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Contents

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 Marian Zimmermann's text entitled *On Jurisdictional Proceedings and the Concept of a Party in the Code of Administrative Procedure*, published originally in Polish in *The Book in Honour of Professor Kamil Stefka* in 1967.

Professor Zimmermann was one of the most influential representatives of Polish legal scholarship, Head of the Department of Administrative Law and Studies on Administration and Dean of the Faculty of Law and Administration. His academic achievements include studies on public administration activities, to which he devoted the following monographs: *The attitude of the Supreme Administrative Court towards penal-administrative judgments* from 1927, *The issue of penal-administrative jurisprudence* from 1929, *Article 72 of the Constitution and the Polish legislation. Penal-administrative perspective* from 1930, *Expropriation. Study in Public Law* from 1933, *Polish expropriation law* from 1939, *On the principles of the new system* form 1935 and *Local legal regulations in the territory of Poland. The law of partitioning states* from 1963.

Professor Zimmermann's article was selected by Professor Zbigniew Janku, and was translated by Tomasz Żebrowski, Stephen Dersley and Ryszard Reissner, to whom we wish to express our heartfelt thanks. We would also like to thank Professor Jan Zimmermann, who agreed to the publication of his father's article.

Paweł Kwiatkowski

Foreword

Professor Marian Zimmermann's article *On Jurisdictional Proceedings and the Concept of a Party in the Code of Administrative Procedure*, written shortly after the adoption of this Code, was one of the author's last works. It presents theses which highlight the very essence of administrative procedure, which is entirely different from judicial procedure and is connected with substantive law in a special way. Consequently, this article still has great relevance, regardless of the many amendments that have subsequently been made to the Code. It is a work that the doctrine continually refers to as a basis for considerations focused on the fundamental issues of administrative procedure, and it also provides the support for many court decisions. For these reasons, Professor Marian Zimmermann's article remains a key text for those studying administrative law at faculties of law and administration.

It was in the pages of this article that, for the first time in scholarly literature, administrative procedure aimed at issuing administrative decisions was described as 'jurisdictional' procedure. The word 'jurisdiction' is conventionally used to describe judicial actions that involve 'deciding about someone's right'. By using this term in the context of administrative procedure, the author pointed out that if a procedure in which an abstract and general norm of administrative law is transformed

into a concrete and individual norm by means of a decision, it also has the character of jurisdiction: because the administrative body also thereby decides about someone's right. At the time when Professor Marian Zimmermann's article was written, there was no administrative judiciary in Poland, so the term 'jurisdiction' could be applied to settling cases by way of an administrative decision. *Nota bene*, the emergence of the administrative judiciary did not change this situation, because the administrative courts do not have the competence to adjudicate on the merits of a case, that is, to exercise jurisdiction.

The essence of the article is its reflection on the category of legal interest as a factor that determines the very existence of jurisdictional procedure. The author carefully considers two opposing conceptions of this interest, which arose as a result of two interpretations of the controversial Article 25 of the Code of Administrative Procedure (now Article 28). However, the author's reflections on this dispute do not constitute the key contribution of the article, since this controversy has already been resolved by judicial decisions. The timeless element is rather that the category of legal interest is grasped as the basic factor linking a norm of substantive administrative law with jurisdictional procedure. Let us note that it is the existence of a legal interest pertaining to a subject that allows an administrative case can be built. Such a case arises when there is a fact or event that can be connected with a norm of substantive law in such a way that it allows for the concretization of this norm. However, the case must be 'someone's' and the concretization of the norm should concern 'someone'. This 'someone' can only be an entity holding a legal interest. It is therefore an 'individual case', and it is precisely the resolution of such cases that is regulated by the Code of Administrative Procedure. When reading Professor Marian Zimmermann's article, we come to realize just how important a legal interest is for this entire matter. The author's presentation of different positions on this subject, his own conclusion, and his referring the whole issue to the category of an administrative case – these are the elements that constitute the basic value

of the article. This truly scientific value is independent of the contemporary fate of the Code, to which various amendments, breakthroughs and controversial ‘improvements’ have already made. Despite such changes, the essence of a legal interest and its significance cannot be erased.

Prof. Jan Zimmermann
The son of the author

Marian Zimmermann

On Jurisdictional Proceedings and the Concept of a Party in the Code of Administrative Procedure[1]

1. The Code of Administrative Procedure[2] provides for two different types of proceedings. The first, let us call it jurisdictional proceedings,[3] concerns only the legal interests of 'parties', while the second, which can be called complaint proceedings for simplicity, regulates the filing of petitions and proposals in the ordinary interest of citizens or a community.

The subject-matter scope of the proceedings of the first type is defined by the general clause of CAP, Article 1, with Article 194 providing, however, for a separate type of proceedings for certain fields.

The general clause is, however, vague and gives rise to many doubts. Article 1 of the CAP states that the CAP regulates proceedings 'in individual cases coming within the purview of state administration'. Are individual cases really the issue here? A ban on bathing in a specific place could be considered, for example, as an individual case. Is it

1 Translated from: M. Zimmermann, *Z rozważań nad postępowaniem jurysdykcyjnym i pojęciem strony w kodeksie postępowania administracyjnego*, in: *Księga pamiątkowa ku czci Kamila Stefki*, Warszawa 1967 by Tomasz Żebrowski and proofread by Stephen Dersley and Ryszard Reissner. Translation and proofreading was financed by the Ministry of Science and Higher Education under 848/2/P-DUN/2018.

2 Hereinafter: CAP.

3 M. Waligórski, *Polskie prawo procesowe cywilne. Funkcja i struktura procesu*, Warszawa 1947, p. 36: "The function related to the first objective of a case, i.e. the pursuit of a concrete norm, regulating a legal relation, can be called jurisdiction". Since it can be seen from further definitions that the cited author construed the words "regulating a legal relation" to the said concrete norm, being the outcome of a case, broadly (definition encompasses constitutive claims as well), the present author believes that it perfectly defines the very nature of administrative proceedings as described in CAP, Divisions I-II.

rather the case of a specific entity that is meant here, or possibly both? The term 'individual case' is, after all, a relative concept.

Nor is the expression 'within the purview of state administration' clear. It is argued in our literature that this expression in itself does not exclude cases dealt with as part of the civil-law activity of state administration bodies. Since CAP, Article 1, does use the expression 'within the scope of administrative law' (as did the 1928 Decree of President of Republic[4], Article 1), it does not exclude the acts of 'gestio' in the broad sense. Nor does it exclude cases belonging to separate legal systems (in particular all kinds of rules self-imposed on administration).

Thus Article 1 alone does not give us either the complete or clear scope of the CAP, in terms of subject matter. This can be obtained only by studying all the CAP provisions, in particular those that concern elements[5] important for the construction of jurisdictional proceedings, i.e. the concepts of 'party', 'legal interest' and administrative 'decision'.

2. The purpose of proceedings is to issue a decision that 'disposes of the case' of the party (CAP, Article 97 in connection with Article 99). If the decision is faultless and favourable to the party, it creates its 'right' and may be set aside or modified only with its consent. The right is permanent as, apart from the case of the party's consent, it may be set aside or modified only in the cases of qualified defectiveness listed in the CAP or in special provisions (Article 142), or expropriated for a compensation ('expropriation of right'). This reaffirms its permanence. It is a *res iudicata* which *ius facit inter omnes*. In particular, it binds state administration bodies that have issued it (CAP, Articles 12, 102, 137(1)(3)). Hence, it is issued by a state administration body as an act of 'imperium' in proceedings regulated by administrative law provi-

4 Hereinafter: DPR.

5 These are chiefly Articles 1, 25–26, 57, 61, 97–99, 135–137, 163–166. It is worth noting that the 1925 Austrian codification, which served as a model for our codification, as is well known, does not have an equivalent of the general clause included in our Article 1. Whereas provisions introducing Article I 1 limit this type of proceedings to 'imperious' administration and Article II 6 excludes service matters of officials.

sions and progressing in a specific case the purpose of which is an individual norm for a specific addressee.[6] This allows us to exclude from the scope of the CAP application certain actions and acts. These are civil-law actions, acts of a general scope, acts of 'gestio' (non-imperious acts) and – since a decision is an external act, i.e. one that regulates, creates and abolishes the rights or responsibilities of individuals in the sphere of administrative 'universally' binding law – 'internal' acts of administration.[7]

3. One of the crucial concepts for the understanding of the construction of proceedings in the CAP is that of a 'party'. Article 25 of the CAP states:

> A party to proceedings is any person whose legal interest or responsibility is the object of the proceedings or who demands the intervention of a state administration body[8] on account of his/her legal interest or responsibility.

The second sentence of this Article has given rise to fundamental disputes in our literature. Since individual views must, next to texts, be the foundations of this study, it shall be necessary to quote many important fragments verbatim.

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6 This corresponds to the classic definition of an administrative act – e.g. O. Mayer, *Deutsches Verwaltungsrecht*, I, 93: „ein der Verwaltung zugehöriger, obrigkeitlicher Ausspruch, der dem Untertanen im Einzelfall bestimmt, was für ihn Rechtens sein soll" (emphasis M. Z.). V. S. Kasznica, *Polskie prawo administracyjne – pojęcia i instytucje zasadnicze*, 4th ed., Poznań 1947, p. 112.

7 J. Starościak, *Prawo administracyjne*, Warszawa 1965, p. 248.

8 The 1928 DPR, Article 9(3), worded this differently: 'The interested persons who take part in a case pursuant to a legal claim or a legally protected interest are parties'. Although comparing this wording with the wording of para.1 of the same Article ('An interested person is anyone who requires an intervention of a body … etc.), a certain similarity of this expression cold be noticed to CAP, Article 25; that wording, after all, was no doubt less categorical.

The wording of Article 25 reminds one of Article 9 of the 1922 SAT Act and Article 49 of the 1932 SAT Regulation (the right to appeal from a decision 'is enjoyed by any person who claims that his/her right has been infringed […] unlawfully' – Article 49). It seems, however, that in that case the assertion made by a party was indeed of such a kind that any answer to it called for holding proceedings first.

It shall be also necessary to reach back to history. As it is well known, the origins of our CAP, via the 1928 DPR, go back to the Austrian codification of 1925. Its theoretical foundation was the classic work by E. Bernatzik *Rechtsprechung und materielle Rechtskraft*, which has remained useful for the Austrian system to this very day. He founded his construction on the concepts of legal claim and legal interest (in the DPR: 'legally protected interest'). The first gives the right to a decision of a specific content, while the second to a specific conduct, aimed at issuing a decision. In both cases, however,

Der Begriff, 'der Partei' bestimmt sich im Verwaltungsrecht nicht nach den Wünschen eines Einzelnen, sondern darnach, ob ein rechtliches Interesse vorliegt oder nicht.[9]

This stance was in principle taken also by the Austrian Administrative Tribunal and our Supreme Administrative Tribunal (SAT) (The definitions of the concept of a 'party' in § 8 of the Austrian Act and Article 9 of the DPR are identical).[10]

With respect to our DPR of 1928, the question was best discussed by Klonowiecki in his well-known monograph:

> While defining a party, Article 9 uses, following the Austrian model, substantive criteria. […] the use of substantive criteria to define a party allows only persons having these substantive qualifications to participate in administrative proceedings. […] Both a legal claim and a legal protection of an interest must rely on the provisions of positive law and must exist objectively, not only in the opinion of the interested person (sub-

9 E. Bernatzik, *Rechtsprechung und materielle Rechtskraft*, Vienna 1886, p. 187; see also p. 65.

10 Cf. a judgement of the Austrian Administrative Tribunal going even further of 11 May 1935, no. 465: 'Nicht dass ein Rechtsanspruch von einer Partei behauptet wird, sondern dass nach den betreffenden Verwaltungsvorschriften ein öffentlich – rechtlicher Anspruch überhaupt vorgesehen ist, entscheidet nach § 8 A.V.G. über die Parteistellung; diese bildet die begriffliche Voraussetzung für den Anspruch auf Beiziehung zum Verfahren und nicht ein Ergebnis des Verfahrens' (emphasis M.Z.) quoted after F. Graefenstein, *Die Verwaltungsverfahrensgesetze*, 2nd ed. Graz 1937, p. 35). Cf. also the SAT judgment of 13 Feb. 1931 (coll. no. 349 A): 'It is not the will of the interested person that is decisive, but the relevant provisions of substantive law'.

> jectively). […] Under a legally protected interest should be understood, according to the DPR, an interest that can be attained taking advantage of an administrative decision in accordance with the law. The legal protection of such an interest is the possibility to satisfy it both passively and actively in accordance with the law.[11]

Hence, the Austrian system is not the only possible one. It is possible to design administrative proceedings modelled on civil proceedings. For the latter, in 1919, Stefko adopted the general rule that a claim is allowable when the claimant has a substantive legal interest to obtain protection in the form of a judgement. The answer to the question when the claimant has the legal interest can be easily left to the court to give it in reliance on substantive law. A judgement may be entered each time a party shows a legal interest in the granting of a judgement it demands. However, it can show the interest only in the course of proceedings.[12]

Finding it necessary, therefore, to ascertain the objective existence of a legal interest to enter a decision does not pre-determine in itself that this cannot happen in the course of proceedings.

It is this solution that was adopted by the codifications of administrative proceedings in Czechoslovakia in 1928 and Yugoslavia in 1930.

The reasons why we adopted the Austrian system back in 1928 in the version shaped by the practice of the Austrian Administrative Tribunal prior to the enactment of a relevant statute, and the literature, are convincingly set out by Klonowiecki.[13]

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11 W. Klonowiecki, *Strona w postępowaniu administracyjnym*, Lublin 1938, pp. 39–41.

12 K. Stefko, *Główne zasady polskiej procedury cywilnej*, "Przegląd Prawa i Administracji" 1919 XLIV, pp. 159, 161, see also p. 157. Such a system may also contribute, under certain conditions, to the rise of certain new legal institutions. This account, e.g. in 1919, made the codifiers of the future CCP leave out from it a provision on right-creating (constitutive) judgments, whose existence was debatable at that time. Ibidem, p. 161).

13 W. Klonowiecki, op.cit., pp. 36–39: 'While defining the concept of a party to proceedings, it is possible to adopt formal or substantive criteria. The former make the rights of a party to proceedings dependent on the specific conduct of an individual vis-à-vis the authorities or vice versa. It does not matter if individuals have any rights or qualified interests. Anyone, if he/she wants to, may participate in a case as a party. Only as a result of proceedings

4. In 1959, the commission for drafting an administrative procedure bill published a draft bill for the purpose of opening it to public debate. It was the intention of the majority of commission members to use the 'subjective' definition of a party: Article 19(1) said that: "A party is any person whose lawful interest is the object of proceedings or who requests the intervention of a body, claiming that it bears on this interest". The 'subjectivity' of this definition was questioned in the course of debate by pointing to fundamental differences between administrative and civil proceedings, and to the nature of the connection of the trial situation of a party with a right and administrative proceedings.

In this respect, Bigo pointed out that in administrative proceedings it is not possible to follow the example of civil procedure law in which the litigation initiative is not formally connected to the substantive-law relation although causes of action must of course follow from the substantive-law legal order. [In administrative proceedings] litigation initiative of an individual, if any, is sanctioned. The sanction is based on a lawful interest, i.e. a substantive-law relation specified in a legal provision outside the CAP. This means that the litigation relation that arises upon the

will it be revealed if he/she had any rights or legal interests. This definition of a party suits best the character of a party as a strictly procedural or formal party. To define a party, Article 9 makes use, following the Austrian model, of substantive criteria. A formal definition would greatly extend the scope of persons entitled to participate in administrative proceedings. With as a rule, low costs of participating in such proceedings, poor knowledge of law among the general public and a certain inclination for litigiousness, the administrative authorities would be greatly overburdened and case processing would be complicated'. The first solution was adopted in the 1928 Czechoslovak Regulation, which does not define a party at all. Any legal person may act as a party, the authorities will verify its title to appear as party on their own motion. Reasons given for the legislation explain that defining the concept of a party is unnecessary because the questions whether certain persons are entitled to participate in a case are decided by individual provisions of administrative law and finding a definition that would cover all cases would not be easy. Czech scholarly comments on this codification maintain that prior to holding proceedings it cannot be ascertained if the applicant has a right or a legally protected interest and so the authorities are to apply to every applicant invoking such a right the rules of proceedings until it is ascertained otherwise. In turn, the Austrian codification adopted a different solution. Its interpretation is, however, an extension of long-standing judicial-administrative practice and years of scholarship, and rests on guidelines issued by the constitutional committee. In relation to our DPR, its provisions are a sufficient basis for explaining this concept. Ibidem.

institution of proceedings is not intrinsic, it is, so to speak, a secondary legal relation.

Bigo analyses the draft bill in great detail and arrives at the following conclusions: Article 43(2) sets out the integral elements of any application, including but not limited to:

> […] facts of the case and the demand, i.e. the description of the practical outcome of a case desired by the applicant. The facts of the case and the demand are enough for the body to determine the title of the applicant to appear. If the application does not meet these requirements, and if such deficiencies are not made up for within seven days, the body leaves the application untended (Article 45(2)). Hence, not every assertion ('I have a lawful interest') suffices to initiate proceedings. […] The matter is unambiguously explained by Article 124 together with Articles 43 and 45. In Article 124, a body, preliminarily examining applications filed, segregates them into those whose authors have a title to appear (persons 'who may be a party') and others that come from other people (the latter applications are treated as complaints).[14]

A similar stance was taken by Langrod, who believes that unlike civil proceedings, in administrative proceedings:

> Administration, performing its public task, is supposed to issue a decision […] in compliance with the law. The initiative of a party out of necessity becomes an integral element of the administrative proceedings: to be able

14 T. Bigo, *Ochrona interesu indywidualnego w projekcie kodeksu postępowania administracyjnego*, "Państwo i Prawo" 1960, no. 3, pp. 466–467 and the literature quoted there. After a public discussion these articles were redrafted. Changes were made to Article 19 (Article 25 now). From Article 43(2) (Article 58(2) now) the words 'and facts in the case being the subject of an application' were struck out, while in Article 124 (Article 163 now) the phrase 'A complaint […] initiates proceedings if it is filed by person who may be a party according to the Code' was replaced with '[…] if it was filed by a party'. The fact that individual articles of the Code oscillate between the 'objective' and 'subjective' conceptions makes for new interpretation difficulties.

> to initiate it, the individual should at the very beginning, at the introductory stage of the proceedings, (emphasis M. Z.) prove the existence of its legal interest (active or passive) in reliance on substantive law. Only then will the individual be allowed to set in motion the public mechanism and participate in the proceedings. This is a consequence of a significant difference between private (liberal) law and administrative law. Par conséquent un droit subjectif public préalable conditionne l'admission à titre de 'partie en cause'.[15]

After the CAP was published, some authors elaborated on the views of Bigo and Langrod, with Dawidowicz being the most prominent among them. Opposing the reception of the concept of a party from a civil action, he highlights the fundamental differences between civil and administrative proceedings:

> An administrative decision is a form of intrinsic and creative administrative activity. [The claim by a party that its interest is 'lawful' is to be sure a point of departure for 'demanding intervention of a body. Unlike a court of law, 'an organ of state administration'] verifies this claim before initiating administrative proceedings (emphasis M. Z.). This is seen in the fact that the CAP does not provide for the issuance of decisions refusing recognition as a party by state administration bodies [Article 163 ff. [Article 124 of the draft]. Under this Article, a body receiving complaints has to classify them according to legal interests involved, while Article 57(2) says that only a demand filed by a party initiates proceedings. Hence, it appears to be quite necessary for a state administration body to make a preliminary finding as to the kind of interest the demand is based on. If it is revealed that the demand is not based on any legal interest, there are no grounds for initiating proceedings (because the person who

15 G. Langrod, *La codification de la procédure administrative non contentieuse en Pologne*, "La Revue administrative" 1960, p. 538, footnote 64. Cf. E. Iserzon, J. Starościak eds, *Kodeks postępowania administracyjnego*, 2nd. ed., Warszawa 1964, p. 61.

> has filed it is not a party to the case). This, however, does not mean that such a demand can be left untended at all. […] It should be dealt with outside administrative proceedings.[16]

The same period, however, witnessed many publications defending the 'subjective version' of the concept of a party. A representative author for this line of thinking is Iserzon, who maintains:

> The CAP defines the concept of a party in a simple, clear and logical manner, guaranteeing the people who, in their opinion, have an unsettled legal claim, a possibility of settling it. According to the initial intention of the CAP drafters, a party is a trial concept and not a category of substantive law; a party is any person who asserts vis-à-vis an administrative body that administrative proceedings affect his/her legal interest (responsibility or right) or who demands the intervention of a body, invoking his/her existing, in his/her opinion, legal interest or responsibility. This does not mean that a body has no competence to verify if the person who demands an act-in-law on account of his/her legal interest or responsibility (Article 25) actually relies on a legal interest or a responsibility […]. The stance I support requires only that a body decide the question in regular proceedings in which the individual filing a claim enjoys all the rights of a party and not in a summary and unilateral assessment without initiating regular proceedings […]. My stance is supported by Article 57(2), under which proceedings are automatically initiated on the day the party files a demand with the administrative body.[17]

Moreover, Brzeziński believes that a body verifies if the applicant has correctly assessed his/her interest to be a legal interest and that this can be done only in the course of explanatory proceedings. In this case, it must be presumed that the applicant is a party.[18] Jendrośka writes:

16 W. Dawidowicz, *Ogólne postępowanie administracyjne. Zarys systemu*, Warszawa 1962, p. 71.
17 E. Iserzon, J. Starościak eds, op.cit., p. 13.
18 W. Brzeziński, *Review of W. Dawidowicz, Ogólne postępowanie administracyjne – Zarys systemu*, "Państwo i Prawo" 1963, no. 1, p. 122.

> Article 25 alone justifies the conclusion that the Code has adopted the so-called subjective version of the party's title to appear. […] Thus, the Code allows for establishing a litigation relation regardless of whether a lawful interest is actually present in a given case. [19]

As can be seen from these quotations, the dispute centred on the question whether in the light of CAP provisions, when proceedings are initiated on demand from the interested person (or a 'party'), the ascertainment of the presence of a 'legal interest' takes place only in the course of the proceedings or whether we are faced in this case with an 'objective' category which constitutes a prerequisite of proceedings in the opinion of the supporters of this solution.

The concept of a legal interest no doubt belongs to law as an objective concept, which is not questioned as a rule by the supporters of the 'subjective version'. If the literature draws a distinction between objective and subjective approaches to the concept, it is essentially done for the purpose of marking different functions out of regard for the applicant, where the concept is to have such in a trial. Is it to be therefore the qualified relation of the applicant in a given case to the law, with the existence of the relation to be proven only during the trial? Or is it to be a prerequisite of a trial per se?

An answer should be provided by the CAP itself. However, due to 'opposing trends' within the codification commission, the CAP is neither clear nor consistent on this matter. The dispute is thus about the 'objective' or 'subjective' understanding of a legal interest. Let us attempt to learn therefore how this is understood by the CAP provisions themselves.

6. The concept of a 'legal interest' is not expressly defined in the CAP. Nonetheless, the concept of a party pivots on it. If the concept of a party were to have a solely trial character (in this case 'legal interest'

19 J. Jendrośka, *Sytuacja prawna strony*, "Acta Universitatis Wratislaviensis" 1964 no. 19, XII, p. 33.

would be ascertained only in the course of trial), apart from proceedings initiated by an organ on its own motion, a party could be only 'he/she who requests the intervention of an organ, on account of his/her legal interest'.

There are provisions in the CAP, however, in which the concept of a party has, as it seems, an objective character, independent of the will of the 'party'.

> [Article 57(2)] The date of initiating proceedings on demand from a party shall be the day of filing the demand with the state administration body.
> [Article 57(3)] Of initiating proceedings by an organ on its own motion or on demand from a party, all persons being parties to the case shall be notified.
> [Article 84(3)] If it is probable that besides the summoned parties participating in proceedings there may be other parties to the case, unknown to the state administration body, the date, place and subject matter of a hearing shall be announced by public notices or in a manner customarily used in a given locality.
> [Article 163] A complaint in an individual case that has not been the subject of administrative proceedings, initiates proceedings, provided that it has been filed by a party. If the complaint is filed by another person, it may cause administrative proceedings to be initiated on the own motion of the body, unless the law makes a demand by a party necessary to initiate proceedings.

Article 57(2) could be – as was shown – interpreted in two ways: either 'subjectively' (the person who files a demand is thereby a party)[20] or such that even if proceedings are initiated on demand from a party – a party must already exist (thus, it must indeed have a legal interest).[21]

In the next paragraph of this Article, the wording tends to suggest an 'objective' interpretation more strongly. Article 84(3), in turn, treats

20 Cf. Iserzon, op.cit.
21 Cf. Dawidowicz, op.cit.

the concept of a party unequivocally in an objective manner as being independent of proceedings already under way on the motion of the body itself or of the filing of a 'demand'. An adjudicating organ therefore is only to search for already objectively existing – but unknown – 'parties'. An analogous situation is found in Article 163: objectively existing 'legal interest' is decisive; a person filing a 'complaint' is not even aware of the fact that he/she is a 'party', has a legal interest and enjoys the right to demand that jurisdictional proceedings be initiated.

7. All this, however, does not settle completely our question especially as the wording of the final sentence of Article 25 remains enigmatic ('on account of his/her legal interest'). The deliberate exclusion from the CAP of the former provision of the DPR, Article 71, is differently interpreted in the relevant literature.[22] Furthermore, the fact CAP does not provide for the issuance of decisions refusing recognition as a party by state administration bodies provokes opposing conclusions.[23]

Both interpretations, therefore, are or may be anchored more or less legitimately in the CAP wording that is insufficiently communicative and harmonised on this question. However, it is crucial for legal practice to arrive at a uniform interpretation of the CAP. In this context, the absence of the administrative judiciary is acutely felt as without it any attempts by juristic scholarship cannot be expected to make such an interpretation any time soon.

8. It still seems to be necessary to ponder the sense of the vital concept of a 'legal interest'. It was the desire of the liberal 'state ruled by law' to subject the interests of its citizens vis-à-vis state administration to legal protection. The interests were to be considered in the broadest

22 Cf. T. Bigo, op.cit., p. 466: 'The omission from the draft of an equivalent of the 1928 DPR, Article 71, does not mean that the draft decrees some 'right to administrative protection' modelled on the right to civil protection in civil proceedings'. Iserzon, in turn, condemns 'unlawful use of the provision of the 1928 DPR, Article 71, which the CAP drafters deliberately did not embrace'.

23 E.g. W. Brzeziński, op.cit., p. 122 and W Dawidowicz, op.cit., p. 71, who believes that this fact 'shows that the verification if a given entity is a party takes place prior to the initiation of proceedings'.

possible sense as 'rights' and, thus, 'judicialized'. Examples were drawn from civil law and procedure. Bernatzik's construction of administrative trial, relying on distinguishing various forms of legally-protected interests, was actually motivated by the desire to extend the protection beyond the 'claim' as such. Since administrative law was chiefly about right-creating ('constitutive') decisions, whose existence in a civil action was debatable at that time,[24] the category of a 'legal interest' was established ('legally protected' in the DPR) alongside 'legal claims', giving the 'right to specific conduct'.

A 'legal interest' gave the right to specific conduct, that is, conduct in which an interested person has a possibility to be granted a decision creating for him/her *Interessenverhältnisse* or legal relations.[25]

Bernatzik – likewise the practice of the Austrian Administrative Tribunal – conceived of a legal interest as existing objectively and independently of the will of a party; this had to assume the existence of substantive-law grounds – apart from the very right to participate in proceedings – even if only in competence provisions.[26]

Since, however, the concept of a 'legal interest' means only the possibility of being granted a decision, it can be conceived of as a purely procedural category. It is then reduced to the existence of a legal norm providing for the possibility of issuing and obtaining a decision in certain cases in administrative 'jurisdictional' proceedings. As regards the decision content, the centre of gravity moves to proceedings them-

24 Cf. K. Stefko, op.cit., p. 161. It must be remembered that in the authoritative juristic literature of those times state administration was believed to be chiefly 'free and creative activity' for which law was only the 'bounds'. With this approach, E. Bernatzik, op.cit., p. 46 juxtaposes his theory of administration being bound by the hypothetical general norm binding every organ: *Tue, was Du glaubst, dass es durch das öffentliche Wohl bedingt ist.*

25 E. Bernatzik, op.cit., p. 186 ff. See also above p. 435 and footnotes 6–8 & 10. The reliance on the criterion of 'interest' in defining administrative proceedings, in agreement with the views of Ihering's times, later to be criticised sometimes in the writings on administrative law as well (Herrnritt), suggests somehow the interested person's perspective on this fundamental concept of administrative proceedings.

26 Otherwise a vicious circle would arise here – cf. for instance, the gloss by Wasiutyński quoted by W. Klonowiecki, op. cit., p. 18, footnote 2.

selves, which will consider the substantive-law and factual grounds of the decision.

The concept of a 'legal interest' would play then a double role from the perspective of the interested person. It would authorise him/her to participate in a specific procedure aimed at obtaining a favourable decision and it could be, being a competence provision at the same time, independent grounds for a decision in those very rare cases where the administrative organ is not bound by any other provision of law in issuing a decision ('absolute discretion').

A 'legal interest' thus conceived offers, however, further possibilities for the interpretation of the CAP.

9. It does not take long to see that the 'legal interest' in this formal sense actually means the possibility, provided for by a certain group of administrative regulations, of holding 'jurisdictional' administrative proceedings in certain categories of cases. A provision that says, for instance, that competent bodies may issue water, industrial or other permits is the provision that for this category of cases opens the doors to a 'jurisdictional' administrative proceeding. At this juncture a more general issue arises – if embarking on this path is admissible at all.

Administrative law is not such a uniform whole as civil law, *corpus iuris clausum*, pursuant to which every 'civil' interest may be satisfied and in which the road of a civil action is open to all. 'Jurisdictional' administrative proceedings is but one kind of administrative proceedings in a broad sense (generically different CAP 'complaint' proceedings are *sui generis* proceedings as well). Under these conditions, in favour of the 'jurisdictional' competence of administrative organs, no presumption argues. In each category of cases, an express provision of law is necessary that provides a possibility of taking the road of administrative procedure. Granted, CAP, Article 1, knows the general concept of 'cases coming within the purview of state administration', but as was shown above this concept covers only such case types in which administrative organs may issue decisions. Where this is possible it is decided

by provisions scattered across various statutes. Therefore, holding such proceedings depends on whether the individual case with which they are to be concerned belongs to such a category of cases for which the law provides the possibility of issuing an administrative decision.

If the law does not provide a means of jurisdictional administrative proceedings for a certain category of 'administrative cases', an administrative body cannot hold such proceedings at all, as they would be void *ab initio*.[27] A sensible CAP interpretation leads to the conclusion that the examination of whether in a given category of cases jurisdictional administrative proceedings are admissible, an administrative body receiving an application for initiating proceedings should preliminarily carry out on its own motion. What is meant here is a prerequisite for the possibility of holding such proceedings at all, an 'argument' in their favour – but *iura novit curia* after all!

