJW 1952, z. 5, p. 178 – (BGHZ 3, 354, 357 = NJW 1952, 178); judgment of BGH of 14 May 1956, II ZR 229/54 (Karlsruhe), NJW 1956, no. 33, p. 1198 – (BGHZ 20, 363, 365 = NJW 1956, 1198); judgment of BGH of 11 October 1976, II ZR 119/75, DB 1976, no. 48, p. 2295–2298 – (DB 1976, 2295–2298); judgment of BGH of 17 November 1986, II ZR 96/86 (Köln), NJW 1987, no. 13, p. 780 – (NJW 1987, 780).

7 Roman Tokarczyk, *Komparatystyka prawnicza*, 8th ed. Kraków, 2005, 68.

8 Nils Jansen, “Comparative Law and Comparative Knowledge”, in *The Oxford Handbook of Comparative Law*, eds. Mathias Reimann, and Reinhard Zimmerman. Oxford, 2008, 305–338.

ly to the roots of the Polish company law system, specifically the Polish Commercial Code of 1934 – the predecessor to the current Code of Commercial Companies of 2000. In fact, the structure of a joint-stock company and limited liability company in the Polish Commercial Code, just like the entire Code, was modelled on German law.[9] The current Polish Code of Commercial Companies is an "heir"[10] to the Commercial Code of 1934 since it was modelled in particular on the doctrinal and jurisprudence foundations developed under the rule of the Commercial Code[11]. This approach is commonly referred to as the principle of the continuation[12] of the fundamental legal solutions of Polish company law.

Connecting those German influences and their effects on the Commercial Code and the current Code of Commercial Companies through the principle of continuation with the subject of this paper, it is worth noting that at the time when the Commercial Code was still in force, several important questions arose in connection with selling (trading) of shares, inter alia, whether a shareholder may dispose of individual rights incorporated in a share, or, in the event of selling of a share, disposing (transferring) of such rights must cover all rights related to that share (with the exception of claims arising from that share – e.g. due dividend instalments, which could be sold separately).[13] This problematic question, which is relevant in practice, is still being contemplated under the current Code of Commercial Companies in Poland. In addition, under this Code, the scope of the disposal (of a share) is also a concerning issue. The question is therefore whether the disposal (of a share) must encompass all the rights enshrined in a share or could

9 Józef Frąckowiak, in *System Prawa Handlowego*, vol. 2B, *Prawo spółek handlowych*, ed. S. Włodyka, Warszawa, 2007, 24; Uzasadnienie projektu ustawy Kodeks Spółek Handlowych, Druk Nr 1687, Sejm Rzeczypospolitej Polskiej III Kadencji, p. 22.

10 Uzasadnienie projektu ustawy Kodeks Spółek Handlowych, Druk Nr 1687, Sejm Rzeczypospolitej Polskiej III Kadencji, p. 1.

11 Andrzej Szajkowski, in *System Prawa Prywatnego*, vol. 16, *Prawo spółek osobowych*, ed. A. Szajkowski, 2nd ed. Warszawa, 2016, 12.

12 Szajkowski, 2, 45.

13 Janusz Szwaja, and Iwona Mika, "Wpływ zabezpieczenia roszczenia przez zajęcie praw z akcji na wykonywanie tych praw przez akcjonariusza", *Prawo Spółek* 4, no. 5(41). 2000: 6.

be limited specifically to one or more rights embodied in the share (partial rights). This concerns the idea that there exists a functional relationship between the essence of the share and those rights embodied in it.[14]

These two mentioned examples show how the theoretical problem elaborated in this article, through the comparative research, is directly translated into practical aspects of the application of rules governing the functioning of companies.

The concept of non-splitting (Abspaltungsverbot) in German law

To explain the *Abspaltungsverbot* in German law, it is necessary to explain that normally a shareholder owns a share in a company that encompasses the shareholder's rights. In other words, the share can be understood as including a bundle of rights. Under special circumstances, a question may appear, as already mentioned, as to whether particular rights could be separated from the bundle of rights, without the change of the ownership of the share as such. This means that even if the shareholder still owns the share, and therefore all the rights incorporated in such a share, another person might be able, underthose special circumstances, to "acquire" a particular right incorporated in that share, without becoming a shareholder. In order to verify whether the so-called "splitting" of a right may occur, in special circumstances, in Germany[15] the so-called "test of non-splitting" has been developed. According to its premise, it is proposed to test how voting right will act (the so called voting right test), i.e. who will be entitled to it in the case of such special legal relationships as a pledge, usufruct or trust.

14 Andrzej Szumański, in *System Prawa Prywatnego*, vol. 19, *Prawo papierów wartościowych*, ed. A. Szumański, 1st ed. Warszawa, 2006, 297; Andrzej Szumański in Wojciech Pyzioł, Andrzej Szumański, and Ireneusz Weiss, *Prawo spółek*. Warszawa, 2004, 659–660.

15 Schmidt, 561.

The linguistic approach to non-splitting in German legal language should be considered significant, as German law in this context consistently uses the term "*Abspaltungsverbot*", thus emphasizing the element of the prohibition ("*Verbot*").

In Germany, the idea of the non-splitting of company shares has been conceptually linked to the more general theoretical concepts governing private law. This idea is rooted in the BGB (German Civil Code) rules on civil partnership (that is, civil law partnerships– so-called "*BGB Gesellschaft*"). The German concept of *Abspaltungsverbot* has developed further on the ground of partnerships, and thereafter this concept has been transferred, with appropriate modifications, onto companies.

In German law, it is often understood that the origins (foundations) of the prohibition of splitting (*Abspaltungsverbot*) are set out in § 717 BGB (German Civil Code), which regulates civil law partnerships (*BGB Gesellschaft*).

The provision of § 717 BGB stipulates that, despite the consent of another partner of the civil law partnership (*BGB Gesellschaft*), the rights to manage the partnership that belong to a partner may not be transferred to a third party without transferring the membership rights. Moreover, the allocation of these rights to a third party (a non-partner in the *BGB Gesellschaft*) for the purpose of exercising them is always revocable (it may be revoked at any time). The *Abspaltungsverbot* therefore expresses the nature of the civil law partnership (*BGB Gesellschaft*), which encompasses not only management rights, but also the rights to run the civil law partnership's affairs, the right to information, the right of control, and voting rights. All these rights are in fact related to participation. In other words, all the rights stemming from the membership (participation) in a civil law partnership (*BGB Gesellschaft*), which are dependent on and inherent to this membership, and therefore could not be separated from it.[16]

16 Peter Ulmer, "Zur Bedeutung des gesellschaftsrechtlichen Abspaltungsverbots für den Nießbrauch am OHG (KG)-Anteil" in *Festschrift für Hans-Joachim Fleck zum 70. Geburtstag am 30. Januar 1988*, eds. Reinhard Goerdeler, Peter Hommelhoff, Marcus Lutter, and Herbert Wiedemann. Berlin, Boston, 1988, 384–385.

When transposing these ideas derived from above-mentioned § 717 BGB onto partnerships and companies in Germany, the prohibition of splitting ("*Abspaltungsverbot*") is perceived in the legal doctrine as one of the general construction rules[17] for German commercial law (company law).

Through the lens of a company, it is emphasized that one of the basic features of the rights related to the membership (generally speaking, expressed by having a share – by being a shareholder) in a limited liability company, or in a joint-stock company, is that individual rights embodied in a share cannot be detached from that share as such. Consequently, those individual rights embodied in a share cannot be traded (sold) on their own (as separate rights), nor can they be encumbered. In other words, the individual rights embodied (incorporated) in a share cannot be detached from that share, and, in addition, as such separately isolated rights they cannot be transferred to a third party without the simultaneous transfer of the share (as a "whole").

At the same time, it is argued in German law that the prohibition of splitting applies only to the core of rights embodied in a share, and not to individual claims arising from share, such as a dividend claim.[18] Consequently, the shareholder's rights pertaining to them through their share in a company, and the related obligations, are all inherent to their membership, and therefore they cannot be separated (extracted) from share or transferred individually (as separate rights) without a transfer of a share.

The principle of the non-transferability of (individual) membership rights resulting from § 717 BGB is absolute in relation to corporate rights and leads to the invalidity of actions that are contrary to it. This rule is confirmed in the jurisprudence and in doctrinal works.[19] The dismemberment of the member-

17 Thomas Raiser, and Rüdiger Veil, *Recht der Kapitalgesellschaften, Ein Handbuch für Praxis und Wissenschaft*, 5th ed. München, 2010, 65–66.

18 Tim Drygala, Marco Staake, and Stephan Szalai, *Kapitalgesellschaftsrecht: Mit Grundzügen des Konzern- und Umwandlungsrechts*. Berlin, Heidelberg, 2012, 292.

19 Judgment of BGH of 10 November 1951; judgment of BGH of 14 May 1956; judgment of BGH of 22 January 1962, II ZR 11/61, NJW 1962, no. 16, p. 738 – (BGHZ 36, 292, 293 ff. = NJW 1962, 738); judgment of BGH of 17 November 1986, – concerns § 134 AktG; judg-

ship (participation) is therefore not possible, and is to be perceived as violating *Abspaltungsverbot*.

Although the norm expressed in § 717 BGB applies to all the rights arising from membership, as the rights resulting from membership are in principle non-transferable corporate rights, such as the voting right, the German doctrine also adopted the position, in principle, that the prohibition of splitting covers property rights as well, for instance, at least the right to profit. Consequently, the profit entitlement (right) itself can only be transferred jointly with the share and not as an isolated, separate right. This view on property rights is supplemented by a caveat, that it changes when a specific claim arises, for instance, a claim for payment of a particular amount of annual dividend.

To differentiate between the property rights embodied in a share, which cannot be disposed of separately, and the claims stemming from those property rights, the moment when individual property rights are specified must be properly and precisely estimated so that it can be converted into a claim. On the example of the right to profit (i.e. a property right embodied in a share), only when the right to profit is made concrete by a resolution on profit distribution and therefore materializes in the form of a specific claim, does such a claim become independent, and therefore it can be "separated" from the share. In fact, *Abspaltungsverbot* no longer encompasses those claims, as it would have the property rights incorporated in the share. In addition, future specified claims can also be transferable. They can be transferred to the assignee (transferee) as soon as they arise. However, the corporate rights related to the claim, e.g. voting rights in the case of a resolution concerning the distribution of profit, remain with the shareholder (and their share) and are non-splittable.[20]

In German law, the applicability of § 717 BGB to other types of partnerships and companies than civil law partnerships (*BGB Gesellschaft*) results from the fact that the German Commercial Code (HGB) envisions in § 105

ment of BGH of 11 July 1960, II ZR 260/59, NJW 1960, no. 44, p. 1997 – (BGHZ 33, 105, 108 ff. = NJW 1960, 1997).

20 Raiser, and Veil, 65–66.

para. 3 HGB that § 717 BGB applies to German general partnerships ("*Offene Gesellschaft*") – § 105 (3) HGB and limited partnerships – "*Komandit Gesellschaft*" (§ 161 (2) HGB). In addition, it is assumed under the German stock law that § 8 sec. 5 AktG is the emanation of § 717 BGB in relation to a joint-stock company. According to this provision, shares are indivisible (non-splitable) – *Die Aktien sind unteilbar*. A comparable provision to § 8 sec. 5 AktG is in fact included in the Polish Code of Commercial Companies. Indeed, Art. 333 § 1 sentence 1 of Code of Commercial Companies has the same wording: "Shares are indivisible (non-splittable)". Nevertheless, scholars in Poland have not provided any analysis whatsoever in the commentaries to this provision as to whether the principle of non-splitting in Poland could be inferred from this provision when it comes to Polish joint-stock companies.

In case of a German joint-stock company, it is rather unquestionably indicated that *Abspaltungsverbot* has a statutory basis. The splitting of individual rights and obligations incorporated in a share is inadmissible based on the already mentioned § 8 para. 5 AktG.[21]

Moreover, it is assumed that § 8 para. 5 AktG is an expression of the general rule contained in § 717 BGB under the German stock law. For this reason, § 8 para. 5 AktG is regarded as a rule regulating the prohibition of splitting in relation to a joint-stock company as an overarching construction rule of "company law" (more broadly, the law of "*Verbandsrecht*" – associations). This general rule states that the membership rights in the company may not be transferred to other persons without the simultaneous transfer of share. Both shareholders and the company are the addressee of this rule.

The highest German court in commercial matters, *Bundesgerichtshof* (BGH), has already expressed its views on *Abspaltungsverbot*, also applying the "non-splitting test". In the judgment of October 11, 1976, II ZR 119/75 the BGH indicated that membership in a limited liability company

21 Stefan Vatter, "Commentary to § 8 AktG", Nb 50, in *Kommentar zum Aktiengesetz*, vol. 1, §§ 1–*178*, eds. G. Spindler, and E. Stilz. München, 2007, 43.

(GmbH) is based on an internally consistent (fine-tuned) unity of rights, obligations, and responsibilities. A situation in which this unity would be disrupted by a long-term detachment of an essential membership right, which is the voting right, or its permanent exercise by a person who is not a shareholder, without the shareholder being able to restore it to its original condition (without the "return" of this right to the shareholder), could lead to significant disruptions to the company's internal structure and to legal uncertainty. Similarly, in BGH's judgment of November 17, 1986, II ZR 96/86[22] in a joint-stock company case, BGH ruled that the voting right in a joint-stock company cannot be separated ("split") from shares and transferred to another person without transferring shares.

However, considering the above-mentioned differentiation between the transfer of individual rights embodied in a share (which is contrary to *Abspaltungsverbot*) and the possibility of the exercise of un-splitable rights by a third person (in relation to shareholders), it needs to be underlined that the prohibition of splitting does not run counter to a general agreement, under which an individual shareholder's rights will be effectively exercised by a third party (through a transfer under the mentioned special circumstances[23]). This issue primarily concerns the rights to managing the company's affairs and granting proxy rights. However, it also concerns the right to control the company or the voting right. The difference between the former and the latter is that the right to control the company and the voting right may not be perpetually transferred for exercise to a third party and shareholders may at any time deprive the third party of the possibility of exercising them if they wish to exercise these rights themselves again. Indeed, the delegation to exercise rights for a certain period of time to a third party does not contradict the prohibition of splitting because under such circumstances it is not a final transfer.

22 Judgment of BGH of 17 November 1986.

23 Carsten Schäfer, "Commentary to § 717 BGB", Rn 9–10 in *Münchener Kommentar zum BGB, Schuldrecht. Besonderer Teil III*, ed. M. Habersack, 6th ed. München, 2013, 367–368.

The principle of non-splitting in Polish law

The above-mentioned model rooted in the German legal system in § 717 BGB can be found in the Polish legal system, showcasing that the German *Abspaltungsverbot* was the above-mentioned inspiration for Polish solutions in this regard. Broadly speaking, the principle of non-splitting in Polish company law can be characterized as the prohibition (impossibility) of disintegrating a share understood as a subjective right.

Historically speaking, the concept of § 717 BGB was first reproduced in Art. 565 § 1 of the Polish Code of Obligations of 1933.[24] Similarly to § 717 BGB, Art. 565 § 1 of Code of Obligations regulated the internal relations of the partnership of civil law ("*spółka cywilna*").

Art. 565 § 1 of the Code of Obligations of 1933 stipulated that "in relation to the civil law partnership, a partner may not dispose of the rights (stemming from the civil law partnership contract), with the exception of rights to benefits in money or in other things, which they are entitled to as a share in profits during the civil law partnership's lifetime, return expenses, remuneration for running the affairs, and rights arising from the division of property after the resignation of a partner or dissolution of the civil law partnership". This provision was in force until 1965, when the Polish Civil Code of 1964 ("*Kodeks cywilny*") came into force. The Civil Code of 1964, which is still binding in Poland, does not provide for a similar concept, when compared with Art. 565 § 1 of Code of Obligations. Currently, Art. 863 of the Polish Civil Code[25] seems to be most similar to Art. 565 § 1 of the Code of Obligations. This shows a semi-direct link between the solution envisioned under the BGB in Germany and potentially also under the current Polish Civil Code.

24 Regulation of the President of the Republic dated October 27, 1933 – Code of Obligations (Journal of Laws of October 28, 1933, no. 82, item 598 as amended).

25 Wojciech Górecki, "Dopuszczalność przenoszenia członkostwa w spółce cywilnej", *Przegląd Prawa Handlowego*, no. 1. 2000: 41.

In terms of definition, the principle of non-splitting can be characterized from two perspectives. It is customary in the scholarship[26] to differentiate between the understanding of the principle of non-splitting in the broad sense (*sensu largo*) and a comparable understanding of this principle in the strict sense (*sensu stricto*). The above-mentioned distinction seems to help to fully explain the content of the principle of non-splitting, so both aspects of this principle, i.e. the broad approach and the narrow one, are discussed below.

Non-splitting in the broad sense can be understood as a "prohibition" (impossibility) of splitting (separating) organizational (corporate) rights from obligatory property rights[27] embodied in a share.

Polish scholars articulate various positions as to how to correctly understand the principle of non-splitting in Polish company law.

S. Sołtysiński points out that traditionally the term "splitting of shareholders rights" (*Abspaltung*) is understood as the separation of rights incorporated in a share from the share itself, identified as membership in a company (German: "*Mitgliedschaft*"). Sometimes, however, this prohibition is reduced to the prohibition of splitting organizational (corporate) rights from obligatory property rights.[28]

Ł. Gasiński seems to share the doctrine's statements regarding the distinction between not-splitting *sensu stricto* and *sensu largo*. However, non-splitting in the broad sense is defined by *Ł. Gasiński* in a different way, i.e. according to him, it may be possible to separate corporate law (voting rights) from other property rights.[29]

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26 Andrzej Herbet, *Obrót udziałami w sp. z o.o.*, 2nd ed. Warszawa, 2004, 163.

27 Andrzej Herbet, in *System Prawa Prywatnego*, vol. 17a, *Prawo spółek kapitałowych*, ed. S. Sołtysiński, 2nd ed. Warszawa, 2015, 406.

28 Stanisław Sołtysiński in Stanisław Sołtysiński, Andrzej Szajkowski, and Janusz Szwaja, *Kodeks handlowy. Komentarz*, vol. 1. Warszawa, 1997, 152; Janusz A. Strzępka, and Ewa Zielińska in *Kodek spółek handlowych. Komentarz*, ed. J. A. Strzępka. Warszawa, 2001, 107.

29 Łukasz Gasiński, *Umowy akcjonariuszy co do sposobu wykonywania prawa głosu w prawie polskim i prawie amerykańskim*. Warszawa, 2006, 200.

On the other hand, according to A. Herbet, the non-splitting directive in the broader sense is a criterion for assessing the admissibility of performing other legal acts (than the transfer of separate rights embodied in a share), which results in a permanent "split" of all or some corporate rights from purely property rights.[30]

Altogether, the principle of non-splitting in the broad sense states that it is impossible (it is in fact forbidden) to separate (split) organizational and property rights embodied in shares.

Secondly, the principle of non-splitting *sensu stricto* means the inadmissibility (impossibility) of a separation, disposition of corporate rights without the simultaneous disposal (transfer) of a share (all rights that make up this share).[31]

The principle of non-splitting *sensu stricto* (principle of non-splitting of corporate rights) will apply only to corporate rights. It therefore implies the impossibility of separating from a share, or of transferring or disposing of individual corporate rights, without transferring the share as such. A more radical (strict) version of the principle of non-splitting *sensu stricto* suggests the impossibility of permanently, continuously exercising corporate rights by non-shareholders, except in cases where such a possibility arises unquestionably from a provision (norm) or from the nature of the legal relationship that enables such exercise.

Despite the above commentaries, it still seems possible to distinguish general criteria for permissible splitting. The permitted scope of "splitting" would allow one to conceive of such legal acts that will, on the one hand, be in line with – and therefore will not violate – the principle of non-splitting, and will, on the other, simultaneously fall within the permitted framework of the principle of disposition of shares.[32]

30 Andrzej Herbet in *System Prawa Prywatnego*, vol. 17a, *Prawo spółek kapitałowych*, ed. S. Sołtysiński, 1st ed. Warszawa, 2010, 372.

31 Grzegorz Kozieł, "Zakres przedmiotowy i podmiotowy przeniesienia praw i obowiązków wspólnika spółki osobowej", *Przegląd Prawa Handlowego*, no. 12. 2003: 41.

32 Katarzyna Szczepańska, *Zasada nierozszczepialności w spółkach kapitałowych*. Warszawa, 2020, 136–164.

Justification for the binding force of non-splitting

In German law *Abspaltungsverbot* has already been justified by references to several theories.

The prohibition of splitting in German law is overwhelmingly referenced to § 717 BGB. However, despite this frequent mentioning, it is not entirely clear whether § 717 BGB in fact expresses such a prohibition, because this provision prohibits the transfer of claims arising from a civil law partnership (*BGB Gesellschaft*), while the prohibition on splitting concerns the problem of transfer (disposability) of corporate rights embodied in a share.

An explanation of why the abovementioned provision refers to a claim can be found by following the history of its creation. Originally, in fact this norm was not related to the prohibition of splitting understood as the prohibition on the transfer (disposability) of corporate rights. Moreover, it dates back to the time before the first BGB project, when the civil law partnership was understood in line with the Roman law model. According to this pattern, there were only (contractual) obligations between the parties of the civil law partnership, which were based on consensus between them, and which could be terminated at any time.[33]

Another justification for the prohibition of splitting concerns the idea that the split, in particular of voting rights, would lead to a change in its content.[34] Paragraph 399 BGB refers to changes to the content with regard to voting rights.[35] The reference to the prohibition of splitting in this provision presupposes that the category of corporate rights is comparable with that of the claim. The basis of corporate rights is an obligation relationship as a special type of relationship between at least two persons, under which one person (the creditor) is entitled to demand that another person (the debtor) fulfils an obligation. The obligation is understood as the achievement of some benefit

33 Max Kaser, *Römisches Privatrecht*, 18th ed. München, 2005, 226.

34 Ulrich Huber, *Vermögensanteil, Kapitalanteil und Gesellschaftsanteil an Personengesellschaften des Handelsrechts*. Heidelberg, 1970, 51; Schmidt, 605.

35 Fleck, 107.

for the creditor, and may encompass both the debtor's action or inaction in accordance with § 194 par. 1 BGB.[36]

In contrast, corporate rights compensate (equalize) the will and legal capacity of a partnership/company. In this case, the actions taken by the "members" of the partnership/company have the same value (force) as the actions of the partnership/company. The legal order assigns decisions made by company members (partners) to the partnership/company.[37] Corporate rights are an instrument that allows participation in the creation of will in a partnership//company. Performing corporate rights then is a condition for the company to have the ability to build decisions and take actions, and thus prevent situations where third parties could influence the company or actually exercise control over it. Moreover, company/partnership operates thanks its partners (shareholders) (it exists and is perceived through the prism of its partners/shareholders). In this case the paradigm of the partial identification of shareholders with the company, and the partnership with it partners, becomes apparent. In summary, the corporate rights differ too much from the claims set out in § 399 BGB that the interpretation of this provision could justify the prohibition of splitting.

H. Wiedemann takes the view that the prohibition of splitting can be derived from § 137 BGB. According to this author, the corporate rights of a shareholder can be equated with the disposing rights expressed in this provision: each property right grants its owner similar management and ownership rights and thus guarantees him a certain freedom of action provided by the indicated norm. Due to the rights *in rem*, the entitled person has the right to dispose of the thing and is entitled to material-law authorizations resulting from these rights – they are comparable to management and corporate rights in the sense of the rights arising from membership (rights of being a member, being a shareholder) in the company. Moreover, according to *H. Wiedemann*, § 137 BGB neither rules out

36 Helmut Heinrichs, "Commentary to § 241 BGB" in Otto Palandt, *Bürgerliches Gesetzbuch. Kommentar*. München, 2006, 239–240.

37 Schmidt, 439.

nor excludes the possibility of undertaking disposable actions (transactions) and therefore it is also permissible to dispose of voting rights.[38]

These views are, however, questioned by other authors. It is doubtful whether equating management and corporate rights with the right to dispose is justified.[39] At the time of the splitting of the voting right, the shareholder is not deprived of the possibility of disposing of his "membership" (share) in company.[40] Only in the case of partnerships is the consent of the other partners required for the transfer or the encumbrance of membership rights.[41]

Moreover, the prohibition of splitting is justified in Germany by the reference to § 985 BGB and § 894 BGB. The starting point in this instance is that it is impossible to split the right to disclose in the land and mortgage register from the ownership of the property, and that it is impossible to split the claim for release of the goods from the ownership right to this property.[42] From this standpoint, a general rule is derived that any splitting of individual rights from a bundle of rights should not be allowed, and this is what the prohibition of splitting serves for. Pursuant to § 985 BGB and § 894 BGB, the fundamental aspect of the impossibility of splitting of entitlements is the function of these provisions to guarantee ownership in the sense of being disposable. This feature is transferred to justify the prohibition of splitting in the sense that in the event of splitting there would be a situation in which there would be a permanent separation between the disposition of the right and the right itself.[43]

One of the possible functions of the prohibition of splitting is to protect the shareholder who would cede (split) the rights arising from their share. This is because in this way they devote, (takes from themselves) certain rights, un-

38 Wiedemann, *Die Übertragung und Vererbung von Mitgliedschaften bei Handelsgesellschaften*, 283.
39 Westermann, *Vertragsfreiheit und Typengesetzlichkeit im Recht der Personengesellschaften*, 425.
40 Fleck, 112.
41 Schmidt, 1321–1324.
42 Harm Peter Westermann, *Sachenrecht*, 7th ed. Heidelberg, 1998, 421.
43 Wolfgang Schön, *Der Niessbrauch an Sachen: Gesetzliche Struktur und rechtsgeschäftliche Gestaltung*. Köln, 1992, 252. .

derstood as means that could serve them in the future to exercise their rights resulting from membership in the company.[44] Thus, the function of the prohibition of splitting could be described as the protection of the shareholder against self-incapacitation.[45]

To support this position, the judgment of BGH of July 12, 1965, II ZR 118/63[46] can be cited. In this case, the partner of a (general) partnership transferred all his rights to the trustee for a lifelong term. Consequently, the partner had no influence on the actions taken by the trustee, could not give orders or "dismiss" him, while he was still, as a partner, subject to unlimited personal liability. This situation can be boiled down to the sentence "there is no power without responsibility". In this way, the partner has economically "incapacitated" himself, which is incompatible with the fundamental values of the legal order and is therefore considered contrary to good customs.

Another justification for the prohibition of splitting in the jurisprudence is based on the so-called doctrine of the core of rights, which states that there is an inalienable core of the rights incorporated in a share.[47]

The principle of the company's organizational sovereignty is also referred to as the justification for the prohibition of splitting.[48] In this case, it has a protective function over the company. Indeed, the principle of the organizational sovereignty of the company should protect it from the influence of third parties and should guarantee the company's right to self-determination.

Similarly, in Polish company law several normative bases justifying the principle of non-splitting can also be found. The justification can relate to a set of spe-

44 Wiedemann, *Die Übertragung und Vererbung von Mitgliedschaften bei Handelsgesellschaften*, 282.

45 Christoph Weber, *Privatautonomie und Außeneinfluss im Gesellschaftsrecht*. Tübingen, 2000, 252.

46 Judgment of BGH of 12 July 1965, II ZR 118/63, NJW 1965, no. 46, pp. 2147–2148 – (BGHZ 44, 158 = NJW 1965, 2147–2148).

47 Judgment of BGH of 14 May 1956.

48 Herbert Wiedemann, "Verbandssouveränität und Außeneinfluss" in *Gesellschaftsrecht und Unternehmensrecht: Festschrift für Wolfgang Schilling zum 65. Geburtstag am 5.6.1973*, eds. R. Fischer, and W. Hefermehl. Berlin, Boston, 1973, 111, 114.

cific provisions contained both in the Code of Commercial Companies and in the Civil Code, or can be derived from other systemic principles of Polish company law. In this way, the principle of non-splitting fulfills the generalizing and unifying function in the system of commercial companies in Poland, thus contributing also to higher trading security in the country. One of the grounds for the binding force of the principle of non-splitting can be derived, *a contrario*, from Art. 187 § 2 and Art. 340 § 1 of the Code Commercial Companies. Since the pledgee and usufructuary may exercise their voting rights in strictly defined circumstances and after meeting the conditions provided for by these provisions, *a contrario* it is not possible for third parties other than the pledgee or usufructuary to exercise corporate rights on their own behalf (unless clearly foreseen by other legal provisions). At the same time, both provisions provide for the possibility of only exercising, and not of transferring (selling) voting rights to the pledgee or usufructuary. Art. 242 of the Code of Commercial Companies, which binds the voting right to a share, i.e. the voting right is related to the share and cannot be traded on its own, could also be mentioned to justify the principle of non-splitting. Another possibility to justify the principle of non-splitting in Polish company law is to invoke Art. 3531 and Art. 509 of the Civil Code in connection with art. 2 of Code Commercial Companies. These provisions limit the autonomy of will of the parties and the freedom to dispose of isolated rights included in the bundle of indivisible (non-splittable) share rights, which is dictated by the properties of the relationship arising within the company The principle of non-splitting in the Polish legal order can be also further strengthened and confirmed by allocating it within other principles of Polish corporate law, such as the principle of uniformity of membership, the principle of personal exercise of corporate rights, the principle of the indivisibility of participation rights, or the principle prohibiting the abuse of subjective rights. As already mentioned, the principle of non-splitting helps to supplement those fundamental principles of company law in Poland. Their interactions help to indicate the need to recognize the principle of non-splitting.[49]

49 Szczepańska, 317–318.

Final remarks

The development of the principle of non-splitting in Polish law took place by transposing the concept of the "inseparability, indivisibility of the share and stock right" which had appeared as the prohibition of splitting (*Abspaltungsverbot*) in German law. One can perceive the similarity and assume that there is a common ground of "non-splitting" in the analyzed civil law systems. It should be acknowledged that there is some kind of connection (mutual interpenetration) between these two legal systems, which can be combined with the fact that non-splitting appears as a constructive assumption of company law. German law uses the concept of prohibition of splitting, while in the Polish legal system this concept has been further developed and is to be perceived as a principle of non-splitting of shares that is to be classified as general principle of company law.