If then an application is filed by a person who demands that a decision be issued in the matter of moving a bus stop closer to his/her residence, invoking in this individual case coming within the purview of state administration his/her vital interests, no administrative body will consider such an application as the initiation of proceedings. It will not, because no law provides for a possibility of issuing an administrative decision in such matters and, consequently, holding jurisdictional proceedings in their respect. Nevertheless, this type of interest is not deprived of some protection under the 'complaint and proposal' procedure. The law does not provide

27 K. Stefko, *Wadliwe akty sądu w postępowaniu cywilnym*, in: *Księga pamiątkowa dla uczczenia pracy naukowej K. Przybyłowskiego*, Kraków – Warszawa 1964, pp. 329, 332–333, assuming that 'a significant task of a trial is entering a decision', believes that 'proceedings before a common court of law must be deemed nonexistent if they do not share the crucial characteristics of contentious judicial proceedings'. Among such characteristics, he counts the entering of a decision on the jurisdiction of a common court of law. Its absence results in a trial being non-existent. 'Remedying these deficiencies is not possible, because the 'trial is non-existent'. Moreover, he rightly believes that the institution of nullity of action may be transposed by analogy to an administrative trial. Bernatzik believes that since *jeder rechtliche Interessent von der Behörde "zur Partei" von Amtswegen gemacht werden soll*, the omission of this renders the decision null and void in their respect, *weil der Prozess hier inkorrekt, dem Übergangenen gegenüber nichtig ist*. E. Bernatzik, op.cit., p. 188.

for such a possibility, because creating individual rights in this respect would be against a community interest. Thus, even if the application were accepted, it would not constitute a right of the interested person, restricting the discretion of disposition by administration, and the relevant body would be able to modify it any time.

The same is true for situations where a demand to initiate proceedings is filed in a matter which is actionable before a court of law or which has no character of 'administrative matter' at all.

10. Incidental to these questions is the determination of the date of the initiation of proceedings. If an application has been filed in a matter in which a body has found, in a preliminary examination, jurisdictional administrative proceedings to be appropriate and, thus, a legal interest in the above sense to exist and the applicant to enjoy the character of a 'party', the date of initiation of proceedings should, conceivably, be the date of the filing of the application. For in this case, the applicant was – on the strength of Article 25 – a party at that moment.

11. The discussion so far has shown CAP jurisdictional proceedings to have their subject-matter scope determined by 'universal' administrative law, providing for, in expressly specified categories of cases coming within the purview of this branch of law, the possibility of issuing administrative decisions by state administration bodies. Such decisions are individual norms regulating the individual rights or responsibilities of their addressees in this sphere. Exceptions are matters expressly excluded by virtue of CAP, Article 194.

Hence, the proceedings concern the realm of 'universally binding' law; they do not concern separate legal systems (i.e. all kinds of self-imposed internal rules of administration).

A party, in turn, under CAP, is an individual whose case may be disposed of in such proceedings by issuing a decision.

12. This short outline had to omit many relevant issues, especially one concerning the distinction between 'external' and 'internal' acts in the operation of some state organs, especially those of the institution

type, left out from the CAP, which must be left to the interpretation of relevant provisions of law.

The growth of administrative law, in particular in the areas of institution-type and business administration, creates new problems. These include new types of 'sources of law', new economic plans, which are in principle acts of 'internal' law, but affect even jurisdictional proceedings by deciding often the tenor of decisions or actually substituting them sometimes to a large extent (e.g. 'flat allotment' lists). All this calls for investigations on how to regulate them procedurally by either appropriately amending substantive law and extending the scope of the CAP or introducing special, adequate kinds of proceedings and separating them from jurisdictional proceedings. Now, diverse and fragmentary internal regulations are used in these areas, supplemented by complaint proceedings, at least as regards activities going outside to a degree (e.g. CAP, Articles 152 & 157).

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SUMMARY

On Jurisdictional Proceedings and the Concept of a Party in the Code of Administrative Procedure

The paper is an English translation of *Z rozważań nad postępowaniem jurysdykcyjnym i pojęciem strony w kodeksie postępowania administracyjnego* by Marian Zimmerman published originally in *Księga pamiątkowa ku czci Kamila Stefki* in 1967. 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.

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State Borders in the Light of International Public Law. An Outline of the Issues

The concept of a border and types of land borders

In response to the COVID-19 pandemic, which in 2020 spread throughout the territory of most countries, many governments closed their borders in order to protect their own population from its negative effects, thus preventing or hindering movement, while at the same time realizing the role of the border for the state. When reflecting on its meaning, it should be emphasized that the existence of a border is related to the division of powers between states in space, thus determining the scope of their power over a given area. This power is based on the principle of reality or, in other words, efficiency.[1] In turn, this is related to the criterion of sovereignty, which is the uninterrupted and peaceful exercise of state functions, the limitation of which in space are the boundaries defined as a line or plane perpendicular to the border line within which the territory of the state is contained. At the same time, a border separates a state from another state or area that is res nullius or res communis, which corresponds to the fact that a territory, being a three – dimensional space, is not limited only to the surface of the globe, because the boundaries are also delimited by air space, sea space and the interior of the Earth.[2]

1 M. Bartoś, *Les difficultes du reglement des litiges de frontier*, "Revue de la Politique Internationale" 1959, no. 229, p. 10–12; C. Berezowski, *Prawo międzynarodowe publiczne*, Warszawa 1966, I, p. 184.

2 L. Antonowicz, *Podręcznik prawa międzynarodowego*, Warszawa 2015, p. 106; T. Baudet, *The Significance of Borders*, Leiden 2012, p. 128; T. Jasudowicz, *Granice państwa*, in: *Wielka Encyklopedia Prawa. Prawo międzynarodowe publiczne*, Warszawa 2014, vol. IV, p. 109.

When analyzing the essence of a border, it should be emphasized that it does not exist independently in the sphere of international law, as its course in space, whether through land, sea or air, is, as a rule, the result of territorial changes taking place in the form of either the acquisition or loss of territory, causing a corresponding change of its course, which in turn necessitates its delimitation and demarcation. Nowadays, the legal basis for territorial delimitation is treaty law, or, in its absence, customary law, which supplements the former with general principles for delimiting state areas.[3] However, this was not always the case: in ancient times Mediterranean societies and empires (mainly Greek and Roman), as well as those of the Middle East, did not need to delineate the boundaries of their legal orders, as wherever their troops went, their power also reached. This changed over time, but it was only in the period of ancient Rome that 'limes' in the sense of the dividing line (limes Imperii Romani) were marked on maps. These lines corresponded to various fortifications on the ground which required maintenance, including the presence of border troops, to counteract the incursions of the barbarians from the north (Huns and Goths), thereby generating the considerable financial expenses which were one of the causes of the fall of the Roman Empire (around 476–480 AD).[4] The word 'border' appears again at the turn of the 13th and 14th centuries, but the Middle Ages were also characterized by a lack of borders in the present sense of the word. This state of affairs lasted until the end of the 17th century, the time when border territories appeared instead of borders, and their course was often marked by the location of fortified castles, rivers or a line of walls.[5] It was only in the years of the French Revolution (1789–1799) that the concept of a linear border appeared, which can be seen in the treaties concluded by France until the end

3 C. Berezowski, *Prawo międzynarodowe…*, p. 184.

4 See more E. Rowson, *The Literary Sources for Pre – Marian Army*, in: *Roman Culture and Society*, Oxford 1991, p. 286.

5 See more J. Gilas, *Granica państwa*, in *Encyklopedia prawa międzynarodowego i stosunków międzynarodowych*, Warszawa 1976, p. 90–91; J. Symonides, *Terytorium państwowe w świetle zasady efektywności*, Toruń 1971, p. 185.

of the 18th century or the beginning of the 19th century, and in the Final Act of the Congress of Vienna of 1815.[6]

The concept of a border is also related to the definition of their character, and due to the method of their determination and their routing, they are divided into land, sea and air. The first of these may be natural or may consist of artificial boundaries. Natural ones can be defined by mountain ranges, for example. However, in practice – except for borderlines connecting the highest peaks of the mountains, the land border in the form of a watershed has the advantage.

In the case of borders involving non – navigable and navigable rivers and other inland waterways, the following solution is adopted: the border runs along the median, i.e. the center of the non – navigable riverbed, watercourses and canals, and in relation to navigable rivers – along the main, deepest river current (talweg), entailing that its course may be variable. Sometimes it is also assumed that if the river leaves the current and creates a new bed, the center of the abandoned bed will remain the border. Finally, in the case of a lake, the border is marked out similarly to navigable rivers – it runs through the middle of a border lake.[7]

6 J. Gilas, *Granica państwa…*, p. 90; J. Symonides, *Terytorium państwowe…*, p. 185

7 Referring to examples from international practice, it should be emphasized that the law, in the absence of a different contractual regulation, recognizes that the waters of border lakes may belong, in relative parts, to neighboring states, or the border may run along the center of the lake's surface. The latter solution, i.e. the center of the lake's water surface, was adopted in relation to the contractual delimitation of the waters of Lake Constance (through which the Rhine flows) lying on the border of the Swiss Upland, the Bavarian Upland and the Western and Eastern Alps, on the shores of which Austria, Germany, Switzerland lie; and Lake Geneva, between Switzerland and France. Cf. G.H. Hackworth, *Digest of International Law*, Washington 1940, vol. 1, p. 615 and next. Similar solutions have been adopted to delimit the waters of the Great Lakes in North America, along the surface of which runs the border between the United States of America and Canada. Pursuant to the treaties concluded between these countries in 1783, 1814, 1842, 1907, the center line as the border was adopted in relation to Lakes Erie, Huron and Ontario, and in relation to the waters of Lake Superior, the principle of the middle line of the deepest current was adopted. Cf. p. Fauchille, *Traite de droid intenational public*, Paris 1925, vol. 1, part 2, p. 419. According to the above principle, by the Estonian – Russian treaty of February 1920, the border waters of Lake Peipus (Eastern Estonia) were divided. Cf. J. Lewandowski, *Estonia*, Warszawa 2001, p. 154; R. Taagepera, *The Baltic Sea, Years of Dependence 1949–1991*, London 1993, p. 189 ff. The waters of Lake Ohrid were similarly divided, the largest in the Balkans, located between Albania and Montenegro,

Land borders can also be classified according to the way they are established. Hence, they can be divided into orographic – taking into account the shape of the earth's surface; and mathematical – running independently of the topography, which occurs, for example, when delimiting the Arctic space on the basis of the so-called sector theory. A special type of borders are astronomical borders, running along meridians or parallels, characteristic for the separation of territories on the African or North American continent, as well as in Asia.[8] Less often, they are the result of an arbitration or court ruling, or a decision of an international body, as was the case, for example, with the decisions of the Confederation of Ambassadors of Great Powers or the League of Nations Council, in which the powers to define post-war European borders arose from the

and Lake Pres, located between Albania, Greece and North Macedonia, or on the African continent lakes: Albert – between the Democratic Republic of Congo and Uganda; Tanganyika – between the Democratic Republic of Congo and Tanzania; Victoria – between Tanzania and Uganda; Muere – between the Democratic Republic of Congo and Zambia; as well as the waters of Lake Chad (in the southern part of the Sahara), divided between Chad, Cameroon, Nigeria and Niger; and finally on the South American continent, the waters of the tectonic Lake Titicaca, divided between Peru and Bolivia. However, in relation to the waters of Lake Hanka, located in Far East Asia, between China and the Russian Federation, a demarcation analogous to the navigable rivers was applied, while in relation to the Aral Lake its waters were divided in appropriate parts between Kazakhstan and Uzbekistan. And the problem of closed seas in the physical sense, surrounded by land on all sides, without connection to international waters, where the legal situation is similar to that of a lake, an example of such a sea being the Caspian Sea, the shores of which are ruled by the following states: Azerbaijan, the Russian Federation, Iran, Kazakhstan and Turkmenistan. Regarding the borders on the river: see M. N. Shaw, *Prawo międzynarodowe*, Warszawa 2008, p. 338; M. Benhenda, *La frontiere en dront international public*, Paris 2–3, vol. 1, p. 205.

8 An example of southern state borders on the African continent are: the Egyptian – Libyan borrder, partially the Kenyan-Somalian border, the Malian-Mauritanian border, and the border between Namibia and Botswana; on the South American continent – the Argentinian-Chilean border, in North America – partly the border between Canada and Alaska (the US state). On the other hand, partially latitudinal borders in Africa is the border between Egypt and Sudan, and between Mauritania and the Western Sahara; on the North American continent – partly the border between Canada and the United States; on the Asian continent – the border along the 38th parallel between North Korea (Democratic People's Republic of Korea) and South Korea (Republic of Korea) established in July 1953 by the Armistice of Panmunjon which ended the Korean War 1950–1953; finally, in Europe, the northern part of the border of the Republic of Poland with the Kaliningrad Oblast, the farthest territorial unit in the Russian Federation. Cf. R. Bierzanek, J. Symonides, *Prawo międzynarodowe publiczne*, Warszawa 2005, p. 209–211.

peace treaties of 1919–1920 which ended the First World War.[9] Sometimes the land border may take the form of so-called "lines of control", in other words – a temporary border, as currently exists in relation to the mountainous state of Jammu and Kashmir in South Asia, the disputed area between India, China and Pakistan, and in the Northeast Himalayas in relation to the state of Arunacal Prades, constituting the Hindu north-eastern territory – the state of affairs of which, together with the border separating it from China, the latter does not recognize. Taking into account both the nature of the borders and their types, it should be emphasized that the determination and actual course of a border is related to specific stages, including: a political decision by which a certain territory is granted to another state or other states, then the delimitation of the border, i.e. the precise determination of its course by marking on a map of an appropriate scale, which in turn is the basis for its demarcation, i.e. marking its course in the field with appropriate signs, which is performed by a mixed commission consisting, on a parity basis, of representatives of countries delimiting their territories.[10] The last stage is establishing the rules of border administration, that is, the regulation between the interested parties of such matters as the use of waters, roads, border bridges and forest management, and the rules for fishing, hunting or – mining exploitation.

Consideration should also be given to the fact that the territory of a state is usually presented as a segment of the globe which includes

9 L. Gelberg, *Prawo międzynarodowe i historia dyplomatyczna. Wybór dokumentów*, Warszawa 1954–1960, vol. 2, p. 204–208; A. Nowak, *Pierwsza zdrada Zachodu. 1920 – zapomniany appeasement*, Kraków 2015, p. 144 and next. According to J. Symonides, *Terytorium państwowe…*, p. 183, a border may also be the result of long – term and peaceful possession, otherwise it may be the result of usucapion. See also: Ch. G. Fenwick, *International Law*, New York 1948, p. 370–371; J. L. Huillier, *Droit intemational public*, Paris 1949, p. 154. Cf. Recueil de tekts a l'usage des conferences de la paix, Paris 1946, p. 20; L. Gelberg, *Prawo międzynarodowe…*, vol. 3, p. 135; *Zbiór Dokumentów*, Warszawa 1946, no. 1, p. 3–33.

10 For example, the political decisions of the leaders of the Great Allied Three, i.e. the Soviet Union, the United States and Great Britain, taken during World War II during the Tehran conference in 1943 (November–December) and the Yalta-Potsdam conference in 1945 (February–July–August) in relation to the borders of the Republic of Poland after World War II.

the space above and below the earth's surface, and when it is a coastal, island or archipelagic state; it also includes the space above the sea waters of such a state. Recognizing that the state's sovereignty extends also to its underground area, it is assumed that it reaches the center of the globe, which is a geometrical cone, the base of which is the surface of the globe, and its apex – the center of the globe.[11] In practice, the limit to which the state's sovereignty over the interior of the earth reaches is determined by its effective ability to exploit underground resources.

The Sea Border of a State

The above comments should also apply to a country's sea area, since – similarly to the interior of the earth – they cannot be considered in isolation from the country's land territory, as they are adjacent to it.

In the case of the sea area and their borders, the economic interests and security of the state mean that the country has strived to extend its sovereignty over the adjacent sea basins so that, in addition to internal sea waters and the territorial sea, it also covers the waters of historical straits and bays, which are treated as internal on the basis of historical laws, and which resulted in the emergence of problems concerning the actual extent of sovereignty over sea waters and thus the determination of the actual limit of the jurisdiction of a sea state. This turns out to be important, because in the past, in order to determine the extent of state sovereignty over a sea area, various solutions were used, for example, adopting a distance of 100 nautical miles from the shore as the border of the state's maritime sovereignty, which was supposed to correspond to a two – day journey on a ship at that time. Sometimes the criterion of visibility from the shore was referred to, but it was not known whether this denoted the visibility from the flat contact of land with the sea or the visibility of a high shore (cliff); and another solution

11 L. Antonowicz, *Podręcznik prawa międzynarodowego…*, p. 106; J. Gilas, *Granica państwa…*, p. 91; J. Symonides, *Terytorium państwowe…*, p. 188 .

was that sea waters would belong in equal parts to each of the states located by the sea. Finally, reference was made to the eighteenth-century rule coined by the Dutchman C. van Bynkershoek, namely that "terrae podesta finite armorum vis", so that the boundary of sovereignty reaches the distance of a cannon shot from a given land.[12] However, none of the proposed solutions answered the question of how to define the border of a state's maritime areas beyond any doubt, and thus establish the border of its territorial sovereignty. Due to the lack of a uniform practice of the state in the discussed matter, they began to determine the size of the maritime zones subject to their sovereignty by themselves. This led to a highly diversified approach to the issue in question. Attempts were made to harmonize the approaches during the Geneva Convention in 1958, which was devoted to the statutory international rights of territories marine and offshore. However, it was the United Nations Convention on the Law of the Sea, adopted in December 1982, that regulated all the issues of the law of the sea, including the legal status and boundaries of sea water zones subject to effective state power.[13]

Currently, the following zones of sea waters should be distinguished: internal sea waters with bays, territorial sea, sea archipelagic waters, and straits included in coastal sea waters.

The first of these zones, i.e. internal sea waters, are situated between the land and the inner border of the second zone – the territorial sea. Determining the baseline from which the width of the waters of this body of water is measured depends on the shape of the shoreline. With regard to the shore with a regular shape, the baseline, i.e. the contact between the land and the sea, will be the line of the farthest water level. In the case of an unshaped shore, there will be a system of straight baselines, causing the waters to consist of the waters of ports and their rivers, as well as bays, the shores of which belong to a single state, provided that their en-

12 Cf. Ch. G. Fenwick, *International…*, p. 375; L. Oppenheim, H. Lauterpacht, *International Law*, London 1955, vol. 1, p. 409; Ch. Rousseau, *Droit intemational public*, Paris 1953, p. 436; J. Symonides, *Terytorium państwowe…*, p. 193.

13 Journal Of Laws of 2002, no. 59, item 543.

trance does not exceed 24 nautical miles.[14] The presence of a delta at the mouth of the river into the sea means that the coastline is a non-constant baseline, which means that it can be defined by the points farthest from the sea in the line of the lowest state of the sea at its low tide, and the baseline determined in this way will apply irrespective of the possible subsequent withdrawal of the lowest water level.

Also, archipelagic marine waters, which are a new category of marine waters provided for by the 1982 Convention, are treated as internal sea waters of a state consisting entirely of one or more archipelagos, or others formed at the parallel or meridian, having the character of a coastal archipelago lying on the continental shelf (e.g. Great Britain), or volcanic (e.g. Indonesia, Japanese Islands), or coral (e.g. Marshall Islands in the Pacific Ocean). Finally, there are archipelagos within which we can distinguish smaller archipelagos (for example, the Moluccas or the Riau in the Malay Archipelago in Southeast Asia), whose sovereignty extends over the waters within the archipelago baselines delineated according to the essence of Article 47 of the Convention in 1982, which stipulates that the state may draw straight baselines for the archipelago connecting the outermost points of the outer islands or drying reefs, which may serve as baseline points, provided, however, that the ratio of water to land, including the atolls, is in the ratio 1: 1 to 9: 1, and further that the length of the baselines shall not exceed 100 nautical miles, except that 3% of the total number of baselines covering an archipelago may exceed this length by a maximum of 125 nautical miles. In addition, baselines should not be drawn by temporary ascent markings unless they are lighthouses, and, furthermore, the baseline system must not cut off another country's territorial sea from the high seas or sea special zones. Finally, all the waters within such baselines are archipelagic waters with exist-

14 In Poland, the status of internal sea waters have: part of the Nowowarpieńska Bay and the Szczecin Lagoon, part of the Gdańsk Bay closed by a line connecting the Hel Cape with the point of contact of the Polish-Russian border on the Vistula Spit, and part of the Vistula Lagoon to the west of the line connecting the Polish-Russian border on land with the border at the Vistula Spit.

ing agreements and submarine cables, the right of innocent passage, and the right of passage through the archipelago sea route.

Archipelagic marine waters are therefore sea waters situated on the inner side of straight archipelagic baselines drawn through the outermost points of archipelagos of individual islands or reefs, but with limitations as to the maximum lengths of these lines and the appropriate proportion between the land area and the maritime territory of the country.[15]

Bays are another body ofterritorial water and these are divided into sea bays and historical bays. The former are a distinct depression of the shoreline, wherein the indentations into the land in relation to their width are such that the waters of the bays are covered by land and at the same time they are more than just a land indentation. On the other hand, the test that is to answer whether a cavity in the land corresponds to the definition of a bay is to compare the surface of the cavity with the surface of a semicircle, the diameter of which is a line drawn through the opening of the cavity. Thus, if the area of the indentation is equal to or greater than the area of a semicircle, the bay can be considered a body of internal sea waters. However, in the event that the shores of the bay belong to two or more states, the delimitation of waters is performed by a contractual agreement between the states concerned.

Historical bays are also the concavity of the sea shore, and due to the location and size of the opening, they are also classified as internal sea waters, despite the fact that the opening to the sea at the time of the farthest tide may exceed twice the width of the territorial sea, i.e. 24 nautical miles, and over which waters the states exercise sovereignty, including the seabed and the underground beneath these waters, and the air space above them, on the basis of a geographical title also justified by historical arguments, i.e. that they have long been

15 Cf. J. Gilas, *Status obszarów morskich*, in: *Prawo Morskie*, ed. J. Łopuski, Bydgoszcz 1996, p. 58; L. Łukaszuk, *Morskie wody archipelagowe*, in: *Wielka Encyklopedia Prawa*, op. cit., pp. 268–269; T. Wasilewski, *Morskie wody wewnętrzne* in: *Wielka Encyklopedia Prawa*, op. cit, p. 269; M.N. Shaw, op.cit., pp. 360–361.

treated as internal waters both by the sea state concerned and by foreign states.[16]

Another zone of sea waters is a territorial sea, which constitutes a strip of waters situated between the inner boundary of sea special zones, i.e. the adjacent sea belt, the zone of excluded fishing and the excluded economic zone, and the baseline of this sea, which is also the outer limit of internal sea waters.[17] The width of the water strip of this body of water is regulated by the Convention on the Law of the Sea of 1982, assuming that a country with access to the sea has the right to establish its own territorial sea in such a way that its width does not exceed 12 nautical miles from the baseline which is the end line of internal sea waters. Without going into the matter of convective regulations in detail, it should be concluded that the border of the territorial sea depends on the configuration of the seacoast. Thus, in the case of an unshaped coastline, when delimiting its baseline, one should refer to the system of straight baselines, taking into account, however, that when delineating them, the sea area located inside these lines should be related to the land in such a way that it can be treated as a part of coastal sea waters. While the baseline of this sea may be traced through points also on islands in that body of water, they cannot be traced at the elevations of the seabed that emerge only periodically at low tide; at the same time, the system of these lines must not cut off the sea areas over which neighboring states will rule from those areas that are not subject to sovereignty, including the high seas.

16 Referring to international practice, it should be noted that a number of bays are recognized as historical, such as: the Bay of Laholm in Sweden, which is part of the Kategat waters, the White Sea in northern Karelia in Russian Federation, the Bay of Peter I the Great in the northwest parts of the Japanese Sea off the Far Eastern Asian shores of the Russian Federation, Hudson Bay in northern Canada – between the Labrador peninsula and the provinces of Manitoba and Nunavut, Concepcion Bay in Newfoundland in Canada and Chesapeake Bay, which has a 12 – mile entrance in Maryland in USA.

17 By the Act of 17 December 1977, Poland extended the breadth of the Polish territorial sea to 12 nautical miles from 1 January 1978, and the change was confirmed by the Act of 21 March 1991, stating that the territorial sea of the Republic of Poland was the area of sea waters 12 nautical miles wide measured from the line of lowest water along the coast or from the inner limit of the internal sea waters.

To conclude, the external border of the territorial sea, which is also the internal border of sea special zones that do not constitute the territory of a state with access to the sea, but in which it reserves the rights necessary to protect its customs, migration, sanitary or fiscal interests, is a line on which each point is located from the nearest point of the baseline at a distance equal to the width of that body of sea. On the other hand, the lateral boundary, as in the case of internal sea waters, is a line all points of which are equidistant from the nearest points of the baseline from which the breadth of this sea of neighboring states is measured. At the same time the state's sovereignty extends over the water of that sea and the seabed below it, as well as the underground and the air space above this part of sea waters. In the first case, if the width of the strait's waters exceeds twice that of the territorial sea of the maritime state or states, then the waters of the strait beyond the limits of the territorial sea do not come under the authority of the state, as they constitute the waters of the high seas. In the case when the strait is narrower (in a certain section) than the double breadth of the territorial sea, it is called the territorial strait, and its status is similar to that of the territorial sea. And if it is intended for international navigation, the right of transit in its waters does not affect the legal status of these waters, its bottom and underground, and the air space above it, which are subject to the sovereignty of the maritime state. Therefore, if such a strait connects the high seas with the closed sea or with the internal waters of a state, it is considered the internal waters of the state, and an example of such is the Kerch Strait connecting the Black Sea with the Sea of Azov, the waters of which are the internal waters of Ukraine and the Russian Federation.[18]

18 Following the adoption of the 12 – mile – wide territorial sea in the Law of the Sea Convention of 1982, many international straits were legally transformed into territorial straits falling under the same territorial sea regime of one or more countries, including the Bering Strait separating Asia from North America, the Bab – al – Mandab Strait at the entrance to the Red Sea, the Strait of Gibraltar separating Spain from Morocco, the Strait of Hormuz in the Persian Gulf or the Strait of Malacca separating the Malay Peninsula from the Island of Sumatra.

The State Border in Airspace

The last sphere requiring a definition of the state border is the airspace over land and water extending to the Universe (Space). The legal situation of this border is analogous to the status of the area in which it is located.

The delimitation of the state sovereignty in this part of the world gained importance and significance with the commencement of the exploitation of this sphere of the world in October 1957, which involved, among other things, placing various types of space objects in orbit, i.e. outside airspace. This forced states to expressly take a position on the legal situation of airspace, taking into account their interests in the sphere of their national security.[19] This forced states to expressly take a position on the legal situation of airspace, taking into account their interests in the sphere of their national security. With regard to determining this limit, reference was made to the practice of states, assuming that the space in which artificial satellites orbit around the Earth, i.e. the height from 100 to 200 km, is not considered as airspace over states and waters.[20]

Although international aviation law does not define the upper limit of the airspace per kilometer subject to state sovereignty, rejecting the principle that "cuius est solum euis est usque ad coelum", i.e. "whoever's is the soil, it is theirs all the way to Heaven", it is assumed that the upper limit of the airspace is a height of about 100–150 km from the surface of the globe, which is the limit in the space to which extends, the real sovereignty of the state. States are also in favor of such a solution that corresponds with the current technical capabilities of contemporary society.[21]

The analysis leads to the conclusion that the existence of a state border at sea, land and in the air space is subject to the territorial integrity of the state, within which states exercising effective sovereignty over the subordinate area must also exercise them over the country's borders,

19 W. Góralczyk, *Przestrzeń powietrzna* in *Encyklopedia prawa międzynarodowego*, op. cit., pp. 312–313; Z. Galicki, *Przestrzeń powietrzna*, in *Wielka Encyklopedia Prawa*, op. cit., s.406: J. Symonides, *Terytorium państwowe*…, p. 208.

20 M. Jaroszyński, *Galaktyka i Wszechświat*, Warszawa 1993, p.195.

21 C. Berezowski, Międzynarodowe prawo lotnicze, Warszawa 1964, pp. 59–60; Z. Galicki, op. cit., p. 406; M. Żylicz, *Prawo lotnicze międzynarodowe, europejskie i krajowe*, Warszawa 2011, p. 35.

because their existence is to ensure to the state as well as its citizens economic, military and social security. At the same time, it favors the actual division of competences between states in space, which, being one of the fundamental functions of international law, at the same time shows the essence and role of the state border in the contemporary world.

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SUMMARY

State Borders in the Light of International Public Law. An Outline of the Issues

Apportionment of authority among states in the space is one of the fundamental functionof public international law and aim of that serves state borders institution. State borders are define as a line or surface separating state territories in land, martime and airspace. However exist different kind of borders that their establish in space bases on delimitation and demarcation. As long as do not give rise controversy establish land and maritime borders, while inspite of lack border determine in air space accept that sit height about 100–150 km. To sum up in the light of public international law exists and significant border is submit of principle of territorial integrity of states at the same time by their establish essential role plays crucial role effectiveness in carry out control of territory and borders. Therefore the principle of territorial integrity of States and effectiveness control over territory defines essence and role of state border.

Keywords: Basic line, border, effectiveness, gulf/bay, high sea, outer space, shore, sovereignty, territorial waters, territory, territorial integrity, territorial sovereignty, straits.

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Advisory Opinion or Judgment? The Case of the Chagos Archipelago

Introduction

One of the tasks of the ICJ is to issue advisory opinions on questions submitted to it by bodies authorised to make such requests. In 2019, the ICJ issued an advisory opinion in a case concerning the Chagos Archipelago, which has attracted much interest, and not only among academics. The case is still relevant because it concerns the territory that the United Kingdom has not yet handed over to Mauritius.

The islands of the Chagos Archipelago, a dependency of the UK, constitute what is known as the British Indian Ocean Territory (BIOT). Since its establishment on 8 November 1965 by an Order in Council, the BIOT has become a contentious issue and a cause of two major disputes. Besides the Chagos islands, the BIOT also included, until June 1976, the islands of Aldabra, Desroches and Farquhar, which were ceded to the Seychelles, of which they are now part. Although constitutionally British Overseas Territories (BOTs) are not part of the UK, they fall within the "Crown's undivided realm" as regards government power, ownership and belonging. When it comes to international relations, they do not enjoy separate status and the highest judicial body for all BOTs is the Judicial Committee of the Privy Council. The UK Parliament retains ultimate legislative authority, and any reform of a BOT's constitution requires amendment either by an Order in Council or an Act of Par-

liament.[1] Disputes have arisen, on the one hand, between the Chagos islanders and the UK government regarding the legality of the expulsion of the former from the islands and, on the other, between the UK and Mauritius over which state is entitled to exercise authority over the islands. In other words, the disputes centre, on the one hand, around a fundamental human rights issue, whereas on the other, they focus on the question of sovereignty and decolonization.

The purpose of this article is to analyse the advisory opinion provided by the ICJ in the Chagos Archipelago case in 2019. It is primarily intended to answer the following question: is it consistent with the letter and the spirit of international law for the ICJ to issue advisory opinions in disputes between sovereign states, which, due to the lack of consent from one of the parties to the dispute, cannot be brought before the ICJ and be decided by means of a judgment. Another question that arises is how to read the ICJ's recent opinion – as advice or as something more – in cases where requesting an advisory opinion is the only way of gaining access to the Court when one of the parties refuses to consent to the jurisdiction. And in such cases, what role is the Court playing: is it issuing an opinion as such or is it – de facto if not de jure – ruling on the subject matter under the guise of an opinion?

In addition to their main objective, the authors will also pursue a number of complementary goals. In particular, an attempt will be made to determine whether, among other things, an ICJ ruling is the right means of settling an issue involving decolonization, and whether Brexit was a possible factor affecting the case under discussion.

The article consists of five parts. It begins with an introduction and ends with brief conclusions. The first part sets out the background to the dispute between the UK and Mauritius. The other parts focus respectively on the nature of advisory opinions and the ICJ's advisory opinion on the particular case involving the Chagos Archipelago in 2019. Then the au-

1 H. O. Yusuf, T. Chowdhury, *The persistence of colonial constitutionalism in British Overseas Territories*, "Global Constitutionalism" 2019, 8:1, p. 163.

thors show the possible impact of Brexit both on the dispute between the UK and Mauritius as well as on the UK's international standing in general. The article ends with some reflections on voluntarism in international law.

The methodology employed is descriptive and interpretative. It is descriptive in all those instances where the authors recall the facts, and interpretative where they explain why an advisory opinion should not be treated as an opinion per se but as a judgment on the subject-matter.

The authors argue that in cases where one of the parties cannot bring a contentious issue before the Court, an advisory opinion may, due to its significance and the very authority of the Court as the highest international judicial body, be read as a ruling on the issue. Such a stance is supported by the fact that advisory opinions are binding on UN organs in cases involving points of law decided by the Court. Finally, they conclude that *de lege lata* advisory opinions of the ICJ should absolutely only concern abstract legal problems and they should not have the character of authoritative court statements issued in pending inter-state disputes.

The Background of the Dispute Between the United Kingdom and Mauritius

From 1814 till 1965, the UK administered the Chagos Archipelago as a dependency of Mauritius. In 1965 the UK detached the Chagos Archipelago from Mauritius to form the British Indian Overseas Territory. In 1966 the Chagos Archipelago, and more precisely the archipelago's largest island Diego Garcia, was made available for military use and since 1971 it has been the site of a US military base.

On 12 March 1968, Mauritius gained its independence from the UK. Between 1968 and 1971, the Chagossians were forced to leave the islands, and, as a consequence, were resettled in Mauritius and the Seychelles. They received only modest compensation in return.[2] In the 1970s,

2 R. Cormacain, *Prerogative legislation as the paradigm of bad law-making: the Chagos Islands*, "Commonwealth Law Bulletin" 2013, 39:3, p. 488.

the Chagossians initiated the struggle for the right to return to their homeland, including to Diego Garcia where US defence facilities had been set up in the meantime. It was Michel Ventacassen who brought the case to the High Court in London in 1975.

The centrepiece of the Chagossians' litigation, however, was the *Bancoult* case. In 1998, Mr Louis Olivier Bancoult, a Chagossian, instituted proceedings in the UK courts aimed at challenging the validity of legislation denying him the right to reside in the Chagos Archipelago. Following the ruling of the Divisional Court (*Bancoult 1*),[3] which found the expulsions to be invalid, the Labour government gave the Chagossians the right to return to islands other than Diego Garcia, once the appropriate feasibility studies had been conducted.[4] Robin Cook, the then Foreign Minister, issued the Immigration Ordinance of 2000,[5] repealing the 1971 Ordinance, under which the Chagossians were legally entitled to move to any of the Chagos islands, with the exception of Diego Garcia. However, in 2004, the BIOT (Constitution) Order and the BIOT (Immigration) Order were issued under royal prerogative.[6] Section 9 of the BIOT Constitution prohibited the Chagossians from living on the Chagos islands. In 2004, the Chagossians, and more precisely Mr Bancoult who had challenged the validity of both the BIOT Constitution and the BIOT Immigration orders, were successful in the Divisional Court (2006) and the Court of Appeal (2007); however, their claims were rejected by the House of Lords (2008). The Law Lords upheld the 2004 Order in Council, which prevented the Chagossians from returning to their homeland, arguing that since the Chagos islands were part of the

3 See *UK R Bancoult v. Secretary of State for Foreign and Commonwealth Affairs*, 2001, QB 1067.

4 T. Frost, C. Murray, *The Chagos Islands Cases: The Empire Strikes Back*, "Northern Ireland Legal Quarterly" 2015, 66:3 p. 278.

5 Ibidem, p. 278; see also D. Snoxell, *An ICJ Advisory Opinion, Basis for a Negotiated Settlement on the Issues concerning the Future of the Chagos Islanders and of the British Indian Ocean Territory*, "QIL" 2018, 55, p. 12.

6 See R. Cormacain, supra note 2, p. 490; see also British Indian Ocean Territory Constitution Order 2004 <archive.org/details/BritishIndianOceanTerritoryConstitutionOrder2004>.

colony, they were subject to the prerogative powers of the Crown, which included the power to prevent resettlement[7] (*Bancoult 2*).[8] In its 29 June 2016 decision, the Supreme Court dismissed the Chagossians' appeal to return, i.e., it ruled against setting aside the 2008 verdict of the House of Lords.[9] Nonetheless it recommended that the UK government review their right of abode. However, in November 2016 the UK government announced that it had decided against the Chagossians' resettlement on the grounds of feasibility, defence and security interests, as well as in view of the costs to the British taxpayer[10] – the decision was subject to judicial review and was upheld.[11]

The documents disclosed during the *Bancoult* litigation confirm that in 1965 the UK neglected its obligations to the BIOT under the UN Charter, i.e., the duty to foster self-government and facilitate the exercise of the right to self-determination, due to the fact that the territory was inhabited at that time by a permanent population and thus was a non-self-governing territory under the UN Charter, and also because the Chagossian societal group constituted a distinct people under customary international law.[12]

Following the proclamation of the Marine Protected Area (MPA) in 2010, Mauritius – a group of islands in the South – West Indian Ocean – now claimed that the Chagos Archipelago – a group of coral atolls

7 See T. Frost, C. Murray, supra note 4, p. 264.

8 See *UK R On the Application of Bancoult v. Secretary of State for Foreign and Commonwealth Affairs*, 2008, UKHL 61.

9 *UK R on the application of Bancoult No 2 v. Secretary of State for Foreign and Commonwealth Affairs* 2016, UKSC 35.

10 Update on the British Indian Ocean Territory: Written Statement, 16 November 2016.

11 *UK Bancoult and Hoareau v. The Secretary of State for Foreign and Commonwealth Affairs* 2019, EWHC 221

12 S. Allen, *International Law and the Resettlement of the (Outer) Chagos Islands*, "Human Rights Law Review" 2008, 8:4, p. 690; see also *Declaration on the granting of independence to colonial countries and people*, GA Res 1514, UNGAOR, 15th Sess, Supp No 16, UN Doc A/4684, 1960, 66, para. 2 and *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, GA Res 2625, UNGAOR, 25th Sess, Supp No 28, UN Doc A/8028, 1970, 121 and also S. Allen, *Self determination, the Chagos Advisory Opinion and the Chagossians*, "ICLQ" 2020, 69:1, pp. 206–211; R. McCorquodale, J. Robinson, N. Peart, *Territorial Integrity and Consent in theChagos Advisory Opinion*, "ICLQ" 2020, 69:1, p. 223 et seq.

in the middle of the Indian Ocean – was a dependency under its authority. The problem with the BIOT MPA arose, among other things, because it was a unilateral decision that disregarded the legitimate interests of other states and the people concerned.[13]

On 18 March 2015, the arbitration tribunal constituted under Annex VII of the UN Convention on the Law of the Sea issued an award in the dispute between the Republic of Mauritius and the UK regarding the UK's decision on 1 April 2010 to establish the MPA around the Chagos Archipelago. The tribunal found that the commitment to return the Chagos to Mauritius was binding under international law and affirmed Mauritius's rights with respect to the Chagos. The tribunal found that the UK's unilateral declaration of the MPA was incompatible with its obligations under the UNCLOS, as the UK had failed to consult Mauritius and had disregarded Mauritius's fishing rights in Chagos waters, as well as its rights to minerals and oil in the seabed and subsoil. Furthermore, the tribunal ruled that the UK was bound by international law to return the Chagos Archipelago to Mauritius once the islands were no longer needed for defence purposes.[14] The tribunal also pointed out that Mauritius's concerns included not merely the return of the Chagos Archipelago, but also the state in which the Archipelago would be returned. Hence, the question of whether the Archipelago should or should not be covered by the MPA greatly affects the nature of what Mauritius would eventually receive and the uses it would be able to make out of it.[15]

Furthermore, Chagossians living in the UK sought to challenge the proclamation of the MPA. The case was brought by Mr Bancoult on behalf of a group of Chagossians who had been expelled from the Archipelago. In the 11 June 2013 decision[16] the High Court ruled against the

13 P. H. Sand, *Fortress Conservation Trumps Human Rights?: The 'Marine Protected Area' in the Chagos Archipelago*, "The Journal of Environment & Development", 2012, 21:1, p. 37.

14 *Chagos Marine Protected Area Arbitration Mauritius v. United Kingdom*, Award of 18 March 2015, para. 547 B.

15 Ibidem, para. 298.

16 *UK R Bancoult v. Secretary of State for Foreign and Commonwealth Affairs* 2013, EWHC 1502.

Chagossians and on 23 May 2014 the Court of Appeal upheld the verdict of the High Court[17] (*Bancoult 3*). In February 2015, an application for leave to appeal was made to the Supreme Court, which on 8 February 2018 held that the MPA had not been created for an improper purpose and that the consultation process had been lawful.[18]

On 22 June 2017, the UN General Assembly passed Resolution 71/292 referring the Mauritius case to the ICJ for an advisory opinion. At the time the ICJ held oral hearings on the matter, no British judge was sitting on the court bench for the first time in its history.[19] The questions submitted to the ICJ concerned the incomplete process of decolonization and the consequences under international law arising from the UK's continued administration of the Chagos Archipelago.[20] The ICJ issued its opinion on 25 February 2019. The first question was whether the decolonization of Mauritius had been lawfully completed by the time Mauritius had been granted independence in 1968, bearing in mind the earlier detachment of the Chagos Archipelago, and considering the perspective of international law, including the obligations arising from General Assembly resolutions 1514 (XV) (requiring the decolonizing state to maintain the territorial integrity of the colony), 2066 (XX) (calling on the UK not to violate the territorial integrity of Mauritius during decolonization), 2232 (XXI) and 2357 (XXII). The ICJ said that one could not talk of an international agreement – the 1965 agreement between Mauritius and the UK – when one of the parties had been under the authority of the latter. Hence, as a result of the Chagos Archipelago's unlawful detachment and incorporation into a new

17 *UK R Bancoult v. Secretary of State for Foreign and Commonwealth Affairs* 2014, EWCA 708.

18 *UK R on the application of Bancoult No 3 v. Secretary of State for Foreign and Commonwealth Affairs* 2018, UKSC 3.

19 S. Minas, *Why the ICJ's Chagos Archipelago advisory opinion matters for global justice – and for 'Global Britain'* "Transnational Legal Theory" 2019, 10:1, p. 129.

20 *Request for an advisory opinion of the International Court of Justice on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965*, GA Res 292, UNGAOR, 71st Sess, Supp No 49, UN Doc A/RES/71/292, 2017, p. 2.

colony, the process of decolonization had not been lawfully completed. As to the second issue, namely the consequences arising under international law from the UK's continued administration of the Chagos Archipelago, including the inability of Mauritius to implement a programme of resettlement for its nationals, the ICJ said that the UK was obliged to bring its administration to an end, thereby enabling Mauritius to decolonize the territory in a manner consistent with the right of peoples to self-determination. As regards the resettlement of Mauritian nationals on the Chagos Archipelago, including those of Chagossian origin, the ICJ stated that this was an issue relating to the protection of human rights, which should be addressed by the General Assembly during the completion of the decolonization of Mauritius.

The ICJ ruled that the contentious issue was the decolonization process itself, which is a matter of particular concern to the UN. The ICJ also referred to the right of self-determination by declaring that the peoples of non-self-governing territories are entitled to exercise their right to self-determination in relation to their territory as a whole, the integrity of which must be respected by the administering power; consequently, any detachment by the administering power of any part of a non-self-governing territory, unless based on the freely expressed and genuine will of the people, is contrary to the right to self-determination.[21] Finally, the ICJ ruled that the decolonization of Mauritius had not been conducted in a manner consistent with the right of peoples to self-determination and that the UK is under an obligation to bring to an end its administration of the Chagos Archipelago as soon as possible.[22]

21 *Legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 2019, ICJ Rep 95, para. 160.

22 Ibidem, pp. 40–41, paras 177–182. See also *Advisory opinion of the International Court of Justice on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965*, GA Res 295, UNGAOR, 73rd Sess, Supp No 49, UN Doc A/RES/73/295, 2019, where we can read: "Demands that the United Kingdom of Great Britain and Northern Ireland withdraw its colonial administration from the Chagos Archipelago unconditionally within a period of no more than six months from the adoption of the present resolution", and the UK government statement following the publication of the UN Secretary General's report on implementing Resolution 73/295 relating to the Chagos Archipelago, 13 June 2020,

At this point, however, the question arises of whether, in light of the facts presented above, the ICJ should have issued an advisory opinion at all, because we are dealing here with a situation in which the UK refused to give its consent for the ICJ to settle a dispute between the UK and the Republic of Mauritius. As a consequence, the legal character of advisory opinions requires examination, as does the question of whether issuing such an opinion is admissible in the case in question.

The Nature of Advisory Opinions

The ICJ is the highest judicial body in the international arena. Apart from hearing cases brought by states – the parties to the ICJ Statute[23] – the Court can also issue advisory opinions. It may give an advisory opinion on any legal question at the request of UN organs and affiliated UN agencies regarding legal issues arising within the scope of their activities.[24] It needs to be said that advisory opinions are not another form of legal recourse available to states but rather a means by which the Security Council and the General Assembly can seek advice on legal questions.[25]

The ICJ settles disputes by issuing judgments that have binding force. On the other hand, the advisory opinions issued by the Court are authoritative but not formally binding. An important point to note here is that some entities may request the Court to launch contentious proceedings, whereas others may request advisory proceedings. Only states can appear as parties before the ICJ and initiate contentious proceedings, whereas proceedings that lead to the issuance of an advisory

where we find: "the International Court of Justice and General Assembly are not the appropriate fora for resolving what is fundamentally a bilateral matter of disputed sovereignty between 2 UN member states" <www.gov.uk/government/news/united-nations-secretary-generals-report-on-the-implementation-of-resolution-73295-uk-statement>.

23 Statute of the International Court of Justice, 18 April 1946.

24 Ibidem art. 65 in connection with art. 96 UN Charter, 26 June 1945.

25 M. Law, *The Chagos Request: Does It Herald a Rejuvenation of the International Court of Justice's Advisory Function*, "Queen Mary Law Journal" 2018, IX, p. 27.

opinion – not contentious by definition – are intended for the UN General Assembly and the Security Council. Such an option is also open to the Economic and Social Council, the Trusteeship Council and UN specialized agencies; however, in these cases prior authorization of the General Assembly is required.

It should be made clear that states cannot ask the ICJ for an advisory opinion. Hence the ICJ cannot initiate such a procedure at the request of a state. On the other hand, when it comes to contentious cases the ICJ can only launch proceedings with the consent of states, i.e. the parties to the dispute.

It is also necessary to point out that, as is shown in practice, advisory opinions can concern both contentious issues and abstract formulated questions of law.[26] The consent of the states-parties to the dispute – is not required. As a consequence, the ICJ can issue an opinion at the request of the collegiate body in which the vote takes place (e.g., in the UN General Assembly) even if one of the states – a party to the dispute – or both states have voted against it, subject to the required majority having been obtained.[27]

It is worth mentioning here that both contentious and advisory proceedings must refer to legal issues.[28] It is important to note that an advisory opinion is not formally binding. Nevertheless, due to the very authority enjoyed by the judiciary, it carries symbolic and political weight. The gravity of an advisory opinion also depends on the persuasiveness

26 "It has also been contended that the Court should not deal with a question couched in abstract terms. That is a mere affirmation devoid of any justification. According to Article 96 of the Charter and Article 65 of the Statute, the Court may give an advisory opinion on any legal question, abstract or otherwise." *Conditions of Admission of a State to Membership in the United Nations Article 4 of the Charter*, Advisory Opinion, 1948, ICJ Rep 57, p. 8; see also A. Wnukiewicz – Kozłowska, *Kompetencje doradcze sądów międzynarodowych Współczesne sądownictwo międzynarodowe*, ed. J. Kolasa, vol. II, Wrocław 2010, p. 171.

27 See also B. Kuźniak, M. Marcinko, M. Ingelevič-Citak, *Organizacje międzynarodowe*, Warszawa 2017, pp. 71–72, 80–84 and references cited therein.

28 See A. Wnukiewicz-Kozłowska, supra note 26, pp. 161–162.

of its reasoning.[29] Being interpretive in nature, it can significantly affect the direction in which international public law develops, and because it is an authoritative statement,[30] it may resemble a court judgment. As regards the latter, it should be noted that in the circumstances of a specific case it may mean – de facto even if not de jure – that a court judgment issued without the consent of the states that are – parties to the dispute – will lead to compulsory ICJ jurisdiction entering through the back door.[31]

The first court vested with the authority to issue advisory opinions was the court of the League of Nations – the Permanent Court of International Justice. Even at that time, the conditions under which the court was entitled to issue advisory opinions was a matter of controversy. Moreover, later, when the UN was established with the ICJ as its judicial body, the provisions of the UN Charter governing the advisory jurisdiction of the ICJ (art. 96(1) of the UN Charter) differed significantly from the provisions of the Covenant of the League of Nations defining the advisory jurisdiction of the PCIJ (art. 14 of the LN Covenant). In the case of the PCIJ, an advisory opinion could be issued in "any dispute or question referred to it", as compared with "any legal question" under the UN Charter. The above modification may indicate that lawmakers did not envisage advisory opinions as a tool for resolving disputes directly;[32] all the more so in the absence of consent from both states-parties to the dispute.

It should also be stressed that the Court exercises its advisory jurisdiction at its own discretion. Based on art. 65 of the ICJ Statute, it can be reasonably argued that the Court has the right to decide whether to accept or reject a request for an advisory opinion, i.e., it is the Court it-

29 M. Pomerance, *The ICJ's Advisory Jurisdiction and the Crumbling Wall between the Political and the Judicial*, "American Journal of International Law" 2005, 99:1, p. 36.

30 A. Kozłowski, *Międzynarodowy Trybunał Sprawiedliwości* in *Współczesne sądownictwo międzynarodowe*, ed. J. Kolasa, vol. II, Wrocław 2010, p. 36. See also A. Wnukiewicz-Kozłowska, supra note 26, p. 157 and J. M. Pasqualucci, *The Practiceand Procedure of Inter – American Court of Human Rights*, Cambridge 2013, p. 37.

31 See A. Wnukiewicz-Kozłowska, supra note 26, p. 159.

32 Ibidem p. 160 and references cited therein.

self which decides whether or not to exercise its advisory jurisdiction in a particular case.[33] The ICJ should be extremely cautious and vigilant to ensure it does not issue judgments by way of advisory opinions, especially without the consent of the parties concerned. Such a risk cannot be excluded due to the fact that the contentious procedure does not differ significantly from its advisory counterpart (art. 68 of the ICJ Statute). An advisory opinion does not, in principle, constitute a state of *res judicata*; however, by requesting such an advisory opinion an organ may indirectly – through the exercise of its own authority – bestow upon it normative value.[34] For this reason, the Court should be vigilant when issuing advisory opinions in any kind of dispute between states.

Hence, what are the arguments in favour of issuing advisory opinions? Firstly, the Court can play the role of legal counsel to political organs, instructing them on questions of law without interfering in their political objectives; secondly, in the case of questions concerning the interpretation of the Charter, the powers of UN organs, the rights of its members, etc., instead of asking for internal legal advice or setting up an *ad hoc* commission of jurists, such advice can be sought from the ICJ.[35]

What arguments, in turn, speak against advisory opinions? Firstly, some commentators believe that advisory opinions, which have no binding force, can be harmful to the prestige of the Court; secondly, the advisory role of the Court may serve as a way of circumventing the requirement of state consent to the judicial settlement of disputes; thirdly, the advisory function of the Court may directly clash with the contentious function of the Court since bringing a case before the Court under the guise of advisory proceedings does not preclude the dispute from being brought before the Court as a contentious case; and fourthly, the

33 Ibidem p. 162; D. W. Greig, *The Advisory Jurisdiction of the International Court and the Settlement of Disputes between States* "International & Comparative Law Quarterly" 1966, 15:2–3, p. 327.

34 See A. Wnukiewicz-Kozłowska, supra note 26, pp. 171–173 and references cited therein. See also A. Kozłowski, supra note 30, p. 36 and M. Pasqualucci, supra note 30, pp. 36–40.

35 R. Kolb, *The Elgar Companion to the International Court of Justice*, London 2014, pp. 258–260.

availability of facts is uncertain in advisory cases, so it may happen that the Court will not have the possibility to rely on a strong factual basis.[36]

As was noted above, advisory opinions are binding neither on the requesting entities nor on the states concerned; however, they are binding on UN organs with regard to the points of law decided by the Court.[37] In addition, some advisory opinions have binding legal force and even a *res judicata* effect which, however, does not follow from the opinion itself but rather from other legal acts that give the Court's opinions binding force.[38]

Summing up the above considerations, we can conclude that when deciding whether or not to issue an advisory opinion in a particular case the ICJ should be vigilant in ensuring there is no circumvention of the rule that the judicial settlement of a dispute requires the consent of the states-parties to that dispute.

The Advisory Opinion on the Chagos Archipelago Case

When the ICJ issued its advisory opinion in the Chagos Archipelago case, it referred to procedural questions. Citing the 1975 advisory opinion on *Western Sahara*, the Court observed that the questions related not to a territorial dispute between states but rather to the issue of decolonization. As a consequence, it was in the interest of the General Assembly to seek an advisory opinion that it believed would assist it in carrying out its functions with regard to decolonization.[39]

The fundamental issue, namely, the requirement that the parties to the dispute give their consent for the case to be settled by the ICJ, in the absence of which the Court could only give (and did give) an advisory opinion, had been addressed on a number of earlier occasions. In its advisory opinion on the *Interpretation of Peace Treaties with Bulgaria*,

36 Ibidem, pp. 260–261.
37 Ibidem, p. 277.
38 Ibidem, p. 279.
39 *Legal consequences*, supra note 21, p. 22, para. 86.

Hungary and Romania, the ICJ clearly stated that this opinion had no binding force and was addressed not to the states but to the organ entitled to request the said opinion.[40] Similarly in its opinion on the *Legal consequences of the construction of a wall in the occupied Palestinian territory*, the ICJ declared that the refusal of a state to consent to the Court's jurisdiction in contentious cases had no bearing on the Court's jurisdiction in advisory opinions.[41]

Taking the above into consideration, in the Chagos Archipelago case the Court concluded that the United Kingdom was under an obligation to bring its administration of the Chagos Archipelago to an end as quickly as possible, and that all Member States must co-operate with the United Nations in completing the decolonization of Mauritius.[42]

However, the authors of the present study focus on the formal aspects of this case, namely whether the Court has the right to issue an advisory opinion or whether it should make use of its authority and admit that due to the absence of consent from the states-parties to the dispute – it should refrain from making its views known (even in the form of an advisory opinion). In the opinion we read the following:

> the Court does not consider that to give the opinion requested would have the effect of circumventing the principle of consent by a State to the judicial settlement of its dispute with another State. The Court therefore cannot, in the exercise of its discretion, decline to give the opinion on that ground.[43]

Here, the Court clearly upholds the view it expressed in its advisory opinion on *Western Sahara*.[44] It follows from the above that the ICJ

40 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion, 1950, ICJ, Rep 65.

41 *Legal consequences of the construction of a wall In the occupied Palestinian territory*, Advisory Opinion, 2004, ICJ Rep 136, pp. 25–26, para. 47.

42 *Legal consequences*, supra note 21, p. 43, para. 182.

43 Ibidem, p. 23, para. 90.

44 *Western Sahara*, Advisory Opinion, 1975, ICJ Rep 12, p. 25, para. 33.

took the position that any circumvention (*sic*!) of the principle of state consent to the judicial settlement of disputes with another state was unacceptable.

At this point, however, it is worth recalling that in the history of its adjudication, the ICJ, just like its predecessor, the PCIJ, maintained an ambivalent position on this issue and only subsequently tried to reconcile its rather inconsistent views. In the case of *Eastern Carelia*, the Court advanced the general rule that it does not exercise any advisory jurisdiction in contentious situations in which one of the parties does not agree to the dispute being resolved by that Court. In the opinion we read the following:

> there has been some discussion as to whether questions for an advisory opinion, if they relate to matters which form the subject of a pending dispute between nations, should be put to the Court without the consent of the parties […] It is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement [...] The Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a Court.[45]

Later, however, in the case of the *Interpretation of Peace Treaties* (1950) cited above, the Court mitigated its initial position.[46] In turn, in the previously mentioned *Western Sahara* case, the ICJ attempted to reconcile the above positions, stressing that everything depends on the circumstances of a given case. In the opinion, we read the following:

> In certain circumstances, therefore, the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the

45 *Status of Eastern Carelia*, Advisory Opinion, 1923, PCIJ, Ser. B, No. 5, p. 29.
46 *Interpretation*, supra note 40, p. 71.

> Court's judicial character. An instance of this would be when the circumstances disclose that to give a reply would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent. If such a situation should arise, the powers of the Court under the discretion given to it by Article 65, paragraph 1, of the Statute, would afford sufficient legal means to ensure respect for the fundamental principle of consent to jurisdiction.[47]

This is, in principle, replicated in its opinion on the Chagos Archipelago. At this point, however, the question that should be asked is whether in the Chagos Archipelago case the Court acted consistently and complied with its procedural guidelines. In the opinion under consideration, it seems that the ICJ was aware of the fact that there is a very fine line between what is simply an opinion and what can be interpreted as a court judgment. In the Chagos Archipelago case, the ICJ stressed and pointed out again and again that when giving its opinion, it was referring only to the issue of decolonization, which is an issue of particular concern to the UN. However, how can this be understood against the background of the very telling and unequivocal Court pronouncement that "the United Kingdom is required to complete the administration of the Chagos Archipelago as rapidly as possible", a decision made despite the fact that the UK did not consent to the judicial settlement of the dispute over the actual possession of territory? To better illustrate the problem outlined above, we can cite, by way of example, the view expressed by one of the representatives of the doctrine of public international law. In his contribution, we read that "this is obviously where the UK just totally lost the case".[48]

It should be pointed out that the addressees of the principle of self-determination mentioned in art. 1 of the UN Charter are not states

47 *Western Sahara*, supra note 44, p. 25, para. 33. See also M. N. Shaw, *Prawo międzynarodowe*, Warszawa 2000, pp. 573–574.

48 M. Milanovic, *ICJ Delivers Chagos Advisory Opinion, UK Loses Badly*, "European Journal of International Law Blog" 2019.

but nations.[49] It is widely understood that the aim of this principle is to protect peoples, not states.

The above notion found expression, inter alia, in the Declaration on Principles of International Law adopted by the UN General Assembly in 1970 in cases where peoples entitled to protection under the principle of self-determination actually found themselves in opposition to states. It was clearly stated that every state has a duty to respect the right of peoples to self-determination.[50] Unquestionably, the entities privileged under this rule are those nations that enjoy the right to self-determination, including the right to independence as states.[51]

As a consequence, since the nation, and not the state, is the addressee of the principle of self-determination, the dispute between Mauritius and the UK should be classified as an inter-state dispute over the exercising of sovereignty in a given territory, rather than one concerning ongoing decolonization. The decolonization of Mauritius, including the decolonization of the disputed territory, has already been completed, except in the case of Chagos, where it has not yet been effected. The United Kingdom does not deny that the disputed territory should be transferred to Mauritius, but instead argues that this can only take place after it ceases to be used as a base for US troops,[52] whereas Mauritius wishes to reclaim the

49 R. Andrzejczuk, *Prawa człowieka podstawą prawa narodów do samostanowienia*, Lublin 2004, p. 162; see also P. Kilian, *Self – determination of Peoples in the Charter of the United Nations* "RECHTD" 2019, 11:3, pp. 341–353.

50 "By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter. Declaration, supra note 12, p. 123; see also R. Andrzejczuk, supra note 49, p. 177.

51 Ibidem, p. 161. With regard to the principle of self-determination of peoples, see also K. Knop, *Diversity and Self-Determination in International Law*, Cambridge 2002; K. Roepstorff, *The Politics of Self-Determination Beyond the Decolonisation Process*, Abingdon, New York 2013, and M. Pomerance, *Self-Determination in Law and Practice. The New Doctrine in the United Nations*, The Hague–Boston–London 1982.

52 See the draft minutes of the Lancaster House Meeting, where we read "if the need for the facilities on the islands disappeared the islands should be returned to Mauritius." Chagos Marine, supra note 14, para. 74. It should be noted that the new state, which is created as

territory immediately. The key question in the dispute is not whether, but when the territory in question will be surrendered to Mauritius, in other words, not whether the disputed territory is to be returned to Mauritius, but the timing of this event (*sic*!). Such a dispute should be classified as a disagreement over the exercising of sovereignty, and therefore as a territorial dispute, and not one involving the ongoing self-determination of a nation. The above reasoning is supported by the fact that there is no guarantee that the actions undertaken by Mauritius will lead to the return of the Chagossians to the island, all the more so as not all Chagosssians are Mauritian citizens.[53] Moreover, as we read in the ICJ advisory opinion, the Chagossians are descendants of enslaved persons originally from Mozambique and Madagascar, who in the early 1800s were brought to work on British-owned coconut plantations.[54] Hence, the state of Mauritius cannot be equated with the people whose rights are to be protected under the principle of self-determination. It should also be added that the Prime Minister of Mauritius, Pravind Kumar Juqnauth, stated that his country is ready to conclude agreements with both the United States and the UK to allow unhindered operation of the military base.[55]

Hence, bearing in mind international law, and fully appreciating the significance and importance of the principle of self-determination, the au-

a result of decolonization, is not obliged to honour the commitments incurred by the colonial state, although such a possibility exists. In such a case we are dealing with implied succession. It can therefore be assumed that initially Mauritius implicitly honoured both the Lancaster House agreement and British – American agreements providing Americans with access to the island of Diego Garcia.

53 Following the establishment of BIOT and the US military base some Chagossians were relocated to Mauritius, while others were resettled in Seychelles, thereby making them Seychellois citizens, and yet others migrated to the UK having been awarded UK citizenship.

54 *Legal consequences*, supra note 21, p. 28, para. 113; see also L. Jeffery, *'For Mauritians, joy; for Chagossians, sadness': Mauritian independence, the sacrifice of the Chagos Archipelago, and the suffering of the Chagos islanders*, in *The Mauritian Paradox: Fifty years of development, diversity and democracy*, eds. R. Ramtohul, T. H. Eriksen, Baltimore, Maryland, 2018, p. 245 where we read that the Chagos Islands were uninhabited prior to European colonial expansion in the Indian Ocean from the late 18th century onwards; it was the French and later British colonists who populated the islands with slave labour and contract workers, mostly from East Africa and Madagascar via Mauritius.