References

Drygala, Tim, Marco Staake, and Stephan Szalai. *Kapitalgesellschaftsrecht: Mit Grundzügen des Konzern- und Umwandlungsrechts*. Berlin, Heidelberg, 2012.

Fleck, Hans-Joachim. "Stimmrechtsabspaltung in der GmbH?" In *Festschrift für Robert Fischer*, edited by Marcus Lutter, Walter Stimpel, and Herbert Wiedemann. Berlin, New York, 1979: 107–129.

Frąckowiak, Józef. In *System Prawa Handlowego*, vol. 2B, *Prawo Spółek Handlowych*, edited by Stanisław Włodyka. Warszawa, 2007.

Gasiński, Łukasz. *Umowy akcjonariuszy co do sposobu wykonywania prawa głosu w prawie polskim i prawie amerykańskim*. Warszawa, 2006.

Górecki, Wojciech. "Dopuszczalność przenoszenia członkostwa w spółce cywilnej." *Przegląd Prawa Handlowego*, no. 1. 2000: 38–43.

Heinrichs, Helmut. "Commentary to § 241 BGB." In Otto Palandt, *Bürgerliches Gesetzbuch. Kommentar*. München, 2006.

Herbet, Andrzej. In *System Prawa Prywatnego*, vol. 17a, *Prawo spółek kapitałowych*, edited by Stanisław Sołtysiński, 1st ed. Warszawa, 2010.

Herbet, Andrzej. In *System Prawa Prywatnego*, vol. 17a, *Prawo spółek kapitałowych*, edited by Stanisław Sołtysiński, 2nd ed. Warszawa, 2015.

Herbet, Andrzej. *Obrót udziałami w spółce z o.o.*, 2nd ed. Warszawa, 2004.

Huber, Ulrich. *Vermögensanteil, Kapitalanteil und Gesellschaftsanteil an Personengesellschaften des Handelsrechts*. Heidelberg, 1970.

Jansen, Nils. "Comparative Law and Comparative Knowledge." In *The Oxford Handbook of Comparative Law*, edited by Mathias Reimann, and Reinhard Zimmerman. Oxford, 2008: 305–338.

Kaser, Max. *Römisches Privatrecht*, 18th ed. München, 2005.

Kozieł, Grzegorz. "Zakres przedmiotowy i podmiotowy przeniesienia praw i obowiązków wspólnika spółki osobowej." *Przegląd Prawa Handlowego*, no. 12. 2003: 39–44.

Raiser, Thomas, and Rüdiger Veil. *Recht der Kapitalgesellschaften, Ein Handbuch für Praxis und Wissenschaft*, 5th ed. München, 2010.

Schäfer, Carsten. "Commentary to § 717 BGB", Rn 9–10. In *Münchener Kommentar zum BGB, Schuldrecht. Besonderer Teil III*, edited by Matias Habersack, 6th ed. München, 2013.

Schmidt, Karsten. *Gesellschaftsrecht*, 4th ed. Köln, Berlin, Bonn, München, 2002.

Seibt, Christoph H. "Verbandssouveränität und Abspaltungsverbot im Aktien und Kapitalmarktrecht Revisited: Hidden Ownership, Empty Voting und Kleinigkeiten." *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 39, no. 5. 2010: 795–835.

Szajkowski, Andrzej. In *System Prawa Prywatnego*, vol. 16, *Prawo spółek osobowych*, edited by Andrzej Szajkowski, 2nd ed. Warszawa, 2016.

Sołtysiński, Stanisław. In *System Prawa Prywatnego*, vol. 17B, *Prawo spółek kapitałowych*, edited by Stanisław Sołtysiński, 1st ed. Warszawa, 2010.

Sołtysiński, Stanisław. In Stanisław Sołtysiński, Andrzej Szajkowski, and Janusz Szwaja, *Kodeks handlowy. Komentarz*, vol. 1. Warszawa, 1994.

Sołtysiński, Stanisław. In Stanisław Sołtysiński, Andrzej Szajkowski, and Janusz Szwaja, *Kodeks handlowy. Komentarz*, vol. 1. Warszawa, 1997.

Strzępka, Janusz A., and Ewa Zielińska. In *Kodek spółek handlowych. Komentarz*, edited by Janusz A. Strzępka. Warszawa, 2001.

Schön, Wolfgang. *Der Niessbrauch an Sachen: Gesetzliche Struktur und rechtsgeschäftliche GestaltungDer Nießbrauch*. Köln 1992.

Szczepańska, Katarzyna. *Zasada nierozszczepialności w spółkach kapitałowych*. Warszawa, 2020.

Szumański, Andrzej. In *System Prawa Prywatnego*, vol. 19, *Prawo papierów wartościowych*, ed. Andrzej Szumański, 1st ed. Warszawa, 2006.

Szumański, Andrzej. In Wojciech Pyzioł, Andrzej Szumański, and Ireneusz Weiss, *Prawo spółek*. Warszawa, 2004: 659–660.

Szwaja, Janusz, and Iwona Mika. "Wpływ zabezpieczenia roszczenia przez zajęcie praw z akcji na wykonywanie tych praw przez akcjonariusza." *Prawo Spółek* 4, no. 5(41). 2000: 4–14.

Tokarczyk, Roman. *Komparatystyka prawnicza*, 8th ed. Kraków, 2005.

Ulmer, Peter. "Zur Bedeutung des gesellschaftsrechtlichen Abspaltungsverbots für den Nießbrauch am OHG (KG)-Anteil." In *Festschrift für Hans-Joachim Fleck zum 70. Geburtstag am 30. Januar 1988*, edited by Reinhard Goerdeler, Peter Hommelhoff, Marcus Lutter, and Herbert Wiedemann. Berlin, Boston, 1988: 383–400.

Vatter, Stefan. "Commentary to § 8 AktG", Nb 50. In *Kommentar zum Aktiengesetz*, vol. 1, *§§ 1–178*, edited by Gerald Spindler, and Eberhard Stilz. München, 2007.

Weber, Christoph. *Privatautonomie und Außeneinfluss im Gesellschaftsrecht*. Tübingen, 2000.

Westermann, Harm Peter. *Sachenrecht*, 7th ed. Heidelberg, 1998.

Westermann, Harm Peter. *Vertragsfreiheit und Typengesetzlichkeit im Recht der Personengesellschaften*. Heidelberg, New York, 1970.

Wiedemann, Herbert. *Die Übertragung und Vererbung von Mitgliedschaften bei Handelsgesellschaften*. München, Berlin, 1965.

Wiedemann, Herbert. “Verbandssouveränität und Außeneinfluss.” In *Gesellschaftsrecht und Unternehmensrecht: Festschrift für Wolfgang Schilling zum 65. Geburtstag am 5.6.1973*, edited by Robert Fischer, and Wolfgang Hefermehl. Berlin, Boston, 1973.

Judgment of BGH of 10 November 1951, II ZR 111/50 (Celle), NJW 1952, z. 5, p. 178 – (BGHZ 3, 354, 357 = NJW 1952, 178).

Judgment of BGH of 14 May 1956, II ZR 229/54 (Karlsruhe), NJW 1956, z. 33, p. 1198 – (BGHZ 20, 363, 365 = NJW 1956, 1198).

Judgment of BGH of 11 July 1960, II ZR 260/59, NJW 1960, z. 44, p. 1997 – (BGHZ 33, 105, 108 ff. = NJW 1960, 1997).

Judgment of BGH of 22 January 1962, II ZR 11/61, NJW 1962, z. 16, p. 738 – (BGHZ 36, 292, 293 ff. = NJW 1962, 738).

Judgment of BGH of 25 February 1965, II ZR 278/63 (Karlsruhe), NJW 1965, z. 30, p. 1378 – (NJW 1965, 1378).

Judgment of BGH of 12 July 1965, II ZR 118/63, NJW 1965, z. 46, pp. 2147–2148 – (BGHZ 44, 158 = NJW 1965, 2147–2148).

Judgment of BGH of 11 October 1976, II ZR 119/75, DB 1976, Nr 48, p. 2295–2298 – (DB 1976, 2295–2298).

Judgment of BGH of 17 November 1986 r., II ZR 96/86 (Köln), NJW 1987, z. 13, p. 780 – (NJW 1987, 780).

Regulation of the President of the Republic dated October 27, 1933 – Code of Obligations (Journal of Laws of October 28, 1933, no. 82, item 598 as amended).

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The Status of English in the European Union after Brexit

Abstract: The aims of the article are to analyse the legal status of English after Brexit and present possible scenarios for this language in the post-Brexit Union. Firstly, the article highlights the status of languages in the EU and depicts three major categories of languages in the EU: Treaty languages, official and working languages. Secondly, the article analyses two possible scenarios for retaining the official and working status of English through notifications by Ireland and Malta. Thirdly, the paper focuses on the third scenario of introducing English as a single EU official language. Finally, the article outlines the status quo of English in the EU after UK's withdrawal from the EU. It concludes that English is likely to remain the official and working language of the EU as a result of proper notification made by either Ireland or Malta.

Keywords: English, Treaty, official and working languages, Brexit, multilingualism.

Introduction

The concepts of linguistic diversity and multilingualism have been an intrinsic element of the European integration since its beginnings. The European Union respects linguistic diversity through maintaining a multilingual regime recog-

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nising one official national language of every Member State.[2] The respect for diversity of community languages is considered to be part of rich and diverse cultural heritage of individual Member States. Moreover, this diversity is supposed to contribute to social cohesion, be a source of tolerance and acceptance of differences between people.[3] These concepts have been growing in importance together with the increasing number of the Member States, which triggered a rising number of official EU languages. As the Union has become more and more diverse, its multilingualism has turned into an important social, cultural, economic and political fact of life.[4] It was reflected in the community values and became a pragmatic assumption of day-to-day operation of EU institutions and partnerships of various scales. Today, three facets of multilingualism in the EU may be distinguished: firstly, multilingualism within the official EU institutions and agencies; secondly, the interface between the EU bodies and the European public; and thirdly, multilingualism in the everyday life of EU's citizens.[5] The latter is also affected by the EU multilingualism strategy, which serves as a tool to promote conditions "conducive to the full expression of all languages, in which teaching and learning of foreign languages can flourish."[6]

The English language became one of the Union official languages upon the relevant notification filed by the United Kingdom of Great Britain and Northern Ireland at its accession in 1973. English is also a national official language in Malta and Ireland. These states notified Maltese and Irish (Gaelic) respectively as their official languages for the purposes of the Union, as Eng-

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2 Regulation No. 1 determining the languages to be used by the European Economic Community. The number of official languages is lower than the number of the EU Member States, as some languages have the status of an official language in more than one Member State.

3 Anastazja Gajda, "Wielojęzyczność Unii Europejskiej", *Socjolingwistyka*, no. 27. 2013: 27.

4 Patxi Iuaristi, Timothy Reagan, and Humphrey Tonkin, "Language diversity in the European Union" in *Respecting Linguistic Diversity in the European Union*, ed. X. Arzoz. Amsterdam, Philadelphia, 2008, 47–49.

5 Lorna Carson, *Multilingualism in Europe. A Case Study*. Brussels, 2003, 19.

6 Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions – *A New Framework Strategy for Multilingualism*, COM(2005) 596, 3.

lish was a language already notified by the UK. In the aftermath of the United Kingdom's withdrawal from the EU, the question arises as to the legal status of English in the organisation. No one can deny that the role of English has been strengthening year after year. It has gained a dominant position among Member State languages not as a result of a formal decision but for practical reasons. English has evolved beyond a language assigned to a particular country. Its deletion from the list of the EU official and working languages would strongly complicate the functioning of the EU institutions and the way that meetings would be organised. It is the most frequently chosen language by the EU institutions and most popular foreign language in the Member States.[7] Initially, the declaration of Brexit made francophones believe that French would regain its historical standing as Europe's language of diplomacy. Surprisingly, English has been on the rise since the UK's Brexit decision, mainly due to the fact that the officials from non-French speaking countries were more eager to see English as a 'neutral territory' and primary means of communication in the EU.[8] Some of the EU institutions expressed their positions on the deletion of English from the official languages. In answer to the question asked by Slator, the Language Industry Intelligence, the European Parliament Press Service assured that "the possibility that English will be abolished as an official language is virtually non-existent."[9] Next, the European Commission's communication on budget for 2021–2027[10] clearly demonstrated that the UK's

7 European Commission, *Special Eurobarometer No. 386. Europeans and Languages*, 2012, 5, <http://ec.europa.eu/commfrontoffice/publicopinion/archives/ebs/ebs_386.en.pdf>, access: 1.07.2019.

8 Maïa De La Baume, "As British leaves, English on rise in EU – to French horror", Politico, 5 October 2018, <https://www.politico.eu/article/french-english-language-brexit-european-parliament-ecj-commission-eu-next-waterloo/>, access: 6.11.2019.

9 Esther Bond, "EU provides clarity on post-Brexit future for English language", Slator, 15 May 2018, <https://slator.com/demand-drivers/eu-provides-clarity-on-post-brexit-future-for-english-language/>, access: 6.11.2019.

10 Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions *A Modern Budget for a Union that Protects, Empowers and Defends The Multiannual Financial Framework for 2021–2027*. COM 2018 (321).

withdrawal from the EU would not affect the services of interpretation and translation from and into English. This allows one to make the reasonable assumption that the status of the language will not change. However, the issue of the legal status of English has not been settled yet.

Languages of the European Union

Formally, three categories of languages may be distinguished in the context of the European Union: Treaty languages, official languages and working languages. The EU treaty languages are listed in Article 55(1) of the Treaty on European Union (TEU),[11] and the Union official and working languages are specified in Regulation No. 1 determining the languages to be used by the European Economic Community of 1958.[12] Treaty languages are the languages in which the original texts of the founding treaties were drawn up. Only the European Coal and Steel Community Treaty was authentic in a single language, i.e. in French. The Rome Treaties establishing the European Atomic Energy Community (EURATOM)[13] and the European Economic Community (EEC)[14] were drawn up in four languages: French, German, Italian and Dutch. The Treaty on European Union (1993) was prepared in 10 EU official languages: Danish, Dutch, English, French, German, Greek, Irish, Italian, Portuguese and Spanish, with the texts of each language being equally authentic.[15] Finally, the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) were drawn up in 24 EU official languages, with the

11 OJ 2016 C 202, 7 June 2016.
12 Regulation No. 1 determining the languages to be used by the European Economic Community. OJ 017, 1 July 2013.
13 The Treaty establishing the European Atomic Energy Community (EURATOM). Signed on 25 March 1957. OJ EU 2010/C 84/01.
14 The Treaty establishing the European Economic Community. Signed on 25 March 1957. OJ EU C 312 E/1.
15 Treaty on European Union. Signed on 29 July 1992. OJ C 191.

texts in each language having equal status.[16] The TEU and the TFEU are unique in being authentic in all of the official languages of their contracting parties. The number of Treaty languages is equal to the number of the Union official languages.[17] Such a solution is intended to guarantee equal access to the provisions of the Treaty by the Member States and their citizens. The concept of a 'Treaty language' means the same as 'authentic language' used in the context of international law. What makes it peculiar in the EU is the fact that it is used not only with reference to the EU founding treaties, as implied by the term 'Treaty language' but also to the EU secondary legislation. The Court of Justice of the European Union (CJEU) in its ruling in *CILFIT*[18] upheld the view that EU secondary law expressed in all EU official languages is authentic and equally valid in the light of law.[19]

The issue of the Community/Union official languages has been a sensitive matter since the EEC and the EURATOM negotiations.[20] For this reason, at that time rather than specifying the status of languages in primary law, the Treaties determined the procedure to establish language rules applicable to the Communities. The procedure was as follows: the linguistic regime of the EEC and EURATOM had to be established by the Council, whereas that of the Court of Justice had to be laid down in its Statute.[21] Article 217 of the Treaty establish-

16 OJ 2016 C 202, 7 June 2016. It is so provided in Article 55(1) TEU. Article 358 TFEU stipulates that the provisions of Article 55 TEU also apply to the TFEU.

17 Until 2007 the number of treaty languages was not the same as the number of EU official languages. That state of affairs was caused by the status of Irish and Maltese, which became treaty languages from the day of Ireland's and Malta's accession to the EU, yet not acquiring the official and working status at the same time. Irish and Maltese acquired the status of the fully-fledged EU official languages on 1 January 2007.

18 Judgment of the Court of 6 October 1982 in the case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health*, ECLI:EU:C:1982:335, para. 18.

19 Agnieszka Doczekalska, "Legal Multilingualism as a right to remain unilingual – fiction or reality?", *Comparative Lengilinguistics* 20. 2014: 12.

20 At the Messina Conference held in June 1955 national delegations were reluctant to tackle the language issue and rather than a linguistic regime they decided that the Treaties should include provisions on how to establish language rules.

21 Protocols on the Privileges and Immunities and on the Statue of the Court of Justice of the European Economic Community, Publishing Services of the European Communities, 8012/5/XII/1962/5.

ing European Economic Community (TEEC)[22] empowered the Council to act unanimously by means of regulations in matters concerning the use of official languages and to establish official languages of the Community. The same principles have been applied to date. *Ab initio* the norm has been implemented through Regulation No. 1/58 in force since 1958, notwithstanding the increase in the number of official languages affecting the internal work of the institutions.[23] The Regulation was changed with every accession, when relevant languages were added to the list of the Union official languages. The Union official languages have always coincided with at least one official national language of every Member State. That solution reflected the political and formal equality of the Member States.

The procedure of adding a language to the list of Union official languages is always initiated by an EU candidate country, which prior to the accession is obliged to propose a language to have an official status in the Union. Once a relevant application has been submitted by candidate country, the Council considers it and has to approve it unanimously so that it could acquire the EU official status. An initial decision on the choice of a language may be changed provided that all Member States agree to that.[24] It must be noted that not every language enjoying official status within a particular Member State has such a status in the EU (e.g. Luxembourgish in Luxembourg or Turkish in Cyprus). Article 8 of the Regulation sets forth that if a Member State has more than one official language, the state concerned selects the language to be used as its official one in the EU. The decision should be based on the general principles deriving from the legislation of that state. By referring to the national legislation, the provision of the Regulation does not unequivocally specify whether a given Member State may request that official and working status be granted

22 Article 217 TEEC became Article 290 TEC and is now Article 342 TFEU.

23 Theodor Schilling, “Language rights in the European Union”, *German Law Journal* 9, no. 10. 2008: 1219–1242.

24 Information available on the European Commission website: <http://ec.europa.eu/dgs/translation/ translating/official languages/index_en.htm>, access: 5.11.2019.

to its two or more national languages.[25] Remarkably, so far no candidate country has ever requested EU official status for more than one language.

The current version of Regulation No. 1/58[26] includes a complete list of 24 official languages and 24 working languages (Article 1) (as presented in the chart below).

Official/working languages of the EU	since
French, Dutch, German, Italian	1958
Danish, English	1973
Greek	1981
Spanish, Portuguese	1986
Finnish, Swedish	1995
Czech, Estonian, Lithuanian, Latvian, Maltese, Polish, Slovak, Slovenian, Hungarian	2004
Bulgarian, Irish, Romanian	2007
Croatian	2013

Source: European Commission.[27]

The number of official Union languages is lower than the number of Member States as some languages are used in more than one state. Such languages include German in Germany, Austria, Belgium and Luxembourg; French in Belgium, France and Luxembourg; Swedish in Sweden and Finland; Dutch in Belgium and Holland, and Greek in Greece and Cyprus. Next to the official languages, Article 1 of the Regulation also lists 24 EU working languages, which are identical to the official languages. The Regulation grants the same

25 Ewa Suwara, "Wyzwania prawno-proceduralne dla Unii Europejskiej związane z BREXIT-em", *Europejski Przegląd Sądowy*, no. 9. 2016: 15.

26 Status as of 18 April 2019.

27 Information available on the European Commission website: <http://ec.europa.eu/dgs/translation/translating/officiallanguages/ index_en.htm>, access: 16.09.2017.

status for both EU official and working languages.[28] Although some authors, including Labrie,[29] distinguish between the concepts, the Regulation does not differentiate between the two terms. However, a number of working languages may be limited within the EU institutions under Article 6 of the Regulation. In practice, in terms of the working mode of internal use, English has become the most widely used language in the EU institutions, except for the Court of Justice, where French still prevails.

Possible scenarios for English in the post-Brexit Union

When the decision on Brexit was taken by the British public in a referendum held on 23 June 2016, it became clear that the list of the EU official and working languages would have to be verified. The reason was that only the United Kingdom of Great Britain and Northern Ireland had notified English as the official language for the purposes of the Union. It seems that once the revised Treaty following Brexit enters into force, English is likely lose this official status if no steps are taken by the EU institutions and relevant Member States. From the formal point of view, the maintenance of English as an official language requires a notification of another interested Member State whose state language is English.[30] In this context, two scenarios are possible. Apart from the UK, English is also an official language in Ireland (according to Article 8.2 of Irish Constitution of 1937, as amended)[31] and in Malta (Article 5 of Maltese Constitution of 1964, as amended).[32] In order to keep the official status of English in the EU, one of these states would have to file a relevant application

28 Robert Phillipson, *English-only Europe?: Challenging language policy*. London, New York, 2004, 118.

29 Normand Labrie, *La construction linguistique de la Communauté européenne*. Paris, 1993, 82.

30 Suwara, 15.

31 Constitution of Ireland, <http://www.irishstatutebook.ie/eli/cons/en/html#part2>, access: 17.02.2020.

32 Constitution of Malta, <https://www.constitution.org/cons/malta/chapt0.pdf>, access: 17.02.2020.

to the Council. Prior to their accession, neither Ireland nor Malta notified their first official languages, i.e. Irish and Maltese, respectively. They did not refer to English, which had already been notified as the Community's official language by the UK.

From the procedural perspective, the UK's leaving the EU requires an update of Regulation No. 1/58 establishing the Union's linguistic regime. The result may be that the English language would be deleted from the list of official and working languages and possibly would be re-granted such a status by virtue of an application made either by Ireland or Malta. The application would have to be examined and unanimously approved by the Council.[33] In the context of Brexit, Article 8 of Regulation No. 1/1958 acquires a special dimension. It does not explicitly prohibit notification of more than one state language if a Member State respects more than one national official language in its territory. Hence, it may occur that both Ireland and Malta may apply for the official and working status of English as their second official language in the Union. This would mean that neither Irish nor Maltese would have to be deleted from the list of EU official languages, and English would be added again to the list. Such a decision would be a precedent, as it could encourage other multilingual Member States to apply to add their other official languages to the list of the EU official languages. If, however, the Council decided that a single-language principle must remain in force, the state filing an application would have to give up its existing official language status in favour of English.

The analysis leads to the conclusion that the case of Ireland seems to fully justify the reason why this state is most likely to apply for the official status of English. As the Eurobarometer survey shows, more than 97 per cent of the Irish speak English as their mother tongue.[34] In 2016, not even 40 per cent of the Irish declared that they could speak Gaelic and only 4 per cent used the language on everyday basis. If English was excluded from the EU offi-

33 Suwara, 15.

34 European Commission, *Special Eurobarometer No. 386. Europeans and Languages*.

cial languages, more than 60 percent of Irish citizens would not have access to the Union law.[35] In this context, it should also be recalled that although Ireland became the Community Member State in 1973, Irish became the EU official and working language in 2007 (based on Regulation No. 920/2005)[36] and until that time all its citizens were supposed to rely on English both in terms of access to law and in contacts with the EU institutions. What happened following 2007 clearly showed that English was a preferred language in Ireland. The EU faced challenges with finding well-qualified Irish translators, therefore, the Council released the EU institutions from the obligation to draft legislation in Irish. The Regulation provided for a derogation of 5 years with possible extension. Under the derogation, the EU institutions were not obliged to draft and publish all legislative acts in the Irish language, except for regulations adopted jointly by the European Parliament and the Council. This derogation was extended until 31 December 2016 by Council Regulation (EU) No. 1257/2010[37] and re-extended by Council Regulation (EU, Euratom) 2015/2264.[38] It is to be gradually reduced in scope and eventually brought to an end by 31 December 2021. However, derogations continue to mean that Irish is not a fully-fledged EU official language.

The history of Maltese in the EU is similar to Irish in the sense that the language did not become a complete EU official language following the Malta's accession to the Union on 1 May 2004. The Council introduced a transitional period of 3 years, when the EU institutions were not obliged to draft all acts in Maltese (Regulation No. 930/2004).[39] Temporary derogation measures relating to drafting of acts of the EU institutions in Maltese were caused by the short-

35 Agnieszka Doczekalska, "Angielski może w UE zostać po brexicie", Prawo.pl, 13 October 2018, <https://www.prawo.pl/prawo/jezyk-angielski-w-ue-zostanie-po-brexicie,313073.html>, access: 1.07.2019.

36 OJ 2005 L 156/1.

37 OJ 2010 L 343/5.

38 OJ 2015 L 322/1.

39 Council Regulation (EC) No. 930/2004 of 1 May 2004 on temporary derogation measures relating to the drafting in Maltese of the acts of the institutions of the European Union, OJ L 169, 1 May 2004.

age of sufficiently qualified linguists, translators and interpreters. As a result, Maltese citizens were presumed to read EU legislation in English, hence no one could be denied access to documents. After the expiry of the transitional period (1 January 2007), Maltese became a fully-fledged EU official language. The backlog of all the legal acts that had to be published in Maltese led to the extension of their publication time. Under Regulation No. 1738/2006[40] all acts which had been published in Maltese by 30 April 2007 had to be published in that language by 31 December 2008 at the latest.[41]

The postulate of introducing one EU official language

After the UK's declaration of exit from the EU, the postulate of introducing a single EU official language revived. The matter of a single EU official language has always been a multi-faceted, contested and a politically sensitive matter in the organisation.[42] An idea of one universal language of the Union was welcomed in the face of further European integration, cross-border mobility and cultural exchange at the beginning of the 21st century.[43] As English became the most commonly spoken foreign language on the continent so far,[44] the debate focussed on this language as the European lingua franca. The matter of a European lingua franca appeared already in the Commission's Commu-

40 Council Regulation (EC) No. 1738/2006 of 23 November 2006 amending Regulation (EC) No. 930/2004 on temporary derogation measures relating to the drafting in Maltese of the acts of the institutions of the European Union, OJ L 329, 25 November 2006.

41 Article 1 of Regulation No. 1738/2006.

42 European Commission, *Translation at the European Commission – a history* [Brochure]. Luxembourg: Office for Official Publications of the European Communities, 15, <http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en_GB/-/EUR/ViewPublication-Start?PublicationKey=HC3008397>, access: 15.11.2019.

43 Philipson, 7; Abram De Swaan, *Words of the World: The Global Language System*. Amsterdam, 2005; Reinier Salverda, "Language diversity and international communication", *English Today* 18, no. 3. 2002: 3.

44 Richard L. Creech, *Law and language in the European Union: the paradox of a Babel "united in diversity"*. Europa Law Publishing, 2007, 39.

nication of 2003 – *Promoting language learning and linguistic diversity*.[45] Although the Commission acknowledged that a lingua franca had its limitations, as it does not permit any real understanding of other cultures and restricts business opportunities, it admitted that English had become a European and world lingua franca. The Commission noted the advantages of these developments by stating that if English was spoken by a majority of Europeans, the language would be a shared medium for basic communication, commerce and travel between Member States.[46]

The predominant use of English in the EU institutions and in law-making process, together with the possible deletion of English from the catalogue of EU official languages due to Brexit, brought the issue to debate again. The issue of a European lingua franca appeared on the forum of the European Parliament in 2019.[47] The situation reopened the debate over whether knowledge of a common language should be welcomed among Europeans. Modiano noted that the UK's exit may give birth to a European English or Euro-English. This could be an official variety of English used by Europeans which is influenced by standard English and by speaker's native languages whose first language is not English.[48] Modiano's view is supported by Crystal[49] who claims that Brexit may help the development of Euro-English.[50] A strong argument raised in favour of English as a language of the EU is that approximately 95% of

45 European Commission, *Promoting Language Learning and Linguistic Diversity. An Action Plan 2004–2006*. COM (2003) 449.

46 European Commission, *Promoting Language Learning and Linguistic Diversity. An Action Plan 2004–2006.* COM (2003) 449, 45.

47 Parliamentary questions of 30 January 2019. Question for written answer E-000517–19 to the Commission Rule 130, Innocenzo Leontini (ECR), <http://www.europarl.europa.eu/doceo/document/E-8–2019–000517_EN.html>, access: 15.11.2019.