55 <www.reuters.com/article/us-britain-mauritius-un-idUSKCN1SS2CR>.

thors of the present study subscribe to the view that colonies have absolutely no place in the modern word. On the other hand, the critical focus of this study was the fact that the ICJ decided to issue an advisory opinion in the present case. In a situation where no judicial path was open to Mauritius in its territorial dispute (due to the absence of UK consent to ICJ jurisdiction), it was necessary for the court to exercise extreme caution and vigilance so as not to allow mandatory jurisdiction through the back door. The ICJ not only spoke out on the issue of decolonization but authoritatively decided what the United Kingdom should do. In the *obiter dicta* we read that the General Assembly had not sought the Court's opinion as an instrument for resolving a territorial dispute.[56] But how else to read the ICJ's words "the United Kingdom is under an obligation to bring an end to its administration of the Chagos Archipelago as rapidly as possible"[57] if not as a clear and unequivocal statement on the subject, designed to settle a bilateral dispute. And even if we agree that the issue of decolonization is at stake, decolonization should concern the nation as a whole, i.e., all Chagossians striving to secure the right to return to and resettle on the Chagos islands. So, how to read the second question posed to the ICJ, namely "[w]hat are the consequences under international law […] including with respect to the inability of Mauritius to implement a programme for the resettlement on the Chagos Archipelago of its nationals, in particular those of Chagossian origin?" if not as referring only to one group represented by the Republic of Mauritius rather than to the entire nation, however we define it. The advisory opinion is not binding and is not addressed to the parties to the dispute, but only to the UN General Assembly. Nevertheless it is so important that, if not *de jure* then certainly *de facto*, it may be read as a judgment in the circumstances of a specific case.

The UN General Assembly should also be cautious when asking for an advisory opinion, because what we are dealing with here is a ter-

56 *Legal consequences…*, supra note 21, p. 22, para. 86.
57 Ibidem, p. 42 para. 178.

ritorial dispute in the background of which there is the question of decolonization.

It is therefore worth considering the reasons why the UN voted in favour of asking the ICJ for an advisory opinion on this matter, and why the ICJ finally issued such an opinion. To put it more succinctly, why did this happen? An analysis of current international relations and events leads to the conclusion that one factor that influenced these decisions, at least to some extent, was what is commonly known as Brexit.

The Impact of Brexit on the Dispute Between United Kingdom and Mauritius and on the UK's International Standing

On 29 March 2017 the UK government notified the EU Council of Ministers of its decision to withdraw from the EU. Following this declaration, the UK's left EU on 31 January 2020 and the transition period ended on 31 December 2020. The very process of UK's withdrawal from the EU did not only have consequences for the Union. Another noticeable effect has been the declining influence of the UK on the international scene, which can, at least partly, be attributed to Brexit. EU Member States no longer support the UK's international interests, for they no longer feel obliged to do so. Telling examples of this tendency include the UK's failure to secure the re-election of a British judge to the ICJ as well as its failure to prevent the UN General Assembly from requesting an advisory opinion on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965. In the case of the former, it is the second time that a UN Security Council permanent member has had no judge on the ICJ and the first time that it has lost a vote in the UN General Assembly. After Sir Christopher Greenwood's candidacy was defeated in the General Assembly, the UK withdrew his application. The vacancy on the ICJ was eventually filled by Mr. Dalveer Bhandari, an Indian citizen – India being the UK's most significant post-Brexit

trading partner.[58] As regards the UN General Assembly vote on seeking an advisory opinion in the Chagos case, Cyprus (a former colony of the UK) joined Mauritius in supporting the UN Resolution, whereas Bulgaria, Croatia, Hungary and Lithuania joined the UK in voting against. The other EU Member States abstained. Hence, bearing in mind the UK's diminishing role on the international scene, it would be difficult not to acknowledge, at least partially, the impact of Brexit on the voting habits of EU Member States in the UN General Assembly. What is more, the vote on the resolution took place almost exactly a year after the Brexit referendum. Hence its adoption can be attributable, at least to some extent, to the abstentions of EU Member States. And as for the UK's loss of a seat on the ICJ, it occurred at exactly at the same time that British diplomacy was preoccupied with Brexit.

There are other cases where the influence of Brexit is even more obvious, for example in the decisions to move the European Medicines Agency and the European Banking Authority from London to Amsterdam[59] and Paris, respectively.[60] According to the European Commission "[t]he relocation of these two Agencies is a direct consequence – and the first visible result – of the United Kingdom's decision to leave the European Union".[61] The UK's withdrawal from the EU may also have serious repercussions for Gibraltar, which has been a British Overseas Territory since 1969, as it once more raises the possibility of UK and Spain exercising joint sovereignty over this territory. What is more, in a recent regulation concerning post-Brexit visa-free travel, Gibraltar is referred

58 *Election of five members of the International Court of Justice*, SC, UN Doc. S/PV.8110, 2017, p. 2.

59 See EU, *Regulation of the European Parliament and of the Council 2018/1718 of 14 November 2018 amending Regulation EC No 726/2004 as regards the location of the seat of the European Medicines Agency*, 2018, OJ, L 291/3.

60 See EU, *Regulation of the European Parliament and of the Council 2018/1717 of 14 November 2018 amending Regulation EU No 1093/2010 as regards the location of the seat of the European Banking Authority*, 2018, OJ, L 291/1.

61 <ec.europa.eu/commission/presscorner/detail/en/IP_17_4777>.

to as a colony of the British Crown.[62] Indeed, the removal of a British MEP as a rapporteur to overcome an objection to the term "colony" to describe the British Overseas Territory is a further clear sign of the UK's isolation.[63] In the case of BOTs, whose status is uncertain, there arises the question of their future relationship with the EU and possibly also the UK.[64]

In fact, the UK's departure from the EU is seen as presaging a re-evaluation of the former's position in the world. Since the Second World War, the UK has exercised more influence in the international community than its actual position merited, due to its special relationships with the USA and Europe. Today, these relationships are beginning to break down, and as they do so the special standing enjoyed by the UK and the role it has played up to now in promoting a stable and open international order is likewise eroding.

Hence, if current international interests and the emotions they inspire begin to prevail in a collective body like the UN General Assembly – where decisions are taken in the form of a vote, then an expert body like the Court should exercise considerable prudence and caution. Otherwise, it will violate the foundations of public international law, which by its very nature is a relatively fragile instrument, since it is based on agreement between states, which is contractual in nature.

Voluntarism in International Law

The administration of justice at the level of public international law is, in principle, non-mandatory in character. We are aware that this is not the best solution; however, at the current stage of the international com-

62 See *Regulation of the European Parliament and of the Council 2019/592 of 10 April 2019 amending Regulation EU 2018/1806 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, as regards the withdrawal of the United Kingdom from the Union*, 2019, OJ, L 103I/1.

63 See S. Minas, supra note 19, p. 135.

64 See O. Yusuf, T. Chowdhury, supra note 1, p. 158.

munity's development it is the only possible option. Indeed, the absence of any compulsory jurisdiction means that public international law is essentially contractual in form.

A review of the main sources of public international law, e.g. treaties and international customs, shows quite clearly that in this sphere the law is based on the consent of states. Consent to a treaty and thus to its specific content is expressed via the acts of signing and then ratifying such an international agreement; in the case of custom, consent, in principle, is reduced to the uniform conduct of states (*usus*) and the belief that a particular practice is not a matter of chance but is prescribed by law and is even – we can argue – imposed by law (*opinio juris*). Moreover, lawmakers are usually at the same time its addressees. As L.F. Oppenheim wrote a century ago, "since the Law of Nations is based on the common consent of States [...] the Law of Nations is a law between, not above, the States"[65]. Today, however, we must concur with the opinion that "this extreme voluntarism does not find confirmation in the practice of international law"[66]. Among those exempted from this rule are those states created as a result of decolonization and which entered the already existing system of norms of international law formed without their contribution; this is especially the case with those norms created by way of custom (this exception does not apply to treaty norms, since their succession to treaty rights and obligations is governed by the *tabula rasa* rule, which enables newly created states to give their consent to be bound by the norms they have inherited from their predecessors). On the other hand, in the case of written law, some exceptions can be traced back to the requirement of a state's consent. These can be found, for instance, in some treaty – making mechanisms and in the law-making processes of organs of international organizations. In such bodies, most decisions are

65 L. Oppenheim, *International Law. A Treatise*, vol. I, London–New York 1912, p. 20.

66 J. Brunnée J., *Consent* in *Max Planck Encyclopedia of Public International Law*, ed. R. Wolfrum, vol. II, New York 2012, p. 679.

not made unanimously, i.e., with the consent of all states – members of the organization. Rather, a specific majority of votes will suffice.

In addition to the problem indicated above, it cannot be said – either historically or currently – that the consent of sovereign states as equal participants in the international community is not the primary, main and decisive factor conditioning the development of public international law norms. The necessity of relying on state consent is due to the relatively poor degree of organization of the international community. Compared to the situation at the state level, the international community clearly lacks a global centre of legislative and executive power and does not exercise compulsory jurisdiction over its members. With regard to international law, the most convenient situation is when compliance with the law of nations is anchored in the consent given a priori by states to the content of legal regulations and is based on the principle of pacta sunt servanda respected by all states. In the case of a dispute, in particular the judicial settlement of a dispute, it is extremely important that a state – party gives its consent to proceedings under the court's jurisdiction. The lack of such consent may lead to a situation in which international courts will endeavour to adjudicate, but their judgments will nevertheless not be enforced by states. Such a situation would mean a significant step backwards in the development of international law. As we have just mentioned, the international community is not organized in the same way as the domestic community. An important characteristic of the former is the lack of any centralized system of law enforcement analogous to that which functions in the domestic realm, such as a state's coercive apparatus.[67]

Thus, bearing in mind the necessity for compliance with the nature and essence of international law, and:

1. Considering the fact that public international law is based on the consent of states;
2. Considering the fact that there is no legislative and executive centre in the international community ranking higher than sovereign states and exercising compulsory jurisdiction;

67 W. Czapliński, *Sądownictwo międzynarodowe*, in *Wielka encyklopedia prawa*, ed. J. Symonides, D. Pyć, vol. IV, Warszawa 2014, p. 448.

3. In the light of the subject and the purpose of current and historical legal regulations, which show that advisory opinions were not designed as a tool directly supporting dispute settlement; and
4. Taking into account the effectiveness of international law in its application,

the conclusion to be drawn *de lege lata* is that the advisory opinions of the ICJ should not have the character of authoritative court statements issued in ongoing inter-state disputes. These opinions should be issued at the request of an organ or organization authorized to do so in situations where such an opinion is useful for their work. They should solely and directly concern abstract legal problems, which means that in some cases the ICJ should refrain from issuing them.

Advisory opinions should neither complement nor replace the settlement of international disputes. It must be remembered that international law is relatively fragile, as its norms apply and operate only between states, i.e., horizontally rather than vertically, that is, in situations involving the vertical subordination of states to norms. The desire to strengthen international law by compelling members of the international community to comply with its provisions may, paradoxically, weaken the law. International courts, especially one as important as the ICJ (given its global reach and general competence), should exercise a considerable degree of self-restraint in this area.[68]

We should also be aware that the law in operation in the international community, which by its nature is voluntary, is closely bound up with political interests. In practice this fact would appear to be its weakness. For example, it cannot be ruled out that political factors played a role in the present case. The many long – standing relationships between international law and politics, as well as the constant interweaving of actual actions undertaken by states in international relations, sometimes dictated by state

68 S. Yee , *Notes on the International Court of Justice (Part 7) – The Upcoming Separation of the Chagos Archipelago Advisory Opinion: Between the Court's Participation in the UN's Work on Decolonization and the Consent Principle in International Dispute Settlement*, "Chinese Journal of International Law" 2017, 16:4, pp. 623–642.

goals and interests (not always directly related to the decisions and steps taken) and sometimes by the requirements of the law, highlight some of the imperfections and deficiencies in the *jus gentium* today. It ought to be stressed that the actors on the international scene constitute a large and a heterogeneous group,[69] since in addition to states they also include other players. These collective entities (such as the European Union) are oriented towards the protection and promotion of the common interests of their member states; however, achieving this goal requires taking into consideration the scope and strength of such structures. Against this background, we should indeed ask whether so many European countries would still have abstained in the UN General Assembly vote on seeking an opinion on the Chagos Archipelago had it not been for the Brexit situation. Was the request for an advisory opinion at least partly dictated by the desire to "punish" Great Britain for its "divorce" from the EU?

In summary, the introduction of compulsory jurisdiction through the "back door" would appear to be an extremely dangerous move, as this is one of the factors that can undermine the already fragile foundations of *jus gentium* today. That said, these factors stem from basing international law on both the consent of states as lawmakers as well as on the dictates of international politics – which remains an extremely important regulator of international relations.

Conclusions

In the international community, legislators, in particular states, are subjects of public international law. States lay down rules in their capacity as both legislators and the addressees of these rules. While international courts are not legislators, the impact they have on international relations, including on the interpretation and development of public international law, cannot be denied. The most important judicial institution of the international com-

69 I. Popiuk-Rysińska, *Uczestnicy stosunków międzynarodowych, ich interesy i oddziaływania*, in *Stosunki międzynarodowe w XXI wieku*, eds. E. Haliżak *et al.*, Warszawa 2006, p. 480.

munity, i.e., the court of the United Nations – the ICJ, has two instruments at its disposal: judgments and advisory opinions. From a formal point of view, an ICJ judgment only binds the parties to a particular dispute and only in a given case (Article 59 of the Statute of the ICJ), whereas an advisory opinion is not binding. In fact, however, both types of rulings are authoritative. When comparing a judgment to an advisory opinion, it is worth emphasizing that the former, unlike the latter, is binding. However, an advisory opinion is addressed to collective bodies, such as in particular the UN General Assembly. Moreover, when delivering a judgment, the court influences the widely accepted interpretation of international law. However, from a formal point of view it does so only indirectly, whereas by issuing an advisory opinion it does so directly. Therefore, it is difficult to hierarchize judgments and advisory opinions in terms of their authority, for both have relevant albeit different features upon which their significance depends. It should be emphasized, however, that a judgment may only be issued with the consent of the parties to the dispute. When issuing advisory opinions, which are equally salient, disregarding the fact that the parties to a dispute did not agree to a court settlement, does not seem justified. Issuing advisory opinions in disputes between states should most certainly not serve as a means of circumventing the principle that a party to a dispute must give its consent for the matter to be settled by judicial means. After all, the latter would violate the very essence of public international law, which is based on the consent of states.

To conclude, it is worth recalling that the doctrine is not a source of public international law; however, it is difficult to deny its influence on practice. The authors are of the opinion that the role – or even the duty – of the doctrine is to explain disputed issues and clearly define the course of action. It can be argued that in the advisory proceedings before the ICJ the arguments were raised, which were also used in this study. However, they have a different weight when they come from an independent, objective commentator, on the one hand, who – and this is worth stressing – does not stick to conservative positions, according to which, equal states are the only "rulers" of the

international community and everything that takes place must absolutely be based on their consent; and, on the other hand, from a commentator who is focused on enhancing the significance and the power of international law, the law the states are subjects to and the law which should be applied to in contentious situations. Nonetheless, the fact that the bodies of international organizations, and in particular the judiciary, in very sensitive areas, grant themselves the power to go beyond what is covered by the consent of states, does not enhance the significance and the prestige of international law. This study was written with this in mind and was guided by such a concern and even – let's not be afraid to emphasize – a mission.

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SUMMARY

Advisory Opinion or Judgment? The Case of the Chagos Archipelago

The aim of this article is to provide an analysis of the ICJ's advisory opinion of 25 February 2019 on the Chagos Archipelago. It will endeavour to answer the following questions: (i) is it consistent with the letter and the spirit of international law for the ICJ to issue advisory opinions in cases involving a dispute between states, which, due to the lack of consent from one of the states, cannot be brought before the ICJ

and be settled by a judgment of that judicial body?; (ii) is such a ruling the right way to settle the issue of decolonization?; and (iii) did Brexit play any role in the case under discussion?

The article begins by describing the background to the dispute between the UK and Mauritius. The focus of the analysis then shifts to the nature of advisory opinions and the 2019 ICJ advisory opinion on the Chagos Archipelago. Next, the authors discuss the possible impact of Brexit on the dispute between the UK and Mauritius itself, as well as on the UK's international standing in general. The article concludes with reflections on voluntarism in international law.

The authors conclude that *de lege lata* an authorized body or organization may ask the ICJ for an advisory opinion in situations where it believes that such an opinion would be useful for its work. However, such advisory opinions should not have the character of authoritative court statements made in pending disputes between sovereign states. As a consequence, such opinions should refer only to abstract legal problems, which means that in some cases the ICJ should refrain from issuing them.

Keywords: ICJ, the case of the Chagos Archipelago, Brexit, advisory opinion, decolonization

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The Convention for the Protection of Human Rights and Fundamental Freedoms as an International Treaty and a Source of Individual Rights

Introduction

The Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950[1] is a particularly important component of the Council of Europe's *acquis*.[2] The Council's *acquis* comprises more than 220 treaties. The most important elements of this legacy are those regulations which lie at the core of the European legal system for the protection of human rights and fundamental freedoms.[3] The Convention for the Protection of Human Rights and Fundamental Freedoms, along with its additional protocols, which was undoubtedly inspired by the provisions of the Universal Declaration of Human Rights, constitutes the most advanced system of regional protection of human rights. The Convention is particularly distinctive not only against the backdrop of the entire global system for the international protection of human rights, but also among other regional systems. What makes the Convention stand out is the fact that it deploys effective international moni-

1 Hereinafter: the Convention.

2 European Treaty Series, no. 005; Polish version: Journal of Laws of 1993, no. 61, item 284.

3 List of the Council of Europe treaties: <https://www.coe.int/en/web/conventions/full-list>.

toring mechanisms, including judicial procedures conducted within the European Court of Human Rights.[4]

It can be argued that no other international treaty, be it of a universal or regional nature, is as important as the Convention for providing effective international protection of individuals in their relations with states. In other words, the provisions of the Convention and the way in which its monitoring mechanisms are used in practice demonstrate how the concept of individual rights and freedoms has evolved towards granting individuals the right to draw on the Convention directly and use some of its provisions.[5]

In the context of this article, it should be emphasized that the Convention, like any international agreement, is subject to the law of treaties, as outlined in the Vienna Convention on the Law of Treaties of 23 May 1969.[6] This applies to its interpretation as well as to the way in which it takes effect and is applied in practice. However, due to the special nature and contents of the Convention, especially those related to individual rights and freedoms, the ECtHR has developed its own interpretation techniques which expand on the Convention provisions in an interesting way. This claim will be discussed hereafter.

For states, the Convention is a direct source of rights and obligations under international law, just like any other international agreement. Therefore, the Convention's provisions should be executed by the states-parties in good faith, in accordance with the *pacta sunt servanda* principle. These obligations are specific to international human rights law treaties, which is a relatively new area of international law. International human rights law, which is an area of law primarily concerned

4 Hereinafter: "the Court" or "the ECtHR". Discussed at length by: M. A. Nowicki, *Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka*, Warszawa 2009; B. Gronowska, *Europejski Trybunał Praw Człowieka. W poszukiwaniu efektywności ochrony jednostki*, Toruń 2011.

5 A. Gadkowski, *Wpływ orzecznictwa Europejskiego Trybunału Praw Człowieka na sytuację prawną jednostki w dziedzinie zabezpieczenia społecznego w Polsce*, Poznań 2020, p. 174 et. seq.

6 UNTS vol. 1155, p. 331; Polish version: Journal of Laws of 1990, no. 74, item 439.

with the protection of individuals in their relations with states, epitomises the overall evolution of international law in the past few decades.

Characteristically, some of the provisions of international human rights law address individuals directly, which means that individuals can draw on them when seeking resolution to their issues before international bodies, including judicial bodies. Such international bodies hear claims which individuals make against states that are alleged to have breached their international treaty obligations. This implies that international law clearly interferes in the relations between individuals and states. In these relations individuals are subject to the state jurisdiction, and the state may exercise its regulatory powers.

There is no doubt, however, that the Convention, as an international agreement, is first and foremost a source of international law in relation to the states-parties. After all, international agreements are the major source of state obligations with regard to international protection of human rights. Of course, in this context we should not disregard the importance of international custom and the general principles of law in this area. Likewise, we should not dismiss the importance of so-called international *soft law* regulations. The Universal Declaration of Human Rights, adopted as a UN General Assembly resolution, is a prime example here.[7]

It should be noted here that international agreements, which define states' obligations in respect of human rights, usually set out their obligations related to the protection of individuals as the right holders. At the present stage of international law development, individuals themselves cannot be parties to international treaties. In a wider context, therefore, it can be stipulated that all international human rights treaties are the source of specific obligations for their contracting states-parties. The most fundamentally important obligation in this respect is taking appropriate measures to ensure that individual human rights are respected in accordance with the international standards established in treaties.

7 Text of the Declaration: A/Res. 217 A III.

The Convention is particularly distinctive in this respect, in comparison with other international human rights treaties. It lays out a wide catalogue of individual rights and, moreover, it makes them subjective. Therefore, individuals are the primary rightholders of the rights provided for in the Convention.

The Convention in the Context of the International Legal Obligations of States-parties

Article 1 of the Convention does not only define its jurisdiction *ratione personae*, *ratione materiae* and *ratione loci*. It also formulates a general obligation of states-parties to respect human rights. This article sets forth an obligation for states-parties to ensure that all individuals under their jurisdiction shall enjoy the rights and freedoms listed in section 1 of the Convention, i.e. those defined in articles 2–14, as well as in the relevant additional Protocols. The practice of applying the Convention's provisions, in particular of the abundant and diverse ECtHR case law, demonstrates that the obligations of states-parties are twofold: negative and positive.[8] The negative obligations constitute the fundamentals of the protection system set out in the Convention. They should be understood as the obligation of states to refrain from human rights breaches, i.e. states-parties shall not interfere in the enjoyment of individual rights and freedoms. In fact, such a prohibition can be categorical only in exceptional circumstances. The Convention's role here is to set out and apply clear rules for establishing any limitations to the enjoyment of individual rights and freedoms. Whenever such a basic prohibition to interfere is not effective in practice for securing individual rights and freedoms, the positive obligations of states-parties need to come into play, e.g. those stipulated in art. 2 and 6 of the Convention, or art. 3 of

8 The matter is discussed more broadly by M. Balcerzak, in *Odpowiedzialność państwa – strony Europejskiej Konwencji o Ochronie Praw Człowieka i Podstawowych Wolności. Studium prawnomiędzynarodowe*, Toruń 2013 and E. Morawska, *Zobowiązania pozytywne państw – stron Konwencji o Ochronie Praw Człowieka i Podstawowych Wolności*, Warszawa 2016.

Protocol 1. These obligations of states set out in the above – mentioned articles are aimed at creating both legal and factual conditions enabling individuals to exercise their rights and freedoms. The ECtHR case law indicates that such positive obligations of states, which result from all human rights and freedoms secured in the Convention, are actually the flipside of the negative obligations, i.e. those related to the prohibition of states to interfere in the enjoyment of individual rights and freedoms.[9] Particularly important here is the obligation of states to secure individual rights and freedoms at least to the degree specified by the universal and regional standards of international human rights protection adopted by the state. In particular, this obligation implies that states need to undertake appropriate measures to ensure genuine and effective protection of individual rights and freedoms at the national level, in line with international standards. Provisions contained in the Convention do not specify, *in abstracto*, what measures should be undertaken by states-parties. The detailed nature of these obligations is specified mainly in the ECtHR case law. It should be noted that these obligations are fulfilled both at the substantive and procedural level. With regard to the substantive aspect, states-parties are obliged to ensure that national law and implementing legislation are compliant with the rights and freedoms provided for in the Convention, in terms of their content, scope and the line of interpretation. As far as the procedural aspect is concerned, multiple provisions of the Convention oblige the states-parties to implement adequate procedures, in line with their internal legal system, which will ensure legal protection against breaches of individual rights and freedoms.[10] Therefore, it is self-evident that national law needs to ensure that the Convention is implemented effectively in practice. This claim is further

9 E.g. *Airey v. Ireland*, judgment of October the 9th 1979, application no. 6289/73, § 32. The Court's case law is fully available at the ECtHR online database at: <https://hudoc.echr.coe.int> Hereinafter referred to as HUDOC.

10 Discussed in detail by L. Garlicki, *Komentarz do artykułu 1 Konwencji*, in *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności, Tom I, Komentarz do artykułów 1–18*, ed. L. Garlicki, Warszawa 2010, p. 33.

substantiated by the fact that art. 52 of the Convention authorises the Secretary General of the Council of Europe to ask for clarification from states-parties regarding the ways in which their national law ensures effective application of the Convention. In practice, this may take the form of legislation that establishes an adequate protection framework in both substantive and procedural law.[11] However, it should be noted that should the state fail to fulfil this obligation, or should it fulfil it inadequately, the obligation is transferred onto the international level. In practice, this is where the treaty bodies of the Convention take over, in particular the European Court of Human Rights. This fundamental principle of subsidiarity has been clearly defined in the ECtHR case law. For instance, in *Handyside v. United Kingdom*, the Court pointed out that "the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights (...). The Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines".[12] At the national level, the principle of subsidiarity implies that states-parties are free to ensure adequate protection of individual rights and freedoms in various ways which they deem fit. However, they cannot fail to provide the minimum level of protection guaranteed in the Convention. From the point of view of the Council of Europe, the principle of subsidiarity implies that the Court respects the superiority of national law in providing adequate protection of individual rights and freedoms. The adequate level of protection, on the other hand, is determined by international standards, in particular those set forth in the Convention. Therefore, the states are independent in this respect to a certain extent, but their actions in the area of human rights protection are subject to international scrutiny, which follows from their treaty obligations.[13] Needless to say, in line with the principle of subsidiarity, individuals may bring action before the ECtHR only if all avail-

11 Ibidem, p. 27 et seq.

12 ECtHR judgment of December the 7th 1976, application no. 5493/72, § 48.

13 Discussed in more detail by e.g. L. Garlicki, op. cit., p. 29.

able domestic law remedies have been exhausted. Moreover, the ECtHR does not act as an appellate court in such cases. Also, the ECtHR should not act in the national courts' stead in determining the correct interpretation of domestic law. Besides, it should be noted that ECtHR judgments are declaratory, which means that they do not alter the binding force of either national courts' judgments or national legislation. Although the ECtHR judgments are not generally applicable law and they relate to specific cases, they have significant effects in the national legal order, especially from the point of view of the protection of individual rights and freedoms. Such effects are achieved both within the framework of individual and general measures of implementing the Court's judgments by states-parties.[14]

The role of the ECtHR is particularly distinctive in that the specific obligations of states-parties result from the Court's interpretation of the Convention. The Convention is an international treaty formulated at a high level of abstraction, i.e. it requires a certain interpretative effort and it does not contain detailed guidelines related to its interpretation. As a result, relevant articles of the Vienna Convention on the Law of Treaties need to be applied to interpret certain provisions of the Convention. As early as in the 1975 judgment in *Golder v. The United Kingdom*, the ECtHR confirmed that the Court's interpretation should be guided by the general principles of interpreting treaties outlined in art. 31–33 of the Vienna Convention.[15] However, the Convention is a special international treaty in this regard, since it exerts direct impact on the relations between states and their citizens, as well as any other individuals under their jurisdiction. These issues are particularly significant when the interests of both states-parties and individuals are taken into account. In addition, some norms enshrined in the Convention are addressed directly to individuals as the right holders. The international legal status of individuals is fundamentally different than that of states-parties in this respect. Individuals here are the right

14 A. Gadkowski, op. cit., p. 208 et seq.

15 ECtHR judgment of February the 2nd 1975, application no. 4451/70, § 29, HUDOC.

holders and states are the obliged entities. Therefore, as the Court stated in the 1968 case *Wemhoff v. Germany*, in the process of interpreting the provisions of the Convention, it is advisable to "seek the interpretation that is most appropriate in order to realise the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties".[16] As a result, in the 1989 case *Soering v. The United Kingdom*, the Court found that "in interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms".[17]

What this means is that through its judgments and decisions the ECtHR has developed its own characteristic interpretation techniques. These techniques are tailored to the special nature of the Convention as an international treaty and to its dynamic application in practice.[18] There are two interpretation methods which are important from this point of view: the *living instrument* doctrine and the doctrine of effectiveness[19]. When following the former interpretation method, the ECtHR assumes that the Convention's provisions need to be interpreted dynamically, as it is a "living organism" created to protect human rights. Protection standards need to be applied in a flexible way, respecting the dynamically changing circumstances in the states that are parties to the Convention. However, states-parties should always strive to increase the level of protection they provide. In practice, this means that it is necessary to depart from the standard way of categorising events as breaches of the Convention, and to start giving consideration to various circumstances accompanying the purported breach, both at the national and international level. For example, in the 2002 case *Stafford v. The United Kingdom* the Court clearly stated that it must take into account "the changing conditions and any

16 ECtHR judgment of June the 27th 1968, application no. 2122/64, § 8.

17 ECtHR judgment of July the 7th 1989, application no. 14038/88, § 87.

18 M. A. Nowicki, op. cit., p. 556.

19 A. Mowbary, *The Creativity of the European Court of Human Rights*, "Human Rights Review" 1995, vol. 5, p. 57 et seq.

emerging consensus discernible within the domestic legal order of the respondent Contracting State".[20] Similarly, in the 1978 case *Tyrer v. The United Kingdom* the Court concluded that "the Convention is a living instrument which (...) must be interpreted in the light of present – day conditions".[21] In this context, it should be emphasized that such a dynamic interpretation of the Convention by the ECtHR translates primarily into the creative nature of its case law. This way of interpreting does not mean, however, that the ECtHR can derive new rights which were not originally formulated in the Convention. On the other hand, with regard to the doctrine of effectiveness, the ECtHR attempts to derive positive obligations of states-parties from the Convention, which further clarify the general obligation of states to respect human rights, as formulated in art. 1 of the Convention. Therefore, the point is that states, in the process of applying the Convention and fulfilling their international obligations, should undertake specific actions (both legislative and institutional) which would bring genuine protection of the rights and freedoms enshrined by the Convention. Thus, in the 1979 case *Airey v. Ireland*, the Court stated that "the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective".[22] The doctrine of effectiveness, defined in this way, is therefore used by the Court to ensure that in the process of fulfilling their international treaty obligations deriving from the Convention, the states-parties shall not just refrain from interfering with the realisation of human rights, but they must provide genuine protection of the rights and freedoms contained therein.

20 ECtHR judgment of May the 28th 2002, application no. 46295/99, § 68.

21 ECtHR judgment of April the 25th 1978, application no. 5856/72, § 31.

22 *Airey v. Ireland*, op. cit., § 24. Commentary: A. Hauser, *Prawo jednostki do sądu europejskiego*, Warszawa 2017, p. 9.

The Convention in the Context of Individual Rights

Undoubtedly, the Convention is an important international treaty in the sense that it is a source of individual rights. However, this statement should be understood and discussed in a wider context. A more general statement could be made, namely that human rights are actually individual rights. First and foremost, this concept entails that individual rights define the legal situation of individuals in the specific norms which are addressed directly to them.[23] After all, individual human rights are grounded in human nature. All humans are endowed with them, regardless of any decisions by state legislature or any other state authorities. In this context, human rights constitute a whole set of individual rights which are derived from the inherent and inalienable dignity all humans are endowed with. The goal of these rights is to provide individuals with the opportunity for self-development. This is how the nature of human rights has been defined not only in the preamble to the Universal Declaration of Human Rights, but also in all the most significant international regulations in this area – universal and regional alike. This makes it possible to evaluate the normative structure of human rights from the point of view of individuals and their individual rights.

According to Sarnecki, subjective rights (in the context of human rights) should be understood as a legal situation created by the law for the benefit of an individual. In this sense, subjective rights shape the legal status of individuals. What this means for individuals is that they may demand certain behaviour from the obliged entity. This can encompass both actions and omissions. The obliged entity in this relationship is required by law to perform the expected behaviour. Most importantly, should the obliged entity fail to fulfil their obligation in this matter, the individual has the legal means to enforce it. This possibility is an indispensable element of subjective rights.[24] The discussion above,

23 The matter is discussed broadly in S. Wronkowska, *Analiza pojęcia prawa podmiotowego*, Poznań 1973, p. 5 et seq.

24 P. Sarnecki, *Prawo konstytucyjne Rzeczypospolitej Polskiej*, Warszawa 2005, p. 88.

particularly of the nature of state obligations under the Convention as well as the role of ECtHR in the monitoring system of the Convention, demonstrates that the Convention is a fundamentally important source of international individual rights. Such a line of reasoning is further substantiated by certain provisions of the Convention which provide the grounds for lodging individual claims. An example of such a provision is art. 13 of the Convention, which explicitly guarantees individuals the right to effective appeal, which can be broadly understood as a means of protecting their rights.