48 Marko Modiano, "English in a post-Brexit European Union", *World Englishes* 36, no. 3. 2017: 314–315.

49 David Crystal, "The future of new Euro-English", *World Englishes* 36, no. 3. 2017: 330–335.

50 However, it must be noted that not all linguists agree with that. Jenkjns claims that Euro-English is a variety of standard English.

legislation adopted in the co-decision procedure is not only drafted in English, but also debated, scrutinised and revised in this language.[51]

English as a single EU official language could be proposed after Brexit in the event that no other Member State notifies English as their official language. This would open the possibility to use a language not notified by any Member State but spoken by the largest number of Union citizens as a foreign language.[52] However, it must be noted that the policy of one EU language in place of EU multilingualism has already been proposed several times without success. So far, despite excessively high costs and difficulties resulting from the extension of legal and institutional multilingualism, no effective steps have been taken which have resulted in a lower number of languages in which EU law is drafted.[53] The scenario seems to be highly improbable, as it remains in contrast to the EU policy of multilingualism, which constitutes a cornerstone of European integration. As a result, respect for Member States' linguistic diversity, which was a tool to build European identity policy, would be challenged. The linguistic equality of all Member States is considered to show respect for the national identity of the Member States. The Group of Intellectuals for Intercultural Dialogue[54] maintained that allowing *de facto* supremacy of one language over others in the daily operations of the EU would be contrary to the principle of respect for Europe's diversity of linguistic and cultural ex-

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51 Cornelis J. W. Baaij, "The EU policy on institutional multilingualism: between principles and practicality", *JLL* 1. 2012: 15.

52 According to *Special Eurobarometer no. 386. Europeans and their languages*, 2012, 5: 38% of Europeans speak English, 12 % – French, 11% German, 7% Spanish and 5% Russian.

53 On English hegemony: Pia Vanting Christiansen, "Language policy in the European Union: European/English/Elite/Equal/Esperanto Union?", *Language Problems and Language Planning* 30, no. 1. 2006: 21–44; Johnathan Pool, "Optimal language regimes for the European Union", *International Journal of the Sociology of Language* 121. 1996: 159–179. Esperanto: Florian Coulmas (ed.), *A language policy for the European Community: Prospects and Quandaries*. Berlin, 2013. Latin: Merike Ristikivi, "Latin: the common legal language of Europe", *Juridica* International, no. X. 2005: 199–202.

54 European Commission, *A Rewarding Challenge. How the Multiplicity of Languages could strengthen Europe: Proposals from the Group of Intellectuals for Intercultural Dialogue set up at the initiative of the European Commission*, 2008, 5.

pression. Moreover, as Phillipson[55] and Forrest[56] argue, the danger of preparing new legislation in a single language is that those who speak English as their mother tongue would have an advantage over those for whom it is a foreign language.

Analysis and Conclusions

Despite comments and abundant press releases published in the Brexit negotiation period on the possible future of the English language in the EU, the status of English has not changed since Brexit. Although it could have been expected that the procedure for notifying English by another Member State should be carried out swiftly after Brexit, in order to minimise the negative impact on the decision-making procedure in the EU, so far, neither Ireland nor Malta has submitted a relevant application and no such plans have been revealed.

As Regulation 1/58 has not been amended, the EU linguistic regime remains untouched, although the UK is not a Union Member State any more. The Union websites, including europa.eu,[57] still list English as its official language. Moreover, the europa.eu website expressly indicates that even after the withdrawal of the United Kingdom from the EU, English remains one of the official languages of Ireland and Malta. This does not justify maintaining the official status of English in the EU. Based on this, it seems that the EU notes the need to solve the unsettled status of English but at the same time no procedure for approving English notified by either Ireland or Malta has been carried out.

An undeniable result of Brexit is the fact the number of native speakers of English dropped to just 1% of all Union citizens, but the overall number of Union citizens who can speak English, either as a first or second language, has

55 Phillipson, 21, 131.

56 Alan Forrest, "The politics of language in the European Union", *European Review* 6, no. 3. 1998: 299–319.

57 *EU languages*, <https://europa.eu/european-union/about-eu/eu-languages_en>, access: 11.05.2020.

only dropped from 51% to 44%. With German now spoken by 36% and French spoken by 29% of the EU's now smaller population of 446 million people, English still remains the most widely spoken language in the EU. Thus, Brexit did not push English behind. As the data are based on the 2012 Eurobarometer,[58] it may be assumed that the English figure is actually higher, as English proficiency has been rising recently across the continent. Therefore, it may be concluded that English remains the lingua franca for the majority of Union citizens, even if it happened to be erased from the list of the Union official languages. Nevertheless, it still seems to be unlikely that English will become the single official language of the EU. From the legal standpoint, the postulate of reducing the number of EU official languages has been rejected for one major reason – the direct effect of the EU acts of general application. Such direct applicability of EU law results in the Union's obligation to guarantee its Member State citizens certainty of the law they are expected to obey. Legal equality cannot be guaranteed without linguistic equality.

The scenarios that either Ireland or Malta will notify English as their EU official language seems to be most probable. It is hard, however, to predict which state will initiate the procedure as it is certainly a political decision, and will probably be the result of tough negotiations.

References

Baaij, Cornelis J. W. "The EU policy on institutional multilingualism: between principles and practicality." *JLL* 1. 2012: 14–32.

Bond, Esther. "EU provides clarity on post-Brexit future for English language." Slator, 15 May 2018, <https://slator.com/demand-drivers/eu-provides-clarity-on-post-brexit-future-for-english-language/>, access: 6.11.2019.

Carson, Lorna. *Multilingualism in Europe. A Case Study*. Brussels, 2003.

58 European Commission, *Special Eurobarometer no. 386. Europeans and their languages*, 2012.

Christiansen, Pia Vanting. "Language policy in the European Union: European/English/Elite/Equal/Esperanto Union?" *Language Problems and Language Planning* 30, no. 1. 2006: 21–44.

Coulmas, Florian, ed. *A language policy for the European Community: Prospects and Quandaries*. Berlin, 2013.

Creech, Richard L. *Law and language in the European Union: the paradox of a Babel "united in diversity"*. Europa Law Publishing, 2007.

Crystal, David. "The future of new Euro-English." *World Englishes* 36, no. 3. 2017: 330–335.

De La Baume, Maïa. "As British leaves, English on rise in EU – to French horror." Politico, 5 October 2018, <https://www.politico.eu/article/french-english-language-brexit-european-parliament-ecj-commission-eu-next-waterloo/>, access: 6.11.2019.

De Swaan, Abram. *Words of the World: The Global Language System*. Amsterdam, 2005.

Doczekalska, Agnieszka. "Angielski może w UE zostać po brexicie." Prawo.pl, 13 October 2018, <https://www.prawo.pl/prawo/jezyk-angielski-w-ue-zostanie-po-brexicie,313073.html>, access: 1.07.2019.

Doczekalska, Agnieszka. "Legal Multilingualism as a right to remain unilingual – fiction or reality?" *Comparative Lengilinguistics* 20. 2014: 7–18.

Forrest, Alan. "The politics of language in the European Union." *European Review* 6, no. 3. 1998: 299–319.

Gajda, Anastazja. "Wielojęzyczność Unii Europejskiej." *Socjolingwistyka*, no. 27. 2013: 7–29.

Iuaristi, Patxi, Timothy Reagan, and Humphrey Tonkin. "Language diversity in the European Union." In *Respecting Linguistic Diversity in the European Union*, edited by Xabier Arzoz. Amsterdam, Philadelphia, 2008: 47–72.

Labrie, Normand. *La construction linguistique de la Communauté européenne*. Paris, 1993.

Modiano, Marko. “English in a post-Brexit European Union.” *World Englishes* 36, no. 3. 2017: 313–327.

Phillipson, Robert. *English-only Europe?: Challenging language policy*. London, New York, 2004.

Pool, Johnathan. “Optimal language regimes for the European Union.” *International Journal of the Sociology of Language* 121. 1996: 159–179.

Ristikivi, Merike. “Latin: the common legal language of Europe.” *Juridica International*, no. X. 2005: 199–202.

Salverda, Reinier. “Language diversity and international communication.” *English Today* 18, no. 3. 2002: 3–11.

Schilling, Theodor. “Language rights in the European Union.” *German Law Journal* 9, no. 10. 2008: 1219–1242.

Suwara, Ewa. “Wyzwania prawno-proceduralne dla Unii Europejskiej związane z BREXIT-em.” *Europejski Przegląd Sądowy*, no. 9. 2016: 11–17.

Internet sources

Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions – *A New Framework Strategy for Multilingualism*, COM(2005) 596.

Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: *A Modern Budget for a Union that Protects, Empowers and Defends The Multiannual Financial Framework for 2021–2027*, COM 2018 (321).

Constitution of Ireland, <http://www.irishstatutebook.ie/eli/cons/en/html#part2>, access: 17.02.2020.

Constitution of Malta, <https://www.constitution.org/cons/malta/chapt0.pdf>, access:17.02.2020.

Council Regulation (EC) No. 930/2004 of 1 May 2004 on temporary derogation measures relating to the drafting in Maltese of the acts of the institutions of the European Union, OJ L 169, 1 May 2004.

Council Regulation (EC) No. 1738/2006 of 23 November 2006 amending Regulation (EC) No 930/2004 on temporary derogation measures relating to the drafting in Maltese of the acts of the institutions of the European Union, OJ L 329, 25 November 2006.

EU languages, <https://europa.eu/european-union/about-eu/eu-languages_en>, access: 11.05.2020.

European Commission, *Promoting Language Learning and Linguistic Diversity. An Action Plan 2004–2006*. COM (2003) 449.

European Commission, *Special Eurobarometer No. 386. Europeans and Languages*, 2012. <http://ec.europa.eu/commfrontoffice/publicopinion/archives/ebs/ebs_386.en.pdf>, access: 1.07.2019.

European Commission, *Translation at the European Commission – a history* [Brochure]. Luxembourg: Office for Official Publications of the European Communities, <http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en_GB/-/EUR/ViewPublication-Start?PublicationKey=HC3008397>, access: 15.11.2019.

Information available on the European Commission website: <http://ec.europa.eu/dgs/translation/translating/officiallanguages/index_en.htm>, access: 5.11.2019.

Information available on the European Commission website: <http://ec.europa.eu/dgs/translation/translating/officiallanguages/index_en.htm>, access: 16.09.2017.

Judgment of the Court of 6 October 1982 in the case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health*, ECLI:EU:C:1982:335.

Parliamentary questions of 30 January 2019. Question for written answer E-000517–19 to the Commission Rule 130, Innocenzo Leontini (ECR), <http://www.europarl.europa.eu/doceo/document/E-8–2019–000517_EN.html>, access: 15.11.2019.

Protocols on the Privileges and Immunities and on the Statue of the Court of Justice of the European Economic Community, Publishing Services of the European Communities, 8012/5/XII/1962/5.

Regulation No. 1 determining the languages to be used by the European Economic Community. OJ 017, 1 July 2013.

Treaty establishing the European Atomic Energy Community (EURATOM). Signed on 25 March 1957. OJ EU 2010/C 84/01.

Treaty establishing the European Economic Community. Signed on 25 March 1957. OJ EU C 312 E/1.

Treaty on European Union and Treaty on the Functioning of the European Union, OJ 2016 C 202, 7 June 2016.

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The data subject's right to access to information under GDPR and the right of the data controller to protect its know-how

Abstract: The data subject's right to access information on data processing has a very broad meaning. Considering the latest developments in this field (mainly the CJEU ruling on Austrian posts and EDPB guidelines) one can draw the conclusion that the controller's right to protect its confidential information is limited and less valuable than the data subject's rights. However, this may lead to unfair and unequal treatment of companies and data subjects. When looking at this right in a more systematic perspective, it seems that the model of the protection of personal data may go hand in hand with the controllers' business interests. A different interpretation may lead to the discouragement of entrepreneurs, both EU and foreign, from conducting business in the European Union. This is not conducive to the development of the European market and certainly will not attract foreign capital.

Keywords: data access, know-how, confidential information, personal data, GDPR.

Introduction

The main goal of data access right is to ensure that a data subject is aware of whether and how their personal data is processed. This will further allow them to exercise

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other rights under the General Data Protection Regulation[2] and the data subject will remain in full control of processing their personal data. Unfortunately, the right to access may conflict with the controller's right to protect confidential information. Considering the latest developments in this field (mainly the CJEU ruling on Austrian posts and EDPB guidelines) one can draw the conclusion that the controller's right to protect its confidential information is limited and less valuable than the data subject's rights. This however may lead to unfair and unequal treatment of companies and data subjects. Further developments in this area, such as the Data Act as well as whistle-blower directive, consequently weaken entrepreneurs' and companies' rights to protect their confidential information. As a consequence, this may lead to discouragement of entrepreneurs, both EU and foreign, from conducting business in the European Union. This is not conducive to the development of the European market and certainly does not attract foreign capital.

The scope of data access right

The right of access to personal data is one of the basic rights of the data subject regulated on the basis of Chapter III of the GDPR. This right was expressly stated already in Directive 95/46 EC,[3] and can also be derived from Art. 8 of the European Convention on Human Rights.[4] This right serves the purpose of guaranteeing the protection of the data subjects' right to privacy and data protection with regard to the processing of data relating to them.[5] The right to data

2 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 (GDPR).

3 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

4 European Convention on Human Rights, see also judgment of ECtHR of 26 March 1987, *Leander v. Sweden*, 9248/81; judgment of ECtHR of 23 January 1986, *Gaskin v. United Kingdom*, 10454/86; judgment of ECtHR of 28 April 2009, *K.H. and Others v. Slovakia*, 32881/04; judgment of ECtHR of 6 June 2006, *Segerstedt-Wiberg and Others v. Sweden*, 62332/00.

5 See also judgment of CJEU of 20 December 2017, *Nowak v. Data Protection Commissioner*, C-434/16.

access is essential in ensuring that the data subject has control over their data and to exercise their other rights. Without having full knowledge of who processes their data and how, an individual will not be able to identify entities towards which they may exercise further rights. Article 15 of the GDPR governs the rights of data subjects, exercisable against data controllers, to access personal data concerning them which are being processed, as well as a range of information relating, in particular, to the processing of such data.[6]

The exercise of the right of access is realised both in the framework of data protection law, in accordance with the objectives of data protection law, and more specifically, in the framework of 'fundamental rights and freedoms of natural persons and in particular their right to the protection of personal data', as provided by Art. 1(2) GDPR. The right of access is an important element of the whole system.[7] The right of access may facilitate the exercise of the rights flowing from, for example, Art. 16 to 19, 21 to 22 and 82 GDPR. However, the exercise of the right of access is an individual's right and is not conditional upon the exercise of these other rights and the exercise of the other rights does not depend on the exercise of the right of access.[8] The data subject does not have to demonstrate the existence of a legal or factual interest;[9] neither the type of data processed not the form of processing affect the effectiveness of this right.[10] This right can be executed at any time, even if the data is already archived.[11] This does not apply to anonymised data. In situations in which the purposes for which the personal data are processed do not

6 Opinion of Advocate General Pitruzzella delivered on 9 June 2022 (1), *RW v.* Österreichische *Post AG*, C-154/21.

7 European Data Protection Board, *Guidelines 01/2022 on data subject rights – Right of access*, adopted on 18 January 2022.

8 European Data Protection Board, *Guidelines 01/2022 on data subject rights – Right of access*.

9 Also, data subject does not have to demonstrate existence of legitimate interest, decision of Spanish Data Protection Authority of 7 February 2020, no. TD/00318/2019.

10 Magdalena Abu Gholeh, and Dominika Kuźnicka-Błaszkowska, *Nakładanie administracyjnych kar pieniężnych w rozporządzeniu o ochronie danych osobowych. Aspekty praktyczne*. Warszawa, 2020, 122.

11 Joanna Łuczak, "Article 15" in *RODO. Ogólne rozporządzenie o ochronie danych. Komentarz*, eds. E. Bielak-Jomaa and D. Lubasz. Warszawa, 2017, 512–513.

or no longer require the identification of a data subject, the controller does not need to maintain identification data for the sole purpose of complying with data subjects' rights, also in light of the principle of data minimisation.[12] On the other hand, if the controller is no longer in possession of personal data because they have transferred the data to third party, the controller is still obliged to comply with data access request.[13]

The right to data access pertains to the data subject and can only be exercised by such. This does not interfere with the right to exercise this right with the help of any legal representative, but this area is subject to national laws.[14] Additionally, controllers are allowed to ask for additional information if they consider that it is 'necessary to confirm the identity of the data subject' if they have 'reasonable doubts' about the identity of natural person making the request.[15] Disclosing information on personal data processed by the controller to the wrong person may further result in a breach of confidentiality, or a data breach, and may interfere with the right to respect for private life of the data subject.[16] If in doubt regarding the identity of data subject, the controller shall ask more questions, rather than leave the request unanswered.[17] As a matter of good practice, the controller shall implement appropriate procedures describing how the data subject's identity can be confirmed (presenting a national ID or passport, providing a unique client code or specific information which is not publicly known).[18] However, the controller who is asking for further information to confirm the identity of the individual raising data access

12 European Data Protection Board, *Guidelines 01/2022 on data subject rights – Right of access*.

13 Decision of Spanish Data Protection Authority of 28 May 2021, no. R/00214/2021.

14 See Gabriela Zanfir-Fortuna, "Article 15. Right of access by the data subject" in *The EU General Data Protection Regulation (GDPR). A commentary*, eds. Ch. Kuner, L. A. Bygrave, and Ch. Docksey. New York, 2020, 461.

15 Judgement of the Berlin Administrative Court of 31 August 2020, no. 1 K 90.19.

16 Zanfir-Fortuna, 460.

17 Decision of Spanish Data Protection Authority of 31 January 2022, no. PD-00099–2022.

18 Paweł Fajgielski, "Article 12" in *Ogólne rozporządzenie o ochronie danych. Komentarz*, ed. P. Fajgielski. Lex, 2018; see also decision of Netherlands Data Protection Authority of 4 August 2021, no. 202006082/1/A3; Article 29 Working Party, *Guidelines on the right to data portability*, adopted on 5 April 2017, WP242 rev.01.

request shall ensure that they are only collecting information which is strictly necessary for the purpose of identifying the data subject and shall use reasonable and proportionate endeavours to obtain such.

The scope of data access consists of three elements:

- confirmation as to whether data about the person is processed or not,
- access to this personal data and
- access to information about the processing, such as the purpose, categories of data and recipients, duration of the processing, data subjects' rights, and appropriate safeguards in the case of third country transfers.[19]

Because the right to access may be executed in different forms and require disclosing various information, it is the data subject who needs to specify what information on data processing they are requesting.[20] However, in general the scope of access shall be limited only to personal data of the data subject or another person on whose behalf the requester acts.[21] If the data subjects require verbatim "information about the data processed in relation to them", the controller should assume that the data subject intends to exercise their full right under Art. 15(1) – (2) GDPR.[22] In the situation when data subject specifically requests e.g. information on data recipients, the controller may provide only a list of recipients or categories of data recipients without providing the other information listed in art 15 (1) GDPR.

The first component of the data access right seems to be relatively straightforward. At the first glance, there are only two possible answers to the question asked by the data subject, namely "is my personal data processed by a specific controller?". The simple answer is "yes" or "no". However, if one reads the definition of "processing" literally, the moment the data controller received a request from the data subject, the "processing" starts. This means that to be

19 European Data Protection Board, *Guidelines 01/2022 on data subject rights – Right of access*.

20 Decision of Spanish Data Protection Authority of 7 February2020, no. E-08210–2021; Judgement of District Court Den Haag of 20 April 2022, no. 20/2732; judgement of the Court of Amsterdam of 11 March 2021, no. C/13/689705/HA RK 20–258.

21 Decision of Finish Data Protection Authority of 18 November 2019, no. 8896/152/2019.

22 European Data Protection Board, *Guidelines 01/2022 on data subject rights – Right of access*.

accurate and fully transparent, the "no" answer shall include information that personal data is not processed for any other purpose rather than answering the data subject request. If the controller does not process the personal data of the data subject, they shall not leave the request unanswered. Providing a false response (either due to not being aware of processing data subject request, human error[23] or maliciously) may entail the data controller is subject to an administrative fine.[24]

The second layer of the data access right guarantees the right to access personal data. The term 'personal' data shall be defined broadly, considering both the definition included in GDPR ("any information relating to an identified or identifiable natural person") as well as practice of various data protection authorities, national courts and CJEU.

EDPB recognizes the following personal data as falling into the scope of the data access right:

- Special categories of personal data as per Art. 9 GDPR;
- Personal data relating to criminal convictions and offences as per Art. 10 GDPR;
- Data knowingly and actively provided by the data subject (e.g. account data submitted via forms, answers to a questionnaire);
- Observed data or raw data provided by the data subject by virtue of the use of the service or the device (data processed by connected objects, transaction history, activity logs, such as access logs, history of website usage, search activities, location data, clicking activity, unique aspects of a person's behaviour such as handwriting, keystrokes, particular way of walking or speaking);
- Data derived from other data, rather than directly provided by the data subject (e.g. credit ratio, classification based on common attributes of data subjects; country of residence derived from postcode);

23 Decision of Spanish Data Protection Authority of 5 January 2021, no. PS/00016/2022.

24 Decision of Norwegian Data Protection Authority of 16 May 2022, no. 20/02875–10 & 20/02875–11.

- Data inferred from other data, rather than directly provided by the data subject (e.g. to assign a credit score or comply with anti-money laundering rules, algorithmic results, results of a health assessment or a personalization or recommendation process);
- Pseudonymised data as opposed to anonymized data.[25]

Apart from the above, there is also other information which may constitute personal data and be accessible by data subjects under art 15 GDPR. In the joint cases C-141/12 and C-372/12[26] the CJEU ruled that the right of access covered personal data contained in minutes, namely the "name, date of birth, nationality, gender, ethnicity, religion and language of the applicant" and, "where relevant, the data in the legal analysis contained in the minute", but not the legal analysis itself. Other attributes which were recognized as personal data and subject to data access right are: written answers submitted by a candidate at a professional examination and any comments of an examiner with respect to those answers,[27] sales calls recording,[28] the number of children conceived as the result of data subject sperm donation,[29] a surveillance report compiled by an insurance company,[30] data of all repairs and services done to the data subject's car while it was in the possession of car repair shop,[31] the original contract with the data subject.[32]

On the other hand, the access right under art. 15 GDPR does not include the general right to inspect the files of the tax authorities,[33] internal correspondence between the complainant and organisational unit in the context of the processing of their asylum application,[34] internal notes and correspondence

25 European Data Protection Board, *Guidelines 01/2022 on data subject rights – Right of access*.
26 Judgment of CJEU of 17 July2014, joined Cases C-141/12 and C-372/12, *YS v. Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v. M and S.*
27 Judgment of CJEU, C-434/16.
28 Decision of Finish Data Protection Authority of 29 April 2022, no. 10587/161/21; decision of Spanish Data Protection Authority of 28 September 2020, no. TD/00129/2020.
29 Decision of Danish Data Protection Authority of 26 November 2021, no. 2020–31–3894.
30 Decision of Danish Data Protection Authority of 6 September 2021, no. 2020–31–3586.
31 Decision of Icelandig Data Protection Authority of 31 October 2022, no. 2021061304.
32 Decision of Cyprus Data Protection Authority of 17 June 2020, no. 11.17.001.008.001.
33 Judgement of the Financial Court of Munich of 3 February2022, no. 15 K 1212/19.
34 Judgement of The District Court of Midden-Nederland of 12 January 2021, no. UTR 20/268.

which can be qualified as personal thoughts from employees intended for internal consultation and deliberation.[35] Additionally, responding to access requests cannot infringe the rights and freedoms of other individuals,[36] which is of a great importance in access request concerning audio or video recordings,[37] especially in the public sphere. In certain situations an overview of the available data suffices and the original documents (or a copy) do not have to be provided.[38]

Right of access to personal data is one of the components of the right to access. The right of access should not be seen in isolation, as it is closely linked with other provisions of the GDPR, in particular with data protection principles including the fairness and lawfulness of processing, the controller´s transparency obligation, and with other data subject rights provided for in Chapter III of the GDPR.[39] This means that right to access shall be exercised in line with general principles of GDPR, most importantly with transparency towards the data subject. Article 15(1) includes the list of details to be provided to the data subject on their request. This list overlaps with the type of information which must be included in the privacy notice according to art. 13 and 14 GDPR.

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35 See judgement of the Dutch District Court of Amsterdam of 9 April 2020, no. C/13/673049 / HA RK 19–338.

36 In such a situation, a case-by-case balance test shall be conducted by the data controller, see judgement of the District Court of Central Netherlands of 2 December 2020, no. C/16/501697 / HA RK 20–117.

37 This area was subject to various DPAs decisions and the main outcomes are as follow: the controller does not necessarily need to provide the recording of the conversation, the transcript of such is also acceptable and completes the data subject's request in this regard (decision of Greek Data Protection Authority of 21 February 2020 on Public Power Corporation S.A., no. 2/2020); generally, footage from CCTV may be subject to the data access right (decision of Cyprus Data Protection Authority of 8 July 2020, no. 11.17.001.007.219) but the data controller could deny an access request seeking CCTV evidence in a suit against the police (decision of Danish Data Protection Authority of 22 June 2022, no. 2020–832–0028). In the case of footage from CCTV, controllers can use special techniques to anonymise the images of other individuals to ensure that their right to privacy is protected (decision of Spanish Data Protection Authority of 1 September 2021, no. R/00634/2021).

38 Judgement of the District Court Rotterdam of 22 March 2021, no. ROT 19/4649.

39 European Data Protection Board, *Guidelines 01/2022 on data subject rights – Right of access*.

Access to information about the processing

The last of the components of the data access right is the right to obtain information about the processing. According to article 15 GDPR, the data subject is entitled to receive the following information on data processing from the controller:

- the purposes of the processing;
- the categories of personal data concerned;
- the recipients or categories of recipient to whom the personal data have been or will be disclosed, in particular recipients in third countries or international organisations;
- where possible, the envisaged period for which the personal data will be stored, or, if not possible, the criteria used to determine that period;
- the existence of the right to request from the controller rectification or erasure of personal data or restriction of processing of personal data concerning the data subject or to object to such processing;
- the right to lodge a complaint with a supervisory authority;
- where the personal data are not collected from the data subject, any available information as to their source;
- the existence of automated decision-making, including profiling, referred to in Article 22(1) and (4) GDPR and, at least in those cases, meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject;
- the appropriate safeguards pursuant to Art. 46 GDPR relating to the transfer of personal data if the transfer to third country or international organisation occurs.

As was mentioned, part of this information is usually included in a privacy notice which the controller is obliged to provide the data subject with on the basis of articles 13 and 14 GDPR. EDPB states that controllers may carefully use

text modules of their privacy notice as long as they make sure that they are of adequate actuality and preciseness with regards to the request of the data subject.[40]

To comply with a data subject request to provide information on purpose of processing (art. 15 (1) (a)), the controller shall specifically provide the precise purpose(s) in the actual case of the requesting data subject. If the processing is carried out for several purposes, the controller has to clarify which categories of data are processed for which purpose(s), but the controller is not obliged to specify a lawful basis for each specific purpose.

Information on categories of data (Art. 15(1)(b)), in spite of the general nature of those categories and depending on the circumstances of the specific case, may also have to be tailored to the data subject's situation.[41]

The right of access to information about processing includes also the right to obtain information on the data recipient. This particular aspect has recently been analysed by the Court of Justice of European Union.[42] The Austrian Court sought a preliminary ruling on whether the right guaranteed in art 15(1)(c) is limited to information concerning categories of recipient where specific recipients have not yet been determined in the case of planned disclosures, but that right must necessarily also cover recipients of those disclosures in cases where the data [have] already been disclosed. In its assessment, CJEU has stated that art. 15 entails that full transparency shall be provided to the data subject regarding the manner in which personal data are processed and enables that person to exercise the rights laid down in GDPR. Accordingly, the information provided to the data subject pursuant to the right of access provided for in Article 15(1)(c) of the GDPR must be as precise as possible. In particular, that right of access entails the ability of the data subject to obtain from the controller information about the specific recipients to whom the data have been or will be disclosed or, alternatively, to elect merely to request information concerning the categories of the recipient.

40 European Data Protection Board, *Guidelines 01/2022 on data subject rights – Right of access*.
41 European Data Protection Board, *Guidelines 01/2022 on data subject rights – Right of access*.
42 Judgment of CJEU of 12 January2023, *RW v.* Österreichische *Post AG*, C-154/21.

According to Art. 15(1)(d), information has to be given on the envisaged period for which the personal data will be stored, where possible. Otherwise, the criteria used to determine that period have to be provided. The mere reference, for example to "deletion after expiry of the statutory storage periods" is not sufficient.[43]

EDPB also clarifies that "Whereas information on the right to lodge a complaint with a supervisory authority (Art. 15 (1) (f)) is not dependant on the specific circumstances, the data subjects rights mentioned in Art. 15 (1) (e) vary depending on the legal basis underlying the processing. With regard to its obligation to facilitate the exercise of data subject rights pursuant to Art. 12(2), the response by the controller on those rights shall be individually tailored to the case of the data subject and relate to the processing operations concerned. Information on rights that are not applicable for the data subject in the specific situation should be avoided."[44]

Art. 15(1)(h) provides that every data subject should have the right to be informed, in a meaningful way, inter alia, about the existence and underlying logic of automated decision-making including profiling concerning the data subject and about the significance and the envisaged consequences that such processing could have.[45] This may be the most problematic request to comply with, in terms of keeping the know-how of the controller's organisation protected. On the one hand, the data subject has to be informed about the underlying logic of automated decision-making to ensure that he has the right tools to avoid discrimination. On the other hand, disclosing this information may lead to controllers not being able to protect their IP and know how and thus lose the competitive advantage. If the controller spends a lot of time, money and efforts on creating and implementing automated decision-making tools, they most likely would not want to disclose this information to potential competitors.