In relation to the above discussion, it is worth noting that Z. Kędzia has observed that human rights have a twofold structure. The first layer are subjective rights which individuals are entitled to, and which are guaranteed by the states and other entities. Hence, they are rights which ensure the protection of values which are particularly important not only for individual self-development but also for the functioning of a society. The second layer is the legal norm from which the subjective right is derived. Both of these layers are inherently linked with each other and constitute two aspects of a single legal structure.[25] The legal structure discussed by Kędzia refers to both the domestic and international legal order. The thesis that the source of individual rights can be found in international law is, therefore, fully justified.

As stated above, the Convention is a source of international obligations of states-parties, but also at the same time it is a source of individual rights, which makes it so exceptional among other international treaties. It introduces a wide range of individual rights and raises them to the status of subjective rights. It should be emphasised that these characteristics make the Convention stand out in comparison to other classic international treaties. Its special status does not require further justification. On the other hand, the issue of the status of ECtHR case law as

25 Z. Kędzia, *Burżuazyjna koncepcja praw człowieka*, Wrocław 1980, p. 168 et seq. and J. Czepek, *Zobowiązania pozytywne państwa w sferze praw człowieka pierwszej generacji na tle Europejskiej Konwencji Praw Człowieka*, Olsztyn 2014, p. 26 et seq.

a possible source of individual rights is more complex. ECtHR judgments where the Court found a breach of state obligations and thus specifying the Strasbourg standards, despite being declaratory in nature, are actually binding for state parties and should be acted upon accordingly by states-parties in good faith. Formally, they do not create obligations *erga omnes* as their legal force is relative. However, besides the fact that ECtHR decides upon a specific case, each judgment also expresses significant opinions and standpoints regarding the compliance of a specific legal regulation or action with the Convention. According to the doctrine of *res judicata* it is possible and permissible for entities other than the complainant to lodge claims before state bodies (including judicial bodies) on the basis of the interpretation of the Convention discussed in ECtHR judgments. Such claims may be lodged not only in the countries to which the given ECtHR judgments pertain, but in other countries too.

Regarding the relationship between ECtHR judgments and subjective individual rights, it may be stated that art. 46 of the Convention does not establish the sources of subjective rights *per se.* As a result, it also does not establish the source of specific positive law-making obligations of states.[26] However, there is no doubt that art. 46 does provide the basis for reconstructing an international obligation for states. This general obligation becomes specific in particular cases, i.e. once the Court decides on the legal classification of facts presented by the complainant.[27] Introducing any specific legislation specifying those obligations remains withinthe remit of the state. States enjoy relative legislative freedom in this respect, which may be justified by various reasons, both systemic and functional. Looking at how ECtHR judgments are executed these days, it becomes clear that states no longer have unrestricted freedom

26 For more discussion of this issue, see eg. M. Ziółkowski, *Wyrok ETPCz jako podstawa wznowienia postępowania cywilnego*, „Europejski Przegląd Sądowy" 2011, No. 9, p. 35 et seq.

27 M. Ziółkowski, *Obowiązek przestrzegania wyroków Europejskiego Trybunału Praw Człowieka w świetle art. 46 Konwencji o Ochronie Praw Człowieka i Podstawowych Wolności oraz rezolucji Zgromadzenia Parlamentarnego Rady Europy z 26 stycznia 2011*, in: *Wykonywanie wyroków Europejskiego Trybunału Praw Człowieka przez Sejm*, Biuro Analiz Sejmowych, Warszawa 2012, p. 23 and seq.

in determining the methods of enforcing the Court's judgments. Currently there is a tendency to emphasise the competence of the Court in terms of specifying the implementation obligations of states. In principle, however, states-parties are responsible for the outcome. They are also autonomous when it comes to regulatory (enforcement) aspects and are free to choose appropriate measures intended to execute ECtHR judgments.[28] At this point, it is necessary to quote the stance of the Polish Constitutional Court, which still seems relevant: "(...) it is an internal matter of states-parties to draw conclusions from ECtHR judgments; they need to consider the scope, adequacy, necessity and proportionality of the measures they take, in terms of changes in legal regulations, application of law, also including its interpretation".[29]

It should be noted that the literature on the subject abounds with arguments to support the thesis that art. 46 of the Convention is not a source of individual rights *per se*, and neither is it a source of specific obligations for states related to legislation in this area. It is undoubtedly true that the Convention ensures the protection of individual rights formulated in art. 2–14 therein, as well as in the Additional Protocols. The rights enshrined in the Convention can give rise to individual claims. However, it should be noted that the option to lodge claims for the protection of individual rights is not derived from art. 46 of the Convention. Art. 46 addresses the states-parties as the obliged entities, and not individuals as the protected entities. As has already been underlined, obligations arising from the *pacta sunt servanda* principle are incumbent on states-parties. Final ECtHR judgments formulate obligations for the respondent states-parties which violated the provisions of the Convention. This argument can be further substantiated by the substantive cri-

28 I. C. Kamiński, R. Kownacki, K. Wierczyńska, *Wykonywanie orzeczeń Europejskiego Trybunału Praw Człowieka w polskim systemie prawnym*, in: *Zapewnienie efektywności orzeczeniom sądów międzynarodowych w polskim porządku prawnym*, ed. A. Wróbel, Warszawa 2011, p. 97 et seq.

29 Judgment of the Polish Constitutional Court of October the 18th 2004, file ref. no. P 8/04, OTK – A 2004, no. 9, item 92.

teria for an objective assessment of the implementation of international obligations by states-parties. Another argument that can be invoked in support of this thesis refers to the material criteria of an objective assessment of the implementation by a state party of its international obligations. This concerns both the obligation to implement the provisions of the Convention and the obligation to implement the ECtHR judgments. Naturally from the formal point of view both types of obligations should be fulfilled by the states in good faith, according to the *pacta sunt servanda* principle mentioned above. The fulfilment of states-parties' obligations arising from the Convention can be evaluated objectively on the basis of the *pacta sunt servanda* principle formulated in the Vienna Convention of 1969, as well as its rules for interpreting international treaties. However, with ECtHR judgments the matter is more complex.

Apart from a general obligation to fulfil its obligations in good faith, art. 46 par. 1 of the Convention does not formulate any *in abstracto* substantive criteria for evaluating the implementation of specific obligations by respondent states-parties arising from ECtHR judgments; hence there may be multiple forms of implementation. It depends on various factors, such as the nature of the breach, the nature of the rights which are violated, the source of the breach, the nature of the act as the cause of the breach, among others.[30] This implies that the state party's obligation to implement the ECtHR judgment in good faith must be assessed in the context and on the basis of a specific case. However, it should always take into account the assessment framework, which results from the judgment itself. Therefore, the respondent state which the Court found to be guilty of a breach is in fact free to choose the measure it deems fit for putting an end to the obligations resulting from art. 46 of the Convention. However, this freedom of choice is only granted if the measures it opts for are consistent with the conclusions drawn from

30 Discussed at length by A. Bodnar, in *Wykonywanie orzeczeń Europejskiego Trybunału Praw Człowieka w Polsce. Wymiar instytucjonalny*, Warszawa 2018.

the judgment.[31] However, a thesis can be put forward that from art. 46 an obligation for states-parties can be derived; this obligation is not unambiguous, though, and its realisation depends on the level of involvement of the Committee of Ministers of the Council of Europe, i.e. in fact it depends on political decisions.[32] In this context, a more general conclusion comes to mind, namely that implementing judgments of international courts is more difficult and complicated than implementing the judgments of domestic courts. Among other reasons behind it, this complexity results mainly from the special position of the state as a sovereign international law entity. In particular, it concerns its status before international courts, in the process of realising their jurisdiction and implementing their decisions.[33]

When we evaluate the current content and wording of art. 46 of the Convention, we must remember that they were put forward in the Additional Protocol no. 14 of May 13, 2004, in relation to the introduction of new options to monitor the enforcement of ECtHR judgments.[34] This protocol equipped the Court with new competence to decide on cases where states-parties fail to fulfil their obligation (formulated in art. 46 par. 1 of the Convention) to implement the ECtHR judgments in good faith. Such infringement proceedings are exceptional and differ significantly from typical complaint or advisory proceedings. In infringement proceedings, the Grand Chamber of the European Court of Human Rights decides only about a possible infringement of international obligations (those formulated in art. 46 of the Convention) by states-parties. The legal basis for such decisions is provided in art. 31 b) of the Convention in connection with rule 99 of the Rules of Court.

31 See eg. M. Ziółkowski, *Obowiązek przestrzegania wyroków*..., op. cit., p. 27.

32 M.A. Nowicki discusses the procedure before the Committee of Ministers in more detail in: *Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka*, Warszawa 2013, p. 267 et seq.

33 A. Gadkowski, *Legal Basis for the Establishment of International Courts*, in: *Judicial Power in a Globalized World: Liber Amicorum Vincent De Gaetano*, eds. de Albuquerque P. P., Wojtyczek K., Cham 2019, p. 197 et seq.

34 European Treaty Series no. 194; Polish version: Journal of Laws of 2010, no. 90, item 587.

Should the Grand Chamber find an infringement, the case is transferred back to the Committee of Ministers. The Committee is a supervisory body which is tasked with ensuring that states-parties fulfil their obligations in this respect, hence it issues a final decision about the measures to be implemented in such cases.[35] Therefore, it cannot be considered as new proceeding against the state party, unlike a typical complaint proceeding. It should be considered as infringement proceeding regarding a breach, i.e. failure of a state party to comply with a significant international obligation arising from the Convention. Hence, a decision in such a case does not constitute a declaration of breach of the Convention in the sense of a violation of a specific subjective right formulated therein. An individual whose application initiated the proceedings which ended with an ECtHR judgment cannot point out to either the Court or the Committee of Ministers that a state party failed to fulfil its international obligation. Furthermore, individuals do not have the right to file complaints in such cases. If we assume that art. 46 par. 1 of the Convention pertains to subjective rights, it would mean that the Court would be entitled to decide in cases filed by individuals regarding the violation of states-parties' obligation to enforce ECtHR judgments in good faith[36]. However, this is not the case, and the Court's decision initiates a control mechanism which is much more political in nature, namely the Committee of Ministers supervises the execution of final judgments of the ECtHR.

On the other hand, such a thesis does not predetermine that e.g. there are certain legislative actions which the state party must necessarily undertake to remedy the violation, which in turn would mean that the Court's judgment could be considered as executed. On the flipside, it would also be risky to venture a statement that failure on the part of the state party to undertake specific legislative actions would imply that an individual should be entitled to claims related to non-fulfilment of positive obligations by the state party, as defined in art. 46 par. 1 of the

35 It is undoubtedly true that should the state party fail to execute an ECtHR judgment, this could in practice constitute a violation of individual subjective rights.

36 L. Garlicki, *op. cit.*, p. 353.

Convention. Nevertheless, failure to undertake such legislative actions by the state would of course mean that the above-mentioned *infringement proceedings* may be initiated, as per Additional Protocol no. 14.

Concluding Remarks

The most important role of the normative system of the Convention is to protect individual rights in an effective way. The effectiveness of this system of protection should, in turn, be assessed from the point of view of the actual individual rights derived from ECtHR judgments, as well as the possibility of executing these judgments in practice. The Court decides whether the facts of the case as presented by the individual complainant point to the possibility of violating individual rights. Such a violation would in turn mean a breach of an international legal obligation by the state party. The Court does not have the authority to specify the exact nature of the international legal obligations of states-parties. It is also not empowered to enforce the implementation of its judgments effectively. Therefore, the states-parties' legislatures have relative freedom to undertake such legislative and normative actions which would enable the proper implementation of ECtHR judgments. Under no circumstances, however, should this freedom be unrestricted. In each case the scope of this freedom should be determined by the need to provide effective mechanisms and institutions for the international protection of human rights. Of course, it is not impossible to imagine a particular situation where a state would not operate any such mechanisms for the implementation of ECtHR judgments whatsoever. Similarly, a state could fail to undertake any actions at all to remedy the breach of the Convention. In such cases, it would be fully justified to claim that such a state fails to fulfil its obligations formulated in art. 46 par. 1 of the Convention. In specific cases this could lead to the Court finding a violation of individual human rights by a state party.[37]

37 M. Ziółkowski, *Obowiązek przestrzegania wyroków*…, op. cit., p. 36.

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SUMMARY

The Convention for the Protection of Human Rights and Fundamental Freedoms as an international treaty and a source of individual rights

The aim of this paper is to present the legal nature of the Convention for the Protection of Human Rights and Fundamental Freedoms as a special treaty under international human rights law. The article focuses on the twofold nature of the Convention. First, it presents the Convention as an international treaty, and thus as a source of specific obligations of states-parties. Second, it presents the Convention as the source of fundamental individual human rights. The article also discusses the role of ECtHR case law in the context of fundamental individual human rights.

Keywords: human rights law, international protection of human rights, fundamental rights, Convention for the Protection of Human Rights and Fundamental Freedoms, European Court of Human Rights.

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The Institution of Full Powers in the Process of Concluding International Agreements

Introduction

The institution of full powers derives from broadly understood private law, and has the purpose of enabling one person to take actions on behalf of another, so that such actions produce legal effects for the principal.[1] In Polish civil – law literature, such empowerment is characterized as competence given to a plenipotentiary under a declaration of intent of the party being represented, or as an entitlement of a plenipotentiary to represent another person.[2] On the other hand, the doctrine defines the term 'full powers' in different ways. In particular, terminological problems result from the application of the term 'full powers' in different meanings, which is caused by the Polish legislator's lack of consistency in the use of this term.[3] In my opinion, A. Sylwestrzak is right to put forward the hypothesis that full powers is an ambiguous term, and as such needs clarification, especially taking into account the context of the statement, to determine which sense of the term is used in a given case.[4]

1 J. Sandorski, *Nieważność umów międzynarodowych*, Poznań 1978, p. 77.

2 Z. Radwański, A. Olejniczak, *Prawo cywilne – część ogólna*, Warszawa 2011, p. 324; S. Grzybowski, *System prawa cywilnego*, vol. I, 1974, p. 614–615.

3 A. Szpunar, *Stanowisko prawne pełnomocnika*, PN 1949/I, p. 62.

4 M. Balwicka – Szczybra, M. Glicz, A. Sylwestrzak, *Pełnomocnictwo, Komentarz*, Warszawa 2020, p. 32.

The empowerment at an international level to represent a state during the conclusion of an international agreement is stipulated in Article 7 of the 1969 Vienna Convention on the Law of Treaties.[5] As pointed out by J. Sandorski, the granting of full powers is essential for the performance of a state's legal capacity to conclude a treaty in international relations.[6] The fundamental function of the aforementioned Article is to regulate the issue of representation of the state, since states can have different practices in that respect.[7] On the other hand, the fundamental function of full powers is to define the scope of the representative's authority.[8] The wording of Article 7 of the Vienna Convention of 1969 partially constitutes a piece of advice, and partially an exposition of legal freedom in that respect.[9] It is worth pointing out that the regulation in question indicates two types of authorizations in the process of concluding treaties. Specifically, Article 7(1) applies to persons authorized under full powers to represent a state in the process of adopting, authenticating, or concluding a treaty, while Article 7(2) applies to persons who by virtue of their functions under international law are authorized to represent a state without having to produce full powers. The purpose of this paper is to analyze essential elements of the institution of full powers in the process of concluding international agreements, in the context of prevailing regulations of international law. At the end of the considerations I will present practical aspects of establishing plenipotentiaries, drawing on the example of regulations present in the Polish legislative system.

5 Cf. Article 7 of the Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969.

6 J. Sandorski, op. cit., p. 77.

7 O. *Dörr, K. Schmalenbach*, *Vienna Convention On The Law Of Treaties*, Heidelberg – Dordrecht – London – New York 2012, p. 119.

8 J. Sandorski, op. cit., p. 77.

9 D. Hutchinson *The Judicial Nature of Article 7 of the Vienna Convention on the Law of Treaties* AYIL 1996, 17, p. 187, 207.

Historical Background

The generally accepted form of full powers is the result of many centuries of diplomatic practice which influenced the development of the procedure of concluding international agreements.[10] As pointed out in international law doctrine, the obsolete English term *full powers* itself, used in Article 7, refers back to a long tradition of the institution of full powers in international law and diplomacy. In antiquity the highest leader of the state acted on his or her own behalf.[11] The beginnings of the development of the institution of full powers should be sought in diplomatic law dating back to ancient times, which is one of the oldest laws governing relations between states.[12]

The growing number of signed treaties and their increasing complexity have lengthened the process of their conclusion. Due to this it was essential to involve close associates when concluding treaties.[13] This was a turning point, since agreements ceased to be quasi – personal in nature, while the ruler and his or her representatives appeared on behalf of the state.[14] Over time, the need arose for the ruler's interests to be represented by an authorized person. In the Middle Ages, rulers began to confer increasingly broad powers on plenipotentiaries, and included in full powers not only the authorization to sign agreements, but also a commitment to exchange ratification documents within the time limits set out in the full powers. This state of affairs allows us to advance the hypothesis that it was the ratification obligation that vested in the plenipotentiary, who acted as the alter ego of the monarch, the final expression of consent to be bound by an agreement.[15] Plenipotentiaries could be sent to negotiate the content of a treaty. The precise language of the full powers was fundamental for two reasons. First, the wording stipulated that the representative had the authority to bind the state with the plenipotentiary's signature, and sec-

10 J. Sandorski, op. cit., p. 77.
11 O. *Dörr, K. Schmalenbach, op. cit., p. 120.*
12 Cf. J. Sutor, *Prawo dyplomatyczne i konsularne*, Warszawa 2004, p. 21–25, 387.
13 O. Corten, P. Klein, *Vienna Convention On The Law Of Treaties*, Oxford 2011, p. 126.
14 O. *Dörr, K. Schmalenbach, op. cit., p. 120.*
15 J. Sandorski, op. cit., p. 78.

ond, due to the ratification procedure formed in the seventeenth century.[16] The development of civil law and its influence on international relations formed the rule that the authorization to bind the principal can be restricted under the terms of the full powers. This very practice was recorded at the peace congresses of Münster (1642–1648), Cologne and Nijmegen (1673–1676), and Ryswick (1697). It is worth noting that the aforementioned congresses were attended not only by the parties to the conflict, but also by mediators who significantly influenced the achievement of the final agreement.[17] The role of mediators often came down to reviewing the scope, expiry dates, and nature of plenipotentiaries' authorization, which later gave rise to the creation of commissions for the verification of full powers in international relations. J. Sandorski pointed out that the relationship of the plenipotentiary to the sovereign was modeled on the relationship of an agent to the principal in private law, hence international agreements were considered analogous to civil – law contracts. In view of the above, the ruler could evade the effects of international obligations which were incurred by a representative but were inconvenient for the ruler, only if the plenipotentiary went beyond the powers granted to him or her. Such circumstances allowed rulers to refuse the ratification promised in the full powers, which led to a situation in the 18th century where the importance of full powers, over time, diminished.[18] As rulers began to refuse ratification on the pretext of plenipotentiaries' exceeding the authority vested in them, they practically turned the obligation to ratify into the possibility to do so.[19] Several interesting cases of refraining from ratification took place in the 19th century and are described by H. Blix.[20]

16 O. *Dörr, K. Schmalenbach, op. cit., p. 121.*

17 S. E. Nahlik, *Narodziny nowożytnej dyplomacji*, Wrocław–Warszawa–Kraków–Gdańsk 1971, p. 74.

18 J. Sandorski, op. cit., p. 78.

19 O. *Dörr, K. Schmalenbach, op. cit., p. 121*

20 H. Blix, *Treaty – Making Power*, London 1960, p 7–11:
In 1809, the British government refused to ratify an agreement with the United States, stating that the British minister in Washington had exceeded his instructions. In 1822, a British plenipotentiary in Bushire on the Persian Gulf signed an agreement with the Persian minister subject to the consent of both governments. The British authorities rejected the tre-

The issue of full powers was discussed at the Congress of Vienna in 1814. It was agreed that envoys whose full powers raised doubts could participate in the deliberations, however, without the right to vote. It should be noted that this principle has been widely adopted at international conferences and in international organizations. The above rule did not apply to ambassadors accredited in the capital where the conference was convened, as it was customary to recognize their competence to negotiate in the host country.[21]

It is worth noting that the representatives' full powers were also thoroughly examined in bilateral negotiations. In case of doubts regarding the scope of their powers, they were requested to produce new full powers in order to verify the authority necessary to sign an agreement. In practice, there were cases where negotiations were ongoing while the full powers document had not yet been delivered. Two solutions were used in this situation. The first derives from US practice. According to the Instructions to the Diplomatic Officers of the United States published in 1897, a concluded agreement was to be signed in the form of an instrument expressly stating that it was signed subject to the approval of the signer's government. The second solution developed with the advancements of communications, when agreements were increasingly signed by representatives who did not have full powers. In such a situation, after receiving full powers, earlier announced by telegraph, the fulfillment of formalities was recorded in a special protocol.[22]

Given the varying practices of states in the nineteenth century, often the documents presenting full powers differed, which led to problems in

aty and informed the Persian government that the plenipotentiary was never in possession of any instructions to enter into treaty negotiations and had exceeded his powers. In 1879, the Chinese plenipotentiary Chonghou signed the Treaty of Livadia with Russia for the return of Ili Province to China. Upon Chonghou's return, the ruler found that Chonghou had disobeyed instructions and exceeded his powers. The treaty was rejected and the emissary sentenced to death. Only after the Russian government's and Queen Victoria's interventions did the Chinese emperor change his mind and send a new negotiator to St. Petersburg. After some hesitation by Russia, a new treaty was drafted, signed and eventually ratified.

21 J. Sandorski, op. cit., p. 79.

22 Ibidem, p. 79.

determining plenipotentiaries' actual powers. This problem became apparent at the 1868 conference on the treatment of the sick and wounded in war, when a commission to review full powers was not appointed, but delegates were asked to clarify what powers they held. In the course of clarifications it turned out that there was a large discrepancy in the scope of authority given in individual full powers documents.[23]

Discrepancies and misunderstandings resulting from the different – phrased wording of the full powers resulted in an attempt to standardize them after World War I. This work was undertaken by the League of Nations and later by the United Nations.[24]

It is worth pointing out that the members of the League of Nations' Council comprised states represented mostly by ministers of foreign affairs with broad international competence, while for the persons representing members of the Assembly the requirement was introduced for them to hold full powers. The Commission for the Verification of Full Powers found that instead of full powers, delegates often submitted telegrams or letters from the minister of foreign affairs, and sometimes there were cases where delegates issued full powers to themselves.[25] This practice led to a change in the rules of procedure of the Assembly and introduction of a provision that stipulated that full powers must be issued by the head of state, or the minister of foreign affairs, and presented to the Secretary General one week before the start of the session.[26]

International law doctrine representatives analyzed whether international law should regulate the question of who had the right to represent a state in international relations. On the one hand, references were made to internal law, and, on the other hand, it was pointed out that internal law implied that the competence to represent a state is vested with the head of state.[27] The United Nations made an attempt to put order to

23 Ibidem, p. 80.
24 Ibidem, p. 80.
25 League of Nations, Official Journal 1933, No. 115, p. 30.
26 J. Sandorski, op. cit., p. 80.
27 S. E. Nahlik, *Kodeks Prawa Traktatów*, Warsaw 1976, p. 111.

the practices of various legal doctrines. In the work on the codification of treaty law, conducted by the International Law Commission, three issues emerged: 1) who can represent the state in concluding treaties by virtue of their position; 2) how can a person not supported by their position prove their competence; and 3) whether and to what extent a person who is not supported by his position and who has not been given the authority to represent the state, even on an ad hoc basis, can be considered as acting on behalf of the state.[28] The International Law Commission (ILC) associated the power to conclude treaties *ex officio* with three state positions: the head of state, head of government, and minister of foreign affairs[29], and to a limited extent also with the head of a permanent diplomatic mission, and with the state's representative at an international conference and in a body of an international organization.[30] Subsequently, the ILC put forward a draft where it proposed a regulation on persons whose competence was not supported by their position, and who had to demonstrate that they represented the state on the basis of an issued full powers instrument. The ILC's draft put forth this possibility to be the first choice.[31] Subsequently, promoting the postulate of flexibility, in its draft the ILC allowed the abandonment of full powers if 'circumstances' indicated that this was the intention of the parties.[32] The proposed text of the provision was supplemented by an amendment from the United States that added 'in practice the states concerned', which may indicate an intention to resign from full powers.[33] With regard to the binding of the State by an unauthorized person subject to the approval of the state, the ILC made a very cautious proposal of the provision, guided by issues in the field of the problem of invalidity of international agreements.[34] Based on the above agreements, the

28 Ibidem, p. 111.
29 H. Waldock 1962, ILC, Report 1962, Article 4(2).
30 H. Waldock 1962, ILC, Report 1962, Article 4(3).
31 ILC, Report 1966, Article 6(1)(a).
32 ILC, Report 1966, Article 6(1)(b).
33 S. E. Nahlik, *Kodeks…*, op. cit., p. 113.
34 ILC, Report 1966, commentary to Article 7 sections 1–3.

final wording of Articles 7 and 8 of the 1969 Vienna Convention on the Law of Treaties was formulated.

Authorization to Conclude the Treaty

Undoubtedly, treaties are the most important tools regulating international relations. They can be concluded between states, between states and international organizations, or between international organizations. International organizations, and the UN in particular, play a very important role in international lawmaking, often as initiators of treaties.[35] Treaties may be drafted or concluded in virtually any way the parties see fit. The procedure for formulating a treaty depends on the intention of and agreements between the stakeholders. Regardless of the above, the 1969 Vienna Convention on the Law of Treaties[36] specifies certain common norms that govern the formation of international agreements. Since states are not identifiable persons, specific rules have been adopted under which persons representing states actually do have the powers to conclude treaties.[37] Article 7 of the VCLT stipulates that the following persons are fully exempt from the obligation to submit full powers, by virtue of their functions: heads of state, heads of government, and ministers for foreign affairs, while a limited exemption applies to the heads of a diplomatic mission and states' representatives at an international conference or in its body. Without a full powers document, heads of a diplomatic mission may accept the text of a treaty between a sending and receiving state. Similar powers are vested in state representatives accredited to a treaty drafting conference or to an international organization when a treaty is being concluded within its framework (Article 7(2)(a, b, c). There is no equivalent of the above regulation applicable to bodies of international organizations in the 1986 Vienna

35 M. Fitzmaurice in: *International law*, ed. M.D. Evans, Oxford 2004, p. 177.
36 Hereinafter: VCLT.
37 M. N. Shaw, *Prawo międzynarodowe*, Warszawa 2000, 2006, p. 523–524.

Convention on the Law of Treaties between States and International Organizations or Between International Organizations. The above Convention does not authorize any person to express, by virtue of their function, the consent of an international organization to be bound by a treaty.[38]

It is worth noting that despite the fact that the institution of full powers has its origins in diplomatic law, none of the conventions regulating diplomatic and consular relations directly governs the matter of full powers, which is so important for the conclusion of international agreements. The Vienna Convention on Diplomatic Relations lists among the functions of diplomatic missions the function of representing the sending state in the receiving state, and holding negotiations with the government of the receiving state. Additionally, relevant literature emphasizes that the negotiation function is one of the oldest and most important diplomatic functions.[39] The matter of the institution of full powers in the execution of the negotiation function was pointed out by J. Bryła, who highlighted that the necessity of fulfilling the requirement of presenting formal full powers to conduct negotiations depends in practice on the degree of regular contacts between the negotiating parties, mutual knowledge of the negotiators themselves, and mutual trust between the participants of the negotiations.[40]

The question of full powers to conclude international agreements is extensively addressed by the VCLT. Each state determines in its internal law which authority is competent to issue full powers for particular treaty actions. The type and nature of the scope of the delegated activities determines what the nature of full powers is, and what official body is authorized to issue such a document. In international organizations, the authority to conclude agreements is always held by the highest officer (e.g. secretary or director general). Their authority usually includes the issuance of a full powers document. Treaty competence, on the other

38 M. Frankowska, *Prawo traktatów*, Warszawa 2007, p. 68.

39 M. Sykulska – Przybysz, edited by S. Sykuna, J. Zajadło, *Leksykon prawa i protokołu dyplomatycznego*, Warszawa 2011, p. 238.

40 J. Bryła, *Negocjacje międzynarodowe*, Poznań 1997, p. 71.

hand, is held by the highest authority in the international organization (the assembly or council).[41] Full powers may be required to negotiate or adopt a text (i.e., for example, to initial or vote in favor of a text at an international conference), but also to sign an agreement, or to perform other activities.[42] It is worth pointing out that, for example, Article 67 of the VCLT stipulates that "Any act of declaring invalid, terminating, withdrawing from or suspending the operation of a treaty pursuant to the provisions of the treaty or of paragraphs 2 or 3 of article 65 shall be carried out through an instrument communicated to the other parties. If the instrument is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers." It is on behalf of authorities competent to conclude international agreements that plenipotentiaries usually act, as they are persons with the appropriate authority, which is called 'full powers'.[43] The VCLT defines 'full powers' as a document "emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty" (Article 2(1)(c)). Thus, full powers are simply written proof that the person named therein is authorized to represent the state in performing certain acts with respect to a treaty, usually only to sign it.[44] As Sandorski rightly pointed out, a characteristic feature of full powers should be clarity. Full powers, as a document containing a declaration of intent of a state authority, should clearly define the scope of authorization, in a way that makes it easy to ascertain the authority's intention. Failure by states to follow this principle may result in disputes over the validity of the agreement concluded by the plenipotentiary.[45]

41 J. Sozański, *Współczesne prawo traktatów*, Warszawa – Poznań 2005, p. 76–77.
42 A. Wyrozumska, *Umowy międzynarodowe teoria i praktyka*, Warszawa 2006, p. 149.
43 M. Frankowska, op. cit., p. 67.
44 A. Aust, *Handbook of International Law*, Cambridge 2005, p. 59.
45 J. Sandorski, op. cit., p. 86.

Due to the fact that many international agreements are subject to ratification, plenipotentiaries acting within the scope of their authorization cannot conclusively bind their state to a treaty. The full powers instrument authorizing the conclusion of a treaty therefore relates to international agreements that enter into force on the date of signature.[46] For multilateral agreements, the full powers are submitted to the executive committee of the conference. They are then reviewed by a verification commission. Then, following their examination, the committee reports the findings to the conference. Customarily, the original copies of full powers are kept by the state on whose territory the conference is holding its session, i.e. by the state acting as depositary. International practice varies in terms of bilateral agreements. State delegates may retain the original copies of the other party's full powers instrument, or may present the originals and only exchange copies. Typically, the actions relating to the presentation or exchange of full powers are noted in the introduction to the treaty.[47]

Today, however, the requirement for full powers is increasingly being dropped. This is due to the fact that many international agreements concern specialized areas, on which various forums for meetings of state representatives (experts), commissions, or joint committees are set up. Interestingly, international organizations also establish commissions, committees, or working groups. Such forums can negotiate international agreements in a simplified formula, e.g. by officially communicating the names of their representatives without showing special full powers.[48] Pursuant to Article 7(1)(b), in exceptional situations, full powers are not needed when it appears from the practice of the states concerned or from other circumstances that their intention was to consider a given person as authorized to undertake specific actions without full powers. It is worth noting here that an analogous provision is stipulated in the 1986

46 R. Jennings, A. Watts, *Oppenheim's International Law*, vol. 1, London 1992, p. 1222.
47 A. Wyrozumska, op. cit., p. 150.
48 Ibidem, p. 150–151.

Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.[49] The ILC emphasized that the rule set out in Article 7 "makes it clear that the production of full powers is the fundamental safeguard for the representatives of the States concerned of each other's qualifications to represent their State for the purpose of performing the particular act in question; and that is for the States to decide whether they may safely dispense with the production of full powers."[50]

At this point, I would like to draw attention to Article 8 of the VCLT, which stipulates that an act relating to the conclusion of a treaty performed by a person who cannot be considered as authorized to represent the state for the relevant purposes is legally ineffective. The above regulation sanctions the existence of full powers.[51] An interesting example was the case that occurred in 1951 with regard to a cheese naming convention. The Convention was signed by a joint delegate of both Sweden and Norway, but it turned out that the delegate was authorized only by Norway. However, the Convention was later ratified by both countries and entered into force.[52] It is worth noting that Article 47 of the VCLT provides for a situation where the authority of the plenipotentiary to express the consent of a state to be bound by a particular treaty is subject to a specific restriction and the plenipotentiary failed to comply with that restriction. However, the above case should be considered in the category of conditions that invalidate an international agreement.

49 M. Frankowska, op. cit., p. 68–69.

50 A. Watts, *The International Law Commission 1949–1998*, vol. 2: The Treaties Part II, Oxford 1999, Article 6 (3).

51 M. Muszyński, *Państwo w prawie międzynarodowym*, Bielsko Biała 2012, p. 394.

52 *Yearbook of the International Law Commission YILC*, 1966, t. 2, p. 195.

Classification of Full Powers

Based on the collected literature, the purpose of this chapter is to propose a classification of international full powers from the point of view of their nature, the scope of authorization, the authority issuing the full powers instrument, the period for which full powers are granted, the entity recognized by international law, and the mode in which the international agreement is concluded.

From the point of view of their nature, full powers can be divided into personal and joint ones. Personal full powers are given to one person, while joint full powers are issued when there are several plenipotentiaries. The latter full powers may be of joint – and – several type, where all plenipotentiaries must sign the international agreement, or individualized, where the agreement may be signed by all plenipotentiaries or only one of them. As indicated in the relevant literature, personal full powers stress the principle of uniformity of a delegation, while joint powers of attorney have their practical justification, particularly in the event of the indisposition of one of the plenipotentiaries or, for example, when one of them needs to leave earlier.[53] It is worth noting that a plenipotentiary cannot commission anyone to perform for them the acts authorized by the full powers (in international law one cannot appoint a substitute plenipotentiary, as is the case, for example, in Polish civil law).[54]

With regard to the scope of authorization, full powers can be divided into general and special. Such a division was made by I. Sinclair on the basis of an analysis of British practice, which ascertained that general full powers are held by the Secretary of State for Foreign and Commonwealth Affairs (the British term for the minister of foreign affairs), a Secretary of State, and Parliamentary Under – Secretaries of State at the Ministry of Foreign Affairs, and Britain's Permanent Representatives to the United Nations, which authorize them to negotiate and sign

53 A. Wyrozumska, op. cit., p. 149.
54 M. Frankowska, op. cit., p. 68.

any treaties. Specific full powers, on the other hand, are given to specific individuals to negotiate and sign specific treaties.[55] In the field of special full powers, one could differentiate between powers to negotiate, to adopt a text, or to initial, sign or conclude an international agreement. In their content, such special full powers hold special instructions from the government.[56]

With regard to the authority issuing full powers, a distinction can be made between powers issued by the president to conclude state agreements, powers issued by the prime minister to conclude government agreements, and powers issued by the competent minister in the case of concluding departmental agreements.[57]

With regard to the term for which the full powers are issued, persons acting on behalf of a state, as well as representing states in international organizations, as a rule must hold special authorization. It is worth pointing out that such an authorization concerns clearly specified and one – time activities, and is issued for a specified period of time. In contrast, a specific type of general authorization, essentially indefinite, under which a representative performs multiple actions forming part of his or her duties, are letters of credence.[58]

With regard to the entity recognized by international law, one can distinguish full powers issued by competent authorities of the state, which usually results from the regulations stipulated by the state's internal law, and in the case of international organizations, full powers issued by the highest officer of such an organization. The statutes and bylaws of specialized organizations use the term 'full powers'. It should be noted here that such a document is given to delegates of states only for the duration of sessions held by authorities, and not to states' permanent representatives in the organization. It is not the name of the authorization but its scope that

55 I. Sinclair, *The Vienna Convention on the Law of Treaties*, Manchester 1973, p. 32.
56 J. Sozański, op. cit., p. 77.
57 M. Frankowska, op. cit., p. 68.
58 G. Grabowska, *Prawo dyplomatyczne w stosunkach państw z organizacjami międzynarodowymi*, Katowice 1980, p. 119–120.

determines the powers of the head of mission or delegation. When differentiating between the nature of missions and delegations of states, it can be presumed that heads of permanent diplomatic missions receive letters of credence, while heads of delegations to authorities and to conferences act on the basis of an authorization similar to full powers.[59] An interesting distinction between full powers and letters of credence was drawn by M. Fitzmaurice, who pointed out that letters of credence are submitted to an international organization or a government organizing conferences by a delegate participating in the negotiations, and authorize the delegate only to accept the text of a treaty and sign the final deed. In contrast, the signing of a treaty requires general full powers or specific instructions received from the government in such an instrument. Full powers and letters of credence can be set out in one document.[60]

Due to the mode in which a given agreement is concluded, one can distinguish between full powers to conclude an agreement, and full powers to sign an agreement. In the simple procedure, a state becomes a party to an agreement as a result of its signing by plenipotentiaries or by exchanging with a counterparty documents forming the agreement (sometimes the initialing can have the effect of signing an international agreement if the negotiating states have so agreed). In the complex procedure, the signing merely reveals the state's intention to be bound by the agreement, while the state represented by the plenipotentiary acquires the status of signatory.[61]

Full Powers in the Polish Treaty Procedure

In Polish law, the procedure for issuing international full powers is regulated by the Act on International Agreements of 2000, and the Regulation of the Council of Ministers of 2000 on the Implementation of Cer-

59 Ibidem, p. 120.

60 M.D. Evans ed., op. cit., p. 177.

61 R. Kwiecień, *Miejsce umów międzynarodowych w porządku prawnym państwa polskiego*, Warszawa 2000, p. 70.

tain Provisions of the Act on International Agreements.[62] Pursuant to Article 9 of the aforementioned Act, the Minister of Foreign Affairs is the authority authorized to issue full powers to negotiate and adopt a text of an international agreement. The issuance of full powers by the Minister of Foreign Affairs is subject to prior consent given by the Prime Minister to conduct negotiations. This consent also includes the designation of the official authorities involved in the negotiations. In turn, in accordance with Article 10 of the aforementioned Act, full powers to sign an agreement are granted by the Prime Minister. This competence stems from Article 148(4) of the Constitution of the Republic of Poland, under which the Prime Minister determines how to implement the policy of the Council of Ministers, which had previously given its consent to the signing of an agreement. Such authority applies to all categories of agreements, including agreements requiring ratification.[63]

The analysis of the aforementioned regulations shows that the President of the Republic of Poland is not a competent authority to sign an agreement that requires ratification. As A. Wyrozumska rightly pointed out, since the President does not conclude an agreement, and the signing of an agreement is undoubtedly a stage in the procedure of concluding ratified agreements, the President cannot have at the same time the authority to issue full powers. Polish regulations governing the procedure for concluding international agreements give such authority to the President, but only with the prior consent of the Council of Ministers, when the government authorizes the President to act on its behalf.[64]

When the state is represented by a plenipotentiary, what applies is the procedure set out in the Regulation of 2000. Pursuant to section 7, an application for granting full powers to conduct negotiations, adopt the text

62 Cf. text of the Act on International Agreements of 14 April 2000 (Dz.U. 2000 No. 39, item 44); cf. text of the Regulation of the Council of Ministers of 28 August 2000 on the Implementation of Certain Provisions of the Act on International Agreements, Journal of Law 2000 No. 79, item 891.

63 A. Wyrozumska, op. cit., p. 155.

64 Ibidem, p. 155.

of an international agreement, or sign it shall be submitted by the authority competent to conduct negotiations to the minister in charge of foreign affairs at least 14 days before the commencement of negotiations, the intended adoption of the text of an international agreement, or its signing. An application may be submitted later only in exceptional cases and requires detailed justification. In turn, the minister responsible for foreign affairs is competent to submit an application for granting full powers to sign an international agreement to the Prime Minister within 7 days of receiving an application on this matter from the authority competent to conduct negotiations. An application made at a later date can also take place in exceptional cases and requires detailed justification. Section 7(3) of Regulation of 2000 puts forth the formal requirements of the application, in particular the title of the international agreement, the negotiating parties in the case of an application for full powers to negotiate or adopt the text of an international agreement, obtaining consent to hold negotiations, adopt the text of an international agreement, or sign it, as well as the full name, official position or function of the person to be the plenipotentiary. Other instruments are attached to the applications, namely a document confirming the consent to conduct negotiations, the adoption of the text of the international agreement, or its signing, the Polish text of the international agreement, or the text of its translation into Polish, certified by the authority competent to conduct negotiations by inserting the clause 'certified translation', justification and the negotiation instructions, unless specific provisions exempt the obligation to draw up such documents. Application templates form annexes to the Regulation of 2000.[65]

Conclusions

Summarizing the above considerations, it should be noted that the institution of full powers has evolved over the years and continues to be very important in the process of concluding international agreements.

65 Ibidem, p. 156.

A historical analysis of the institution of full powers, an analysis of the provisions of the 1969 and 1986 Vienna Conventions, and the practices of entities recognized by international law, allows us to conclude that the practice of issuing full powers is diverse, and often depends on the regulations contained in the internal law of a given state, as well as the rules and statutes of international organizations. A further field for scholarly analysis of the use of the institution of full powers could be an analysis of the diplomatic practice of international law actors other than states and international organizations. In view of the increasing number of international agreements, the emergence of increasingly specialized international organizations, and the lack of uniform practice in the institution of full powers, it should undoubtedly be said that this is an indispensable institution, since the appointment of a plenipotentiary speeds up the process of concluding an international agreement.

It is worth noting that an analysis of Article 7(1) of the VCLT, to which a substantial part of this study has been devoted, shows that it embodies a certain general principle for each stage of the conclusion of treaties, which is equally important in relation to Article 9 on the adoption of the text of a treaty, Article 10 on the determination of the authenticity of the text of a treaty, and Articles 11 to 17 on giving consent to be bound by a treaty. Questions of empowerment are also regulated explicitly or by implication in other articles of the Vienna Convention: Articles 2(1)(c), 12(1)(c), 14, as well as Articles 46 and 47, which could be the focus of analysis in another study.[66]

The proposed classification of full powers, based on the collected literature on the subject matter, is not exhaustive. The constantly evolving practice of states in this area, and in particular evolving diplomatic law, may lead to the development of a new practice or the creation of new rules for concluding international agreements by plenipotentiary. Nevertheless, the subject matter addressed in this publication seems to be very interesting and merits further didactic analysis.

66 O. Corten, P. Klein, *op. cit., p. 126.*

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SUMMARY

The Institution of Full Powers in the Process of Concluding International Agreements

This paper addresses issues related to the institution of full powers in the process of concluding international agreements. The author makes an analysis of the historical evolution of the institution of full powers and discusses the essential elements of the full powers instrument with regard to the representation of the state and international organizations, taking into account current international law regulations. In this regard, the author also refers to international practice and, based on a review of the scholarly literature, attempts to classify full powers.

Finally, the author presents the practical aspects involved in appointing plenipotentiaries on the example of regulations in force in the Polish legislative system.

Keywords: full powers, state representation, treaty law, international agreement.

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An Examination of Multinational Corporations' Accountability in the light of Switzerland's failed Responsible Business Initiative in the Covid-19 Pandemic Era

Introduction

The amount of international business done by multinational corporations has increased, with the attendant consequences of human rights violations[1] and abuse of the environment.[2]An MNC is an enterprise that operates in many countries but is managed from one country, customarily called the home country. It is "a legal person that owns or controls production, distribution, or service facilities outside the country in which it is based".[3] Developing countries that lack job opportunities for their masses benefit from MNCs as these MNCs expand their operations through their subsidiaries in these countries.[4] The paradox of this

1 S.D. Bachmann, *Bankrupting Terrorism: The Role of US Anti – terrorism Litigation in the Prevention of Terrorism and Other Hybrid Threats: A Legal Assessment and Outlook*, "Liverpool Law Review" 2012, vol. 33, p. 96.

2 U. Baxi, *Human Rights Responsibility of Multinational Corporations, Political Ecology of Injustice: Learning from Bhopal Thirty Plus?*, "Business and Human Rights Journal" 2015, vol. 1, pp. 21–40.

3 N. Jägers, *Corporate Human Right Obligations: In Search of Accountability*, "Human Rights Research Series" 2002, vol. 17, p. 11. See also J. P. Mujyambere, *The Status of Access to Effective Remedies by Victims of Human Rights Violations Committed by Multinational Corporations in the African Union Member States*, "Groningen Journal of International Law" 2017, vol. 5, p. 257.

4 J. Ahiakpor, *Multinational Corporations in the Third World: Predators or Allies in Economic Development?*,"Religion and Liberty" 2010, vol. 2.

is that while MNCs provide job opportunities for developing countries,[5] they constantly engage in human rights violations and environmental pollution.[6] At the international level, efforts, in the form of soft laws have been made to hold MNCs accountable for these violations, but they always fail to be effective.

Switzerland, a country with many MNCs that operate not just in the developing countries, but the whole world, recently went to the polls to vote on two referendums – the "Responsible companies – to protect human beings and the environment" and the "ban on financing producers of war material". While the two failed to get the required cantonal votes, this article will focus on the "responsible companies – to protect human beings and the environment" initiative, popularly called the Responsible Business Initiative (RBI), which required Swiss companies to ensure that their subsidiaries and supply chains comply with UN human rights guidelines and a range of international environmental standards. There are many reasons why these referendums failed, including the fact that according to the government, given that Switzerland's economy was already nosediving due to the Covid-19 pandemic, it would have hurt the Swiss economy evenmore to enforce strict accountability measures on Swiss MNCs.[7] Although it is not certain to what extent the Covid-19 pandemic influenced peoples' voting, politicians and business owners used it to campaign against the RBI. Therefore, in this article, the RBI and other international law policies on responsible business operation, including the UN Guiding Principles on Business and Human Rights, will be discussed. Also, how politicians politicised the Covid-19 pandemic as a reason for the rejection of the RBI will be ex-

5 E. Giuliani and C. Macchi, *Multinational Corporations' Economic and Human Rights Impacts on Developing Countries: A Review and Research Agenda*, "Cambridge Journal of Economics" 2014, vol. 38, p. 479.

6 K. Omoteso and H. Yusuf, *Accountability of Transnational Corporations in the Developing World: The Case for an Enforceable International Mechanism*, "Critical Perspectives on International Business" 2017, vol. 13, pp. 54–71.

7 N. Illien, *Plan to Hold Corporations Liable for Violations Abroad Fails in Switzerland*,"The New York Times" 29 November 2020.

amined. Finally, it is recommended that economic considerations should not impede the enforcement of human rights and laws on protecting the environment. Another recommendation would be that the RBI could be altered after the Covid-19 pandemic ends, and then resubmitted for another referendum, since many other countries like the United States of America, the United Kingdom, and the Netherlands are beginning to move towards holding parent companies liable for acts of their subsidiaries abroad.

The Precursor to the Responsible Business Initiative: The UN Guiding Principles and Compliance by Swiss Multinational Corporations

This section looks at the provisions of the UN Guiding Principles and at whether Swiss MNCs comply with them. To achieve this, I will cite instances of severe allegations of human rights violations and environmental damage caused by Swiss MNCs. These were what led to the RBI.

The UN Guiding Principles

The recent attempts at making MNCs more responsible in respecting human rights in the context of business operation dates back to 1998, when the Working Group on the Working Methods and Activities of Transnational Corporations was established by a Sub-Commission of the UN Commission on Human Rights.[8] There were other subtle legal frameworks, in the form of Corporate Social Responsibility by the OECD and the UN, which were indirectly imposed on MNCs through states' intermediary.[9] This Working Group's efforts culminated into the Norms on the Responsibilities of Transnational Corporations and Other Business

8 P.P. Miretski and S.D. Bachmann, *The UN 'Norms on the Responsibility of Transnational Corporations and other Business Enterprises with Regard to Human Rights': A Requiem*, "Deakin Law Review" 2012,vol. 17, p. 7.

9 Ibidem, p. 10; Some of these also include the Convention on the Elimination of All Forms of Discrimination against Women, and the OECD and UN Anti – Bribery Conventions.

Enterprises with Regard to Human Rights,[10] which was subsequently approved by the Sub-Commission in August 2003. States fiercely opposed the Norms because, among other things, it entailed that MNCs indirectly imposed human rights obligations on States. This duty also applies even when a state refuses to ratify the treaty or convention establishing these obligations.[11] In 2005, the Norms were abandoned after UN organs were tasked with coming up with regulations on MNCs' accountability,[12] and in 2011, the UN Guiding Principles were adopted.

The UN Guiding Principles are divided into three main parts – States' Duty to Protect Human Rights,[13] Corporate Responsibility to Respect Human Rights,[14] and Access to Remedy.[15] These are the trinitarian themes of the UN Guiding Principles – protect, respect, and remedy. It is the responsibility of States to protect human rights in their territory against abuse by third parties, including business enterprises, by introducing laws, regulations, and policies that would address the investigation, punishment, and redress of such abuse.[16] Even though States are required to make it clear to businesses domiciled in their territory that they must respect human rights throughout their operations,[17] States are not

10 Sub-Commission on the Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 2003, UN ESCOR, 55th sess, 22nd mtg, Agenda Item 4, UN Doc E/CN.4/Sub.2/2003/12/Rev.2; S. Deva, *UN's Human Rights Norms for Transnational Corporations and other Business Enterprises: An Imperfect Step in the Right Direction*, "ILSA Journal of International and Comparative Law" 2004, vol. 10, p. 493; O. Martin-Ortega, *Business and Human Rights in Conflict*, "Ethics and International Affairs" 2008,vol. 22,p. 273; J. Campagna, *United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights: The International Community Asserts Binding Law on the Global Rule Makers*, "The John Marshall Law Review" 2004, vol. 37, p. 1205.

11 P.P. Miretski and S.D. Bachmann, *The UN 'Norms on the Responsibility…* p. 8 and p. 10; J.G. Ruggie, *Business and Human Rights: The Evolving International Agenda*, "American Journal of International Law" 2007, vol. 101, pp. 825–826.

12 P.P. Miretski and S.D. Bachmann, *The UN 'Norms on the Responsibility…* p. 9.

13 The United Nations Human Rights Council, *The UN Guiding Principles*… 1–10.

14 Ibidem, Principles 11–24.

15 Ibidem, Principles 25–31.

16 Ibidem, Principle 1.

17 Ibidem, Principle 2.

generally required to regulate the activities of their domestic businesses abroad, except where a crime has been committed, and a State is required to prosecute the crime based on the nationality jurisdiction.[18] The justification for this Principle is that some business enterprises are independent of their home country, making extraterritorial regulation difficult. It is expected that all States will comply with the UN Guiding Principles, thereby making extraterritorial regulation amounting to double regulation unnecessary.

When it comes to business enterprises, they should respect human rights,[19] and this obligation to respect refers to "internationally recognised human rights…as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organisation's Declaration on Fundamental Principles and Rights at Work".[20] Business enterprises must avoid causing human rights violations through their activities and immediately address such when they occur.[21] Business enterprises are to carry out human rights due diligence by "assessing actual and potential human rights impacts, integrating and acting uponthe findings, tracking responses, and communicating how impacts are addressed".[22] The UN Guiding Principles recognise the fact that unforeseen human rights abuse might occur even after a business enterprise has taken human rights due diligence, and when this occurs, "they should provide for or cooperate intheir remediation through legitimate processes."[23] It is worth noting that the duties imposed on business enterprises by the UN Guiding Principles apply regardless of "the size, sector, operational context,ownership, and structure" of the business enterprise.[24]

18 Ibidem, Commentary to Principle 2.
19 Ibidem, Principle 11.
20 Ibidem, Principle 12.
21 Ibidem, Principle 13 (a).
22 Ibidem, Principle 17.
23 Ibidem, Principle 22 and its Commentary.
24 Ibidem, Principle 14.

On access to remedy,"[s]tates must take appropriate steps to ensure, through judicial,administrative, legislative, or other appropriate means, that when such abuses occur within their territory and/or jurisdiction, those affected have access to an effective remedy."[25]Access to remedy can be achieved if the barriers preventing access to justice, such as prolonged legal matters, high costs of instituting claims in court, denial of justice regardless of the merits of the claims, partiality, lack of integrity, and the corruption of judicial officials, are removed.[26]

In Switzerland, the Swiss National Action Plan (the Swiss NAP),which the Swiss government presented in 2016, was focused on implementing the UN Guiding Principles. The Swiss "NAP highlighted that corporations are expected to conduct human rights due diligence in their activities in Switzerland and abroad",[27] and this plan had to be reviewed and updated after four years. So, there are revised National Action Plans 2020–2023, approved by the Swiss National Council on 15 January 2020, on the Implementation of the UN Guiding Principles on Business and Human Rights.[28]In the view of Swiss civil society organisations, the revised version of the Swiss NAP do not constitute a robust framework for ensuring that Swiss businesses, and their business partners abroad, respect human rights in their operations,[29] and it is asserted that it lacks rigour in comparison with the NAPs of other countries.[30] According to the Swiss Coalition for Justice, it is unfortunate that the Swiss NAP does not provide for any binding instrument, such as manda-

25 Ibidem, Principle 25.

26 Ibidem, Principle 26 and its Commentary.

27 N. Bueno, *The Swiss Responsible Business Initiative and its Counter – proposal: Texts and Current Developments*, "Business and Human Rights Journal Blog" 2018, no. 1.

28 Swiss Action Plan 2020–2023, 15 January 2020 <https://globalnaps.org/wp-content/uploads/2020/05/beilage-01-directeurs-entreprises-l%E2%80%99homme-la-eda-bf.pdf>.

29 The civil society organisations in Switzerland released a joint statement on their views on the revised Swiss NAP, entitled "Business and Human Rights: Switzerland's new yet Incomplete Action Plan" 2020, p. 1, <https://globalnaps.org/wp-content/uploads/2020/05/stakeholder-analysis-nap-020–2023.pdf>

30 Ibidem, p. 2.

tory due diligence for MNCs,[31] and this, as discussed in the next section, has resulted in many reports of human rights violations and damage to the environment abroad, as MNCs were not mandated to comply with the NAP.

Human Rights and Environmental Violations by Swiss Multinational Corporations

As one of the world's wealthiest countries, a substantial part of Switzerland's GDP is generated from MNCs "importing raw materials and turning them into high – value goods, such as pharmaceuticals or luxury watches".[32] In addition, Switzerland has the world's largest MNC footprint and was named the most competitive nation in 2013.[33] Reports abound of Swiss MNCs' activities that violate human rights and destroy the environment, contrary to the requirements of the UN Guiding Principles. The actual test of the effectiveness of the UN Guiding Principles on Swiss MNCs is focused on their business and human rights compliance. In Bolivia, Sociedad Minera Illapa S.A., a 100% subsidiary of Glencore, a Swiss corporation, employs underage workers as young as eleven to work in mining operations. There are approximately 20 fatalities annually on the mining site, caused by accidents.[34] Besides this, the mining activity in that region "pollutes the Agua Castillo River, which is the primary source of drinking water for the surrounding villages".[35]

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31 Swiss Coalition for Corporate Justice, *Switzerland's disappointing Action Plan on Business and Human Rights*,"European Coalition for Corporate Justice"13 December 2016 <https://corporatejustice.org/news/359-switzerland-s-action-human-ights>.

32 K. Hetze and H. Winistörfer, *Insights into the CSR Approach of Switzerland and CSR Practices of Swiss Companies*in:*Corporate Social Responsibility in Europe*, eds. S.O. Idowu, R.Schmidpeter and M.S. Fifka,Switzerland 2015,p. 154.

33 Ibidem.

34 Public Eye, *Glencore shirks its Responsibility in Bolivia*, "Public Eye" 2020 <https://www.publiceye.ch/en/media-corner/press-releases/detail/mine-child-shirks-ts-esponsibility-in-bolivia>

35 KonzernVerantwortungs Initiative, *Minors Toil in the Glencore Mine* <https://konzern-initiative.ch/beispiel/minderjaehrige-schuften-glencore-ine/>

The Swiss IXM buys copper ore from Namibia, where Bulgarian copper is processed and subsequently sold to other countries. Arsenic and other heavy metals are released during copper processing. The toxic arsenic is stored in sugar sacks in an open-air dump on a small town's outskirts.[36] In a 2018 study, it was found that the amount of arsenic and other toxic metals around the smelting area is very high,[37] and very toxic to human health when inhaled or upon skin contact.[38] LafargeHolcimhas a subsidiary in Nigeria, the Wapco-Lafarge Ewekoro Cement Plant I & II, where there are reports of dust from the factory polluting the Ewekoro community. The dust's impact on the lives of inhabitants around the area and workers includes respiratory diseases,[39] as well as liver, lung and spleen damage.[40] Again, Glencore, through its 100% subsidiary, PetroChad Mangara, violates human rights in Melom, a village in south-western Chad. By-products of their oil production are channelled to the wastewater, but unfortunately, it spills to a nearby river, from which the villagers drink. According to a report, "dozens of residents suffered physical injuries including burns,skin lesions, and pustules on the skin. Others complainedvcof blurred vision, stomach aches, internal pains, vomiting and diarrhoea after using, and sometimes drinking, the water from the river".[41]The Swiss corporation Syngenta sold pesticides that

36 R. Schenkel, *Dump with Toxic Arsenic next to a Residential Area: A Swiss Company Purchases Copper from a Controversial Smelter*, "AargauerZeitung" 2020 <https://www.aargauerzeitung.ch/schweiz/deponie-mit-giftigem-neben-firma-umstrittenen-chmelzerei-39594138>.

37 I. Hasheela, *Contamination Mapping and Land Use Categorization for Tsumeb, Namibia*, "Communications of the Geological Survey of Namibia" 2018, vol. 19, p. 1.

38 D. Popov, *Dirty Precious Metals: Dumping European toxic waste in Tsumeb, Namibia*, Namibia 2016, p. 11.

39 M.N.Chukwu and N.I.Ubosi, *Impact of Cement Dust Pollution on Respiratory Systems of Lafarge Cement Workers, Ewekoro, Ogun State, Nigeria*, "Global Journal of Pure and Applied Sciences" 2016, vol. 22, pp. 1–5. See also E.E.Ekeng, S.E.Bejor, and I.E.Ibiang, *Effluent Effect from Lafargeholcim Cement Plant on Environment in Cross River State, South – South, Nigeria*" International Journal of Scientific & Engineering Research" 2017, vol. 8, pp. 731–740, where the authors analysed the health impact of Lafargeholcim business activities in another part of Nigeria.

40 KonzernVerantwortungs Initiative, *Lafargeholcim Puts People at Risk with Cement Dust* <https://konzern-initiative.ch/beispiel/lafargeholcim/>

41 RAID, *Glencore's Oil Operations in Chad: Local Residents Injured and Ignored* 2020, p. 4, <https://konzern-initiative.ch/wp-content/uploads/2020/03/raid-glencore-had.pdf>

contain toxic substances – paraquat and profenofos, already banned for use in the European Union and Switzerland, to Asia, Africa, and South America. Through long-term exposure, paraquat damages the lungs, eyes, kidneys and heart.[42] It was only during the campaign for and against the RBI that the Swiss government banned the exportation of these pesticides.[43]

These reports of human rights violations and environmental damage by subsidiaries of Swiss corporations necessitated the initiation and promotion of the RBI.The next section looks at how the RBI was intended to address these abuses and the role of the Covid-19 pandemic in the failure of the RBI.

The Responsible Business Initiative (RBI) and the Counter Proposal

In this section, attempts will be made to look at the provisions of the RBI, the provisions of the Counter Proposal, and other opposing opinions of the RBI, especially from business owners.

The Responsible Business Initiative

Barely five years after the UN Guiding Principles on Business and Human Rights (UN Guiding Principles) were endorsed by the United Nations Human Rights Council, the Swiss government presented the Swiss National Action Plan on the implementation of theUN Guiding Principles, which would require Swiss companies to ensure human rights due diligence in their activities in Switzerland and with their subsidiaries abroad.[44] In 2015, a group of non – government organisations submitted the RBI, which mandated that corporations and their subsidiaries would haveto respect human rights and the environment. The RBI only gath-

42 F. Harvey, *Toxic Pesticides Banned for EU use Exported from UK*,"The UK Guardian" 10 September 2020 <https://www.theguardian.com/environment/2020/sep/10/toxic-pesticides-banned-eu-se-xported-from-uk>

43 K. Schafer, *Switzerland to stop Exporting Banned Pesticides*, "PAN"15 October 2020 <https://www.panna.org/blog/switzerland-stop-exporting-pesticides#:~:text=This%20week's%20decision%20affects%20five,be%20exported%20from%20the%20country>

44 N. Bueno, *The Swiss Responsible Business* …, p. 1.

ered the required 100,000 signatures in 2016. If the RBI had succeeded, the Swiss parliament would have been obligated to amend the constitution to reflect the RBI.[45]

The RBI proposed the below two far-reaching provisions as Article 101a to the Constitution of Switzerland:

1. The Swiss government was to take measures to strengthen respect for human rights and the environment through business. This was the general principle of the initiative and the general idea behind the RBI. As a result, the government could take measures in all legal fields additional to those changes required by the initiative text. Not only is the government competent to take the appropriate steps but was also mandated to do so.[46]
2. The obligations of corporations with their registered office, central administration, or principal place of business in Switzerland shall be regulated by law in accordance with the following principles:
   a) Such corporations and businesses under their control abroad, must respect *internationally recognised*[47] human rights and international environmental standards.
   b) Corporations, together with their controlled businesses abroad, are required to carry out appropriate due diligence. This means that they must: identify real and potential impacts on internationally recognised human rights and the environment; take appropriate measures to prevent the violation of internationally recognised human rights and international environmental standards; cease existing violations, and account for the actions taken.

45 Swiss Federal Chancellery, *The Swiss Confederation – A Brief Guide*, "Communication Support", 2019, p. 18.

46 Swiss Coalition for Corporate Justice, *The Initiative Text with Explanations*, "Factsheet V", p.1 <https://media.business-humanrights.org/media/documents/files/documents/150421_sccj_factsheet_5_-_responsible_business_initiative.pdf>

47 Emphasis added.

c) Corporations are also liable for damage caused by other corporations under their control, where they have, during business operation, committed violations of internationally recognised human rights or international environmental standards.Nevertheless, this liability will not apply where corporations prove that they took all due care.
d) These will apply irrespective of the law applicable under private international law.