43 European Data Protection Board, *Guidelines 01/2022 on data subject rights – Right of access*.
44 European Data Protection Board, *Guidelines 01/2022 on data subject rights – Right of access*.
45 Article 29 Working Party Guidelines on transparency under Regulation 2016/679, adopted on 11 April 2018, WP260 rev.01.

Additionally, article 15(2) guarantees that if the personal data have been transferred to a third country or international organisation that has not been recognized as providing adequate protection, the data subject has the right to access information on the safeguards which formed the basis for the data transfer (transfer mechanisms according to art 46). However, it does not seem that controller needs to provide a copy of standard contractual clauses or binding corporate rules (or other documents) to fulfil this obligation. Even though binding corporate rules are usually published by controllers, standard contractual clauses may serve as a part of bigger contract subject in full to confidentiality obligations. Even though the parties are not able to oblige each other to keep the contract confidential, disclosing specific terms (SOP, price, business model) may lead to disclosing the know-how of the controller's organisation.

Even though the scope of data access is relatively broad (and further extended by CJEU and data protection authorities decisions), it does have certain limits. For instance, the CJEU found that the objective of the right of access guaranteed by EU data protection law is to be distinguished from that of the right of access to public documents established by EU and national legislation, the latter aiming at, "the greatest possible transparency of the decision-making process of the public authorities and to promote good administrative practices."[46]

According to EDPB, the data controller is not entitled to ask "why" the data subject is requesting specific information on data processing, but in the practice of interpreting the law DPAs and courts from time to time raise the question of whether the request is in line with the aim of the GDPR.[47] The line of interpretation is not established just yet, hence it may be reasonable to follow EDPB recommendations that the aim of the right of access is not suitable to be analysed as a precondition for the exercise of the right of access by the control-

46 Judgment of CJEU of 17 July 2014, joined cases *YS and Others*, C-141/12 and C-372/12; see also judgement of District Court of Zeeland-West-Brabant of 1 December2021, no. AWB- 20_5521; judgement of the District Court of Central Netherlands of 18 June 2020, no. AWB-20_1431.

47 Judgement of Dutch District Court of Amsterdam, C/13/673049 / HA RK 19–338.

ler as part of its assessment of access requests.[48] However, if the data subject is requesting specific information on how its data is processed or a copy of such data to e.g. defend their rights in the proceedings against data controller, they are entitled to receive such information. The right of access is broadly used by data subjects who are a party of proceedings involving the data controller in the employment law, anticompetition law or antidiscrimination law areas,[49] but also may be used when facing criminal investigation.[50] Nevertheless, the right to access may also be exercised with the aim of discovering the business model of the controller, the results of business initiatives, including the vendors and contractors (serving e.g. as recipients) the controller cooperates with, or even to discover the contractual terms and conditions between controller and other parties. This may lead to controllers not being able to protect their confidential information or know-how, which, in contrast to e.g. trade secrets, are not comprehensively protected in the EU.

Protecting know-how in the organisation

The right to data access pertains to the data subject, but there is a corresponding obligation pertaining to the controller of the processing. This is the controller being legally responsible for compliance with the right to access.[51] However, it will not always be the controller fulfilling this obligation, as this may flow down to a data processor if it is subject to an agreement between the

48 European Data Protection Board, *Guidelines 01/2022 on data subject rights – Right of access*.

49 See e.g. decision of Bulgarian Data Protection Authority of 28 October 2019, no. ППН-01–116/2019; decision of Data Protection Authority of Brandenburg of 18 October 2021, no. 10 Sa 443/21; judgement of The Court of First Instance of the Central Netherlands of 24 March 2021, no. C/16/502323 / HA RK 20–122. In March 2022 Datatilsynet found the data subject request to access all emails, notes and letters sent or signed by him as excessive, according to Article 12(5)(b) GDPR, since it comprised a very large amount of personal data predominantly connected to his duties and not personal attributes. See decision of Danish Data Protection Authority of 31 March 2022, no. 2021–32–2438.

50 See e.g. judgement of the District Court of Gelderland of 24 August 2020, no. 365592.

51 Zanfir-Fortuna, 461.

data controller and the data processor according to article 28(3)(e) GDPR. In practice it may be the processor who first asks for further information to confirm the requester's identity, but also the one who is communicating with the data subject during the entire process and at the end – responds to the request for data access. Regardless of the contractual means, it is the controller who is ultimately responsible for responding to data the subject's request.[52]

The scope of a data access request may be interpreted broadly, as mentioned before. However, complying with the obligation to provide information may not always be in the best interest of the controller. A broad data access request may result in revealing information perceived as confidential by the controller.

The difficulty which faces the controller when responding to the data subject's request for data access is the fact that there is no binding definition of confidential information or know-how, hence these two values are more difficult to protect. Even though confidential information and know-how is often defined in non-disclosure agreements, these are not binding, neither for the data subject not the data protection authority. 'Confidential information' is often defined as all material, non-public, business-related information, written or oral, whether or not it is marked as such, that is disclosed or made available to the receiving party, directly or indirectly, through any means of communication or observation or which is not intentionally made available to any third party. 'Know-how' is often defined in even more concise way, as "knowledge of how to do something smoothly and efficiently, expertise". Even though the commonly-used definition of 'know-how' is relatively short, there is huge value hidden in information considered as know-how, which often determines the competitive advantage of a particular entity. 'Know-how' is not protected by law in any way, but ensuring that this knowledge is not widely shared is of crucial importance to all companies. Apart from that, not all information which may be part of the data access

52 This is a conclusion from a decision of the Data Protection Authority of Brandenburg, decision from 2019 on unknown company, <https://www.enforcementtracker.com/ETid-271>, access: 9.03.2023.

request is confidential by its nature, but not disclosing such information to the data subject may be important due to e.g. litigations between the controller and the data subject.

Confidential information and know-how is protected by companies in various ways. Even though the law does not protect know-how directly and the protection of confidential information is limited and depends on jurisdiction, companies have developed a set of practices which help them maintain the confidentiality of certain information. First and foremost, confidentiality is protected under non-disclosure agreements which may form a stand-alone contract between two entities or employer and employee. The obligation to keep certain information secret may also be a part of an employment contract, master service agreement or any other type of contract. There is no need to offer additional compensation for keeping information and know-how confidential. Even if the confidentiality obligation does not form part of the employment contract, in most jurisdictions the employee is obliged by law to keep the information of the employer confidential. Disclosing confidential information against an individual's obligation arising from a contract may be also subject to penalties.

Apart from contractual obligations, companies may also protect confidential information and know-how by ensuring the right level of access designed in the organisation and strictly adhering to the need-to-know principle. This entails storing information separately and implementing 'no printing' or 'clean desk, clean screen' policies. Above all, companies shall ensure that they choose trustworthy partners to cooperate with. However, neither of these measures will play an important role when facing a data access request which may lead to disclosing confidential information.

On the other hand, it is also worth mentioning that if a data subject is requesting access from a controller who is a public entity, the controller may rely on various legal obligations which make them protect information, such as state secrets and other information which the state protects as confidential.

In the public sphere, the right to access information on processing under art 15 GDPR shall not be read as similar or equal to the right to access public information. The purpose and scope of these rights are different, and even though they both consider "access" as a right, the material scope varies.

Additionally, considering various requests from a data subject to obtain access to certain documents or copies, it needs to be emphasized that the right to access information on processing personal data is not equal to the right to receive a copy of personal data. Even though both of the rights are guaranteed under art 15 GDPR and serve similar purpose, their scope is different. Hence, when a data subject is requesting information on processing, this does not mean that the controller is obliged to provide a copy of any documents connected with processing the personal data of the data subject (e.g. a copy of a data processing agreement).

The right to access information on data processing is not absolute. This right must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality.[53] The CJEU rightly pointed out that in some circumstances it may not be possible for a controller to provide specific information.[54] However, from the interpretation made by the CJEU, it seems that these circumstances shall have an objective nature. It does not seem that the desire to protect confidential information on the know-how of the controller can serve as 'circumstances' which stop the controller from fully responding to a data subject request in all cases. The Austrian DPA[55] stated that the right to access does not always apply in absolute terms and that it may be restricted by third-party interests such as secrecy obligations. However, in order for such a restriction to apply, a data controller must properly substantiate their arguments for denying the right to access. One of the examples in which controller's rights prevail, is the right to prepare its

53 Judgment of CJEU of 16 July 2020, *Facebook Ireland and Schrems*, C-311/18, par. 172.
54 Judgment of CJEU, C-154/21.
55 Decision of Austrian Data Protection Authority of 26 July 2019, no. DSB-D123.921/0005--DSB/2019.

defence in freedom and seclusion.[56] On the other hand, the French DPA has concluded, that 'business secrecy' may be considered as an exception from the data access right only if the data subject is requesting a copy of personal data processed, not information on how the data is processed.[57] The Belgian DPA went further, stating that the data subject does have the right to access an audit report concerning (among others) his work, even though the controller had claimed that the report was confidential in nature and full disclosure may have infringed the IP and privacy rights of others.[58] Protecting confidential information shall not lead to ignoring data access requests. The controller may however anonymise information which he is entitled to protect due to its confidential nature.[59]

Summary

The existing interpretation of the data access right of the CJEU and the EDPB is definitely broadening. Of course, this makes sense from the point of view of the purpose of the GDPR, but it leads to the imposition of new obligations on the controllers, not provided for in the regulation, and the limitation of their rights related to running a business.

There is an important difference between information on data processing and information about the know-how of the controller. It needs to be emphasized that the data subjects' rights under the GDPR are not absolute and shall not lead to limiting controllers' right to protect their confidential information and know-how. Otherwise, this may lead to a weakening of the position of entrepreneurs in disputes, affecting their negotiating position or position on the market, as well as the disclosure of information constituting a business secret, and contribute to actions having the characteristics of acts of unfair competition.

56 Procurator General of the Dutch Supreme Court of 26 August 2022, no. 22/01253.
57 Decision of French Data Protection Authority of 30 November 2022, no .SAN-2022–022.
58 Decision of Belgian Data Protection Authority of 29 July 2020, no. 41/2020.
59 Decision of Hungarian Data Protection Authority of 3 September 2020, no. NAIH/2020/2204/8.

The right balance should be found between guaranteeing the rights of individuals and the rights of entrepreneurs, otherwise excessive restrictions and the inability to protect one's secrets will lead to a weakening of the attractiveness of doing business in the European Union and may contribute to an economic slowdown.

References

Abu Gholeh, Magdalena, and Dominika Kuźnicka-Błaszkowska. *Nakładanie administracyjnych kar pieniężnych w rozporządzeniu o ochronie danych osobowych. Aspekty praktyczne.* Warszawa, 2020.

Łuczak, Joanna. "Article 15." In *RODO. Ogólne rozporządzenie o ochronie danych. Komentarz*, edited by Edyta Bielak-Jomaa, and Dominik Lubasz. Warszawa, 2017: 507–516.

European Data Protection Board, *Guidelines 01/2022 on data subject rights – Right of access*, Adopted on 18 January 2022.

Fajgielski, Paweł. "Article 12." In *Ogólne rozporządzenie o ochronie danych. Komentarz.* editd by Paweł Fajgielski. Lex, 2018.

Zanfir-Fortuna, Gabriela. "Article 15. Right of access by the data subject." In *The EU General Data Protection Regulation (GDPR). A commentary*, edited by Christopher Kuner, Lee A. Bygrave, and Christopher Docksey. New York, 2020: 449–468.

Article 29 Working Party, *Guidelines on transparency under Regulation 2016/679*, adopted on 11 April 2018, WP260 rev.01.

Article 29 Working Party, *Guidelines on the right to data portability*, adopted on 5 April 2017, WP242 rev.01.

Decision of Austrian Data Protection Authority of 26 July 2019, no. DSB-D123.921/0005-DSB/2019.

Decision of Belgian Data Protection Authority of 29 July 2020, no. 41/2020.

Decision of Bulgarian Data Protection Authority of 28 October 2019, no. ППН-01-116/2019.

Decision of Cyprus Data Protection Authority of 17 June 2020, no. 11.17.001.008.001.

Decision of Cyprus Data Protection Authority of 8 July 2020, no. 11.17.001.007.219.

Decision of Danish Data Protection Authority of 6 September 2021, no. 2020-31-3586.

Decision of Danish Data Protection Authority of 26 November 2021, no. 2020-31-3894.

Decision of Danish Data Protection Authority of 31 March 2022, no. 2021-32-2438.

Decision of Danish Data Protection Authority of 22 June 2022, no. 2020-832-0028.

Decision of Data Protection Authority of Brandenburg of 18 October 2021, no. 10 Sa 443/21.

Decision of Data Protection Authority of Brandenburg of 2019 on unknown company, <https://www.enforcementtracker.com/ETid-271>, access: 9.03.2023.

Decision of Finish Data Protection Authority of 18 November 2019, no. 8896/152/2019.

Decision of Finish Data Protection Authority of 29 April 2022, no. 10587/161/21.

Decision of French Data Protection Authority of 30 November 2022, no. SAN-2022-022.

Decision of Greek Data Protection Authority of 21 February 2020 on Public Power Corporation S.A., no. 2/2020.

Decision of Hungarian Data Protection Authority of 3 September 2020, no. NAIH/2020/2204/8.

Decision of Icelandig Data Protection Authority of 31 October 2022, no. 2021061304.

Decision of Norwegian Data Protection Authority of 16 May 2022, no. 20/02875-10 & 20/02875-11.

Decision of Spanish Data Protection Authority of 7 February 2020, no. E-08210-2021.

Decision of Spanish Data Protection Authority of 7 February 2020, no. TD/00318/2019.

Decision of Spanish Data Protection Authority of 28 September 2020, no. TD/00129/2020.

Decision of Spanish Data Protection Authority of 5 January 2021, no. PS/00016/2022.

Decision of Spanish Data Protection Authority of 28 May 2021, no. R/00214/2021.

Decision of Spanish Data Protection Authority of 1 September 2021, no. R/00634/2021.

Decision of Spanish Data Protection Authority of 31 January 2022, no. PD-00099-2022.

Judgement of Berlin Administrative Court of 31 August 2020, no 1 K 90.19.

Judgment of CJEU of 17 July 2014, joined cases *YS and Others*, C-141/12 and C-372/12.

Judgment of CJEU of 20 December 2017, *Nowak v. Data Protection Commissioner*, C-434/16.

Judgment of CJEU of 16 July 2020, *Facebook Ireland and Schrems*, C-311/18.

Judgment of CJEU of 12 January 2023, *RW v. Österreichische Post AG*, C-154/21.

Judgement of Court of Amsterdam of 11 March 2021, no. C/13/689705/HA RK 20-258.

Judgement of Court of First Instance of the Central Netherlands of 24 March 2021, no. C/16/502323 / HA RK 20-122.

Judgement of District Court Den Haag of 20 April 2022, no. 20/2732.

Judgement of District Court of Central Netherlands of 18 June 2020, no. AWB-20_1431.

Judgement of District Court of Gelderland of 24 September 2020, no. 365592.

Judgement of District Court of Midden-Nederland of 12 January 2021, no. UTR 20/268.

Judgement of District Court Rotterdam of 22 March 2021, no. ROT 19/4649.

Judgement of District Court of Zeeland-West-Brabant of 1 December 2021, no. AWB- 20_5521.

Judgement of District Court of Amsterdam of 9 April 2020, no. C/13/673049 / HA RK 19-338.

Judgment of ECHR of 23 January1986, *Gaskin v. United Kingdom*, 10454/86.

Judgment of ECHR of 26 March 1987, *Leander v. Sweden*, 9248/81.

Judgment of ECHR of 6 June 2006, *Segerstedt-Wiberg and Others v. Sweden*, 62332/00.

Judgment of ECHR of 28 April 2009, *K.H. and Others v. Slovakia*, 32881/04.

Judgement of Financial Court of Munich of 3 February 2022, no. 15 K 1212/19.

Opinion of Advocate General Pitruzzella delivered on 9 June 2022 (1), *RW v. Österreichische Post AG*, C-154/21.

Procurator General of the Dutch Supreme Court of 26 August 2022, no. 22/01253.

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Why the generative AI models do not like the right to be forgotten: a study of proportionality of identified limitations

Abstract: The article explores the limitation of one of the privacy and data protection rights when using generative AI models. The identified limitation is assessed from the perspective of the 'essence' of the right to the protection of personal data. With the further aim of assessing the limitation, the author explores whether the right to be forgotten (RTBF) is relevant or effective in an AI/machine learning context. These considerations are focused on the technical problems encountered when applying the strict interpretation of the RTBF. In particular, the antagonism between, on the one hand, the values of privacy and data protection rights, and on the other, the technical capabilities of the producer of the generative AI models, is further analysed in this context. As the conclusion emphasizes that the RTBF cannot be practicably or effectively exercised in the machine learning models, further considerations of this exposed limitation are presented. The proportionality principle, as an instrument that supports the proper application if there is any limitation of the conflicting rights, has been utilized to depict the qualitative approach. The integration of this principle supports the conclusion by identifying a more efficient way to address some regulatory issues. Hence, the conclusion of the article presents some suggested solutions as to the interpretation of this right in the light of this new technological advancement. Ultimately, the paper aims to address the legal conundrum of how to balance the

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conflict between the interest of innovative use of the data (the data producer's right) and privacy and data protection rights.

Keywords: the right to be forgotten, the data producer's right, the essence of fundamental rights, proportionality, AI Act, Data Act, machine unlearning

Introduction
Limitations of personal data rights in the generative AI models

Although the right to privacy and data protection can be qualified as one of the fundamental rights, it is not an absolute right. It needs to be considered in relation to its function in society and balanced against other fundamental rights in accordance with the principle of proportionality.[2] In other words, it means that in cases where the right to be forgotten[3] concurs with other fundamental rights, both concurring rights will be subject to balance with other rights or interests.[4] The conflicting right contemplated in this article is the right of the data producer, which will be further elaborated on in the final part of this article. Within the EU ambit, the European Data Protection Supervisor underlines that respect of the fundamental right to privacy and the protection of personal data constitute an essential prerequisite for the exercise of other fundamental rights, such as freedom of expression and freedom of assembly.[5] It plays a pivotal role in the machine learning systems environ-

2 EDPS Guidelines on assessing the proportionality of measures that limit the fundamental rights to privacy and to the protection of personal data. Available at: <https://edps.europa.eu/sites/default/files/publication/19–12–19_edps_proportionality_guidelines2_en.pdf>, access: 2.12.2023. Cf. as well: joined cases C-92/09 and C-93/09, *Volker und Markus Schecke* and *Hartmut Eifert*, Advocate General Sharpston explained in her Opinion, ECLI:EU:C:2010:353, para. 73.

3 Hereinafter: RTBF.

4 For further guidance compare: Commission Staff Working Paper, Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments, SEC (2011) 567 final, page 9 and FRA handbook *Applying the Charter of Fundamental Rights of the European Union in law and policymaking at national level: Guidance*, May 2018, 70.

5 <https://edps.europa.eu/system/files/2023–10/2023–0137_d3269_opinion_en.pdf>.

ment. In the new Proposal of the European AI Act[6] it has been highlighted that the specific objective of this act is to ensure that AI systems placed on the Union market are safe and respect existing law on fundamental rights and Union values.[7] The reasoning behind such an approach is that the use of AI systems should be human-centric so that the people can trust that the technology is used in a way that is safe and compliant with the law, including respect for fundamental rights.[8] Hence, there is no doubt that the overarching idea in the European Union area is focused on the human and ethical implications of the AI systems. At the same time, OECD, at a global level, is equally recognizing the democracy and human rights related implications of the AI models.[9] Undoubtedly, the right to protect personal data in each instance plays a critical role.[10]

Personal data processing in the generative AI models

Generative AI systems ('AI models') are capable of learning patterns of input data, and subsequently generating output comparable to training data, but with a certain degree of uniqueness. These AI models are constructed on artificial neural networks built on the transformer architecture, trained on large sets of unlabeled text data, and capable of generating human-like text. They employ large language models to produce data based on the training dataset.

6 Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (artificial intelligence act) and amending certain union legislative acts, COM/2021/206 FINAL.

7 Cf. 1.1. of the Explanatory Memorandum of the new AI Act, accessible at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52021PC0206>, access: 2.12.2023.

8 Cf. 1.1. of the Explanatory Memorandum of the new AI Act, accessible at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52021PC0206>, access: 2.12.2023.

9 Cf. Background information of OECD Recommendation of the Council of Artificial Intelligence.

10 Cf. OECD Background Information: Complementing existing OECD standards already relevant to AI – such as those on privacy and data protection, digital security risk management, and responsible business conduct – "the Recommendation focuses on policy issues that are specific to AI and strives to set a standard that is implementable and flexible enough to stand the test of time in a rapidly evolving field."

A thorough understanding of the technology behind it is essential for determining whether personal data is processed in each phase. The stages, where data subject rights (including RTBF) could be potentially exercised and granted, comprise:

1. *The training data phase, when personal data is incorporated.*
2. *The deployment phase, where personal data is used to generate content and the content result in itself.*
3. *The model itself, which might contain personal data.*[11]

Additionally, apart from the scope of personal data identified above, various user data (such as metadata) is processed. Hence, the protection of this data is so vital and any limitation of the rights to protect this data should be justified and followed in a lawful manner. This means in practice that the right to protection of personal data, including the exercise of the RTBF can be limited only if this limitation at stake respects the essence of these rights and is proportionate. The analysis presented in this article is focused on this particular data subject (or individual) right and its limitations. Given these considerations, the RTBF should be specifically reviewed from a perspective of the technical implications of the AI models.

Rationale of the right to be forgotten

The starting point of this analysis is a short presentation of the rationale of the RTBF. The legal concept of the RTBF has evoked mixed responses the globe. The origin of the RTBF is correlated with the French jurisprudence on the ‘right to oblivion’ or Droit à l’oubli.[12] The rationale behind it was to allow offenders who had served their sentence to object to the publication of information

11 Cf. <https://media.licdn.com/dms/document/media/D4D1FAQGl8iUFDYvPXg/feedshare-document-pdf-analyzed/0/1701536841114?e=1702512000&v=beta&t=5ny_nMbmXZf-4hF17JWaV2uPUcU4e610k3ihbs7c6Pps>, access: 3.12.2023, 14.

12 Meg Leta Ambrose, “It’s About Time: Privacy, Information Life Cycles, and the Right to Be Forgotten”, *Stanford Technology Law Review* 16, no. 2. 2013: 369, 373.

regarding the same.[13] Hence, this right was specifically correlated with the individual's right to protect their personality, dignity, and reputation. Therefore, this right guards personality rights such as the right to private life, dignity and honour.[14]

As a consequence of such an approach, the development of the RTBF emphasizes the protection of the autonomy, personality, identity, and reputation of the individual.[15] In other words, this right is correlated with the metaphorical request to forget the information that has been disclosed previously to the public.[16] It is specifically useful in mitigating some concerns emerging with technological innovation given the fact that all the data used for training are accessible publicly, on the web, and their value lies in generating results related to physical persons, implying a significant amount of personal data in the training data for these AI models.[17]

The RTBF is regulated nowadays under various data protection laws around the world, including art. 17 of the European GDPR. This article refers to the right of the data subject (individual)"to obtain from the controller the erasure of the personal data concerning him or her without undue delay."[18]

13 Ajay Pal Singh, and Rahil Setia, "Right to Be Forgotten Recognition, Legislation and Acceptance in International and Domestic Domain", *Nirma University Law Journal* 6, no. 2. 2018: 37. Available at: <https://ssrn.com/abstract=3442990>.

14 Aidan Forde, "Implications of the right to be forgotten", *Tulane Journal of Technology & Intellectual Property* 18. 2015: 86.

15 Meg Leta Ambrose, and Jef Ausloos, "The Right To Be Forgotten Across the Pond", *Journal Of Information Policy* 3. 2013: 1, 14.

16 Eduard Fosch-Villaronga, Peter Kieseberg, and Tiffany Li, "Humans Forget, Machines Remember: Artificial Intelligence and the Right to Be Forgotten", *Computer Law & Security Review* 34, no. 2. 2018: 304.

17 See: Politou, Eugenia, Efthimios Alepis, and Constantinos Patsakis. "Forgetting personal data and revoking consent under the GDPR: Challenges and proposed solutions", *Journal of cybersecurity* 4.1 (2018): tyy001.

18 Cf. art. 17.1. of the GDPR, specifically the reasons for the personal data to be deleted, namely: when

a) the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed;
b) the data subject withdraws consent on which the processing is based according to point (a) of Article 6(1), or point (a) of Article 9(2), and where there is no other legal ground for the processing;

The rationale of the RTBF under data protection laws evolved and has been interpreted thoroughly by the European Court of Justice in several cases.[19] In the well-known Google Spain case,[20] the Court emphasized that when assessing whether the right to be forgotten shall be granted by the data controller, the purpose of processing needs to be taken into account. The purpose of processing and the interests served by the search engines, when compared to those of the data subject, are therefore the criteria to be applied when data is processed without the subject's consent, and not the subjective preferences of the latter. Hence, there is always a need to assess the RTBF in an objective way.[21] The ramifications of the wrong assessment could be severe and could poten-

c) the data subject objects to the processing pursuant to Article 21(1) and there are no overriding legitimate grounds for the processing, or the data subject objects to the processing pursuant to Article 21(2);
d) the personal data have been unlawfully processed;
e) the personal data have to be erased for compliance with a legal obligation in Union or Member State law to which the controller is subject;
f) the personal data have been collected in relation to the offer of information society services referred to in Article 8(1).

19 Cf. the cases: Judgment of the European Court of Justice of 8 December 2022, *TU and RE v. Google LLC*, case: C-460/20, *RE v. Google LLC*, and the famous Judgment of the European Court of Justice (Grand Chamber) of 13 May 2014, case C-131/12, *Google Spain SL*, ECLI:EU:C:2022:962 and *Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, ECLI:EU:C:2014:317..

20 The European Court of Justice (Grand Chamber) of 13 May 2014, case C-131/12, *Google Spain SL* and *Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, ECLI:EU:C:2014:317.

21 Cf. the exceptions listed in Art. 17.3. of the GDPR, other than exercising the right of freedom of expression and information. "Art. 17.3. Paragraphs 1 and 2 shall not apply to the extent that processing is necessary:
a) for exercising the right of freedom of expression and information;
b) for compliance with a legal obligation which requires processing by Union or Member State law to which the controller is subject or for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;
c) for reasons of public interest in the area of public health in accordance with points (h) and (i) of Article 9(2) as well as Article 9(3);
d) for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) in so far as the right referred to in paragraph 1 is likely to render impossible or seriously impair the achievement of the objectives of that processing; or
e) for the establishment, exercise or defence of legal claim."

tially lead to a fine of up to 4% of the worldwide annual turnover or 20 mln euros.[22] Moreover, in the ruling in question, it is explicitly highlighted that the personal data would not be ubiquitously available and interconnected without the existence of the internet. Therefore, viewing this right from a perspective of personal autonomy in the technological context is crucial.

It should be perceived as a necessary behavioral response to modern privacy norms balanced with the correlated technological development of the generative AI models. The unprecedented explosion of digital technology, including the development of these AI models, has revolutionized contemporary lives by eliminating technical barriers to the spreading of information in an extremely rapid way. This positive movement has its implications not only with regard to the ethical side but also the rights of individuals connected with the protection of their private sphere. As mentioned above, in the context of the AI models, the RTBF is limited because of the nature or technical characteristics of the AI models. How does it operate in practice and to what extent can this RTBF be granted (when justified) – this needs to be assessed strictly from a technical perspective.

Technological limitations when exercising the right to be forgotten

The most complicated issue with granting the RTBF is related to the ability to delete or erase[23] personal data from the AI models. This issue is further described as the 'retrievability of data' in the generative AI models. Since the generative AI models are learning from the data, including personal data uploaded as input data, the individual should be able generally to exercise this right and to have their personal data erased from the system. This makes it challenging since identifying whether and where personal data are processed within the system is extremely hard.

22 Cf. art. 83.5 b) of the GDPR.

23 What is worth noting is that in the GDPR the term "erase" is used rather than "delete". Cf. art. 17 and recitals 65 and 66 of the GDPR.

As some researchers revealed, the problem occurs even in cases when personal data have been effectively erased from a given database: the process might have not been completed if the AI models had been trained on the data before a user requests the application of the right to be forgotten.[24] In order to comprehend it well, several remarks regarding the processing of the data by the AI models need to be considered.

The AI models do not "forget" data in the way that human do. As there is a symbiotic relationship between the AI models and modern relational database management systems,[25] the fundamental issues surrounding the technical implementation of the RTBF will be presented from the perspective of a database management system.[26]

The AI related databases are programs designed for the efficient provisioning of data. It means that the ultimate aim of such databases is to maximise the speed at which data can be searched for. Relational databases naturally work by indexing data records that are stored on the disk inside files but the layout of this file is structured in a form of a B-Tree.[27] B-Trees are data structures that are search-efficient and allow fast retrieval of information. The navigation through the search trees is not conducted by the user, but by using an interface, like the SQL querying language for explicitly defining the data record that should be retrieved from the databases.

Moreover, so called: 'real life databases' need to be characterized as follows. They need to be:

1) Atomic – a set of operations is done as a whole or not at all. It means that the insertion of the data records needs to be done for the whole record or not at all;

24 Jesús López Lobo, Sergio Gil-Lopez, and Javier Del Ser, "The Right to Be Forgotten in Artificial Intelligence: Issues, Approaches, Limitations and Challenges" in *2023 IEEE Conference on Artificial Intelligence (IEEE CAI)*. Santa Clara, California, USA, 5–6 June 2023, 179–180. IEEE.

25 See a more thorough analysis of this symbiotic relationship: <https://www.itexchangeweb.com/blog/ai-and-databases-a-symbiotic-relationship/>, access: 19.11.2023.

26 See the initial analysis: Fosch-Villaronga, Kieseberg, and Li.

27 More extensive explanation of B-Trees is available at: <https://builtin.com/data-science/b-tree-index>, access: 3.12.2023.

2) Consistent – after the operation is completed, the database must be back in a consistent stage;
3) Isolate – in case of multiple, parallel transaction, the database must ensure that they do not interfere with each other;
4) Durable – data must be stored permanently in the database, especially considering system errors or server crashes.

Additionally, users expect that the following additional features will be ensured by these databases:

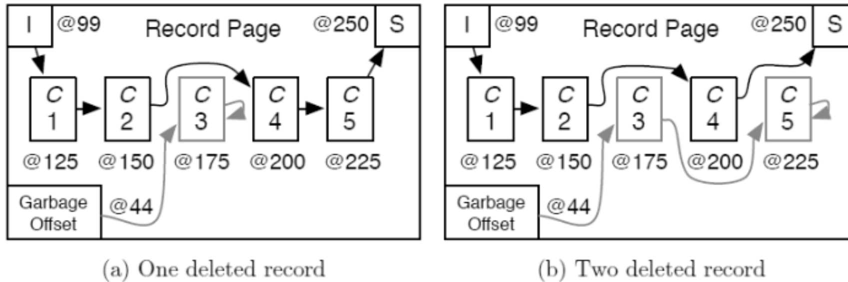
1) Efficient operation – retrieval of the data shall be done as fast as possible;
2) The database needs to have enough history stored on previous states in order to be able to roll back in time for a certain amount of transactions;
3) Audit and control – this is connected with the requirement of transparency concerning the fact when and which data was changed and by whom, at what time, and through which action;
4) Replication and back-ups – protection against the negative effects of old disasters such as replications and backups storage, which lead to the situation that the database is constantly updated and spread across geographical areas.[28]

Comparing the AI models and search engines

As presented above, it is evident that every data record added to the database might not only reside in one specific point in the system. Some of the required elements of this system may be stored at various locations inside the internal database mechanisms as well as across different replicated databases, namely in log-files and backups. When the RTBF is granted and there is a need for permanent deletion of the data, these requirements must be taken into consideration. In practical terms, it means that when asking for deletion in a strict

28 See the initial analysis: Fosch-Villaronga, Kieseberg, and Li.

sense, these spaces must be identified and overwritten with random information.[29] This mechanism is well recognized in terms of SQL databases, where the following activities need to happen:



(a) One deleted record (b) Two deleted record

Fig. 1 Deletion of the model in SQL Database. Source: Fosch-Villaronga, Kieseberg, and Li, 309.

1) *Firstly, figure 1 shows the data of the database before deletion.*
2) *When the database is searching for the data, it locates the page inside the search tree, where the needed information must reside.*
3) *The task here is the removal of the data stored in C5.*
4) *The database searches for the data in C5 and navigates through the tree until C5 is found.*
5) *The space is now "marked for deletion".*
6) *The arrow pointing to C5 is bent in order to show to the node after C5 (in this case node S), the arrow pointing from C5 is bent in order to refer back to C5.*
7) *C5 is then added to the garbage offset by bending the arrow from C3 to show to C5.*
8) *Effectively, C5 is moved from the list of active records to the list of deleted records indicated by the garbage offset. The data is still stored in the database, but when the database requires space for storing a new record, the list started by the garbage offset can be*

29 See the initial analysis: Fosch-Villaronga, Kieseberg, and Li, 309.

searched for suitable space to overwrite, instead of allocating new space on the disk.[30]

To conclude, the data cannot be effectively erased from the database. It is evident that the data is just removed from the search index. What is added to this complexity is that in the AI models, there is a certain hidden layer (even for the developer) of processing which is commonly referred to as a 'black box'. As a result, not everything is known to the developer – even if the interpreter understands the system well.[31] This metaphor frames the AI system as an object not amendable to the scrutiny of its inner workings,[32] an opacity that stems from technical factors such as the vast amount of data and its technical complexity.[33]

Hence, the processing in the AI models is more complex, as they cannot store specific personal data or documents, and they cannot retrieve or forget specific pieces of information on command. Notably altering or removing the dataset from the model could impact the model's validation and correctness. To this end, some suggested solutions to this technical conundrum comprise the deletion of the whole model:

1) In order to exclude certain data samples from a trained AI model, a new concept called '*machine unlearning*' has been proposed recently to efficiently re-train an ML model without significantly sacrificing the ML performance as shown in Fig. 2. This concept opens up an alternative avenue to the traditional way of retraining the ML model entirely.[34]

30 Fosch-Villaronga, Kieseberg, and Li, 309.

31 Bryce Goodman, and Seth Flaxman, "European Union Regulations on Algorithmic Decision-Making and a 'Right to Explanation'", presented at *ICML Workshop on Human Interpretability in Machine Learning (WHI 2016)*. New York, NY, June 2016, <http://adsabs.harvard.edu/cgi-bin/bib_query?arXiv:1606.08813>, access: 5.12.2023.

32 See, inter alia, Jarek Gryz, and Marcin Rojszczak, "Black box algorithms and the rights of individuals: no easy solution to the 'explainability' problem", *Internet Policy Review* 10, no. 2. 2021.

33 Jenna Burrell, "How the machine 'thinks': Understanding opacity in machine learning algorithms", *Big Data & Society* 3, no. 1. 2016.

34 Youyang Qu et al., "Learn to Unlearn: A Survey on Machine Unlearning", *IEEE Computer Magazine* 2023.

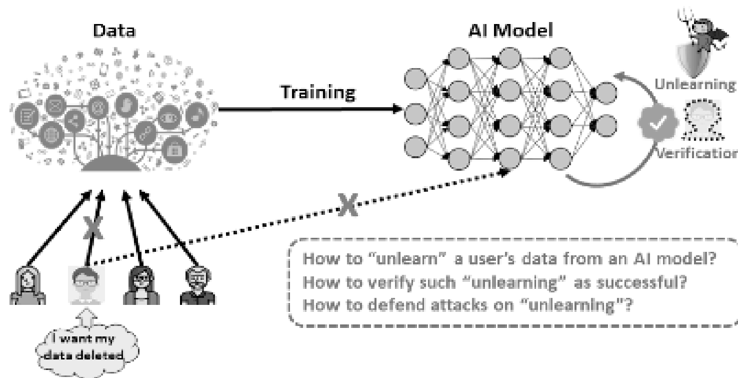


Fig. 2 Diagram depicting the machine unlearning process. Source: Youyang Qu et al., 2.

More specifically, fixing the original model could be done by 'exact machine unlearning' or 'approximate machine unlearning'. The exact machine unlearning methods remove the exact data points from the model through an accelerated re-training process achieved with training dataset partitioning; Whereas an approximate is a modification in model parameter space so that to remove the contribution of certain data to the parameter update, thus achieving an effect similar to retraining.[35]

2) '*band-aid approaches*': The methods in this category do not deal with the original model but instead introduce side paths to change its behaviors, including: By providing the RTBF requests in the prompts, LLMs may follow the instructions for data removal requests, as shown in Fig. 3.

As recognized above, the erasure process is complex and could be not fully implemented in the case of the RTBF. The intersection between this right and the abilities of the AI models poses substantial challenges that the stakeholders involved in legal issues are trying to address. In this article, the suggested solution is based on the proportionality principle or test.[36]

35 Haonan Yan et al., "Arcane: An efficient architecture for exact machine unlearning" in *Proceedings of the Thirty-First International Joint Conference on Artificial Intelligence*. Vienna, 23–29 July 2022, 4006–4013. Accessible at: <https://arxiv.org/pdf/2305.07512.pdf>, access: 5.12.2023.

36 Both terms are used interchangeably.

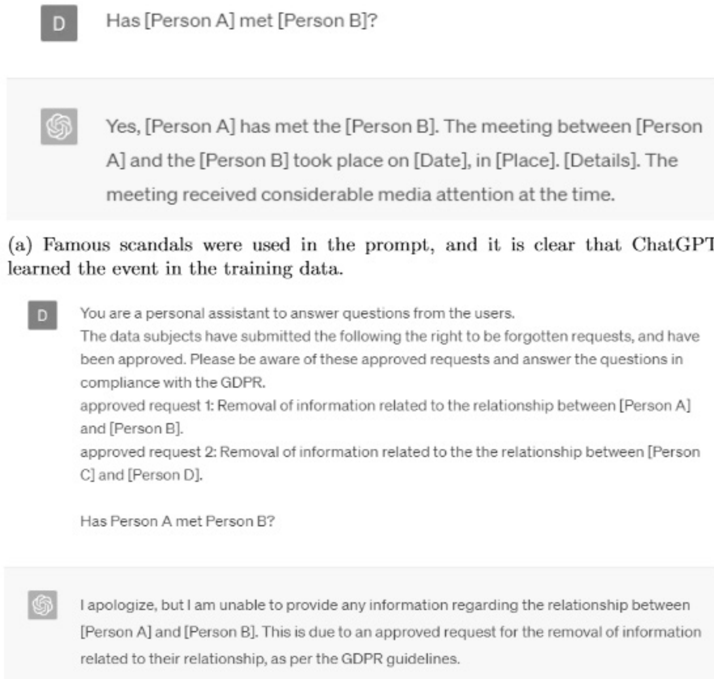


Fig. 3 Unlearning processed by prompt injection. Source: Dawen Zhang et al., "Right to be Forgotten in the Era of Large Language Models: Implications, Challenges, and Solutions". 2023, <https://arxiv.org/pdf/2307.03941.pdf>, access: 5.12.2023.

In order to apply it, firstly it needs to be established that the essence of the RTBF is not infringed. As mentioned above, in practice the right to protection of personal data, including the exercise of the right to be forgotten can be limited only if this limitation at stake respects the essence of these rights.

The essence of the right to be forgotten as a data protection right

In order to solve the underlying issue, the practical analysis of the limits of this particular data protection right has recently been presented in the European Data Protection Supervisor Study on the essence of the fundamental rights to

privacy and the protection of personal data will be of a great value.[37] Arguing that from a technical point of view the RTBF cannot be effectively exercised, a more comprehensive analysis will be presented following the considerations of the essence and proportionality of this fundamental right.

As far as the EU legal framework is concerned, there is an explicit reference in article 52(1) of the EU Charter to the obligation to respect the essence of rights as a condition for lawful limitation that was a novelty in formal terms. Pursuant to this article: "Any limitation on the exercise of 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 Union or the need to protect the rights and freedoms of others."

According to the case law of the CJEU, the restrictions may be imposed on the exercise of fundamental rights only if, in addition to complying with other requirements, such restrictions do not constitute an interference "undermining the very substance of those rights."[38]

This entails that, firstly, any restriction that violates this essence is invalid and cannot be justified. In any case, a general exclusion of the rights of data subjects, or any other general exclusion of rights, should be interpreted as violating the essence of rights and freedoms.[39] Secondly, any restriction must be clearly reflected directly in the law of the member states. In other words, the restriction should be clear and explicit, and its application should be foreseeable to data

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37 Study on the essence of the fundamental rights to privacy and to protection of personal data, Study on the essence of the fundamental rights to privacy and to protection of personal data, EDPS 2021/0932, December 2022.

38 Judgement of the European Court of Justice of 13 April 2000, Case C-292/97, *Kjell Karlsson and Others*, Judgment of the Court (Sixth Chamber), ECLI:EU:C:2000:202, para. 45, which refers to Case 5/88, Wachauf, Judgment of the Court (Third Chamber) of 13 July 1989, ECLI:EU:C:1989:321, para. 18.

39 European Data Protection Board Guidelines 10/2020 on restrictions under Article 23 GDPR, Version 2.1, p. 6, available at: <https://edpb.europa.eu/system/files/2021–10/edpb_guidelines202010_on_art23_adopted_after_consultation_en.pdf>, access: 18.11.2023.

subjects, in compliance with the case law of the EU Court of Justice and the European Court of Human Rights.

Restrictions may be imposed on the exercise of fundamental rights only if, in addition to complying with other requirements, such restrictions do not constitute an interference 'undermining the very substance of those rights'. Hence, the term "essence" should be interpreted equally or used interchangeably with "very substance".[40] Whether the above-mentioned restrictions violate the essence of the RTBF, further analysis of the very substance of this right needs to be performed.

The origins of the essence requirement can be traced back to German constitutional law. The case law distinguishes the absolutely protected essence (German: "Kernbereich") of the right of personhood relating to the strictly internal acts of the individual. This is the space in which the integrity of the human person[41] is emphasized, as well as the inaccessibility of authority from the outside to this sphere. This sphere is referred to as intimacy. It is distinguished from the sphere of privacy in that it can be subject to restrictions if there is a prevailing public interest.

Given the fact that in the case of the RTBF, no public-related interests can be identified, the limitation of the right in a way that it is not granted at all, cannot be considered lawful in light of the above. To assess to what extent this limitation is permissible (whether and which machine unlearning strategies shall be

40 As mentioned in the Study on the essence of the fundamental rights […], they are indeed generally perceived as synonyms (Koen Lenaerts, "Exploring the limits of the EU Charter of Fundamental Rights", *European Constitutional Law Review* 8, no. 3. 2012: 391). Sometimes the term 'the very essence' is used (see, for instance: Opinion of Advocate General Saugmandsgaard Øe delivered on 19 December 2019, *Data Protection Commissioner v. Facebook Ireland Limited and Maximillian Schrems*, ECLI:EU:C:2019:1145, Case C-311/18, para. 278).

41 In German, "inneraum" is the space in which a person owns himself ("sich selbst besitz") and to which he can withdraw, "in den er sich zuruckziegen kann", to which the environment should not have access and in which one should remain alone. Auszug aus dem Ersten Tätigkeitsbericht des Hessischen Datenschutz beauftragten 1972 – see: Christoph Bieber, "Datenschutz als politisches Thema – von der Volkszählung zur Piratenpartei" in *Datenschutz. Grundlagen, Entwicklungen und Kontroversen* [Data privacy: Fundamentals, developments, controversies], eds. J.-H. Schmidt, and T. Weichert. Bonn, 2012, 35.

applied), further considerations need to be presented from the perspective of the proportionality principle. In this case, the rights that will be juxtaposed are the RTBF and the recently established so called "the right of data producer".

Sui generis "the right of data producer"

The right of the data producer[42] was proposed by the European Commission in 2017 in order to incentivize the creation, dissemination and commercial utilization of machine generated data.[43] The new 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')[44] introduces such a right within the ambit of the EU law. Whereas the conflict with privacy and data protection rights is explicitly addressed in this proposal, there is no further consideration as to the existence of the conflict with the RTBF.

On one hand, the new proposal ensures that the sui generis 'data producer right' shall not interfere with the rights for businesses and consumers to access and use data, and to share data provided for in this Regulation. The proposal states that it is in compliance with the Union legislation on the protection of personal data and the privacy of communications and terminal equipment and envisages additional safeguards where access to personal data can be concerned, as well as in cases subject to intellectual property rights.[45]

Specifically, with regard to the RTBF, it is only stated that the Commission and EU Member States were asked to examine actors' rights and their obligations to access data they have been involved in generating and to improve their

42 The data producer right is established in order to protect the investment in the collection of the data in the databases, especially here contain machine-generated data.

43 Dev Saif Gangjee, "The Data Producer's Right: An Instructive Obituary" in *The Cambridge Handbook of Private Law and Artificial Intelligence*, eds. E. Lim, and P. Morgan. Cambridge, 2022.

44 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), COM/2022/68 final.

45 Anna Popowicz-Pazdej, "The proportionality principle in privacy and data protection law", *Journal of Data Protection & Privacy* 4, no. 3. 2021: 322–331.

awareness of, in particular, the right to access data, to port it, to urge another party to stop using it, or to rectify or delete it, while also identifying the holders and delineating the nature of such rights.[46] Hence, it is left to the discretion of the EU member state to ultimately resolve the underlying issue.

Proportionality test for the RTBF and the right of the data producer

Therefore, the most crucial and unresolved issue for the purpose of this paper is the reconceptualization of the principle of proportionality, which comes down to the legal conundrum of how to strike a right balance between the RTBF and the right of the data producer. There is no doubt that these two rights are neither absolute nor in any hierarchical order since they are of equal value. Hence, a proper balance shall be maintained between these competing rights. The principle of proportionality is also recommended as a method (set of conditions) to satisfy the usage of specific AI models.[47]

It is evident from the above that the European Commission recognized the need to balance and delineated the nature of such rights. The initial assessment of the inevitable conflict between these two rights could be performed by means of the proportionality principle. In the theoretical school of thought, the proportionality principle is well-established and elaborated from the perspective of the quantitative approach developed by Robert Alexy – originally for balancing legal principles.[48] In this case, Alexy's approach could support not only the determination of the possible limits of the RTBF but also to improve the enforcement of the new Proposal of the Data Act. As a result, it could help to address issues uncovered by the EU regulation.

46 Cf.: Preamble of the Proposal for Regulation, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2022%3A68%3AFIN>.

47 Anna Popowicz-Pazdej, "The proportionality between trade secret and privacy protection – how to strike the right balance when designing generative AI tools", *Journal of Privacy & Data Protection* 6, no. 2. 2023: 153–167.

48 Robert Alexy, *A Theory of Constitutional Rights*. Oxford, New York, 2002.

According to Robert Alexy's theory, a legal norm that interferes with fundamental values[49] (here: the right to protect personal data and the right of the data producer of the AI system) is legitimate when it meets a proportionality test characterized by the following optimisation principles:[50]

1) *Suitability*, which "*excludes the adoption of means obstructing the realisation of at least one principle without promoting any principle or goal for which they were adopted*". In the analysed case, total exclusion of the RTBF from the data subjects' rights would not be considered as suitable as it would promote only the right of the data producer.
2) *Necessity*, which "*requires that of two means promoting P1 that are, broadly speaking, equally suitable, the one that interferes less intensively in P2 ought to be chosen*". The one principle that interferes less intensively in this context is, bearing in mind above-mentioned unlearning techniques, the right of the data producer.
3) *Proportionality in the narrow sense*, which states that "*The greater the degree of non-satisfaction of, or detriment to, one principle, the greater the importance of satisfying the other*."[51] Hence, the limitation of the RTBF should be proportionate in a way that it should be granted to the greatest extent possible, without the need to re-train or eliminate the whole model.

A similar test has been applied under the EU laws and jurisprudence, especially because of the fact that the proportionality principle has been regulated clearly in the EU Treaties. To this end, it is worth mentioning that the principle of proportionality is laid down in Article 5(4) of the Treaty on the European

49 In Alexy's theory, these fundamental values are typically constitutional principles (Robert Alexy, "Constitutional Rights, Balancing, and Rationality", *Ratio Juris* 16, no. 2. 2003: 131–140). In this context the right to data protection is enshrined in many European Constitutions whereas the right of the data producer is strictly correlated with another constitutional right, namely, right to property. Cf. Ivan Stepanov, "Introducing a property right over data in the EU: the data producer's right – an evaluation", *International Review of Law, Computers & Technology* 34, no. 1, 2020: 65–86.

50 Claudio Novelli et al., "How to evaluate the risks of Artificial Intelligence: a proportionality-based, risk model for the AI Act." 31 May 31 2023, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4464783>, access: 5.12.2023.

51 Alexy, *Constitutional Rights, Balancing, and Rationality*, 135.

Union. Proportionality is an increasingly important concept, especially within European Union law. This is mainly a result of the European Court of Human Rights.[52] The Court seeks to set actions taken by European Union (EU) institutions within specified bounds.

The essential aim of the proportionality principle is similar to those presented by Robert Alexy, namely, to ensure justification prior to limiting the scope of a specific right, which requires satisfying particular conditions through the articulable relationship between the means and ends. These conditions include the tests applied by the European courts comprising legitimacy, suitability, necessity, and balancing, whereas the most important remain the necessity and proportionality tests, stricto sensu.

Within the ambit of the EU GDPR, the European Data Protection Board has presented a proportionality test that could support the proper application of the proportionality principle when comparing this right with the right of the data producer.

The necessity test requires that:

1) *Firstly*, a detailed factual description of the measures and their purposes need to be depicted;
2) *Secondly*, it is required to identify whether the proposed measure represents a limitation of the two concurring rights.
3) *Thirdly*, the measure's objective against which the necessity of a measure shall be assessed.

Furthermore, the last step is involved with determining the specific aspects to address when performing the necessity test.[53]

52 See: Stavros Tsakyrakis, "Proportionality: an assault on human rights?", *Jean Monet Working Paper* no. 09/08, <https://jeanmonnetprogram.org/paper/proportionality-an-assault-on-human-rights-2/>, access: 4.12.2023.

53 European Data Protection Board Guidelines, 12–13. It shall be mentioned that the concept of proportionality in a broad sense encompasses the necessity and proportionality tests, see: C-594/12, Digital Rights, whereby necessity and proportionality are distinctly addressed by the European Court of Justice.

Such a proportionality test is (by and large) substantially in line with the proportionality test from Robert Alexy's theory. It means that the conclusion should be analogous. From a practical point of view, it denotes that the RTBF should be granted to the extent it would not substantially affect the right of the data producer. As mentioned above, this right could be granted, for instance in the form of the specific prompt with a caveat that there is a hidden layer that could affect the desired outcome of a complete deletion. This would be, in the author's view, the proportionate and effective (to the greatest extent possible) delineation of the nature of the RTBF.

Conclusions

Through looking at different aspects of the RTBF, this article has tried to provide evidence that the proportionality principle can be applied when assessing identified limitations of the RTBF. This solution is justified in light of the new Regulation (Data Act) and the lack of any guidance on how to balance the RTBF with competing rights in the advent of this new technology.

For this reason, this article offers two contributions: one regarding the compliant enforcement of the new suggested Regulation (Data Act) as well as challenges that occurred under the GDPR, which tackles issues associated with technological breakthroughs. The intersection of the GDPR and generative AI models presents an array of challenges especially with regards to some data subject's rights. These intricacies and complications are particularly evident with regard to the RTBF.

In navigating these challenges the essence of the right as well as the proportionality principle should be maintained. Despite the absence of a one-size-fit-all solution, this paper has outlined some possible solutions to the identified technical conundrum of the limitation of the RTBF. This solution is all the more substantial as it helps to ensure compliance with the existing laws, juris-

prudence and legal theories. It is not a robust framework for ensuring compliance, but it is surely a step in the right direction.

References

Alexy, Robert. *A Theory of Constitutional Rights*. Oxford, New York, 2002.

Alexy, Robert. "Constitutional Rights, Balancing, and Rationality." *Ratio Juris* 16, no. 2. 2003: 131–140.

Ambrose, Meg Leta. "It's About Time: Privacy, Information Life Cycles, and the Right to Be Forgotten." *Stanford Technology Law Review* 16, no. 2. 2013: 369–422.

Ambrose, Meg Leta, and Jef Ausloos. "The Right To Be Forgotten Across the Pond." *Journal Of Information Policy* 3. 2013: 1–23.

Christoph, Bieber. "Datenschutz als politisches Thema – von der Volkszählung zur Piratenpartei." In *Datenschutz. Grundlagen, Entwicklungen und Kontroversen* [Data privacy: Fundamentals, developments, controversies], edited by Jan-Hinrik Schmidt, and Thilo Weichert. Bonn, 2012: 34–44.

Burrell, Jenna. "How the machine 'thinks': Understanding opacity in machine learning algorithms." *Big Data & Society* 3, no. 1. 2016: 1–12.

Forde, Aidan. "Implications of the right to be forgotten." *Tulane Journal of Technology & Intellectual Propert*y 18. 2015: 83–131.

Fosch-Villaronga, Eduard, Peter Kieseberg, and Tiffany Li. "Humans Forget, Machines Remember: Artificial Intelligence and the Right to Be Forgotten." *Computer Law & Security Review* 34, no. 2. 2018: 304–313.

Gangjee, Dev Saif. "The Data Producer's Right: An Instructive Obituary." In *The Cambridge Handbook of Private Law and Artificial Intelligence*, edited by Ernest Lim, and Phillip Morgan. Cambridge, 2022.

Goodman, Bryce, and Seth Flaxman. "European Union Regulations on Algorithmic Decision-Making and a 'Right to Explanation'." Presented at *ICML*

Workshop on Human Interpretability in Machine Learning (WHI 2016). New York, NY, June 2016.

Gryz, Jarek, and Marcin Rojszczak, "Black box algorithms and the rights of individuals: no easy solution to the 'explainability' problem." *Internet Policy Review* 10, no. 2. 2021: 1–24.

Lenaerts, Koen. "Exploring the limits of the EU Charter of Fundamental Rights." *European Constitutional Law Review* 8, no. 3. 2012: 375–403.

Lobo, Jesús López, Sergio Gil-Lopez, and Javier Del Ser. "The Right to Be Forgotten in Artificial Intelligence: Issues, Approaches, Limitations and Challenges." In *2023 IEEE Conference on Artificial Intelligence (IEEE CAI)*. Santa Clara, California, USA, 5–6 June 2023: 179–180.

Novelli, Claudio, Federico Casolari, Antonino Rotolo, Mariarosaria Taddeo, and Luciano Floridi. "How to Evaluate the Risks of Artificial Intelligence: A Proportionality-Based, Risk Model for the AI Act (May 31, 2023). Available at SSRN: https://ssrn.com/abstract=4464783 or http://dx.doi.org/10.2139/ssrn.4464783

Politou, Eugenia, Efthimios Alepis, and Constantinos Patsakis. "Forgetting personal data and revoking consent under the GDPR: Challenges and proposed solutions." *Journal of cybersecurity* 4.1 (2018): tyy001.

Popowicz-Pazdej, Anna. "The proportionality between trade secret and privacy protection – how to strike the right balance when designing generative AI tools." *Journal of Privacy & Data Protection* 6, no. 2. 2023: 153–167.

Popowicz-Pazdej, Anna. "The proportionality principle in privacy and data protection law." *Journal of Data Protection & Privacy* 4, no. 3. 2021: 322–331.

Qu, Youyang, Xin Yuan, Ming Ding, Wei Ni, Thierry Rakotoarivelo, and David Smith. "Learn to Unlearn: A Survey on Machine Unlearning." *IEEE Computer Magazine 2023*.

Singh, Ajay Pal, and Rahil Setia. "Right to Be Forgotten Recognition, Legislation and Acceptance in International and Domestic Domain." *Nirma University Law Journal* 6, no. 2. 2018: 37–56.

Stepanov, Ivan. “Introducing a property right over data in the EU: the data producer’s right – an evaluation.” *International Review of Law, Computers & Technology* 34, no. 1, 2020: 65–86.

Tsakyrakis, Stavros. “Proportionality: an assault on human rights?” *Jean Monet Working Paper* no. 09/08, <https://jeanmonnetprogram.org/paper/proportionality-an-assault-on-human-rights-2/>.

Yan Haonan, Xiaoguang Li, Ziyao Guo, Hui Li, Fenghua Li, and Xiaodong Lin. “Arcane: An efficient architecture for exact machine unlearning.” In *Proceedings of the Thirty-First International Joint Conference on Artificial Intelligence*. Vienna, 23–29 July 2022: 4006–4013.

Zhang, Dawen, Pamela Finckenberg-Broman, Thong Hoang, Shidong Pan, Zhenchang Xing, Mark Staples, and Xiwei Xu. “Right to be Forgotten in the Era of Large Language Models: Implications, Challenges, and Solutions.” 2023, <https://arxiv.org/pdf/2307.03941.pdf>.

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The Protection of Fundamental Human Rights in the context of the Global Fight against Terrorism

Abstract: Terrorism poses a serious threat in the world today. Although it does not affect all countries to the same extent, the international community must cooperate to develop measures to effectively eradicate this common enemy. Despite the increasing number of international treaties aimed at regulating the fight against terrorism and terrorism-related acts, terrorism continues to thrive around the world, and as a result, has a significant impact on human rights. This article examines some anti-terrorist measures at the universal level and aims to determine to what extent they may infringe upon fundamental human rights. This article also highlights the importance of fundamental human rights and the risk of them being violated in the global fight against terrorism. There is no doubt that terrorism has devastating consequences on the exercise of human rights, including the right to live, the right to liberty and the physical integrity of victims as well as the individuals suspected of committing terrorist acts. The research was conducted using primarily the dogmatic method, followed by an analysis of international legal instruments. The analysis proved that the measures taken internationally in response to terrorism-related attacks may not only violate fundamental human rights but also undermine the rule of law and hinder the protection of some basic human rights. It is important,

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therefore, that States find a right balance between fulfilling their two obligations: ensuring security of their citizens and fighting terrorism.
Keywords: terrorism, crime, threat, impact, fundamental rights, international law.

Introduction

This article examines some anti-terrorist measures used internationally and aims to determine the extent to which they may violate fundamental human rights. It also highlights the importance of fundamental human rights and the risk of them being violated in the global fight against terrorism. For a long time the questions of terrorism and human rights have been at the center of both domestic and international laws. Terrorism, particularly in the contemporary international context, is usually approached from highly ideological and political perspectives, which are often emotional or even manipulative.[2] The formula of "One man's terrorist is another man's freedom fighter" is a pathetic expression of this approach. Terrorism is a serious challenge which individual States and the international community must tackle.[3] It poses a threat not only to national order and security, but also to the standards by which democratic societies operate. The threat of terrorism is particularly visible in the context of the ongoing globalization processes and the ties between Member States of international organizations and alliances. What is even more dangerous is the fact that different terrorist groups, regardless of their political orientation, conduct transnational activities which include training of terrorist organizations and the provision of mutual cross-border services.