The RBI was far-reaching in its scope and intended legal regime. The RBI's objective was to make Switzerland comply with all internationally recognised human rights laws,including the UN Guiding Principles,[48] the Universal Declaration of Human Rights,[49] the International Covenant on Economic, Social and Cultural Rights (ICESCR),[50] the International Covenant on Civil and Political Rights (ICCPR),[51] the OECD Guidelines for Multinational Enterprises,[52] etc. and international environmental standards such as the rules set by the Vienna Convention for the Protection of the Ozone Layer,[53] the Montreal Protocol,[54] the Protection of Global Climate Resolution of 1988,[55] etc.

An interesting part of the RBI is that it used the phrase "*internationally recognised* human rights standard" while referring to the laws that

48 The United Nations Human Rights Council, *UN Guiding Principles …*,
49 United Nations General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, GA Res 217 A (III) UN – Doc A/810 at 71.
50 The United Nations General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3.
51 The United Nations General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171.
52 Organisation for Economic Cooperation and Development, *OECD Guidelines for Multinational Enterprises* 2011 <http://www.oecd.org/daf/inv/mne/48004323.pdf>
53 UN General Assembly, *Vienna Convention for the Protection of the Ozone Layer*, 22 March 1985, reprinted in 26 I.L.M. 1516 (1987).
54 UN General Assembly, *Montreal Protocol on Substances that Deplete the Ozone Layer*, 16 September 1987, reprinted in 26 I.L.M. 1541 (1987).
55 UN General Assembly, *Protection of Global Climate for Present and Future Generations of Mankind* resolution/adopted by the General Assembly, 6 December 1988, A/RES/43/53.

Swiss corporations must abide by. An argument could arise over what "internationally recognised" law means. Would a regional law, like the African Charter on Human and Peoples Rights,[56] for instance, be regarded as internationally recognised?An internationally recognised human rights standard is international law, and in its most straightforward meaning, international law is defined as those set of rules that "govern[ ]relations between *Independent States*."[57] If this definition is correct, then the RBI would have forced the Swiss government to accept the rules set by the UN Intergovernmental Working Group (IGWG) in 2018 called the "Binding Treaty"[58] and its Optional Protocol,[59] because they are to guide multinational corporations' activities in *independent states*.The Binding Treaty and its Optional Protocol aimed at reinforcing respect, advancement, safety, and enforcement of human rights in the light of transnational business activities,[60] which most of the European countries under the auspices of the European Union had already objected to,[61] would have indirectly

56 African Union, *African Charter on Human and Peoples' Rights)*, 27 June 1981, CAB/LEG/67/3 rev 5, 21 ILM 58 (1982).

57 Emphasis added. Permanent Court of International Justice, *'Lotus', France v Turkey*, Judgment No 9, PCIJ Series A No 10, ICGJ 248 (PCIJ 1927), (1935) 2 Hudson, World Ct Rep 20, 7th September 1927, p. 16.

58 The United Nations Intergovernmental Working Group (IGWG), *Binding Instrument To Regulate, In International Human Rights Law, The Activities Of Transnational Corporations And Other Business Enterprises* 6 July 2018 <https://www.business-humanrights.org/sites/default/files/documents/DraftLBI.pdf>. In 2019, the Zero Draft was revised into a well mature, well-constructed, and coherent document. The revised form provides that the Zero Draft will also guide all businesses, not just transnational corporations. See Opennded Intergovernmental Working Group, *Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, 2019. <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf>

59 The United Nations Intergovernmental Working Group (IGWG), *Draft Optional Protocol to the Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises*, October 2018 <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session4/Zero-DraftOPLegally.PDF>

60 The IGWG, *Binding Instrument to Regulate…*, art 2.

61 CIDSE, *Pressure Growing for a UN Binding Treaty with or without the EU's support*, "CIDSE" 19 October 2018 <https://www.cidse.org/newsroom/pressure-growing-for-un-without-he-u-s-support.html>

found its way into Swiss law, thereby enjoying the support of a developed country.

A more expansive definition of international law is that "international law is the totality of norms which have not been created by single states but by customary international law or by international treaties."[62] Nevertheless, it is doubtful whether this was the intention of the initiators of the RBI, because the RBI refers specifically to the UN Guiding Principles, which, as soft laws, are not even binding[63] and are not in the form of a treaty.

Another critical aspect of the RBI is "control": "whoever controls a company should use this control to prevent violations of human rights and the environment. Whoever gains an economic benefit from another should also carry his share of the associated risks. If a Swiss company controls an economic entity abroad, Swiss law has the task to protect people from human rights and environmental damage abroad."[64] Traditionally, corporations under control include subsidiaries within a corporate group and subcontractors or suppliers under certain conditions.[65] For instance, Glencore, an MNC with its mining headquarters in Baar, Switzerland, was on many occasions accused of engaging in environmental pollution,[66] child labour, and tax evasion in the Democratic Republic of the Congo, (DRC)[67] through its groups in DRC:Katanga Mining Limited and Mutanda Mining.Those that campaigned for the RBI highlighted how the agrochemical giant Syngenta is still marketing pesticides long banned in Switzerland in developing nations and

62 A. Von Verdross, *On the Concept of International Law*, "The American Journal of International Law"1949, vol. 43, p. 435.

63 P.P. Miretski and S.D. Bachmann, *The UN 'Norms on the Responsibility.*…, p.25.

64 Swiss Coalition for Corporate Justice, *The Initiative Text with Explanations*…, p. 2.

65 N. Bueno, *The Swiss Responsible Business* …, p. 2.

66 S. Bradley, *Glencore Accused of Environmental Pollution in DRC,*"Swissinfo.ch"27 November 2018 <https://www.swissinfo.ch/eng/business-and-human-accused-drc/44574658>

67 Business & Human Rights Resource Centre, *DRC: Glencore Copper – Cobalt Mine Allegedly Linked to Pollution, Child Labour and Tax Evasion; Including Past Company Responses*, "Business & Human Rights Resource Centre"17 March 2020 <https://www.business-humanrights.org/en/latest-news/drc-copper-to-tax-responses/>

strongly condemned the small – particle contamination spewed from theLafarge Africa Plccement plant operated by LafargeHolcim in Nigeria.[68] So, in these instances, the RBI entailedthat Glencore and Lafarge-Holcim would be liable for the Katanga Mining Limited and Lafarge Africa Plc actions, respectively, for their human rights abuses under the control principle of the RBI.

Under international law, conflict of laws is fundamental, especially when the parties involved are of different nationalities or the case in questionhas connections to more than one jurisdiction.[69] The RBI, in-paragraph 5, provides that the new law would apply irrespective of applicable law under private international law.The reason for this provision is to make sure that the implemented RBI rules would be applicable regardless of conflict of laws rules.In other words, Swiss law would be applicable if a Swiss corporation were sued for violations committed abroad, as though they were committed in Switzerland. This state law-centred conflict-of-laws approach, even though it has been criticised because "domestic laws… are often ill-suited for the special needs of international trade",[70] would have been great since most developing countries where these Swiss corporations have subsidiaries do not have effective laws for holding MNCs liable for human rights violation and environmental damage.This would have also made it possible for the implemented RBI to develop into a model for other countries to emulate.

68 Aljazeera, *Plan to Boost Swiss Firms' Global Liability Fails in Referendum*,"Aljazeera"29 November 2020 <https://www.aljazeera.com/news/2020/11/29/plan-to-boost-firms – global – liability – fails – in – referendum>

69 Black's Law Dictionary, *Conflict of Laws*, 11th ed. 2019.

70 M.J. Bonell, *The Law Governing International Commercial Contracts and the Actual Role of the UNIDROIT Principles*, "Uniform Law Review" 2018, vol. 23, p. 16.

The Counter Proposal and Oppositions to the Responsible Business Initiative

Unlike the RBI,which came by way of a constitutional amendment, the Swiss parliament came up with a Counter Proposal in the form of a modification of the Swiss Code of Obligations[71] by including a new article 964bis. The CounterProposal is a milder version of the RBI without creating civil liability for corporations. On certain human rights, environmental, social, anti – corruption, and employment – related issues, it imposes comprehensive non – financial reporting responsibilities. It also sets out additional duties of due diligence and accountability about conflict minerals and child labour.[72] The Counter Proposal, just like the RBI, has three novelties that include a due diligence obligation, a non – financial reporting obligation, no civil liabilitybut criminal sanctions. Bueno recognises a fourth element of the Counter Proposal to be "an overriding mandatory provision to ensure application of Swiss law ininternational matters."[73]

a) The due diligence and transparency obligation: The board of directors is mandated to take measures to ensure that the corporation complies with the provisions for protecting human rights and the environment relevant to its areas of activities, including abroad. In other words, the board of directors must identify and assess actual and potential human rights and environmental risks; take measures to prevent risks and mitigate violations as well as monitor the effectiveness of the measures and account for how it addresses impacts.[74] This obligation extends to minerals and metals produced out of conflict areas[75] and regarding

71 The Swiss Code of Obligations SR/RS 22 220 Federal Act of 30 March 1911. This is the law that regulates contract law and corporations in Switzerland.

72 V.A. Duvanel, *The Swiss Responsible Business Initiative Has Been Rejected, but the Government's Counterproposal Will Likely Enter Into Force: Brief Overview of the New Duties for Companies*, "JDSUPRA" 10 December 2020.

73 N. Bueno, *The Swiss Responsible Business* …, p. 2.

74 Ibidem; Proposed Art 716 abis (1)(5) Code of Obligation.

75 The "conflict minerals" is based on EU Regulation 2017/821. See Regulation (EU) 2017/821 *of the European Parliament and of the Council of 17 May 2017 laying down supply chain*

child labour[76] for corporations with a registered office, central administration, or principal place of business in Switzerland.[77] The Counter Proposal allows those corporations to comply with a certain degree of due diligence obligations in their supply chain if they are involved in the importation into Switzerland of certain minerals or metals or in the production in Switzerland of such minerals or metals; or provide goods or services manufactured or made using child labour. Unlike the RBI, the Counter Proposal sets a threshold for companies that are required to comply with the due diligence and transparency obligations. In order words, these obligations apply to corporations that satisfy two out of the following three thresholds – (i) a balance sheet of CHF40 million, (ii) a turnover of CHF80 million, and (iii) employment of 500 employees.[78] This is quite unlike the UN Guiding Principles,which apply regardless of "the size, sector, operational context, ownership, and structure" of the business enterprise.[79] Again, while the RBI would have required Swiss corporations to comply with *internationally recognised* human rights and environmental standards, the Counter Proposal limits its application only to binding provisions under international law ratified by Switzerland.

b) Non-Financial Reporting Obligations: An annual report detailing due diligence procedures and processes used in relation to non-financial matters (human rights, environmental, social, anti-corruption and employment-related) would have to be provided by

due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict – affected and high – risk areas OJL 130, 19 May 2017, 1–20.

76 This requirement is based on the Dutch Child Labour Due Diligence Act, proposed to come into force in 2022.

77 See the analysis by J. Kilchmann, *RBI: What is the Most Important Content of the Counter-Proposal?*, "KPMG Blog|"1 December 2020. <https://home.kpmg/ch/en/blogs/home/posts/2020/12/responsible-business-initiative.html>

78 Proposed Art 716abis (3) Code of Obligations.

79 The United Nations Human Rights Council,*The UN Guiding Principles…* Principle 14.

major Swiss public interest bodies (that is, public corporations and regulated financial institutions). The report will extend abroad to controlled corporations.[80] Corporations that meet the underlisted conditions are obligated to publish such a report on an annual basis: (i) corporations of a certain public interest in the sense of Article 2 (c) of the Audit Oversight Act,[81] which together with their subsidiaries in Switzerland and abroad, (ii) employ in two successive financial years at least 500 full-time positions on annualaverage, and (iii) exceed at least one of the following thresholds in two successive financial years: a balance sheet total of 20 million francs and sales revenues of 40 million francs.

c) No Civil Liability, but Criminal Sanctions: Failure to comply with the relevant annual reporting obligations or make false statements is subject to criminal liability, resulting in a fine of up to CHF 50,000 for negligence or CHF 100,000 for deliberate infringement.
d) The application of Swiss law in an international matter: The CounterProposal provides that Swiss law will apply to determine whether the company domiciled in Switzerland conducted the required due diligence and whether an international provision relating to human rights or the environment that Switzerland ratified has been violated. [82] This is also the same provision asthat contained in the RBI.

Apart from the Swiss government's opposition to the RBI, business owners in Switzerland vehemently opposed the RBI and even the Counter Proposal. Several multinational executives spoke out against it, and corporations put out full-page Swiss newspaper advertisements urging

80 V.A. Duvanel, *The Swiss Responsible Business Initiative*...

81 *The Audit Oversight Act*, SR 221.302, Federal Law Of 16 December 2005 on the Approval and Supervision of Auditors. Hereinafter: Law on the Supervision of the Revision, Lsr.

82 Article 139a to the Swiss Code of Private International Law (SPIL)

people not to vote for the RBI.[83] In a letter dated 8 August 2019 and addressed to the Swiss Legal Affairs Committee of the Council of States, an association of 19 Swiss corporations expressed concern that, relative to other jurisdictions, the RBI and the Counter Proposal are unusual in their reach and implementation, and would thus expose Swiss corporations to substantial legal risks.[84] But this is not entirely the case, considering that countries like the UK, the Netherlands, and the US have developed special means, such as the foreign direct liability principle, for holding their MNCs accountable for breaches abroad. So, the RBI would not have been the first of its kind if it had succeeded. The president of the board of LafargeHolcim, called the demands of the RBI "a gigantic absurdity,"[85] while Novartis and Nestlé board members said that the RBI would make them reconsider investing in high – risk countries, because the RBI would open a floodgate of lawsuits from foreigners from these high – risk countries.[86] But the truth is that some countries have developed special means, like the foreign direct liability principle, for holding their MNCs accountable for breaches committed abroad. So, the RBI would not have been the first of its kind if it had succeeded.

The opposition also came from members of parliament. The parliamentarian Christa Markwalder opposed the RBI and argued for the rejection of the original text of the RBI. According to her, Switzerland accommodates MNCs and small and medium – sized businesses that will be impacted by the proposal, thus it will harm Switzerland as an

83 N. Illien, *Plan to Hold Corporations Liable…*

84 Business & Human Rights Resource Centre, *Companies Clarify Position on Swiss Mandatory Human Rights Due Diligence Initiative*, "Business & Human Rights Resource Centre" 18 September 2019.

85 V. Gogniat, *Beat Hess, président de LafargeHolcim: «L'initiative sur les multinationalesestuneabsurdité gigantesque*, "Le Temps" 8 November 2020 <https://www.letemps.ch/economie/beat-hess-president-linitiative-newsletter_eco&utm_medium=email&utm_source=Newsletters&utm_term=0_56c41a402e-dd2f8f12f-10044885>

86 J.D. Plüss, *Big Multinationals in Switzerland have been nearly Unanimous in their Rejection of an Initiative to make Companies more Accountable for their Actions Abroad. What are they afraid of?*, "Swissinfo.ch", 15 November 2020.

economic business location.[87] These claims are what opponents think the economic impact of the RBI would be, without giving careful consideration to human rights violations and environmental damage caused by Swiss MNCs.

The position put forward by Novartis and Nestlé board members, namely that if the RBI were implemented, it would lead to a floodgate of cases lodged by foreigners, did not consider the acts likely to lead to these cases. They failed to address the human rights and environmental grounds on which these cases would be based. In any case, countries would be more willing to allow an MNC with a strong mechanism for addressing human rights and environmental violations to conduct business in their territories.[88] So, a strict human rights and environmental protection mechanism in Switzerland would almost always make other countries more receptive to Swiss MNCs.

The Responsible Business Initiative during the Covid-19 Pandemic

The current Covid-19 pandemic is caused by SARS-CoV-2 (severe acute respiratory syndrome, coronavirus 2),[89] which wasfirst reported in Wuhan, China. Subsequently, on 30 January 2020,[90] the World Health Organisation declared Covid-19 a public health emergency of international concern, and therefore a pandemic.[91] This was after the WHO reported

87 M. Vuilleumier, *Why Swiss Businesses Oppose Plans for Corporate Liability*, "Swissinfo.ch", 8 November 2020.

88 For instance, many countries are afraid of dealing with Chinese corporations because it appears China does not have adequate mechanisms for addressing human rights infringements and environmental wrongs. See G. Karsten, *Perceptions, Practices and Adaptations: Understanding Chinese – African Interactions in Africa*, "Journal of Current Chinese Affairs" 2014, vol. 43, p. 1; B. Karin, *Chinese Human Rights Guidance on Minerals Sourcing: Building Soft Power*, "Journal of Current Chinese Affairs" 2017, vol. 46, p. 136.

89 N. van Doremalen and others, *Aerosol and Surface Stability of SARS-CoV-2 as Compared with SARS-CoV-1* "The New York Journal of Medicine" 2020, vol. 382, p.1.

90 Ibidem

91 The WHO, *Archived: WHO Timeline – COVID-19*, 27 April 2020 <https://www.who.int/news/item/27–04–2020-who-timeline-19>

7818 total confirmed cases globally, with China having the most cases, and 82 cases reported in 18 countries outside China. The WHO gave a risk assessment of very high for China and high at the global level.[92]

On 24 January 2020, the first European case of Covid-19 was reported in France (the person had visited China),[93] while Switzerland had its first case on 25 February 2020.[94] Since then, the number of cases has dramatically increased, with many deaths recorded. As of 23 January 2021, the total number of global confirmed cases stood at 98,827,832, with 2,118,209 deaths.[95] Switzerland recorded a total of 509,279 cases, with 9034 deaths as of 23 January 2021.[96]

The WHO and national governments issued guidelines and introduced safety measures. Some of these measures took the form of straightforward advice, such asavoiding touching one's nose, mouths, and eyes, sneezing into the elbow and not the palm, and others. Some other mandatory measures, like the restriction on movement, social distancing, shut down of businesses, schools, and places of worship, were enforced with sanctions.The employment rate reduced drastically while many businesses had to close permanently, especially small businesses.[97] Switzerland, a country with the highest presence of MNCs globally,[98] took a serious economic hit. Because of the second wave of the pandemic in Europe,Switzerland's State Secretariat for Economic Affairs said that gross domestic product would expand to 3.2%

92 The WHO, *Novel Coronavirus 2019 – nCoV: Situation Report – 10*, 30 January 2020 <https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200130-10-cov.pdf?sfvrsn=d0b2e480_2>

93 European Centre for Disease Prevention and Control, *Timeline of ECDC's Response to COVID-19*<https://www.ecdc.europa.eu/en/covid-19/timeline-ecdc-esponse>

94 The Local, *UPDATED: Switzerland confirms first case of coronavirus*,25 February 2020 <https://www.thelocal.ch/20200225/breaking>

95 Worldmeter, *Covid-19 Coronavirus Pandemic*,23 January 2021 <https://www.worldometers.info/coronavirus/>

96 Ibidem

97 A.W. Bartika and others, *The Impact of COVID-19 on Small Business outcomes and Expectations*, "PNAS" 2020, vol. 117, p. 17666; N. Donthu and A. Gustafsson, *Effects of COVID-19 on Business and Research*", Journal of Business Research" 2020, vol. 117, p. 284.

98 K. Hetze and H. Winistörfer, *Insights into the CSR Approach…*, p. 154.

in 2021, slower than the 4.2% initially forecast.[99] The 2020 statistics from the International Monetary Fund showed that GDP decreased to –5.3% as against 1.2% in 2019, GDP per capita was 81K USD in 2020 as against 82K USD in 2019. While Switzerland's unemployment rate increased from 2.3% in 2019 to 3.2% in 2020, the General Government Gross Debt grew from 42.1% in 2019 to 48.7 in 2020.[100] According to Marius Faber et al, "the spike in the number of employees on short – time work in March and April 2020 is unprecedented and dwarfs even the strong increase following the Great Recession of 2007".[101]

Apart from the direct impact of the Covid-19 pandemic on Switzerland's economy, the pandemic also affected the operations of Swiss MNCs in other countries. Most countries were in lockdowns from the middle of March 2020 until they were partially lifted in late May in some countries. The second wave of the Covid-19 pandemic forcedgovernments to consider another round of lockdown, but many countries feared that their economy may never survive another total lockdown.[102]

This was the situation when Swiss nationals went to the polls to vote for or against the RBI on the 29 November 2020. The outcome is somewhat surprising. It gained a narrow majority of votes, with 50.7 percent supporting it and 49.3 percent against it, but it failed because it was opposed by the majority of the Swiss cantons, or states. In Switzerland, for a referendum to be successful, it must win both the popular votes and the cantonal votes,[103] and the RBI could only gather 8.5 cantonal votes

99 C. Bosley, *Swiss Economic Recovery Delayed by Second Virus Wave*, "Bloomberg" 15 December 2020.

100 The International Monetary Fund, *World Economic Outlook International Monetary Fund: A Long and Difficult Ascent* "Washington DC" October 2020, 55.

101 M. Faber, A.Ghisletta, and K. Schmidheiny, *A Lockdown Index to Assess the Economic Impact of the Coronavirus*, "Swiss Journal of Economics and Statistics", 2020, vol. 156, p. 2.

102 K. Adam, *Second Wave of Covid-19 in Europe leads to new Restrictions but no National Lockdowns*, "The Washington Post"12 October 2020. The Irish Times had predicted that most businesses that survived the first lockdown may not be able to survive a second one. See C. Taylor, *Covid-19: Businesses that Survived First Lockdown may not Survive a Second*, "The Irish Times", 19 October 2020.

103 C. Pierre, *Swiss Politics for Complete Beginners*, Slatkine,2nded,2015, p. 24.

out of 23. The rejection of the RBI by voters automatically activated the government's Counter Proposal, with its narrower requirements.[104]

	Yes	No	%Yes	% No
People	1,299,173	1,261,673	50.73%	49.27%
Canton	8.5	14.5		

Source: Swissinfo.[105]

The table above shows that the referendum result is unprecedented, since it is the first time in more than half a century that a referendum measure has failed on cantonal grounds, despite achieving a popular majority in the whole country.[106] The reason for this is bound up with the uncertainties created by the Covid-19 pandemic. According to Imogen Foulkes, a BBC reporter, "the campaign for and against the [RBI] was a hard – fought one, and in the end economic worries, exacerbated by the Covid-19 pandemic, influenced voters",[107] many of whom were already affected economically by the pandemic.

The massive opposition from the Swiss government and business sector, who worried that Swiss businesses would be affected by the rules in the middle of an economic recession linked to the Covid-19 outbreak,[108] worked in persuading some voters to vote against the RBI, despite its general acceptance by the masses before the Covid-19 pandemic outbreak. Monika Rühl, the CEO of economiesuisse – a Swiss corporate union, had suggested that due to the coronavirus pandemic, the high cost

104 The Local, *UPDATED: World's Strictest Corporate Responsibility Plan Fails in Swiss Vote*, 29 November 2020, <https://www.thelocal.ch/20201129/swiss-reject-worlds-corporate-esponsibility-ules>

105 Swissinfo, *Vote Results: November 29, 2020*,<https://www.swissinfo.ch/eng/vote-results-–november-– 2020/46121138>

106 I. Foulkes, *Swiss vote to reject Responsible Business Initiative*, "BBC News" 29 November 2020.

107 Ibidem.

108 N. Illien, *Plan to Hold Corporations Liable…*

of carrying out the RBI due diligence requirements would be counter-productive because corporations were already in great difficulty.[109]

It is not certain whether the Covid-19 pandemic affected Switzerland more than other countries.In fact, it can be argued that when compared to other countries, from an economic point of view Switzerland has so far managed the crisis successfully.[110] The opposition from politicians was not based on any empirical evidence that suggests that the effect of the Covid-19 pandemic was such that an introduction of a stricter accountability measure on Swiss MNCs would have further caused damage on the Swiss economy. They were merely afraid of the future the new regime would bring, butfrom our discussion in the next section, the idea behind the RBI is not entirely new, as the US, the UK, and the Netherlands, all hold their MNCs liable for human rights violations and environmental damage committed abroad under their various laws.

The US, UK and The Netherlands

Looking at other jurisdictions, an MNC could be accountable in its home country, if its home country's laws are used for human rights infractions. In the US, there is a law known as the Alien Tort Statute (ATS). The ATS is a clause of the US Judiciary Act of 1789[111] where, for a tort only, the federal courts have authority over any civil lawsuit brought by a foreigner regarding acts perpetrated in breach of the law of nations or a US con-

109 Read the full interview of Monika Rühl with the Swissinfo.ch at M. Vuilleumier, *Why Swiss Businesses Oppose Plans for Corporate Liability*, "Swissinfo.ch", 8 November 2020 <https://www.swissinfo.ch/eng/why-swiss-business-against-he-corporate-responsibility-–initiative/46137670>

110 The Federal Council, *Impact of the COVID-19 Crisis on Switzerland's Foreign Economy*, 20 January 2021,<https://www.admin.ch/gov/en/start/documentation/media-releases/media-releases-council.msg-d-2045.html>

111 Judiciary Act of 1789, ch 20, § 9(b), 1 Stat 73,77. The ATS is also called the Alien Tort Claims Act (ATCA), but we only refer to the ATS. For a detailed analysis of the ATS, see S.D. Bachmann and I. P. *Ugwu, Hardin's 'Tragedy of the Commons': Indigenous Peoples' Rights and Environmental Protection: Moving Towards an Emerging Norm of Indigenous Rights Protection?*, "Oil and Gas, Natural Resources, and Energy Journal" 2021, vol. 6, no. 4, pp 579–583.

vention.[112] For the subject matter of this law to be triggered, the following must be present: 1) a foreigner sues, 2) for a tort only, and 3) based on a tortperpetrated in breach of a US convention or the law of nations.[113]

In the case of *Doe v Unocal*,[114] an oil and gas firm registered in the US with its subsidiary in Myanmar was accused of human rights violations when the corporation used the military to displace the locals and forced them to provide labour. The suit was instituted in a US Federal Court, but the Defendant corporation decided to settle out of court in 2003.[115] Again, Pfizer, an American multinational pharmaceutical corporation, was sued in a Federal court in the US for human rights violations committed in Nigeria. In *Abdullahi v Pfizer, Inc*.,[116] the company was accused of administering its new medication, the *Trovan* vaccine,which had not gone through the required clinical trials. Many Nigerians that received the vaccine died, while those that survived it were permanently incapacitated. The court held that "non-consensual drug trials violate customary international law",[117] and so a US Federal Court would have jurisdiction over

112 28 USC § 1350; A.J. Bellia Jr and B.R. Clark, *The Alien Tort Statute and the Law of Nations*,"The University of Chicago Law Review" 2011, vol. 78, p. 445; E.A. Young, *Universal Jurisdiction, the Alien Tort Statute, and Transnational Public-Law Litigation After Kiobel*, "Duke Law Journal" 2015, vol. 64, p. 1023; J.N. Drobak, *The Alien Tort Statute from the Perspective of Federal Court Procedure*, "Washington University Global Studies Law Review" 2014, vol. 13, p. 421; M. Koebele, *Corporate Responsibility under the Alien Tort Statute*,"Developments in International Law" 2009, vol. 61; T.G. Banks, *Corporate Liability Under the Alien Tort Statute: The Second Circuit's Misstep Around General Principles of Law in Kiobel v. Royal Dutch Petroleum Co*. "Emory International Law Review" 2012, vol. 26, p. 229; M. E. Danforth, *Corporate Civil Liability Under the Alien Tort Statute: Exploring Its Possibility and Jurisdictional Limitations*"Cornell International Law Journal" 2011, vol. 44, p. 663.

113 S. Bachmann, *Terrorism Litigation as Deterrence under International Law – From Protecting Human Rights to Countering Hybrid Threats*"Amicus Curiae" 2011, vol. 87, p. 23; B. Jacek, *Alien Invasion: Corporate Liability and its Real Implications Under the Alien Tort Statute*"Seton Hall Law Review" 2013, vol. 43, p. 287; T. Adamski, *The Alien Tort Claims Act and Corporate Liability: A Threat to the United States" International Relations*"Fordham International Law Journal" 2011, vol. 34, p.1511.

114 *Doe v Unocal* 395F 3d 932, 9th Cir 2002.

115 Earth Rights International, *Doe v. Unocal; The First Case of its Kind: Holding a U.S. Company Responsible for Rape, Murder, and Forced Labour in Myanmar*, <https://earthrights.org/case/doe-v-unocal/>.

116 *Abdullahi v Pfizer, Inc*. 562F 3d 163, 2d Cir 2009.

117 Ibidem, pp. 166–167.

the case under the ATS. After repeated appeals, Pfizer opted to settle out of court.[118] Most of the successful ATS cases involving MNCs ended up settled out of court.[119]

On 1 May 2019, the Hague District Court in the Netherlands accepted jurisdiction over a case instituted in 2017 by the wives of some of the victims of Shell Petroleum Development Company of Nigeria (SPDC). The SPDC is a subsidiary of the Royal Dutch Shell, Shell Petroleum NV, Shell Transport, and Trading Company, all registered in the Netherlands and the UK. The Nigerian military killed the victims after they protested against environmental pollution and other forms of human rights abuses carried out by the SPDC. Again, the Hague Court of Appeal,early in 2021, held that Royal Dutch was liable for the actions of its subsidiary in Nigeria, the SPDC,based on the common law doctrine of negligence and duty of care. The Court of Appeal held that a foreign anchor defendant in the Netherlands with a relationship with another defendant from another countrycould be held accountable for the other defendant's negligence.[120] This decision sets the stage for further business human rights litigation in Europe, and it is the first case where a parent company has been found to owe a common law duty of care to claimants residing abroad, especially local communities affected by its subsidiary's activities.[121]

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118 J. Stephens, *Pfizer Reaches Settlement Agreement in Notorious Nigerian Drug Trial*, "Washington Post" 4 April 2009.

119 There are other ATS cases involving MNCs like *Wiwa v Royal Dutch Petroleum Co*., 226 F3d 88 (2d Cir 2000), *Jesner v Arab Bank, PLC* 16–499 US 584 (2018), etc. International organisations canalso be sued in the US by victims of human rights and environmental abuse. For instance, see *Jam et al. v International Finance Corporation* 586 US 2019. Even though the US courts are no longer willing and desirous of granting an ATS case claims, it is important to realise that the ATS still exists and can be used to hold MNCs accountable for violating human rights and the environment.

120 See *Milieudefensie v Roya Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd.* 200.126.849 (29 January 2021).

121 R. English, *Parents Company owes Duty of Care in Transnational Cases – Hague Court of Appeal*, "Human Rights Blog" 1 March 2021.<https://ukhumanrightsblog.com/2021/03/01/parent-company-owes-of-hague-ourt-f-appeal/>.

The UK also has a unique mechanism for holding MNCs headquartered in the UK accountable for human rights and environmental standards breaches.The UK Supreme Court developed the foreign direct liability doctrine, wherein victims of human rights violations and other infringements by subsidiaries of companies registered in the UK can sue for damages and compensation.[122] In *Vedanta Resources Plc and Konkola Copper Mines Plcv Lungowe and Others*,[123] Vedanta Resources Plc, a company registered in the UK, and its Zambian subsidiary, Konkola Copper Mines Plc, were accused of discharging waste that polluted the local waterways and caused harm. The UK Supreme Court agreed with the victims that the argument that a parent company may be liable for the conduct of its overseas subsidiary and might proceed to trial in England. The ruling highlights the need for MNCs to be mindful of the fact that non – UK plaintiffs can bring claims against them in the English courts where they are headquartered in the UK or with their parent companies in the UK.[124] According to Pamela Towela Sambo,[125] "[t]his decision paves the way for the first trial in the UK involving environmental damage committed in a foreign jurisdiction by an overseas subsidiary of a UK – domiciled company".