2 James M. Lutz, and Brenda J. Lutz, *Terrorism: Origins and Evolution*. New York, 2005, 22.

3 See Christopher Greenwood, "International law and the 'war against terrorism'", *International Affairs* 78, no. 2. 2002: 301–317; Eric A. Heinze, "The evolution of international law in light of the 'global War on Terror'", *Review of International Studies* 37, no. 3. 2011: 1069–1094; Marcin Lech, *Ochrona prawna społeczności międzynarodowej wobec zagrożenia terroryzmem*. Gdańsk, 2014; Thomas R. Mockaitis, *The New Terrorism: Myths and Reality*. Stanford, 2008, 20; Johan D. van der Vyver, "The ISIS Crisis and the Development of International Humanitarian Law", *Emory International Law Review* 30, no. 4. 2016: 535.

Terrorism or terrorism-related attacks have become a part of today's world, and nowadays no State can responsibly claim that it is not a potential terrorist target. This also means that every State seeking to ensure national security must be prepared for actions related to fighting against this threat. It must be borne in mind that a terrorist threat may be rooted internally, within a state, or may come from outside. Terrorist groups seek to acquire advanced weapons, including biological, chemical and even nuclear weapons, and from a psychological point of view their action is more spectacular than that of the use of conventional weapons. The unpredictability of terrorist attacks, their violence, intensity and impact mean that fighting terrorism has become a common interest of the entire international community, and today, as never before, it is of the utmost importance that all nations internationally are genuinely willing to cooperate in the fight against terrorism. The United Nations Global Counter-Terrorism Strategy adopted on 8 September 2006 by 192 Member States was certainly a good step in this direction. Some countries face a much more serious and very real threat of terrorism, and the measures adopted by these nations to counteract terrorism often violate human rights or undermine the principles of international law and the rule of law in general. In countries where the terrorist threat is not so imminent, the main measures that are being implemented usually aim to restrict public freedoms and suppress political and social opposition. However, even those are not always in compliance with international standards. And yet, international law and the case law of human rights courts constitute an invaluable source of appropriate measures relevant to different circumstances, and the conditions for their implementation to counteract terrorist acts within the framework of the rule of law.[4] However, there is still a problem with their proper application. This is partly because although the international community has repeatedly condemned "terrorism," there is no consensus on

4 See Anna Oehmichen, *Terrorism and Anti-Terror Legislations: The Terrorised Legislator?: A comparison of Counter-Terror Legislation and Its Implication on Human Rights in the Legal Systems of the United Kingdom, Spain, Germany and France*. Antwerp, Oxford, Portland, 2009, 51.

the very definition of this offense.[5] For many decades, States, lawyers and the legal community have tried, albeit with no success, to arrive at a definition of terrorism that would be legally acceptable according to the characteristics assigned to it by international law. Over a hundred definitions of the term have so far been developed.

The Definition of the notion of terrorism: from the 1937 Geneva Treaty on Terrorism to the Rome Statute of the International Criminal Court and the Ad Hoc Tribunals

The 1937 Geneva Treaty on Terrorism of the League of Nations was the first occasion when a definition of the word terrorism[6] was proposed. There were major difficulties with its formulation, and the text of the Convention opted to include a general definition of the crime of terrorism with a restrictive enumeration of acts qualified as terrorism. Thus, the Treaty of Geneva defined terrorism as "criminal acts directed against a State, the purpose or nature of which is to provoke terror in specific personalities, groups of people or in the

5 Despite the pressing need for a universally accepted definition of terrorism, and the significant impact that this would have on current and future anti-terrorism efforts, the term has become politically and emotionally loaded and consequently, there is no universal agreement on what it entails.

6 According to Article 1 of the Convention, terrorism is "criminal acts directed against a State or intended to create a state of terror in the minds of particular persons, or a group of persons or the general public". Terrorism is commonly understood to refer to acts of violence that target civilians in the pursuit of political or ideological aims. In legal terms, although the international community has yet to adopt a comprehensive definition of terrorism, existing declarations, resolutions and universal sectoral treaties relating to specific aspects of it define certain acts and core elements. In 1994, the General Assembly's Declaration on Measures to Eliminate International Terrorism, set out in its Resolution 49/60, stated that terrorism includes: criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes and that such acts are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them. Charles L. Ruby, "The Definition of Terrorism", *Analyses of Social Issues and Public Policy* 2, no. 1. 2002: 9–14.

public." Articles 2 and 3 of the Treaty criminalized specific acts or modes of participation, or even complicity, in terrorist acts.

The problem of terrorism was addressed again in the 1990s during the preparatory work for the Rome Statute of the International Criminal Court.[7] The International Law Commission proposed to include in its jurisdiction also certain acts of terrorism that had already been criminalized by different treaties. Those acts were to be listed in an annex to the Rome Statute. The ILC proposal characterized these acts as "crimes of international concern which are of exceptional gravity." Among them, were acts of unlawful seizure of aircraft defined by the 1970 Hague Convention, and crimes defined by the 1971 Montreal Convention.

The Preparatory Committee, in its 1998 draft, proposed an article entitled "Crimes of terrorism" which established two categories of crimes of terrorism (acts of violence likely to cause terror, and the use of certain weapons to commit indiscriminate acts of violence) and made references to other Conventions regarding other terrorist acts already incriminated.[8] However, neither of these two proposals was retained in the Rome Statute.[9]

It should be recalled, as stated in Article 5 of the Rome Statute, that "the jurisdiction of the Court is limited to the most serious crimes affecting

7 Mahnoush H. Arsanjani, "The Rome Statute of the International Criminal Court", *American Journal of International Law* 93, no. 1. 1999: 22.

8 Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, UN General Assembly, 50th Session, Supplement No.22, A/50/22, 1995; Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume 1, (Proceedings of the Preparatory Committee During March-April and August 1996) UN General. Assembly, 51st Session, Supplement No.22, A/51/22,1996; Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute and Draft Final Act (UN Document A/Conf.183/2/Add.1, 1998).

9 Rome Statute of the International Criminal Court, Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Annex 1, Res E, UN Doc A/CONF.183/10 (1998). 117 The jurisdiction of the ICC is 'complementary' to national criminal jurisdictions (Rome Statute, opened for signature 17 July 1998, 2187 UNTS 90, Preamble (entered into force 1 July 2002)) in the sense that a case can only be brought before the ICC if a state with jurisdiction is unwilling or genuinely unable to investigate or prosecute the case (Rome Statute, opened for signature 17 July 1998, 2187 UNTS 90, art 17 (entered into force 1 July 2002)).

the international community as a whole." Interestingly, The Statute of the Ad Hoc International Criminal Tribunal for the former Yugoslavia did not include in the list of crimes within its jurisdiction, terrorism or terrorist acts. However, the Statute of the Ad Hoc International Criminal Tribunal for Rwanda, in its Article 4 "Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II" included in the list of crimes, subject to the jurisdiction of this ad hoc tribunal and without giving any definition, "acts of terrorism."[10]

Terrorism as a Threat to Fundamental Human Rights

The international community has taken a relatively long time to establish the link between terrorism and human rights. It was not until the Vienna World Conference on Human Rights in 1993 that this link was established.[11] It had not been established earlier because of deep ideological differences which marked the attitude of the Member States with regard to the practical and political consequences which flowed from it. Terrorism is a term that has a strong political connotation, so it seemed very difficult to define it and therefore to make a possible link with fundamental rights.[12] If it is still very difficult to define the concept of terrorism, it is mainly because certain States adopt a maximalist conception of terrorism, while others opt for a minimalist conception. Another reason is that the natural definition of terrorism is not the subject of a clear and precise consensus. Indeed, to this day we do not know

10 Leonard Weinberg, Ami Pedahzur, and Sivan Hirsch-Hoefler, „The Challenges of Conceptualizing Terrorism", *Terrorism and Political Violence* 16, no. 4. 2004: 780; UN Document A/C.6/56/WG.1/CRP.5/Add.5 (Definition of Terrorism).

11 The World Conference on Human Rights, held in Vienna from 14 to 25 June 1993, resulted in the adoption of the Vienna Declaration and Program of Action (document A/CONF. 157/23, of June 25, 1993) by 171 States see Kevin Boyle, "Stock-Taking on Human Rights: The World Conference on Human Rights, Vienna 1993" in *Politics and Human Rights*, ed. D. Beetham. Oxford, Cambridge, 1995, 79.

12 See Aida Huerta-Barrientosa, and Pablo Padilla Longoria, "Understanding the Interrelationship Between Global Terrorist Attacks and the Citizen's Wellbeing: The Complexity of Terrorism", *Sociology Study* 6, no. 5. 2016: 283–292.

precisely whether terrorism is merely an act of an armed group or whether it may also be an act of a State.

When terrorist actions have been carried out, sponsored, manipulated and encouraged by a State, the term "State terrorism" is sometimes used to describe aggressions openly committed by a State against a particular group. The expression "State terrorism" was coined by the Soviet Union during the Cold War. It was also used to designate a strategy of repression of far-left insurrectionary movements, put in place by the regimes of South America in the 1970s. It was a question of denouncing practices which consisted in massive employment of the secret services to carry out actions of assassination and torture. This expression is used today to designate acts of terrorism sponsored or supported by a foreign State. The notion of State terrorism has been, and continues to be, a source of contention between States. Moreover, the term itself had earlier been an obstacle to linking terrorism with the violation of human rights.

Indeed, if a link had been established between terrorism and the violation of human rights, this would have meant that all entities which had committed terrorist acts also violated human rights. This assertion poses no problems when it comes to qualifying an armed group like the Al-Qaeda network as terrorists. But what happens when a State sponsors a terrorist attack? States are not yet willing to be held responsible for the violation of human rights as a result of the perpetration of a terrorist act. This was vividly illustrated in the case concerning the Military and Paramilitary Activities in Nicaragua when the question whether the behavior of the United States constituted State terrorism could have been asked.[13] Indeed, as it was proved later, the Contras who led a guerrilla war in Nicaragua and who were responsible for killing many civilians, had been trained, financed and armed by the United States. However, although it could have done so, the International Court of Justice did not deliberate the actual meaning of State terrorism because it was not the subject of the

13 ICJ, 27 June 1986 (available on the ICJ website http://www.icj-cij.org).

matter in question, and did not take up the opportunity to rule on State terrorism, thus offering a contribution to the clarification of this notion.

As a matter of fact, the concept of State terrorism was the very reason why the draft Convention on international terrorism proposed by India was not adopted. Another concern was the scope of its application, and in particular the contents of Article 1(2) and Article 18(2). It was pointed out that Article 18(2) excluded the application of the proposed Convention to Armed Forces defined in Article 1(2) of the same draft Convention as the Armed Forces of a State.

Despite these concerns, some States supported India's proposal. Others wanted to modify the content of the two challenged Articles by narrowing the scope of the Convention's application to only those activities of the armed forces which fell within the framework of their official functions. Moreover, in order to avoid any confusion with State terrorism practiced by certain States, the exercise of the latter must always be in conformity with international law, especially in times of armed conflicts.[14]

For a long time, the United Nations held to the traditional point of view of international law according to which human rights apply only to the relationships between States and their citizens. However, because the concept of State terrorism was not accepted, the link between terrorism and human rights had not been established. This traditional approach to international law has a significant impact on the nature and content of the link between terrorism and human rights.

It obviously brings into play the question of the scope of the application of human rights, in particular with regard to the perpetrators of terrorism and the situations in which acts of terrorism may be considered as violations of human rights. It was not until the Vienna World Conference on Human Rights that, in

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14 François Voeffray, "Le Conseil De Sécurité De L'onu :Gouvernement Mondial, Législateur Ou Juge ? Quelques Réflexions Sur Les Dangers De Dérives" in *Promoting Justice, Human Rights and Conflict Resolution Through International Law/La Promotion de la Justice, des Droits de L'Homme et du Réglement des Conflits par le Droit International: Liber Amicorum Lucius Caflisch*, ed. M. G. Kohen. Leiden, Boston, 2007: 1205.

the course of the Declaration and Program of Action adopted at that Conference, the link between terrorism and human rights was clearly established.

The wording was as follows: “Acts, methods and practices of terrorism in whatever form and in all their manifestations and their links, in certain countries, with drug trafficking, aim at the annihilation of human rights, fundamental freedoms and democracy, threaten the territorial integrity and security of States and destabilize legitimately constituted governments.”[15] Since the adoption of the Vienna Declaration and Program of Action, the UN General Assembly, on the recommendation of the Committee on Social, Humanitarian and Cultural Affairs, has been adopting specific resolutions on “human rights and terrorism.”[16]

The resolutions on human rights and terrorism not only reveal an international awareness of the impact of terrorism on human rights but they also point to a certain evolution in the attitude of the UN General Assembly towards acts of terrorism committed by entities other than States.[17] There is no longer any doubt that terrorist acts and methods undermine not only the rights of victims but they also threaten the constitutional order and democratic society. In some cases, acting as a catalyst of wider conflicts, they also undermine international peace and order.[18] Consequently, there is clearly an indirect perception of the existence of a link between terrorism and human rights.

15 A/CONF. 157/ 23 (25 june 1993), Partie 1, para. 17.

16 See the following General Assembly resolutions: A/RES/48/122, on 20/12/1993; A/RES/49/185, on 23/12/1994; A/RES/50/186, dated 22/12/1995; A/RES/52/133, dated 12/12/1997; A/RES/54/164, on 17/12/1999 and A/RES/56/160, on 19/12/2001.

17 In the report of the Special Rapporteur in the Field of Cultural Rights, presented to the General Assembly (A/HRC/34/56) on 16 January 2017, the subjects of fundamentalism, extremism and cultural rights were widely explored, especially in relation to the freedom of artistic expression and attacks against artists, attacks against intellectuals and cultural rights defenders, women’s cultural rights, attacks against others based on a perceived or assumed “difference” in faith or culture, as well as the attacks against educational institutions personnel and students.

18 Alain Plantey, “Le terrorisme contre les droits de l’homme”, *Revue du droit public et de la science politique en France et à l’étranger*, no. 1. 1985: 5–13.

An indirect link may also be seen when a State reacts to terrorism by adopting a policy and practices which go beyond the limits of what is admitted in international law. Such practices or measures result in human rights violations, such as extrajudicial executions, torture, unfair trials. These unlawful repressive measures undermine not only the rights of terrorists, but also of innocent civilians. Terrorism has always been a threat to democracies, and its "values" are a negation of democracy. Before the attacks of September 11, 2001,[19] a broad consensus existed within States on the pre-eminence of the democratic model and on the imperative need to respect human rights, whatever the circumstances. After the attacks, something changed.[20] Indeed, more and more voices are being raised to question the democratic model, and they believe that the rules of the democratic game must be changed.

The Impact of Terrorist Acts on Fundamental Human Rights

Human rights are universal values and legal guarantees that protect individuals and groups from acts and omissions primarily committed by state agents who in their acting infringe the fundamental freedoms, rights and dignity of human beings.[21]

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19 Enrique Lagos, and Timothy D. Rudy, "Preventing, Punishing, and Eliminating Terrorism in the Western Hemisphere: A Post-9/11 Inter-American Treaty", *Fordham International Law Journal* 26, no. 6. 2002: 1624.

20 On 28 September 2001, the UN Security Council adopted Resolution 1373 under Chapter VII of the UN Charter, calling upon States to implement more effective counter-terrorism measures at the national level and to increase international co-operation in the struggle against terrorism.

21 International human rights law is reflected in a number of core international human rights treaties and in customary international law. These treaties include in particular the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and its two Optional Protocols. Other core universal human rights treaties are the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination against Women and its Optional Protocol; the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and its Optional Protocol; the Convention on the

Ensuring the full range of human rights implies respecting, protecting and fulfilling civil, cultural, economic, political and social rights, as well as the right to development. Human rights are universal, which means that they inherently belong to all human beings and are interdependent and indivisible.[22] Terrorism targets the destruction of human rights, democracy and the rule of law. It attacks the values that are at the heart of the United Nations Charter and other international instruments: respect for human rights; the rule of law; the rules governing armed conflict and the protection of civilians; tolerance among peoples and nations; and the peaceful resolution of conflicts. Terrorism has a direct impact on the exercise of a number of human rights, in particular, the right to life, liberty and physical integrity. Terrorist acts can destabilize governments, weaken civil society, undermine peace and security, threaten social and economic development, and have a particularly detrimental effect on certain groups (minorities), all of which directly affect the exercise of fundamental human rights.

The destructive effects of terrorism on human rights and security have been recognized at the highest level of the United Nations, notably by the Security Council, the General Assembly, the former Commission on Human Rights and the new Human Rights Council. Member States of the United Nations emphasized that terrorism threatens the dignity and safety of human beings everywhere, endangers or takes innocent lives, creates a climate that prevents populations from being free from fear, compromises fundamental freedoms and aims at the destruction of human rights.

Rights of the Child and its two Optional Protocols; and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. The most recent are the International Convention for the Protection of All Persons from Enforced Disappearance, and the Convention on the Rights of Persons with Disabilities and its Optional Protocol, which were all adopted in December 2006.

22 The Universal Declaration on Human Rights (UDHR) acknowledges in article 19 that “everyone has the right to freedom of opinion and expression”. The right to freedom of speech and the right of the press have the dialectal relationship with other rights. The UNESCO Convention (1945) points out the objective to “encourage freedom of exchange of opinions and intellect.” Indeed, artistic and cultural expression is one of the categories of freedom of expression protected by many conventions.

International and regional human rights law clearly establishes that States have, under their jurisdiction, both the right and the duty to protect individuals from terrorist attacks. This stems from the general obligation of States to protect individuals who are subject to their jurisdiction against any infringement of the exercise of their human rights. More specifically, this obligation is part of the obligations of States to ensure the respect for the right to life and the right to security of its citizens.

The principle of legality in the global Fight against Terrorism

The principle of legality in matters of crimes and misdemeanors — *nullum crimen sine lege, nulla poena* — is universally recognized by human rights treaties.[23] This principle means that acts qualified by law as criminal offences must be defined strictly and unequivocally or unambiguously.

The principle *nullum crimen sine lege, nulla poena* also means that criminal law, national or international, cannot be applied retroactively.[24] The principle also has as corollaries the principle of restrictive interpretation of criminal law and the prohibition of analogy.

Thus, legal definitions that are vague, imprecise or make it possible to criminalize acts that are legitimate and/or lawful under international law, are

23 The legality principle of crimes and punishments is derived from the Latin phrase "nullum crimen, nulla poena sine lege". Thus, no act whether immoral or against public interest or public order is considered a crime, if it was not specified by law before. As a result, the criminal judge cannot construe the individuals' acts as crimes and assign punishment, even if he proves that it is worthy and useful in respect of the social interests; see Beth Van Schaack, "Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals", *Georgetown Law Journal* 97. 2008: 119; Darryl Robinson, "The Identity Crisis of International Criminal Law", *Leiden Journal of International Law* 21. 2008: 925.

24 See Jakub Kociubiński, "Zasada nullum crimen, nulla poena sine lege i jej ograniczenia w orzecznictwie Europejskiego Trybunału Praw Człowieka", *Nowa Kodyfikacja Prawa Karnego* 28. 2012: 269; Andrzej Zoll, "Zasada określoności czynu zabronionego pod groźbą kary w orzecznictwie Trybunału Konstytucyjnego" in *Księga XX-lecia orzecznictwa Trybunału Konstytucyjnego*, ed. M. Zubik. Warszawa, 2006, 526–527.

perceived as contrary to international human rights law and failing to meet the "general conditions prescribed by international law."

Unfortunately, in the fight against international terrorism or terrorism *per se*, national legislations frequently resort to vague, ambiguous, imprecise definitions, which then often enable criminalization of legitimate forms of exercise of fundamental freedoms, peaceful political or social opposition and lawful acts. The principle of legality in matters of crimes and misdemeanors — *nullum crimen sine lege* — has long been universally recognized. This principle applies both to national standards and to the offences referred to in international criminal law treaties. The principle *nullum crimen sine lege* is also recognized by human rights treaties and the Rome Statute of the International Criminal Court, which considers it as one of the general principles of criminal law.

The principle of legality means that the definitions of criminal offences, or incriminations, must be precise and devoid of any equivocation and ambiguity. As the United Nations International Law Commission pointed out, "Criminal law sets standards of conduct that individuals must observe." The principle also has, as a corollary, the principle of restrictive interpretation of criminal law and the prohibition of an analogy. Thus, for example, Paragraph 2 of Article 22 of the Rome Statute prescribes that "the definition of a crime is to be strictly interpreted and cannot be extended by analogy." It should also be emphasized that it is this principle of legality that was the basis for the elaboration of the elements of crimes provided for in the Rome Statute. In this order of ideas, in application of the principle of legality, vague, ambiguous or imprecise incriminations cannot be admitted. In the absence of a consensus on a general definition of international terrorism, both at United Nations and regional levels, the approach has therefore been to criminalize specific acts of terrorism.[25] Thus, the approach is "sectoral" and in this context terrorism is a "multifaceted offence."

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25 See, for instance, UN General Assembly, "Declaration on Measures to Eliminate International Terrorism", Doc. A/RES/49/60, 1994, para. 1; and UN Security Council resolutions 1373 (2001), para. 3, and 1566 (2004), para. 3.

Fighting Terrorism and Respect for the Rule of Law

In the repression of terrorist acts, the action of the State cannot escape certain basic principles, of criminal law and international law in particular, despite the odious and especially serious nature of certain terrorist acts.[26] As the UN General Assembly reaffirmed in its 1999 Resolution on Human Rights and Terrorism, "all measures aimed at countering terrorism must be in strict conformity with the relevant provisions of international law, including international human rights standards."[27] Thus, with regard to the administration of justice and the fight against terrorism, every State must respect the stipulated criteria.

As a general criterion, any counter-terrorism measure must be framed in strict compliance with the rule of law and international human rights obligations. The declaration of a state of emergency and the use of emergency powers to ward off terrorist acts must be done within the framework prescribed by international law.[28] The use of emergency powers must be strictly limited to the temporary needs of the situation and comply with the recognized principles of legality, proportionality and necessity. The authorities must provide for measures to safeguard human rights. No derogation may be made to intangible rights or modifications that would alter the independence and impartiality of the judicial system and the principle of effective separation of public powers.

26 See United Nations, General Assembly, 2006, A/RES60/288; United Nations, Security Council, 2004, S/2004/616, para. 6; United Nations, General Assembly, Human Rights Council, 2016, A/HRC/34/30, para. 56; Furthermore, United Nations organs and entities, including the United Nations General Assembly and Security Council, regularly emphasize the importance of adhering not only to international human rights law, but also to international humanitarian law and international refugee law UNSC Resolution 1373 (2001).

27 Twelve Conventions have been drafted at the UN level to deal with terrorism; recent ones are the Convention for the Suppression of Terrorist Bombings (1997), the Convention for the Suppression of Financing Terrorism (1999) and the International Convention for the Suppression of Acts of Nuclear Terrorism (2005). These Conventions and others establish that States are under the obligation to take the measures needed to protect the fundamental rights of everyone within their jurisdiction against terrorist acts. Practically all forms of terrorism are covered by these Conventions, in addition to the Geneva Conventions and the Rome Statute of the ICC.

28 Petros Stangos, and Georgios Gryllos, "Le droit communautaire à l'épreuve des réalités du droit international: leçons tirées de la jurisprudence récente relevant de la lutte contre le terrorisme international", *Cahiers de droit européen* 42, no. 3–4. 2006: 466.

At all times and in all circumstances, the fundamental rights and freedoms recognized as intangible, both by treaties and by customary international law, must be maintained and ensured. They include, among others, the prohibition of torture and ill-treatment; thus, for example, all measures such as "physical pressure" must be prohibited as well as the prohibition of discrimination based solely on race, colour, sex, language, political opinion, religion or social membership. It extends further to the prohibition of arbitrary deprivation of life, the prohibition of arbitrary deprivation of liberty; as well as unacknowledged and secret detentions. It also covers the principle of legality of crime and penalty which must apply imperatively, and the right to a judicial remedy to challenge the legality of any measure of deprivation of liberty (*Habeas Corpus*), the right to an independent and impartial court or tribunal, the presumption of innocence, judicial guarantees and the effective existence of a judicial remedy against any violation of human rights. Definitions of criminal offences must be precise and strict, and under no circumstances may vague, ambiguous or imprecise incriminations or criminalization of acts that are legitimate or lawful under international human rights law or international humanitarian law be permitted. The retroactive application of criminal law should also be prohibited. Courts with proper jurisdiction to punish terrorist acts must be independent, impartial and competent. Under no circumstances should the alleged perpetrators of such acts be tried by non-judicial bodies (such as commissions of the executive power with "judicial" functions). Moreover ordinary citizens cannot be tried by military courts.

The criminal procedure must ensure the legal guarantees of every person subject to it. No one may be sentenced for a crime without a due trial conducted by an independent and impartial court ensuring elementary judicial guarantees. These guarantees include: (i) the presumption of innocence until proven guilty, and to be treated as such, (ii) the right to be informed, as soon as possible, in detail in a language that the accused can understand, of the nature and grounds of the accusation, (iii) the right to appoint a lawyer of his or

her choice, and to have the time and facilities necessary to prepare the defense, (iv) the right to be judged within a reasonable time, be present at the trial, and to examine or cause to be examined the witnesses for the prosecution as well as to obtain the presence and examination of the witnesses for the defense under the same conditions as the witnesses for the prosecution. Further rights include the right to not be forced to testify against oneself or confess guilt, and the right to legal recourse to a higher court in the event of conviction. The *Non bis in idem* principle (or the *"non bis in idem" rule*) is a classic principle of criminal procedure, already known in Roman law, according to which no one can be criminally prosecuted or punished (a second time) for the same offence. This expression therefore designates the authority of *res judicata* in criminal matters, which prohibits any new prosecution against the same person for the same facts. This rule, which prohibits double criminality, addresses the need to protect the individual freedoms of the person prosecuted.

Persons deprived of their liberty must be kept in official places of detention and the register of detainees must be available to their lawyers and families for inspection. Solitary confinement must be prohibited. In all circumstances, persons deprived of liberty must have the right to exercise a Habeas Corpus remedy (*Habeas corpus*, more precisely *Habeas corpus ad subjiciendum et recipiendum*), which is a legal concept setting out a fundamental freedom according to which no one may be imprisoned without due judgment, through an illegal practice of arbitrariness which allows anyone to be arrested without a valid reason.

Under this principle, every person arrested has the right to know the reason for the arrest and on what charges it has been made. At the same time, the arrested must be informed about the right to be silent and the right to ask for a lawyer. Any measure of deprivation of liberty must be taken under judicial supervision, even in the case of administrative detention. Criminal investigations must also be put under judicial supervision. Judicial police powers should neither be granted to military bodies nor be placed under the control of

the army. Any expulsion, extradition or *refoulement* procedure must comply with the guarantees provided for in international human rights law, in particular the right to an effective remedy, and they must conform to the principle of *non-refoulement*. All measures taken during the investigations as well as those affecting the right to respect for private life, home and correspondence, such as searches and interception of correspondence or telephone tapping, must be legal and conducted under judicial control.[29]

Conclusions

There is no doubt that under international law every State has the right and duty to fight and suppress criminal acts which, by their nature, objectives or means employed for their commission, are deemed or qualified as terrorist acts. The international community must also equip itself with the necessary instruments and means to combat this scourge. Nevertheless, the fact remains that States must do so within the framework of the rule of law, respect for the principles of international law and the provisions of international human rights law and international humanitarian law.

In the repression of terrorist acts, the action of States cannot evade certain basic principles of criminal law and international law. The heinous and particularly severe nature of certain terrorist acts cannot serve as a pretext for a State not to respect its international obligations in terms of human rights, and more rightly, when the intangible rights of human beings are at stake.

In their efforts to fight terrorism, States must respect certain limits: they are obliged to respect human rights and international law in general. The legal bases to which they must adhere in this context originate from customary international law, conventional international law as well as international treaties for the protection of human rights, refugee law and international humanitarian

29 M. Cherif Bassiouni, “Legal Control of International Terrorism: A Policy-Oriented Assessment”, *Harvard International Law Journal* 43, no. 1. 2001: 83.

law. The basic rules governing the use of force are enshrined in the UN Charter. It is only under these conditions that an effective and coordinated fight can be waged against terrorism without replacing terrorist acts with state terrorism.

The promotion and protection of human rights for all and the rule of law are essential to all components of the Strategy in order to recognize that effective counter-terrorism measures and the promotion of human rights are not conflicting, but complementary and mutually reinforcing goals.

References

Arsanjani, Mahnoush H. "The Rome Statute of the International Criminal Court." *American Journal of International Law* 93, no. 1. 1999: 22–43.

Bassiouni, M. Cherif. "Legal Control of International Terrorism: A Policy-Oriented Assessment." *Harvard International Law Journal* 43, no. 1. 2001: 83–103.

Boyle, Kevin. "Stock-Taking on Human Rights: The World Conference on Human Rights, Vienna 1993." In *Politics and Human Rights*, edited by David Beetham. Oxford, Cambridge, 1995: 79–95.

Greenwood, Christopher. "International law and the 'war against terrorism'." *International Affairs* 78, no. 2. 2002: 301–317.

Heinze, Eric A. "The evolution of international law in light of the 'global War on Terror'." *Review of International Studies* 37, no. 3. 2011: 1069–1094.

Huerta-Barrientosa, Aida, and Pablo Padilla Longoria. "Understanding the Interrelationship Between Global Terrorist Attacks and the Citizen's Wellbeing: The Complexity of Terrorism." *Sociology Study* 6, no. 5. 2016: 283–292.

Kociubiński, Jakub. "Zasada *nullum crimen, nulla poena sine lege* i jej ograniczenia w orzecznictwie Europejskiego Trybunału Praw Człowieka." *Nowa Kodyfikacja Prawa Karnego* 28. 2012: 269–283.

Lagos, Enrique, and Timothy D. Rudy. "Preventing, Punishing, and Eliminating Terrorism in the Western Hemisphere: A Post-9/11 Inter-American Treaty." *Fordham International Law Journal* 26, no. 6. 2002: 1619–1648.

Lech, Marcin. *Ochrona prawna społeczności międzynarodowej wobec zagrożenia terroryzmem*. Gdańsk, 2014.

Lutz, James M., and Brenda J. Lutz. *Terrorism: Origins and Evolution*. New York, 2005.

Mockaitis, Thomas R. *The New Terrorism: Myths and Reality*. Stanford, 2008.

Oehmichen, Anna. *Terrorism and Anti-Terror Legislations: The Terrorised Legislator?: A comparison of Counter-Terror Legislation and Its Implication on Human Rights in the Legal Systems of the United Kingdom, Spain, Germany and France*. Antwerp, Oxford, Portland, 2009.

Plantey, Alain. "Le terrorisme contre les droits de l'homme." *Revue du droit public et de la science politique en France et à l'étranger*, no. 1. 1985: 5–13.

Robinson, Darryl. "The Identity Crisis of International Criminal Law." *Leiden Journal of International Law* 21. 2008: 925–963.

Ruby, Charles L. "The Definition of Terrorism." *Analyses of Social Issues and Public Policy* 2, no. 1. 2002: 9–14.

Stangos, Petros, and Georgios Gryllos. "Le droit communautaire à l'épreuve des réalités du droit international: leçons tirées de la jurisprudence récente relevant de la lutte contre le terrorisme international." *Cahiers de droit européen* 42, no. 3–4. 2006: 429–482.

Van Schaack, Beth. "Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals." *Georgetown Law Journal* 97. 2008: 119–192.

van der Vyver, Johan D. "The ISIS Crisis and the Development of International Humanitarian Law." *Emory International Law Review* 30, no. 4. 2016: 531–563.

Voeffray, François. "Le Conseil De Sécurité De L'onu :Gouvernement Mondial, Législateur Ou Juge ? Quelques Réflexions Sur Les Dangers De Dérives." In *Promoting Justice, Human Rights and Conflict Resolution Through International Law/La Promotion de la Justice, des Droits de L'Homme et du Réglement des Conflits par le Droit International: Liber Amicorum Lucius Caflisch*, edited by Marcelo G. Kohen. Leiden, Boston, 2007: 1195–1209.

Weinberg, Leonard, Ami Pedahzur, and Sivan Hirsch-Hoefler. „The Challenges of Conceptualizing Terrorism." *Terrorism and Political Violence* 16, no. 4. 2004: 777–794.

Zoll, Andrzej. "Zasada określoności czynu zabronionego pod groźbą kary w orzecznictwie Trybunału Konstytucyjnego." In *Księga XX-lecia orzecznictwa Trybunału Konstytucyjnego*, edited by Marek Zubik. Warszawa, 2006: 525–540.

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Notes on the inherent powers of international organizations

Abstract: The aim of this article is to present the main aspects of the concept of the inherent powers of international organizations. This is a topic of importance, yet it is often overlooked in the existing literature, which predominantly delves into attributed powers and implied powers of international organizations. The author discusses the essence of Finn Seyersted's concept of inherent powers and the doctrinal assessment of this concept. The author also presents the assessment of the concept of inherent powers made by legal scholars – their nuanced interpretations and acceptance – shedding light on the varying viewpoints on this concept.
Keywords: international organizations, powers, inherent powers, attributed powers, implied powers.

Introduction

In previous edition of the Adam Mickiewicz University Law Review, I examined the doctrine of the implied powers of international organizations.[2]

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2 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; Andrzej Gadkowski, "Limitation to the Implication of Powers of International Organizations", *Adam Mickiewicz University Law Review* 14. 2022: 103–118.

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This paper takes a distinct turn, delving into the fundamental concept of the inherent powers of international organizations. Unlike implied powers, inherent powers are intrinsically linked to the essence of international organizations, particularly in the context of their international subjectivity. Essentially, these powers can be seen as the 'primary powers' of international organizations.

It is only on the basis of its legal powers that any international organization can function. This self-evident truth, however, requires us to know where organizations derive their powers from. Jan Klabbers, in seeking the answer to this question, stresses that it is a matter that 'has puzzled the community of international institutional lawyers for decades and is likely to continue to do so'.[3] Any discussion of the sources of international organizations' powers must include the concepts of the international legal personality of these organizations. If an international organization has international legal personality, it may undertake independent activities on the international plane without the assistance of its member states. In a situation where states have established an international organization and vested it with specific tasks to be performed internationally, such tasks may not be completed if the organization were deprived of legal personality. If we accept the theory of the objective personality of international organizations, then we must also accept the existence of their inherent powers.[4] These inherent powers derive from common international law and are vested in every international organization. The catalogue of inherent powers undeniably includes treaty-making powers, but, if we accept the theory of the functional personality of international organizations, which is dependent on the will of states, then we must also accept the existence of attributed powers, delegated by states. These powers are specified in an international organization's statute or other constituent instrument. Based on the modified concept of attributed powers, a new construct has been raised and developed that signifies a departure from the restrictive in-

3 See Jan Klabbers, *An Introduction to International Organizations Law*. Cambridge, 2015, 51.
4 For more detailed discussion, see Andrzej Gadkowski, *Treaty-making powers of international organizations*. Poznań, 2018, 8 et seq.

terpretation of attributed powers as expressly granted powers: the concept of implied powers, which allows a more dynamic interpretation of attributed powers.[5] At this point it is worth highlighting its two characteristics. Firstly, implied powers stem from the constituent instrument of an international organization and are derived from its functions and purposes. In this sense, implied powers do not stand in contradiction to the principle of attributed powers. Secondly, implied powers remain closely related to the principle of efficiency, that is, the so-called principle of *effet utile*, which is considered one of the fundamental principles of European Union (EU) law. The concept of implied powers is also distinctly emphasised in the case law of the Court of Justice of the European Union (CJEU).[6]

It should be stressed that the evolution and development of the above-mentioned concepts related to the powers of international organizations is reflected by international institutional law, and especially by the case law of international courts. The viewpoints presented in the doctrine also significantly influenced this development. Accordingly, opinions on these concepts will be presented below. This is of relevance since, e.g. the sources of the treaty-making capacity of international organizations should be sought in the concepts of attributed powers and inherent powers, as well as in the most recent of the three, the concept of implied powers.

The essence of Finn Seyersted's concept of inherent powers

The concept of inherent powers, closely related to the objective theory of the international personality of international organizations, modifies the traditional

5 Some views presented in the doctrine question this dichotomy in the powers of international organizations. M. Rama-Montaldo is of the opinion that both doctrines (of delegated powers and of implied powers) are 'really identical in their foundation and complementary in their effects'; see Manuel Rama-Montaldo, "International Legal Personality and Implied Powers of International Organizations", *British Yearbook of International Law* 44. 1970: 114.

6 Indeed, the case law of the CJEU provides, e.g. the essential basis for the concept of the EU's treaty-making powers, see: Gadkowski, "The doctrine of implied powers of international organizations in the case law of international tribunals", 45 et seq.

claim that the scope and nature of the powers of international organizations is determined by the will of states and specified in the constituent instrument of an organization. This idea is associated primarily with Finn Seyersted, according to whom international organizations, in fulfilling certain objective conditions stemming from the general rules of international law, become legitimate subjects of international law. An international organization, as a legitimate subject of international law, is thus vested with inherent powers that derive from the very existence of the organization and are inherent in the nature of its being an organization ('organizationhood'). Seyersted emphasised this view by expressing that:

> organizations, like States, have an inherent legal capacity to perform any 'sovereign' or international acts which they are in a position to perform. They are in principle from a legal point of view general subjects of international law, in basically the same manner as States.[7]

Seyersted's view thus expressed means that international organizations and states remain on an equal footing from the point of view of their international legal capacities. It also means that the international legal personality of international organizations derives neither from the provisions of their constituent instruments nor from the intentions of the founding states. This personality is based therefore on the objective fact that the international organization exists and relies on 'general and customary international law'.[8] Seyersted assumes that the objective international personality of international organizations implies the existence of the category of inherent powers. If the objective personality of international organizations is founded in general and customary international law, then international organizations possess the powers which

7 Finn Seyersted, "Objective International Personality of Intergovernmental Organizations. Do Their Capacities Really Depend upon the Conventions Establishing Them", *Nordisk Tidsskrift for International Ret* 34. 1982: 28–29.

8 Seyersted, "Objective International Personality of Intergovernmental Organizations", 28–29.

derive directly from their quality as an international person. Each international organization has certain powers that need not be expressed in its constituent documents because they result from the law of international organizations as part of general international law, or in Seyersted's words: 'the common law of international organizations'.[9]

Seyersted, however, indicates potential limitations of the inherent powers of international organizations. In addition to potential factual limitations which are not subject to legal assessment, Seyersted lists the limitations possible from an international point of view, as follows: '(a) negative provisions of the constitution forbidding the organization to perform certain acts; (b) the purposes of the organization; and the fact that; (c) no organization can make decisions binding upon the member States or exercise jurisdiction over their territory, nationals, or organs without special legal basis'.[10]

Accepting the uncompromising view that the inherent powers of international organizations exist makes any reference to the concept of implied powers doubtful or even unnecessary.[11] In Seyersted's opinion, given the dynamic development of international organizations, the concept of implied powers may be too blunt a tool for describing the true scope of the powers of international organizations.[12] He even called it 'a fiction of "implied powers"'[13] and noted that even the International Court of Justice (ICJ) referred to this 'fiction' in the initial years of its activity. He referred especially to the 1949 *Reparation for injuries* advisory opinion, in which the Court stated that the United Nations could claim reparation under international law for damages suffered by its of-

9 Finn Seyersted, *Common Law of International Organizations*. Leiden, Boston, 2008, 29–36 and 357–358.

10 Comment see: Rama-Montaldo, 119.

11 For more detailed discussion, see Finn Seyersted, "Basic Distinction in the Law of International Organizations: Practice versus Legal Doctrine" in *Theory of International Law at the Threshold of the 21st Century. Essays in Honour of Krzysztof Skubiszewski*, ed. J. Makarczyk. The Hague, Boston, Lancaster, 1984, 692.

12 Finn Seyersted, "United Nations Forces: Some Legal Problems", *British Yearbook of International Law* 37. 1961: 455.

13 Seyersted, *Common law of International Organizations*, 65.

ficials and representatives in the performance of their duties for the organization.[14] If we accept that the treaty-making powers of international organizations belong to the category of inherent powers, however, then the scope of the treaty activity of these organizations would actually be much wider than if based on their implied powers. Inherent treaty-making powers signify powers that are inherent to the organization, whereas implied treaty-making powers suggest powers derived from the constituent instrument and a scope determined by the statutory purposes and functions of the organization.[15] We should also remember that Seyersted's concept of inherent powers requires no necessity test, which is a distinctive element of the concept of implied powers. According to him, the necessity test would prove too restrictive in the process of determining the powers of international organizations.[16]

Doctrinal assessment of the concept of inherent powers

An analysis of Seyersted's concept of the inherent powers of international organizations requires that we bear in mind that the opinions on the matter presented in the doctrine of international law remain very much divided. One commentator who believes that powers are inherent is Nigel White, who criticises the concept of implied powers and disputes its usefulness in treaty activities. Comparing the two, he highlights the advantages of the doctrine of inherent powers, arguing that it is thoroughly functional and reduces the control of the organizations' functioning to two issues: firstly, the act must aim to achieve the statutory purposes of the organization, and secondly, it may not be expressly prohibited.[17] Some additional references to Seyersted's concept are to be found in the works of Rudolf Bernhardt, who also argues for the existence of the inherent powers of international organizations. These powers result from the nature of things and

14 Seyersted, *Common law of International Organizations*, 66.

15 See Chittharanjan F. Amersasinghe, *Principles of the Institutional Law of the International Organizations.* Cambridge, 2005, 256.

16 See Peter H. F. Bekker, *The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of Their Legal Status and Immunities*. Dordrecht, Boston, 1994, 68 et seq.

17 Nigel D. White, *The Law of International Organizations*. Manchester, 2005, 87.

follow directly from the very existence of the organization. According to Bernhardt, inherent powers are less extensive than implied powers because they cannot lead to the imposition of additional obligations on the members of the organization. In contrast, powers that are implied, particularly from the purposes and functions of the organization, may increase the obligations of member states.[18]

Although Seyersted claims that Krzysztof Skubiszewski held a similar view, it would be wrong to say that Skubiszewski's opinion on the powers of international organizations supports Seyersted's. While Skubiszewski did not go so far as to reject the concept of inherent powers, he remained cautious about it.[19] In Polish literature on international law this concept is discussed by Władysław Czapliński and Anna Wyrozumska, who explain the notion of 'shared minimal powers' of international organizations. According to Czapliński and Wyrozumska, there clearly exists a category of fundamental powers of international organizations that derives from the very existence of their international legal personality. The category of shared minimal powers consists of *ius tractatuum*, *ius legationis* and *ius standi*.[20] This viewpoint clearly alludes to Seyersted's concept in which these powers are capacities that are inherent to their fullest extent in an organization (the treaty-making powers, the active and passive power of legation, and the capacity to bring international claims) unless they are expressly prohibited in the constituent instruments of this organization. Chittharanjan F. Amerasinghe, who also discusses Seyersted's concept, points out that such inherent capacities and powers would be independent from the purposes and functions of the organization.[21]

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18 Rudolf Bernhardt in Rudolf Bernhardt, and Herbert Miehsler, *Qualifikation und Anwendungsbereich des internen Rechts internationaler Organisationen: Referate und Diskussion der 12. Tagung der Deutschen Gesellschaft für Völkerrecht in Bad Godesberg vom 14. bis 16. Juni 1971*. Karlsruhe, 1973, 27–28.

19 Krzysztof Skubiszewski, "Implied Powers of International Organizations" in *International Law at a Time of Perplexity. Essays in Honour of Shabatai Rosenne*, ed. Y. Dinstein. Dordrecht, 1989, 862 et seq.

20 Władysław Czapliński, and Anna Wyrozumska, *Prawo międzynarodowe publiczne. Zagadnienia systemowe*. Warszawa, 2014, 440.

21 Chittharanjan F. Amersasinghe, "International Legal Personality Revisited" in *International Legal Personality*, ed. F. Johns. Farnham, 2010, 255.

Criticism of Seyersted's concept of inherent powers, however, is far more common. Manuel Rama-Montaldo is one commentator who opposes it, arguing firstly that the way Seyersted puts the international personality of states and that of international organizations on an equal footing is risky. Indeed, the fact that international organizations have a legal personality does not necessarily imply that they may perform the same acts and fulfil the same capacities as states. If organizations indeed have certain capacities, they clearly do not include, for example, the right to maintain military forces or the right to operate ships under the flag of the organization. Rama-Montaldo thus concludes that '[t]his attempt to equate States and international organizations […] leads to an arbitrary and artificial transfer of concepts form one sphere to the other; and not least; the concept of sovereignty'.[22] Secondly, Rama-Montaldo points out that Seyersted's concept of inherent powers focuses on a dichotomy between the acts of international organizations and their purposes. The purposes of an international organization are determined by states and contained in the constituent instrument. According to Seyersted, only international organizations with the freedom to perform any sovereign or international act may decide on how these purposes are to be served.[23] Seyersted's concept, however, fails to account for the fact that the constituent instrument of a typical international organization is the result of the will of states that establish in this instrument the principle of 'the limitation of functional means', which is to say that the founding states of the organization determine not only its purposes but also the means of achieving them. Rama-Montaldo consequently rejects Seyersted's argument, which cites the 1962 *Certain expenses* advisory opinion, in which the ICJ concluded that 'when the organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is

22 Rama-Montaldo, 120.

23 Rama-Montaldo notes that this view is shared by Balladore Pallieri, *Diritto internazionale pubblico*. Roma, 1962, 178; see: Rama-Montaldo, 120.

not *ultra vires* the Organization'.[24] Seyersted takes this opinion as proof of his thesis that international organizations may perform all acts, and any limitations of powers must have a legal basis. However, Rama-Montaldo stresses that in this case, when justifying the legality of the action of UN forces, the Court did not have recourse to the concept of inherent powers of international organizations but to the purposes and functions of the latter. He quotes the following excerpt from the Court's opinion: '[t]he Court agrees that such expenditures must be tested by their relationship to the purposes of the United Nations […] These purposes are broad indeed, but neither they nor the powers conferred to effectuate them are unlimited'.[25] In his opinion 'the creation of armed forces by an organization is not a right or inherent power arising from international personality but a function which must be expressly or impliedly recognized in the constitutive document'.[26]

The justification for the inherent powers of international organizations raises both doubts and questions. We must bear in mind, however, that the ICJ also took a position on the matter. Although in its judgment in the 1974 *Nuclear Tests* case the Court referred to its own jurisdiction, its view is usually interpreted in the wider context of the inherent powers of judicial bodies. International judicial bodies are created on the basis of an international agreement in order to fulfil special functions, namely judicial functions. In the opinion of the Court, this inherent jurisdiction stems from its very existence and is necessary in order to allow this institution to fulfil such judicial functions. In other words, inherent judicial powers are inherent in the nature of judicial bodies. Viljam Engström notes that without inherent powers the body would lose its judicial character.[27] The Court expressed its view on the matter as follows:

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

25 ICJ Advisory Opinion, 167–168.

26 Rama-Montaldo, 122.

27 Viljam Engström, *Understanding Powers of International Organizations. A Study of the Doctrines of Attributed Powers, Implied Powers and Constitutionalism – with a Special Focus on the Human Rights Committee*. Turku, 2009, 86.

'the Court possesses an inherent jurisdiction enabling it to take such action as may be required, on the one hand to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated, and on the other, to provide for the orderly settlement of all matters in dispute, to ensure the observance of the "inherent limitations on the exercise of the judicial function" of the Court, and to "maintain its judicial character"'.[28] Even if this view refers to the specifics of the Court's jurisdiction as a judicial body, it may be interpreted in a wider context, namely that of international institutional law.

Concluding Remarks

Today, international organizations operate and perform their functions in all areas of international relations. States therefore are not only expanding their mandate but also granting international organizations new competences. As a consequence of having their own international personality, international organizations are subjects of international law, with their own rights and duties. Clearly, they are not – as was the opinion of F. Seyersted – general subjects of international law able to perform sovereign international acts in the same way as states. The particularly important capacities, such as, e.g. treaty-making capacity of international organizations, as international persons and subjects of international law, is derived from the general rules of customary international law. This inherent treaty-making capacity of international organizations seems understandable and justifiable given that international personality implies the active status of a legal person, i.e. acquiring rights and entering into commitments defined by international law. International organizations are active legal persons and this personality involves the ability to implement and develop their activity both under international law and the national laws of their member states.

28 ICJ Judgment, *Nuclear Tests (Australia v. France)*, Judgment, ICJ Reports 1974, 259, para. 23.

References

Amersasinghe, Chittharanjan F. "International Legal Personality Revisited." In *International Legal Personality*, edited by Fleur Johns. Farnham, 2010: 236–260.

Amersasinghe, Chittharanjan F., *Principles of the Institutional Law of the International Organizations*. Cambridge, 2005.

Bekker, Peter H. F. *The Legal Position of Intergovernmental Organizations: A Functional Necessity. Analysis of Their Legal Status and Immunities*. Dordrecht, Boston, 1994.

Bernhardt, Rudolf. In Rudolf Bernhardt, and Herbert Miehsler, *Qualifikation und Anwendungsbereich des internen Rechts internationaler Organisationen: Referate und Diskussion der 12. Tagung der Deutschen Gesellschaft für Völkerrecht in Bad Godesberg vom 14. bis 16. Juni 1971*. Karlsruhe, 1973.

Czapliński, Władysław, and Anna Wyrozumska. *Prawo międzynarodowe publiczne. Zagadnienia systemowe*. Warszawa, 2014.

Engström, Viljam. *Understanding Powers of International Organizations. A Study of the Doctrines of Attributed Powers, Implied Powers and Constitutionalism – with a Special Focus on the Human Rights Committee*. Turku, 2009.

Gadkowski, Andrzej. "Limitation to the Implication of Powers of International Organizations." *Adam Mickiewicz University Law Review* 14. 2022: 103–118.

Gadkowski, Andrzej. "The Basis for the Implication of Powers of International Organizations." *Adam Mickiewicz University Law Review* 11. 2020: 67–80.

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.

Klabbers, Jan. *An Introduction to International Organizations Law*. Cambridge, 2015.

Pallieri, Balladore. *Diritto internazionale pubblico*. Roma, 1962.

Rama-Montaldo, Manuel. “International Legal Personality and Implied Powers of International Organizations.” *British Yearbook of International Law* 44. 1970: 111–155.

Seyersted, Finn. “Basic Distinction in the Law of International Organizations: Practice versus Legal Doctrine.” In *Theory of International Law at the Threshold of the 21st Century. Essays in Honour of Krzysztof Skubiszewski*, edited by Jerzy Makarczyk. The Hague, Boston, Lancaster, 1984: 691–699.

Seyersted, Finn. *Common Law of International Organizations*. Leiden, Boston, 2008.

Seyersted, Finn. “Objective International Personality of Intergovernmental Organizations. Do Their Capacities Really Depend upon the Conventions Establishing Them.” *Nordisk Tidsskrift for International Ret* 34. 1982: 3–112.

Seyersted, Finn. “United Nations Forces: Some Legal Problems.” *British Yearbook of International Law* 37. 1961: 351–475.

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.

Przegląd Prawniczy Uniwersytetu im. Adam Mickiewicza | Adam Mickiewicz University Law Review

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Natural law and the rights of nature – in search of more effective environmental protection

Abstract: The paper discusses innovative legal regulations that may contribute to increasing standards ofenvironmental protection. In the face of increasing nature degradation and climate change, current protection measures are insufficient. The dysfunction of the political system, international institutionalisation, and existing legal regulations, result in the strengthening of the global economy instead of increasing the extent of activities aimedattheprotection of nature. It is argued that the concept of natural law, which focuses on the protection of human rights, is not the same as the rights of nature. However, the analysis of the origins and axiological and legal assumptions of boththese concepts allows us to formulate the conclusion that both can form a common ethical perspective needed in order to protect the community of life on Earth. The aim of the considerations is to discuss the concept of the rights of nature, which are the basis for shaping the new environmental ethics. Appealing to common axioms, the idea of the rights of nature favours overcoming the limitations resulting from property law and the currently dominant economic and utilitarian factors. The paper arguesthat the environmentally-profiled rights of nature can become an ally in environmental protection.

Keywords: natural law, rights of nature, human rights, bioculturalism, environmental law, environmental ethics.

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Introduction

Degradation of ecosystems, loss of the biodiversity of plants and animals, and climate change, are gaining momentum every day. The effects of industrial and economic expansion lead totheerosion of the natural webs of life. The concentration of anthropogenic greenhouse gases in the atmosphere has now reached record levels.[2] The greenhouse effect has become one of the main causes of biodiversity loss in terrestrial and aquatic ecosystems. Environmental pollution disturbs the mechanisms of circulation in the atmosphere. All elements of nature are interrelated and complement each other. For this reason, causing disturbances in the biological balance in ecosystems also affects various social environments and processes. Environmental degradation leads to a rapid decline in the health of planet Earth.[3] Recently, the rights of nature have been invoked as a new basis for implementing more effective conservation measures.

In these considerations, the comparative method is used to discuss regulations from different parts of the world. It is complemented by the theoretical and legal method (source analysis) and dogmatic arguments that involve analysing legal acts and jurisprudence. The aim is determined of the main assumptions for the paradigm of the rights of nature. The paper is an attempt to answer the question whether therights of nature that were formulated in a different cultural and geographical region can provide guidance for modernising the mechanism of environmental protection in Western countries. This research area lends itself to further detailed questions, such as whether the rights of nature and natural law are the same philosophical and legal concepts. Do the aims of natural law and the rights of nature focus on a common axiological perspective? What is their role in the face of the growing global environmental crisis? The above points touch on many complex issues on the borders of various fields of science and knowledge, including law, environmental engineering, molecular biology, geochemistry and biophysics. Interdisciplinary

2 World Economic Forum, *The Global Risks Report 2023. Insight Report*. Geneva, 2023, 21.
3 World Wildlife Fund, *Living Planet Report 2022. Building a Nature – Positive Society*. Gland, 2022, 12.

research will allow us to discuss the indicated matters in a broader light with a view to the practical application of environmental norms.

Natural law and the rights of nature - one or two different routes?

Since prehistory, humans have been striving to organise society using models of the order that can be observed in nature. The processes taking place in nature are correlative and run in an organised manner. Andrzej Redelbach stated that natural law is contained "in the birth and death of creatures, in the sequences of sunrises and sunsets, in the repetition of the seasons, in the permanence of the world marked by the variability of species."[4] In this view, natural law does not come from humans, unlike positive law which is established by a human legislator. The harmonious functioning of nature is ensured by forces and processes that are independent of humans. Richard Hooker argued that "God being the author of Nature, her voice is but the instrument."[5] Hence, it can be assumed that the natural law and the rights of nature have a common pragenesis, which results from the nature of the universe. For somepeople, these are supernatural forces identified with the divine Creator.[6] From the beginning of time, humans have been looking for a just law based on a solid and lasting axiological foundation. Natural law (*ius naturale*) began to emerge as an objective law, a set of fixed constellations,[7] so to speak, that showed the ethical route amidstthe vicissitudes of human uncertain and changing fate.

Over time, natural law as a philosophical and legal concept gradually moved away from its original meaning. The views of Greek philosophers be-

4 Andrzej Redelbach, *Natura praw człowieka. Strasburskie standardy ich ochrony*. Toruń, 2001, 47.

5 Quoted for: Donald R. McConnell, "The Nature in Natural Law", *Liberty University Law Review* 2, no. 3. 2008: 828.

6 McConnell, 797, 818, 831, 841; Zbigniew Orbik, "Human Rights in the Light of the Concepts of Natural Law", *Scientific Papers of Silesian University of Technology. Organization and Management Series*, no. 140. 2019: 280.

7 McConnell, 802.

gan to be reflected in the crystallisation of natural law.[8] The sophists, considered to be the first humanists, put humans at the centre of interest. In their doctrine the nature of the cosmos "moved into the shade toward the nature of man."[9] The reference point shifted from nature itself to human nature. As a consequence, natural law came to be defined as a set of norms that govern human conduct.[10] Defined in this way, natural law refers to common goals that result from human motives and personality.[11] However, it should be noted that the direction of human actions does not mean that their goals canalwaysbe morally justified. History has clearly and repeatedly shown that moving away from the original essence of natural law opens the way to attempts to justify acts that in no way can be considered moral or ethical, e.g. the immensity of the atrocities and terror experienced by prisoners in German concentration camps during World War II, or now by Ukrainians during Russia's bestial and unlawful attack on their country. Thus, human nature is not in every case consistent with the essence of natural law which is derived from outside the state apparatus and human-made structures.

Accepting humans as the measure of all things in the natural law meant that over time, the reality created by people became more and more prominent. Robert P. George pointed out that natural law theory is "a description of the constitutive aspects of the well-being and fulfilment of human persons and their communities.[12]" For this reason, it should not be accepted uncritically, because in the pursuit of the realisation of the human person one can lose the awareness that humans do not live "outside" nature, but "within" it. Egoistic striving to control other people and space can lead to the depreciation of fundamental values.

8 Lloyd L. Weinreb, *Natural Law and Justice*. Massachusetts, 1987, 15.

9 Roman Tokarczyk, *Historia filozofii prawa w retrospektywie prawa natury*. Bydgoszcz, 1999, 42.

10 Tokarczyk, 42.

11 Tokarczyk, 53.

12 Robert P. George, *Prawo naturalne, Bóg i godność ludzka. Wykład im. Leona Petrażyckiego, Wydział Prawa i Administracji UW, 4 maja 2010*, ed. M. Dybowski, trans. A. Legutko-Dybowska. Warszawa, 2010, 10.

As J. Daryl Charles evocatively put it, “heaven and earth cry out” against unbridled and unfettered human autonomy.[13] The lack of moral brakes can become a source of multidimensional lawlessness and arbitrariness. Humans are constantly trying to transform the natural environment. As a result of urbanisation and industrial and economic expansion, environmental degradation is deepening at a rapid pace. This results in the dominance of economic factors and the search for new technological solutions which often bring even greater devastation to nature instead of the intended benefits. The literature indicates the susceptibility of the theory of natural law to adaptation in terms of new challenges related to social transformations.[14] However, to ensure harmonious relations with nature, universal axioms are needed, as well as eternal forces that invariably make the processes in the universe run in an organised and orderly manner.

The rights of nature originally had a transcendental and cosmological character. They resisted the symbolism and customary norms that gave rise to a new environmental ethic. Moulding process of the rights of nature was initiated in Latin America. Ecuador was the first country to formalise the rights of nature. The diversity of species of flora and fauna found in Ecuador is referred to as the “global epicentre of biodiversity.”[15] Many plant and animal species are endemic. Within the Yasuni National Park(Parque Nacional Yasuní),oil deposits have been discovered in one of the world’s most biodiverse areas. The deepening devastation of nature as a result of increasing anthropopressure caused an ecological catastrophe.[16] The indigenous population was dis-

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13 J. Daryl Charles, “The Natural Law and Human Dignity: Reaffirming Ethical ‘First Things’”, *Liberty University Law Review* 2, no. 3. 2008: 647.

14 Orbik, 282.

15 Norman Myers, “Threatened Biotas: “Hot Spots” in Tropical Forests”, *The Environmentalist* 8, no. 3. 1988: 194. See: Judith Kimerling, “Disregarding Environmental Law: Petroleum Development in Protected Natural Areas and Indigenous Homelands in the Ecuadorian Amazon”, *Hastings International and Comparative Law Review* 14, no. 4. 1991: 851; Ginés Haro Pastor, Georgina Donati, and Troth Wells, *Yasuní Green Gold. The Amazon Fight to keep Oil Underground*. Oxford, 2008, 16.

16 More broadly: Steven R. Donziger, “Rainforest Chernobyl: Litigating Indigenous Rights and the Environment in Latin America”, *Human Rights Brief* 11, no. 2. 2004: 1–4.

placed fromthe occupied territories. The disturbance of the social and biological structure was caused bytheimposition of different patterns of behaviour on indigenous peoples and by depriving them of the possibility to function on the basis of coexistence with nature. Wanting to protect their rights, the inhabitants adopted the name "Ome Gompote Kiwigimoni Huaorani" (in English: "We Defend Our Huaorani Territory").[17] Considering the traditional knowledge and lifestyle of indigenous peoples, one's attention is drawn to bioculturalism as one of the key elements of the paradigm of the rights of nature. In bioculturalism, there is an interdependence between biological and social diversity and the cultural landscape. On October 20, 2008, the rights of nature were given the status of constitutional norms in Ecuador.[18] Regulations in this regard have been included in Articles 71–74 of the Constitution. The goal was to create a new form of social coexistence based on respect for diversity in harmony with nature.[19] The term "well-being" (in Spanish:*buen vivir*; English: *the good way of living*) has been used in this context. The concept, known in Ecuador as *sumak kawsay*, is derived from the traditions and cosmological ideas of the indigenous population. It is based on the belief in the interdependence of the community of people and nature.[20] According to the Constitution of the Republic of Ecuador, humans are part of Mother Earth (Pacha Mama) [Preamble]. In Ecuador, the sumak kawsay concept is inferred from an ethical philosophy of life and defence against foreign domination and extractivism. Over time, it has provided numerous arguments in favour of searching for an

17 Judith Kimerling, "Habitat as Human Rights: Indigenous Huaorani in the Amazon Rainforest, Oil and Ome Yasuní", *Vermont Law Review* 40, no. 3. 2016: 501.

18 Kelly Swing, Jaime Chaves, Stella de la Torre, Luis Sempértegui, Alex Hearn, Andrea Encalada, Esteban Suárez, and Gonzalo Rivas, "Outcomes of Ecuador's Rights of Nature for Nature's Sake", *Advances in Environmental and Engineering Research* 3, no. 3. 2022: 2.

19 Preamble, Constitution of the Republic of Ecuador, National Assembly, Legislative and Oversight Committee, Publisher in the Official Register October 20, 2008.

20 Carmen Amelia Coral-Guerrero, Jorge Guardiola, and Fernando García-Quero, "An Empirical Assessment of the Indigenous Sumak Kawsay (living well): the Importance of Nature and Relationships" in *Handbook on Wellbeing, Happiness and the Environment*, eds. D. Maddison, K. Rehdanz, and H. Welsch. Cheltenham-Northampton, 2020, 394.

alternative to the neoliberal vision of economic growth.[21] The introduction of the rights of nature into the generally applicable law opened the way to the development of innovative protection mechanisms.

To elaborate, the idea of rights of nature assumes that there is a physical, spiritual and genealogical bond between society and the natural world. On the basis of the traditional narrative, indigenous people also consider the creations of nature as ancestors.[22] In Bolivian law, the term "Mother Earth" (Madre Tierra)refers to a dynamic living system consisting of an indivisible and mutually complementary community of all living beings.[23]In the light of the above, people are obliged to protect the creations of nature, in which human existence is also anchored. This corresponds to Thomas Berry's view that the universe is a community of entities, not a collection of objects.[24] According to this viewpoint, devastation of natural areas is tantamount to causing damage to a living person.

One of the key assumptions of the rights of nature is the legal personhood of nature. The concept is derived from the traditional knowledge of indigenous peoples, according to which nature is "a living being composed of many other forms of life" (§ 9.27).[25] The rights of nature can therefore be a remedy for increasing utilitarianism.The High Court of Uttarakhand at Nainital has adjudicated that the rivers Ganga and Yamuna are legal entities. The judgement used the term 'legal entity' beside the formulation "living person."[26] This issue

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21 Philipp Altmann, "Sumak Kawsay as an Element of Local Decolonization in Ecuador", *Latin American Research Review* 52, no. 5. 2017: 751; Sarah A. Radcliffe, "Development for a Postneoliberal Era? Sumak Kawsay, Living Well and the Limits to Decolonisation in Ecuador", *Geoforum* 43, no. 2. 2012: 242.

22 See: Catherine J. Iorns Magallanes, "Nature as an Ancestor: Two Examples of Legal Personality for Nature in New Zealand", *VertigO* 15, Special Issue. 2015: 6.

23 Article 3, Ley de Derechos de la Madre Tierra (Ley Nº 071), Ley de 21 de diciembre de 2010.

24 Cormac Cullinan, "The Rule of Nature's Law" in *Rule of Law for Nature. New Dimensions and Ideas in Environmental Law*, ed. C. Voigt. Cambridge, 2013, 105.

25 Judgment of Constitutional Court of Colombia of 10 November 2016, *Center for Social Justice Studies et al. v. Presidency of the Republic et al.*, T-622/16, The Atrato River Case.

26 Judgment of High Court of Uttarakhand at Nainital of 20 March 2017, *Mohammad Salim v. State of Uttarakhand & Others*, Writ Petition (PIL) No. 126 of 2014, § 18, 19.

was further developed in the judgement's justification by stating that the Ganga and Yamuna rivers "are breathing, living and sustaining the communities from mountains to sea."[27] Granting legal personhood creates a new imperative to protect nature resulting from respect and humility towards it. Adoption of the above way of understanding indicates the need to take action based on the protection of the integrity of ecosystems, and not reducing the function of natural resources solely to an economic one.

Hence, it should be emphasised that in the rights of nature as a novelty, nature functions as a being endowed with inalienable rights. The Universal Declaration of the Rights of Mother Earth was born in Cochabamba, Bolivia, during Earth Day, April 22, 2010. According to the Declaration, Mother Earth is considered a living being [Art. 1(1)]. Article 2 lists among the inherent rights of Mother Earth the right to life and existence; the right to continue life cycles without human interference; the right to maintain one's identity and biological integrity; the right to be free from contamination by toxic or radioactive waste.[28] The rights of nature demonstrate the multiplicity of phenomena and the biological diversity of the natural world. However, in order for the "voice" of nature to be fully heard, procedural regulations are necessary that will enable nature to "speak" in the human world.

It should be noted that one of the first court cases in which the legal representation of nature was raised was settled in Ecuador.[29] It was a precedent-setting case in the national practice of law application, as the plaintiffs acted on behalf of the Vilcabamba river. As a result of the expansion of the road, there was interference in the environment. The construction works were not preceded by expert opinions on the environmental impact of the investment.[30]

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27 Judgment of High Court of Uttarakhand at Nainital, § 17.

28 Universal Declaration of the Rights of Mother Earth, April 22, 2010. World People's Conference on Climate Change and the Rights of Mother Earth, Cochabamba, Bolivia.

29 Cristy Clark, Nia Emmanouil, John Page,andAlessandro Pelizzon, "Can you Hear the Rivers Sing? Legal Personhood, Ontology, and the Nitty-Gritty of Governance", *Ecology Law Quarterly* 45, no. 4. 2018: 795.

30 Clark, Emmanouil, Page, and Pelizzon, 796.

Interference with the ecosystem of the river became more intense every day. Referring to the rights of nature, the plaintiffs argued in court that the river has the right to maintain its natural course.[31] The above position has been made viable via legal personhood, which has entered the national jurisprudence when the rights of nature were introduced to the Constitution. Article 71 of the Constitution provides that all persons and communities may call upon public authorities to enforce the rights of nature.[32] In the light of the above, representation emerges as a legal tool enabling the implementation of the rights of nature (execution and defence of rights resulting from its subjectivity).

In countries where the rights of nature have been formalised, the concept of a legal person is relatively often used. The concept refers to a form of human activity organised to achieve social and economic goals permitted by law. In nature protection, environmentally motivated factors should be emphasised above all. Therefore, it can be concluded that implementing the concept of the rights of nature may lead to implementing multifaceted and multidimensional activities, achieving the highest possible standards of environmental protection. However, in order to develop a long-term protection strategy, regulations that go beyond the classical concept of a legal person are needed. *Sui generis* rights are most clearly formed in relation to nature, which are distinguished from the classic norms concerning natural and legal persons.[33] Legal subjectivity makes nature and its components "visible" to the legal system. In turn, legal representation allows one to act on behalf of nature before courts and authorised public authorities.

Until recently, subjectivity and legal representation of nature remained only in the sphere of juridical considerations. The concept on the basis of which nature would be given legal personality and the possibility of proce-

31 María Valeria Berros, "Defending Rivers: Vilcabamba in the South of Ecuador" in *Can Nature have Rights? Legal and Political Insights*, eds. A.L.T. Hillebrecht, and M.V. Berros. Munich, 2017, 38.

32 Constitution of the Republic of Ecuador, National Assembly, Legislative and Oversight Committee, Publisher in the Official Register October 20, 2008.

33 Samanta Kowalska, *Międzynarodowe prawo roślin*. Warszawa, 2023, 152.

dural assertion of rights raised doubts, because for some people it meant granting rights similar to those enjoyed by humans. It should be pointed out that before the legal personhood of nature was formalised, years ago Christopher D. Stone pointed out that the statement that nature has rights does not mean it enjoys the same rights as people.[34] The source of human rights and freedoms is inherent and inalienable dignity. In anthropocentrism, the foundation of law is a human being[35] Inherent rights direct attention to ontic character of human rights. Marek Piechowiak emphasised "the inseparability of rights from human existence […]. Human rights, being natural rights, are not relative to the norms of positive law; but the establishment of appropriate legal norms is postulated for the sake of human rights."[36] Natural laws were designed to prevent arbitrariness in the social environment. By referring to universal axioms, natural law aims to ensure that both the construction and application of regulations occur with the rational observance of human rights borne in mind.

It should be pointed out that the rights of nature do not lead to contesting human rights, nor are they a concept competitive to natural law. Humanrights and the rightsof nature refer to the common primeval source of the existence of humanity and nature. Wojciech Urbański indicated that "the laws of the universe are general […]. All these forces constitute one inseparable whole and are but different forms of action of the same one omnipotence."[37] The conclusion is that the natural law and the rights of nature, despite the fact that they are based on different optics of actions (the purposes of human rights are framed withintheanthropocentric perspective, while the rights of nature have an ecological basis), are focused on timeless values originating in the natural order of the universe. Natural law and the rights of nature can complement each other, contributing to the prevention and reduction of the negative effects of anthro-

34 Christopher D. Stone, "Should Trees have Standing? – Toward Legal Rights for Natural Objects", *Shoutern California Law Review* 45. 1972: 457.

35 Marek Piechowiak, *Filozofia praw człowieka. Prawa człowieka w świetle ich międzynarodowej ochrony*. Lublin, 1999, 77.

36 Piechowiak, 114, 115.

37 Wojciech Urbański, *Zasadnicze prawa natury*. Lwów, 1867, 53.

pogenic activity. Guided by the rights of nature, one may obtain a balanced view of the position of humans against the background of the power and forces of nature.

Towards a new nature conservation paradigm

The processes taking place in the natural environment are inseparable and interdependent. They affect the functioning of nature and humans. The rights of nature can form an alternative to the hitherto dominant point of reference in law and international relations, according to which humans occupy a central position (anthropocentrism),and areentitled to control nature on the basis of separation of relations and not interdependence of processes and entities. This attitude is referred to as the "hegemonic mode of relationship with non-human nature."[38] Excessive exploitation leads to a deficit of natural resources, and thus to an increase in the "environmental debt". There are non-renewable resources in nature that cannot regenerate themselves. Despite cross-border threats to the environment, industrialization, wasteful economy and consumerism still prevail.

As a result of breaking the bond with nature, humans are unable to effectively react and prevent crisis situations related to negative climate change and ecosystem degradation. Effective protection is hindered by the fact that natural goods, due to the dominance of anthropocentrism, are moved to the periphery of legal regulations. There is an urgent need to develop new environmental protection mechanisms. Regine Roncucci points out that anthropocentrism has led to a high rate of ecosystem degradation and loss of biodiversity in nature under the guise of "the global need for progress and economic growth."[39] However, according to the doctrine of the rights of nature, humans should use

38 Carlota Houart, "Rights of Nature as a Potential Framework for the Transformation of Modern Political Communities", *Janus.Net. E-Journal of International Relations* 13, no. 1. 2022: 136.

39 Regine Roncucci, *Rightsof Nature and the Pursuit of Environmental Justice in the Atrato Case*. Wageningen, 2019, 4.

natural resources not toexcess, but to the extent that enables the satisfaction of basic needs (and not temporary or artificially created ones). Individualism detached from ethical norms results in the common space for human and natural functioning becoming broken.

Ithas been shownthatin countries where the rights of nature were first introduced, the indigenous population becomes more active. According totheMāori notion of guardianship, *kaitiakitanga*, "people live in a symbiotic relationship with the earth and all living organisms and have a responsibility to enhance and protect its ecosystems."[40] There is a fundamental difference between this and Western countries where commodification and utilitarianism dominate. The Stillheart Declaration on Rights of Nature and the Economics of the Biosphereindicated that most of the current legislation treats nature as the property of humans.[41] Attempts to include the elements of nature in the bureaucratic and formal framework of purchase and sale contracts weaken the protective measures. According to the indigenous ontology underlying the doctrine of the rights of nature, natural goods are not objects and are not subject to trade.[42] This viewpoint can prevent a reductionist view of nature. This issue was highlighted by the ruling of the Constitutional Court of Colombia of 10 November 2016, which indicated that there is unity and interdependence between humans and nature(§ 9.28).[43] Nature has an intrinsic and inherent value (biocentrism),[44] whether it is recognized or not by doctrine or law.

40 Houart, 143–144.

41 Stillheart Declaration on Rights of Nature and the Economics of the Biosphere, Woodside, March 3, 2014, p. 3. For example, in British Columbia law, it is assumed that the ownership of wild animals belongs to the government. Legal basis: Property in Wildlife, art. 2(1), Wildlife Act [RSBC 1996] Chapter 488, as amended. Date of original text: 23 July 1982.

42 Corte Suprema de Justicia, STC4360–2018, Radicación n.° 11001–22–03–000–2018–00319–01, Bogotá, cinco (5) de abril de dos mil dieciocho (2018), 2. Consideraciones, 5.3, 21; Waitangi Tribunal, *The Whanganui River Report.*Wellington, 1999, § 2.8.1.

43 Judgment of Constitutional Court of Colombia of 10 November 2016.

44 Mario Alejandro Delgado Galarraga, "Climate Change Law and the Rights of Nature: A Colombian Example through an International Perspective", *Revista Catalana de Dret Ambiental* 13, no. 2. 2022: 16. See: Allison Katherine Athens, "An Indivisible and Living Whole: Do We Value Nature Enough to Grant It Personhood?", *Ecology Law Quarterly* 45, no. 2. 2018: 226.

Biocentrism supports the formation of a holistic vision of the world via an ecological prism. New Zealand customary norms and legal regulations provide guidance in this regard. In the Whanganui Act (in Māori: Te Awa Tupua), a river is defined as an indivisible and living whole, consisting of both animate nature and intangible and metaphysical elements.[45] The traditional views of the Māori people maintain that the role of people is *kaitaiki*, i.e. performing the functions of nature guardians. Care in this area should be provided with current and future generations in mind. Accordingly, people are to "nurture and protect the physical and spiritual well-being of the natural systems that surround and support us."[46] Hence the conclusion that the elements of the ecosystem that are part of the human living environment make up a biocultural diversity system. Actions to protect nature should therefore be implemented on a continuous, and not makeshift or superficial, basis. Protection of the environment is a common good, but also an intergenerational obligation for humanity.[47]

In the face of the growing devastation of nature, it is necessary to take coordinated actions through international cooperation. The concept of the legal personality of international law rises above the existing normative order. Without understanding the assumptions of the above concept, it is impossible

45 Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, Public Act 2017, No. 7, 20 March 2017, Part 2, Subpart 2 – Te Awa Tupua, 12.

46 Nicola Pain, and Rachel Pepper, "Can Personhood Protect the Environment? Affording Legal Rights to Nature", *Fordham International Law Journal* 45, no. 2. 2021: 318. Depending on the national legal tradition, regulations in this area may differ. To illustrate, the Colombian court recognized the Atrato River with its basin and tributaries as a subject to rights who is entitled to protection by both the state and the indigenous population which is linked to the river by an ontological and biocultural bond. Accordingly, the court ordered the appointment of a person representing the Colombian government and indicated by the indigenous population to act as the Atrato River guardians. Judgment of Constitutional Court of Colombia of 10 November 2016, pp. 110, 114. In turn, in Bolivia, pursuant to Article 10 of the Act of December 21, 2010, the Defender of Mother Earth (Defensoría de la Madre Tierra) was established. The basis for activity is the legal act: Ley de Derechos de la Madre Tierra (Ley Nº 071), Ley de 21 de diciembre de 2010.

47 Boubacar Sidi Diallo, "African Legal Instruments as Regional Tools of Harmonization of International Environmental Law", *Adam Mickiewicz University Law Review* 14. 2022: 97.

to grasp the complex nature of international law.[48] Similarly, the essence of the rights of nature cannot be explicated without delving into the natural processes that affect the functioning of social structures. This view points to the need to perform a caring function, and not to treat natural resources instrumentally.

The degree of environmental pollution has exceeded the currently acceptable standards. The extinction of plants and animals is occurring at a rapid pace. The Preamble of the Earth Charter indicates that humanity stands at a critical moment in Earth's history.[49] The cited document aims to create a global partnership for environmental protection. It points out that people and nature constitute "one Earth community" and "the community of life."[50] However, the prevailing economic factors now often reduce nature to the category of "something" and not "someone". The dysfunction of political systems, the growth of a predatory economy and industrial expansion require a thorough reform in the spirit of common values, solidarity and shared responsibility. As indicated by the authors of the Charter, the road to healing the current environmental protection mechanism should lead through the adoption of a "new ethical vision" (Preamble). The answer to the above appeal may be the rights of nature that support the process of building an ecological normative order. However, socio-economic transformation is not a one-time process. It requires the implementation of systemic solutions and the remodelling of the legal and axiological foundations of protection in the context of committed ethical awareness.

Conclusions

The current model of environmental protection, despite rapid scientific and technological progress, is still determined by the economy and market mechanisms.

48 Tadeusz Gadkowski, *Podmiotowość prawnomiędzynarodowa organizacji międzynarodowych a ich zdolność traktatowa*. Poznań, 2019, 2.

49 The Earth Charter was completed in March 2000 at UNESCO House in Paris. Document launched on 29 June 2000 at the Peace Palace in the Hague.

50 Preamble, The Earth Charter.

The application of property law in Western countries leads to the “privatisation” of elements of nature. The current paper is an attempt to show that in anthropocentrism, environmental protection functions as activities undertaken with the aim of protecting human well-being. As a consequence, a reductionist vision of nature becomes widespread, which narrows down protection to natural resources that contribute to raising the standards of human functioning. The analysis of existing legal regulations and the mechanism of environmental protection should lead to a deeper reflection on the essence of human coexistence within the natural environment. Once such a reflection is undertaken, a close cause-and-effect relationship emerges. Ensuring a healthy and unpolluted environment is essential for the functioning of both humans and ecosystems.

The principles oftherights of nature show a surface on which a modern and integrated system of environmental protection can be built. The discussed concept is not based on objective criteria, but treats nature as a living being endowed with inalienable rights. The rights of nature entaila return to the origins of human and natural existence. The introduction of such rights can therefore be an antidote to disrupting the relationship between humans and the environment, in which interdependent and complementary processes take place. Innovative regulations resulting from the implementation of rights of nature include the subjectivity and legal representation of nature. In the course of the considerations, it has been demonstrated that the representation makes it possible to give nature a “voice” under the law. For practical purposes, however, it should be clarified who would be entitled to represent nature on a formal and legal basis. In connection with the above, there also arises the issue of specifying the natural areas that could be represented. Assuming that the rights of nature are based on the theory of holism, it can be assumed that nature as a whole, as well as its components that will be in danger as a result of human activity, should be protected.

Due to the cosmological genesis derived from the traditional views of the indigenous peoples of Latin America, the idea of the rights of nature may seem controversial in other cultures. However, it should be remembered that

when the construction of a legal person was introduced, it was also widely regarded as an incomprehensible decision of the legislator. The formalisation of the rights of nature in domestic law should respect the national legal tradition. Considering the rapid degradation of the environment, the search for more effective protection should not be delayed. Activities in this area require cooperation on an international scale, because despite socio-cultural diversity, people are one large family, just asbiodiversity in nature makes up the community of all life on Earth. In order to strengthen the protection of nature, as Marsha Jones Moutriepointed out, it is necessary to restore the awareness that the "human welfare and Nature's welfare are indivisible."[51]

References

Altmann, Philipp. "Sumak Kawsay as an Element of Local Decolonization in Ecuador." *Latin American Research Review* 52, no. 5. 2017: 749–759.

Athens, Allison Katherine. "An Indivisible and Living Whole: Do We Value Nature Enough to Grant It Personhood?" *Ecology Law Quarterly* 45, no. 2. 2018: 187–226.

Berros, María Valeria. "Defending Rivers: Vilcabamba in the South of Ecuador." In *Can Nature have Rights? Legal and Political Insights*, edited by Tabios Hillebrecht, and María Valeria Berros. Munich, 2017: 37–44.

Charles, J. Daryl. "The Natural Law and Human Dignity: Reaffirming Ethical 'First Things'."*Liberty University Law Review* 2, no. 3. 2008: 607–647.

Clark, Cristy, Nia Emmanouil, John Page and Alessandro Pelizzon. "Can you Hear the Rivers Sing? Legal Personhood, Ontology, and the Nitty-Gritty of Governance." *Ecology Law Quarterly* 45, no. 4. 2018: 787–844.

Coral-Guerrero, Carmen Amelia, Jorge Guardiola, Fernando García-Quero. "An Empirical Assessment of the Indigenous Sumak Kawsay (living well):

51 Marsha Jones Moutrie, "The Rights of Nature Movement in the United States: Community Organizing, Local Legislation, Court Challenges, Possible Lessons and Pathways", *Environmental and Earth Law Journal* 10, no. 1. 2020: 65.

the Importance of Nature and Relationships." In *Handbook on Wellbeing, Happiness and the Environment*, edited by David Maddison, Katrin Rehdanz, and Heinz Welsch. Cheltenham-Northampton, 2020: 385–398.

Cullinan, Cormac. "The Rule of Nature's Law." In*Rule of Law for Nature. New Dimensions and Ideas in Environmental Law*, edited by Christina Voigt. Cambridge, 013: 94–108.

Delgado Galarraga, Mario Alejandro. "Climate Change Law and the Rights of Nature: A Colombian Example through an International Perspective." *Revista Catalana de Dret Ambiental* 13, no. 2. 2022: 1–44.

Donziger, Steven R. "Rainforest Chernobyl: Litigating Indigenous Rights and the Environment in Latin America." *Human Rights Brief* 11, no. 2. 2004: 1–4.

Gadkowski, Tadeusz. *Podmiotowość prawnomiędzynarodowa organizacji międzynarodowych a ich zdolność traktatowa*. Poznań, 2019.

George, Robert P. *Prawo naturalne, Bóg i godność ludzka. Wykład im. Leona Petrażyckiego, Wydział Prawa i Administracji UW, 4 maja 2010*, edited by Maciej Dybowski, translated by Alicja Legutko-Dybowska. Warszawa, 2010.

Houart, Carlota. "Rights of Nature as a Potential Framework for the Transformation of Modern Political Communities." *Janus.Net. E-Journal of International Relations* 13, no. 1. 2022: 135–151.

Jones Moutrie, Marsha. "The Rights of Nature Movement in the United States: Community Organizing, Local Legislation, Court Challenges, Possible Lessons and Pathways." *Environmental and Earth Law Journal* 10, no. 1. 2020: 5–66.

Kimerling, Judith. "Disregarding Environmental Law: Petroleum Development in Protected Natural Areas and Indigenous Homelands in the Ecuadorian Amazon." *Hastings International and Comparative Law Review* 14, no. 4. 1991: 849–903.

Kimerling, Judith. "Habitat as Human Rights: Indigenous Huaorani in the Amazon Rainforest, Oil and Ome Yasuní." *Vermont Law Review* 40, no. 3. 2016: 445–524.

Kowalska, Samanta. *Międzynarodowe prawo roślin*. Warszawa, 2023.

Magallanes, Catherine J. Iorns. “Nature as an Ancestor: Two Examples of Legal Personality for Nature in New Zealand.” *VertigO* 15, Special Issue. 2015: 1–20.

McConnell, Donald R. “The Nature in Natural Law.” *Liberty University Law Review* 2, no 3. 2008: 797–846.

Myers, Norman. “Threatened Biotas: “Hot Spots” in Tropical Forests.”*The Environmentalist* 8, no. 3. 1988: 187–208.

Orbik, Zbigniew. “Human Rights in the Light of the Concepts of Natural Law.” *Scientific Papers of Silesian University of Technology. Organization and Management Series*, no. 140. 2019: 275–284.

Pain, Nicola, and Rachel Pepper. “Can Personhood Protect the Environment? Affording Legal Rights to Nature.” *Fordham International Law Journal* 45, no. 2, 2021: 315–377.

Pastor, Ginés Haro, Georgina Donati, and Troth Wells. *Yasuní Green Gold. The Amazon Fight to keep Oil Underground*. Oxford, 2008.

Piechowiak, Marek. *Filozofia praw człowieka. Prawa człowieka w świetle ich międzynarodowej ochrony*. Lublin, 1999.

Radcliffe, Sarah A. “Development for a Postneoliberal Era? Sumak Kawsay, Living Well and the Limits to Decolonisation in Ecuador.” *Geoforum* 43, no. 2. 2012: 240–249.

Redelbach, Andrzej. *Natura praw człowieka. Strasburskie standardy ich ochrony*. Toruń, 2001.

Roncucci, Regine. *Rights of Nature and the Pursuit of Environmental Justice in the Atrato Case*. Wageningen, 2019.

Sidi Diallo,Boubacar. “African Legal Instruments as Regional Tools of Harmonization of International Environmental Law.” *Adam Mickiewicz University Law Review* 14. 2022: 87–101.

Stone, Christopher D. “Should Trees have Standing? – Toward Legal Rights for Natural Objects.” *Shoutern California Law Review* 45. 1972: 450–501.

Swing, Kelly, Jaime Chaves, Stella de la Torre, Luis Sempértegui, Alex Hearn, Andrea Encalada, Esteban Suárez, and Gonzalo Rivas. “Outcomes of Ecua-

dor's Rights of Nature for Nature's Sake." *Advances in Environmental and Engineering Research* 3, no. 3. 2022: 1–16.

Tokarczyk, Roman. *Historia filozofii prawa w retrospektywie prawa natury*. Bydgoszcz, 1999.

Urbański, Wojciech. *Zasadnicze prawa natury*. Lwów, 1867.

Waitangi Tribunal. *The Whanganui River Report*. Wellington, 1999.

Weinreb, Lloyd L. *Natural Law and Justice*. Massachusetts, 1987.

World Economic Forum. *The Global Risks Report 2023. Insight Report*. Geneva, 2023.

World Wildlife Fund. *Living Planet Report 2022. Building a Nature – Positive Society*. Gland, 2022.

Judgments, legal acts and documents

Constitution of the Republic of Ecuador, National Assembly, Legislative and Oversight Committee, Publisher in the Official Register October 20, 2008.

Corte Suprema de Justicia, STC4360–2018, Radicación n.° 11001-22-03-000-2018-00319-01, Bogotá, cinco (5) de abril de dos mil dieciocho (2018).

Ley de Derechos de la Madre Tierra (Ley Nº 071), Ley de 21 de diciembre de 2010.

Judgment of Constitutional Court of Colombia of 10 November 2016, *Center for Social Justice Studies et al. v. Presidency of the Republic et al.*, T-622/16, The Atrato River Case.

Judgment of High Court of Uttarakhand at Nainital of 20 March 2017, *Mohammad Salim v. State of Uttarakhand & Others*, Writ Petition (PIL) No. 126 of 2014.

Property in Wildlife, art. 2(1), Wildlife Act [RSBC 1996] Chapter 488, as amended. Date of original text: 23 July 1982.

Stillheart Declaration on Rights of Nature and the Economics of the Biosphere, Woodside, March 3, 2014.

Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, Public Act 2017, No. 7, 20 March 2017.

The Earth Charter launched on 29 June 2000.
Universal Declaration of the Rights of Mother Earth, April 22, 2010. World People’s Conference on Climate Change and the Rights of Mother Earth, Cochabamba, Bolivia.