Conclusion

The Covid-19 pandemic has affected almost all areas of human activity, and not least is its influence onthe attempt made in Switzerland to

122 H. Ward, *Governing Multinationals: The Role of Foreign Direct Liability* "Royal Institute of International Affairs' briefing paper" 2001, vol. 18, p. 1–6; see also C. Rachel, *Parent Company Direct Liability for Overseas Human Rights Violations: Lessons from the UK Supreme Court* "University of Pennsylvania Journal of International Law" 2021, vol. 42, no. 3, pp. 519–579.

123 *Vedanta Resources Plc and Konkola Copper Mines Plc v Lungowe and Others* [2019] UKSC 20.

124 Norton Rose Fulbright, *UK Supreme Court Ruling on Parent Company Liability for Acts of its Overseas Subsidiaries*, February 2020 <https://www.nortonrosefulbright.com/en-za/knowledge/publications/721042ff/uk-supreme-ruling-for-subsidiaries>

125 P. T. Sambo, *Vedanta Resources PLC and K C and Konkola Copper Mines PLC v Lungowe and Others 2019 UKSC 20* "SAIPAR Case Review" 2019, vol. 2, p. 14.

hold MNCs accountable for human rights abuses and environmental violations abroad.Using the failed Swiss RBI, this article has analysed how Switzerland's supposed economic downturn in the middle of a pandemic was used to campaign against the November 2020 referendum on the "responsible companies – to protect human beings and the environment" initiative. There has never been a referendum that garnered the popular votes in more than half a century and yet failed to get the required number of cantonal votes in Switzerland. But the waythe Covid-19 pandemic was emphasised during the campaign contributed to the RBI referendum breaking this record. Contrary to those that opposed it, the requirements of the RBI can be found in some other countries like the US,where foreigners can bring civil lawsuits, under the ATS jurisdiction, for actions perpetrated in breach of the law of nations or a US convention.US MNCs have been sued several times for the acts of their subsidiaries abroad. Again, there is an emerging principle of law called "the foreign direct liability doctrine" in the UK, whereby victims of human rights violations and other infringements by subsidiaries of companies registered in the UK can sue for damages and compensation in a UK court. This is also the new trend in the Netherlands as the Hague District Court accepted jurisdiction in 2019 to consider the claims by victims of the Royal Dutch's subsidiary in Nigeria. In early 2021 the Dutch Court of Appealalso held the Royal Dutch liable for its subsidiary's negligence in Nigeria. This Dutch Court of Appeal decision was also given in the middle of the Covid-19 pandemic, and the impact of the pandemic on the economy of The Netherlands was never an issue, and neither did it affect how the decision was analysed and welcomed.So, the pandemic was politicised in Switzerland even when there was no empirical evidence to show that the implementation of the RBI would negatively affect Switzerland's economy. The RBI would not have been so unique to warrant the argument that victims of abuses from other countries would have unduly targeted Swiss MNCs.

Even though the RBI was defeated in the middle of a pandemic, Swiss MNCs have learned lessons regarding their attitude towards human rights violations and environmental damage.

1. Swiss MNCs are now aware that Swiss nationals are worried that a significant source of the country's GDP could be from proceeds of human rights and environmental violations.
2. New reporting and due diligence obligations will be put in place instead, not as contained in the RBI but as the Counter Proposal-stipulates, even though the obligations are very narrow.
3. There was no empirical evidence to show that implementing the RBI provisions in the middle of the Covid – 19 pandemic would negatively affect Switzerland's economy. This is especially so, seeing that the Netherlands' Court of Appeal issueda judgment in the middle of the pandemic against a company registered in the Netherlands, which will open the gate for other such cases in the Netherlands.

In conclusion, it is recommended that those that initiated and campaigned for the RBI should make minor alterations to the RBI and subsequently initiate a new campaign for it to be taken toa referendum, long after the Covid-19 pandemic has been curbed. Again, Swiss MNCs should intensify their corporate social responsibilities, if only to assure Swiss nationals that they are responsible business enterprises.Strict compliance with human rights and environmental laws by MNCs from a country leads to a general acceptance of those MNCs to operate in other countries. This is particularly so with MNCs from China,as some countries are sceptical about them because the Chinese government is not too good with human rights and environmental protection. The Covid-19 pandemic should not be the reason why Swiss MNCs should not go above the minimum requirements of human rights laws and environmental standards. In the defeat of the RBI, "one small step for [Switzerland], one giant leap for the [international community]" was missed in MNCs' accountability for human rights and environmental violations.

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<https://www.ecdc.europa.eu/en/covid-19/timeline-ecdc-esponse>
<https://www.nortonrosefulbright.com/en-za/knowledge/publications/721042ff/uk–supreme–court–ruling–on–parent–company–liability–for–acts–of–its–overseas–subsidiaries>
<https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf>
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<https://www.worldometers.info/coronavirus/>

SUMMARY

The Accountability of Multinational Corporations in the Light of the Failure of the Responsible Business Initiative of Switzerland during the Covid-19 Pandemic: An Examination

This article examines the efforts made so far in holding multinational corporations (MNCs) liable for human rights and environmental violations in the light of Switzerland's failed referendum in November 2020, during the peak of the Covid-19 pandemic. It also looks at other international law instruments that have the potential to hold MNCs accountable. While these other laws have failed to achieve the desired result of holding MNCs accountable, the referendum, if it had succeeded, would have triggered a binding vote on a constitutional amendment to intro-

duce compulsory human rights due diligence for companies incorporated in Switzerland, the first of its kind in Europe. The consequence would have been that victims of Swiss MNCs' violations would have had the right to bring claims in Switzerland against a defaulting Swiss MNC. Unfortunately, the referendum failed, and to some extent the Covid-19 pandemic negatively affected the referendum outcome, because it was greatly politicised. It became a lost opportunity on what would have been "one small step for [Switzerland], one giant leap for the [international community]".

Keywords: Multinational Corporations, Covid-19 Pandemic, Environmental and Human Rights, Swiss Responsible Business Initiative, UN Guiding Principles.

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Oskar Ratajczak

Trademark Registration in Bad Faith in the People's Republic of China – Causes and Analysis of Provisions of Chinese law

Introduction

Trademarks, understood as signs which can distinguish good and services from the goods and services of others and indicate the source of these goods and services, are an important part of modern market – based economy in countries around the globe.[1] While they play a vital part in building a company's image or product in the mind of consumers, they also have significant importance from the legal point of view. Registering trademarks allows the producers of goods or services to ensure that only the owners of trademarks can legally sell their products on the market under that trademark. This allows them to control the quality of their goods or services and to profit from them. Trademark infringements can be a subject of civil, administrative, or even criminal proceedings. The infringements not only violate the trademark owners' rights but might also cause harm to their name and allow unsuspecting consumers to be taken advantage of, if they purchased a product believing it was genuine.

To protect trademarks, many international sources of law were adopted. In 1883, the Paris Convention for the Protection of Industrial Property[2] was adopted, which ensured that foreign applicants from the

1 K. Sangsuvan, *Trademark Squatting*, "Wisconsin International Law Journal" 2013, vol. 31 no. 2, p. 253–254.

2 The Paris Convention for the Protection of Industrial Property adopted 20 March 1883.

other party of the convention receive the same treatment as domestic applicants[3], established the protection of well – known trademarks (discussed on p. 4–5) and regulated many other issues concerning intellectual property law. Later, the so-called Madrid system was established by adopting the Madrid Agreement Concerning the International Registration of Marks in 1891[4] and a Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks in 1989.[5] The Madrid system allows a trademark to be protected if the registration has currently been filed as an application or registered in the register Office of a Contracting Party, and allows protection in the territory of Contracting Parties to be secured by obtaining the registration of that trademark in the register of International Bureau of the World Intellectual Property Organization.[6] The Agreement on Trade – Related Aspects of Intellectual Property Rights adopted in 1994 set minimum standards of protection of intellectual property rights among the members of World Trade Organization.[7]

Despite extensive international legislation concerning the protection of intellectual property, including trademarks, infringements are still all too common. Trademark registration in bad faith is a persistent practice in many countries worldwide. This practice, often called trademark squatting or trademark piracy, is defined by the World Intellectual Property Organization as "[...] the registration or use of a generally well – known foreign trademark that is not registered in the country or is invalid as a result of non – use".[8] Trademark squatters, hoping to earn money, find unregistered trademarks that belong to someone else,

3 Article 2 and 3 of the Paris Convention for the Protection of Industrial Property adopted 20 March 1883.

4 The Madrid Agreement Concerning the International Registration of Marks adopted 1891.

5 Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks adopted 1989.

6 Article 2 of the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks.

7 Article 1 (1) of the Agreement on Trade – Related Aspects of Intellectual Property Rights.

8 World Intellectual Property Organization, *WIPO Intellectual Property Handbook*, 2004, p. 90.

usually from abroad, and register them in their own names.[9] This practice can lead to multimillion losses and prevents major investments.[10] The specificity of the Chinese economy, language, culture, society, and law makes bad faith trademark registration rather widespread in China.[11] Foreign entities are often not aware of this practice and only find out about it after they have fallen victim to a trademark squatter. Despite this, it seems that the Chinese government is not clamping down on this issue enough.

The aim of this article is to identify the reasons for the popularity of this practice in China and analyse the provisions of Chinese law that combat bad faith trademark registrations. The following work comprises two parts. The first part analyzes the causes and uniqueness of this practice in China. The second part presents an analysis of legal provisions that currently regulate this subject in the People's Republic of China.

The following terms need to be defined, because of the complexity of the Chinese administrative division and the Chinese language. In this work, China or the People's Republic of China means only mainland China. The term does not include the Special Administrative Regions of Hong Kong and Macau, and neither does it include Taiwan. Those three entities have their own legal systems. Even though bad faith trademark registration is present there, it is not as economically significant as in mainland China. A person or other entity that makes such registration is called a trademark squatter and is defined as "a person or company that acquires trademarks, not in the hopes of actually using them to help market a product or service, but rather, in the hopes of making trademark infringement claims against other persons or companies that do use them to market their products or services."[12]

9 K. Sangsuvan *Trademark Squatting* …, p. 254.

10 K. Sangsuvan *Trademark Squatting* …, p. 255–258.

11 K. Sangsuvan *Trademark Squatting* …, p. 255.

12 M. Jessica, *Two Steps Forward, One Step Back: A Need for China to Further Amend Its 2013 Trademark Law in Order to Prevent Trademark Squatting*, "Brooklyn Journal of International Law" 2017, no. 42(2), p. 993, 994–995.

A foreign entity in this article is understood as a legal or a natural person who has its place of residence or its seat outside of China. Both natural persons, such as NBA athletes[13], and legal persons, such as Apple Inc.[14] are falling victim to this practice.

The Causes of the Popularity of Bad Faith Trademark Registrations in China

This practice is present in many countries around the world, but only in China are specific economic, language and legal conditions met for this intellectual property infringement to be so widely spread.

In late 1978, Communist Party of China, under the leadership of Deng Xiaoping, started introducing a reform package, which switched the economy to a market – based one and opened it up to foreign investment. Over time, foreign investors were granted access to millions of diligent workers. Such conditions caused China to be called a 'world's factory'[15], since it became the biggest producer and exporter of goods in the world.[16] In 2010, the Chinese economy, measured by gross domestic product, surpassed that of Japan and became second largest economy in the world.[17] Along with this, Chinese society becomes richer each year, between 2010 and 2020 the average wage more than doubled[18], which

13 L. Xindan, A. Baker III Thomas, R. Leopkey, *Examining the extent of trademark squatting of NBA athlete names in China*, "European Sport Management Quarterly" April 2021, p. 2.

14 H. Karlsson, *Trademark Protection for the Chinese Market – a study on Swedish retail companies established in China* (Dissertation), accessed 31 October 2021, p. 26. <http://urn.kb.se/resolve?urn=urn:nbn:se:umu:diva-171035>

15 Chun Yang and He Canfei, *Transformation of China's 'World Factory': Production Relocation and Export Evolution of the Electronics Firms*, "Tijdschrift Voor Economische En Sociale Geografie (Journal of Economic & Social Geography)" 2017, no. 108 (5), p. 571–572.

16 World Trade Organization, *Total merchandise exports – quarterly (Million US dollar)*, accessed 23 October 2020, <https://data.wto.org/?idSavedQuery=467f03cf-2316–4273-b4e9-c15de67911ee>.

17 World Bank, *GDP (current US$)*, accessed 23 October 2020, <https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?most_recent_value_desc=true&year_high_desc=true>.

18 Trading Economics, *China Average Yearly Wages*, accessed 31 October 2021, <https://tradingeconomics.com/china/wages>

made China one of the largest consumer markets in the world.[19] These unique characteristics of the Chinese economy make bad faith registrations of trademarks so widespread in China because trademark squatters know they can gain sizeable sums of money from the rightful owners of the squatted trademark.

There are three ways for trademark squatters to profit from a wrongfully acquired trademark. The first is to sell the trademark to its rightful owner.[20] Foreign entities often choose this option, because despite being expensive, it is relatively fast and allows civil and/or administrative litigation to be avoided, and it can also help to minimise lost profits due to, for example, delays in launching a new product on the enormous Chinese market. The American brand Tesla, which produces electric cars, fell victim to this practice. In the end, the dispute was solved out of court and the parties reached an agreement.[21] The second possibility is to sell counterfeit products with registered trademarks that imitate the genuine products of the trademark's rightful owner.[22] The third way of monetisation is to produce and sell products with the squatted trademark that differ from the products sold by the rightful owner of the trademark.[23] This is precisely what happened to the rightful owner of the Chivas Regal trademark. A Chinese clothing manufacturer registered the Chivas Regal trademark in the category of clothing and used it to produce garments with this wrongfully acquired trademark.[24] The size of the Chinese consumer market and China's significant role in international trade allows large sums of money to be gained from the squatted trademark, either through selling the products with the trademark or by pressuring

19 Maris G. Martinsons, *Transforming China*, "Communications of the ACM" 2005, no. 48 (4): p. 44, 46.

20 Martin, *Two steps.*..., p. 1003.

21 S. Shen and N. Shirouzu, *Tesla resolves trademark dispute in China*, "Reuters", 6 August 2014, accessed 23 October 2020, <https://www.reuters.com/article/us-tesla-motors-china – idUSKBN0G606420140806>.

22 K. Sangsuvan *Trademark Squatting.*..., p. 259.

23 K. Sangsuvan *Trademark Squatting..*, p. 259.

24 D. C. K. Chow, *Trademark Squatting.*..., p. 96.

foreign entities that had their trademark registered in bad faith by someone else. Quick dispute settlement is crucial to avoiding – often enormous – losses,[25] and often the quickest and the cheapest way to settle the dispute with the squatters is to agree to their demands.[26]

The unique characteristics of the Chinese language contributed tremendously to the spread of the trademark squatting practice across China. The Chinese language uses logograms as characters. A single character is usually read as a single syllable.[27] Furthermore, only a relatively small amount of the Chinese population speaks English or any other Western language on a communicative level. One of the most recent papers addressing this issue estimates that, based on a previous research, government censuses and other language surveys, in 2020 only 20% of the population of China knew some English.[28] However, this paper does not provide detailed statistics on the level of English proficiency among China's population. Another study from 2021 claims that, depending on the province, the English proficiency band can vary from "very low" to "moderate".[29] These factors mean that in everyday life the Chinese and the Chinese mass media almost always use transliterations or translations of the trademark, and less often they use a trademark that is translated into Chinese and written in *pinyin*.[30,31] Understanding the specificity of the Chinese language and culture is hard for foreign entities, for at least several reasons. The first one is a lack of understanding of how modern Chinese society works. As soon as an original trademark appears in Chi-

25 K. Sangsuvan *Trademark Squatting.*…, p. 257–258.

26 D. C. K. Chow *Trademark Squatting.*…, p. 97.

27 Hannas Wm. C., *Asia's Ortographic Dillema*, 1997, accessed: 01 November 2021. <http://www.pinyin.info/readings/texts/east_asian_languages.html>

28 Bolton Kingsley, J. Bacon – Shone, *The Statistics of English across Asia* in Bolton, Botha, Kirkpatrick "*The Handbook of Asian Englishes"* September 2020, p. 60.

29 Chen Liang, Li Wanli, *Language acquisition and regional innovation: Evidence from English proficiency in China,* "Managerial and Decision Economics" May 2021, p. 6. <https://doi.org/10.1002/mde.3374>

30 The official system of phonetic notation of the Chinese language in the Latin alphabet. It is taught in Chinese schools and used to write with Chinese characters on electronic devices.

31 D. C. K. Chow *Trademark Squatting.*…, p. 95.

nese public discourse, the mass media are going to create and use Chinese transliteration or translation of it, unless the transliteration or translation was created by the rightful foreign owner of the trademark.[32] The second cause is the multitude of possible translations and transliterations.[33] Despite that, the possibilities are not unlimited and throughout the years, certain patterns and standards of transliteration and translation emerged.[34] In the literature, it is advised that companies should register the trademark in original foreign form, as well as all probable forms of transliterations, translations and translations written with use of *pinyin*.[35] Furthermore, it is advised to register the trademark in many categories of goods.[36]

The third group of reasons for the popularity of trademark squatting are legal causes. The People's Republic of China did not always try to put a decisive end to this practice. To fully understand these causes, it is necessary to provide a historical outline of Chinese intellectual property law. The first modern legislation concerning trademarks – the Trademark Law of People's Republic of China (from now on also referred to as the Trademark Law)[37] – was enacted in 1982. Later, China ratified or acceded to many international treaties, agreements and obligations concerning intellectual property law – most notably: the Paris Convention for the Protection of Industrial Property (China acceded on 19 December 1984, the convention entered into force on 19 March 1985), the Madrid Agreement Concerning the International Registration of Marks (China acceded on 4 July 1989, the agreement entered into force on 4 October 1989), the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (China acceded on 1 September 1995, the protocol entered into force on 1 December 1995), the Trade – Related Aspects of Intellectual Property Rights (applicable to China as a mem-

32 D. C. K. Chow *Trademark Squatting*…, p. 94.
33 D. C. K. Chow *Trademark Squatting*…, p. 95.
34 D. C. K. Chow *Trademark Squatting*…, p. 95.
35 D. C. K. Chow *Trademark Squatting*…, p. 96.
36 D. C. K. Chow *Trademark Squatting*…, p. 96.
37 Trademark Law of People's Republic of China adopted 23 August 1982.

ber of World Trade Organization – China became member of WTO on 11 December 2001).[38] Despite introducing the legal protection of trademarks and other intellectual property rights, China was accused of not obeying the statutory law concerning trademarks, and was also accused of treating entities that were breaking this law with indulgence.[39] The losses suffered by foreign entities were so big that in 1992, China and the government of the United States of America signed a memorandum concerning the protection of intellectual property, in which China agreed to enhance the protection of intellectual property rights.[40] Despite signing the memorandum, China was still reluctant to introduce further changes.[41]

It was not until 2001 that the Chinese Trademark Law was amended to combat bad faith trademark registrations and ensure the protection of "well – known" trademarks as required by the Paris Convention for the Protection of Industrial Property.[42] The protection of well – known trademarks in China is discussed in the next part of the article. In 2013, another amendment was introduced. It raised the upper limits of damages, made the procedure for registering trademarks more flexible, and extended the rights of third parties to object to a pending registration of a trademark.[43] Despite that, in the literature some have argued that the 2013 amendment was not enough. Some researchers suggested that the amendment did not protect the harmed entities enough, and some researchers underlined that Chinese officials tend to favour the Chinese entities in disputes with foreign entities.[44]

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38 K. Stevenson Matthew, *A Summary of China's Intellectual Property Reform from 2013 to 2019*, "Willamette Journal of International Law & Dispute Resolution" 2020, no. 27, p. 169, 171.

39 K. Stevensons *Summary of China's*…, p. 171.

40 The Office of Trade Agreements Negotiation and Compliance, *Memorandum of understanding between the government of the People's Republic of China and the government of the United States on the protection of intellectual property*, accessed 7 November 2020 <https://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_005362.asp>.

41 K. Stevensons *Summary of China's*…, p. 172.

42 Article 6bis of Paris Convention for the Protection of Industrial Property.

43 K. Stevensons *Summary of China's*…, p. 174.

44 Martin, *Two steps.*…, p. 999.

In 2014, three intellectual property courts were created in Beijing, Shanghai and Guangdong.[45] Regular courts often lacked specialist knowledge in the area of intellectual property rights[46] and were overwhelmed by the increasing number of intellectual property related cases, especially in Beijing, Shanghai and Guangdong.[47] Lack of specialist knowledge resulted in a lack of judicial consistency.[48] These specialised intellectual property courts hold a first instance jurisdiction to hear administrative trademark cases against the administrative decisions of the State Council or local governments, civil cases involving the identification of well – known trademarks, second instance jurisdiction for hearing appeals against civil and administrative judgments and the rulings of the Basic People's Courts from the field of trademarks.[49] In intellectual property courts, judges draw on the expertise of technical investigation officers that are hired to provide assistance regarding the technical issues of intellectual property law[50], but the judges themselves usually have extensive experience in terms of intellectual property cases.[51] There are no intellectual property appeal courts, and appeals are heard by local Intellectual Property Tribunals of High's People's Courts.[52] In the literature, the creation of specialised intellectual property courts is recognised as a very important step in the reforms of intellectual property protection in China.[53]

To further combat trademark squatting, the Trademark Law was amended again in 2019. The analysis of provisions of amended the

45 D. Matthews, *Intellectual Property Courts in China*, "Queen Mary University of London, School of Law Legal Studies Research Paper" 2017, no. 254/2017, p. 5.

46 K. Stevensons *Summary of China's…*, p. 175.

47 D. Matthews *Intellectual Property Courts…*, p. 5–6.

48 D. Matthews *Intellectual Property Courts*… p. 7–8.

49 Article 1(2) and 1(3), Article 6 of Provisions of the Supreme People's Court on the Jurisdiction of Cases in Beijing, Shanghai, and Guangzhou Intellectual Property Courts adopted 17 October 2014.

50 D. Matthews *Intellectual Property Courts…* p. 12.

51 D. Matthews *Intellectual Property Courts…* p. 19.

52 Article 7 of Provisions of the Supreme People's Court on the Jurisdiction of Cases in Beijing, Shanghai, and Guangzhou Intellectual Property adopted 17 October 2014.

53 K. Stevensons *Summary of China's*…, p. 175.

Trademark Law of People's Republic of China is a way of examining if China finally provided adequate protection against bad faith trademark registrations.

The Provisions of the Trademark Law of the People's Republic of China relating to Bad Faith Trademark Registrations – an Analysis

Chinese trademark law is a first – to – file system – whoever files an application first, after meeting other requirements, has priority over others to become owner of the trademark and will be granted with exclusive rights to the use of a trademark under protection of law.[54] Chinese trademark law, by power of Article 6 (3) of the Paris Convention for the Protection of Industrial Property upholds the principle of territoriality and only protects trademarks that are registered in China, independent of registrations in other countries. Under the Trademark Law, trademarks are protected for a duration of 10 years, with possible renewals, each for a period of another 10 years.[55]

The first Article of the Trademark Law of People's Republic of China that relates to bad faith trademark registration is Article 4, which was amended in 2019. This article introduces a bad faith application not made with the intention of using the trademark as an absolute ground for the objection to and invalidation of the registered trademark. The State Administration of Markets Regulation (from now on referred to as SAMR), an agency directly under State Council of People's Republic of China[56], released the Provisions on Regulating Trademark Registration Acts.[57] Article 8 of Provisions on Regulating Trademark Registration Acts provides guidance on what factors should be considered

54 Article 3 (1) of Trademark Law of People's Republic of China.

55 Article 39 and 40 of Trademark Law of People's Republic of China.

56 Article 2 of Provisions on the Configuration of Functions, Internal Institutions and Staffing of the State Administration for Market Regulation adopted 30 July 2018.

57 Provisions on Regulating Trademark Registration Acts adopted 10 October 2021.

when assessing whether the application breaches Article 4 of Trademark Law. These factors are:

1. The number of registered trademarks applied for by the applicant or the natural person, legal person, or other organisation with which the applicant has an associated relationship, the designated classes, the status of trademark transactions, etc.;
2. The applicant's industry, business status, etc.;
3. Circumstances where the applicant has been found to have engaged in the malicious registration of trademarks or infringed on the exclusive rights of other people's registered trademarks by an effective administrative decision, ruling, or judicial decision;
4. Circumstances where the trademark applied for registration is identical or similar to another's well – known trademark;
5. Circumstances where the trademark applied for registration is identical or similar to the name of a well – known person, company name, abbreviation of the company name, or other commercial signs;
6. Other factors that the trademark registration department thinks should be considered.

The Beijing High People's Court also issued very extensive guidelines that, in terms of addressing trademark squatting, are similar to the provisions released by the SAMR.[58]

The new content of this article, alongside Article 8 of the Provisions on Regulating Trademark Registration Acts, must be recognised as a step forward from the old regulation, and should be a somewhat effective tool in opposing and invalidating bad faith registrations. The provisions released by SAMR will enable the effective assessment of applications that are trying to trick the trademark office into believing that this application is not filed in bad faith and with no intention of using the trademark, for example by providing fake proof of intention of using it. Article 7 of the Trademark Law establishes the general principle of good

58 Guidelines for the Trial of Trademark Right Granting and Verification adopted 24 April 2019.

faith in the application procedure and in using the trademark, which can help to justify the rejection of the application to register the trademark.

The next provisions concerning bad faith registrations are Articles 13 and 14, which introduced the well – known marks doctrine to Chinese Trademark Law. The introduction of the marks doctrine is required by Article 6bis of the Paris Convention for the Protection of Industrial Property and Article 16 of the Agreement on Trade – Related Aspects of Intellectual Property Rights.[59] The People's Republic of China, as a member of World Intellectual Property Organization and as a signatory of the Paris Convention, had to implement the marks doctrine into its domestic legal system. The well – known marks doctrine provides protection to unregistered trademarks that gained some recognizability prior to registration.[60] In most of the countries that use the Latin alphabet[61], the marks doctrine is enough to protect trademarks, however, the previously mentioned nuances of the Chinese language and society mean that the marks doctrine is ineffective in China, because of the practice of using translations or transliterations of trademarks by Chinese media and by the Chinese themselves.[62, 63] Proving that a trademark was indeed "well – known" prior to its registration, when the dispute is about a translation or transliteration which was not created by the rightful owner of the trademark, proves to be very hard, sometimes even impossible.[64] If the filing is made to register a translation or transliteration of a trademark in Chinese, the literature outlines two obstacles that reveal the weakness of the marks doctrine in China. The first one is the fact that the translations and transliterations of trademarks are usually

59 D. C. K. Chow *Trademark Squatting.*…, p. 70–71.

60 Article 13 and 14 of Trademark Law of People's Republic of China.

61 Russia, that uses Cyrillic instead of Latin alphabet, and China are named as prime examples of countries where trademark squatting has taken place. See: Sangsuvan *Trademark Squatting*…, p. 255.

62 S. Chang, *Combating Trademark Squatting in China: New Developments in Chinese Trademark Law and Suggestions for the Future*, "Northwestern Journal of International Law & Business" 2014, vol. 34:337, p. 354.

63 D. C. K. Chow *Trademark Squatting.*…, p. 75–80.

64 D. C. K. Chow *Trademark Squatting.*…, p. 84–92.

not created by their foreign owners, but by the Chinese media.[65] The second one is the multitude of possible translations and transliterations.[66] These two obstacles make it more difficult for the foreign entity to prevent the bad faith registration by objecting to the filed application, or to invalidate it on the basis of Article 13 after the registration was granted.

Article 15 also introduces a protection against bad faith registrations. It is divided into two paragraphs. The first paragraph establishes protection against an unfaithful agent or representative that seeks to register his client's trademark in his own name. If the client objects to such a registration, the registration shall be rejected, and the use of such trademark shall be prohibited. The weakness of this regulation is the requirement of objection by the client. A client believing in professionalism of an agent or representative might not be aware of an ongoing fraud up to the point when the trademark is going to be registered. The second paragraph of this Article introduces the prohibition of the registration of a trademark, if the applicant is clearly aware of the existence of the trademark of another company, due to contractual, business, or other relationships with another party which is the rightful owner of the trademark. Such other relationships would be, for example, family ties. Unfortunately, here it is also required by the law for the rightful owner to object to the registration. Perhaps in the case of Article 15, stipulating the requirement of making a statement secured by criminal sanction would greatly improve the effectiveness of the protection against unfaithful agents or representatives.

Articles 18 to 20 need to be mentioned too. These articles introduce the requirement of registering the trademark by foreign entities through trademark agencies, the requirement of acting in good faith by agencies, and the requirement of applying disciplinary measures against employees disobeying the industry's self-disciplinary standards. These articles were enacted to secure the interests of entities that are required by law to use the trademark agencies and to regulate the behaviour of

65 D. C. K. Chow *Trademark Squatting…*, p. 74.
66 D. C. K. Chow *Trademark Squatting…*, p. 74–75.

these agencies when it comes to bad faith trademark registrations. The agencies should not accept the entrustment of their principal, if they know or should have known that the trademark entrusted by the principal violates the provisions of Articles 4, Article 15 or Article 32. If the trademark was already entrusted by the principal, and its registration may fall under circumstances in which registration is not allowed, the agency should inform the principal. Article 19.4 prohibits trademark agencies from applying for registration of the trademarks that were not entrusted to them. That means that trademark agencies are not allowed to register any trademarks unless they were instructed to do so by their client.

Article 32.2 introduces the protection of unregistered trademarks that are already in use by another person and have a certain influence from registrations with the use of illegitimate means. This article does not explicitly mention bad faith trademark registrations, but the term 'illegitimate means' suggests the fact that the trademark is being registered in a bad faith.[67] This article does not seem to be the easiest article to interpret and should be rewritten and expanded in the future amendments to the Trademark Law.

Articles 33 to 35 lay down procedures that allow the rights provided for in the Trademark Law to be pursued by specifying in detail when third parties can object to the registration or apply for second review, and the timeframe in which the trademark office has to make a decision. For example, when the trademark is in violation of Articles 4, 10, 11, 12, 19.4 of the Trademark Law, the period for raising an objection is three months from the date of the preliminary review announcement.

Article 44.1 lists articles 13.2, 13.3, 15, 16.1, 30, 31, 32 that include absolute grounds for invalidation and adds that any registration obtained by fraudulent or other illegitimate means shall also be declared invalid. In practice, the illegitimate means mentioned in Article 44.1 are used to

67 M. Chen, X. Liu, *Bad faith filings in the Chinese Trademark Law: evolution, status quo and improvements*, "Queen Mary Journal of Intellectual Property" 2020, vol. 10 no. 3, p. 314–315.

invalidate trademarks registered in bad faith.[68] Article 45 lists the same articles as article 44.1, but this time they are listed as a relative ground for invalidation. This article also stipulates that the holder of the prior rights of a trademark registered in bad faith is not limited by a five year period to request the trademark review.

As can be seen, there are numerous provisions of Chinese Trademark Law that regulate the bad faith trademark registrations scattered all over Chinese Trademark Law. Some of them overlap each other, some of them are not precise enough and require far-reaching interpretations, some could work well in a Western country, but not in China, where a vastly different trademark "culture", which is an outcome of the causes outlined in this article, makes these provisions inadequate to the challenges that trademark law faces in China. It seems that Chinese Trademark Law still does not provide an adequate level of protection of trademarks from bad faith registrations. Introducing the bad faith filing as an independent absolute ground is cited as a necessity for reducing the numbers of bad faith trademark registrations.[69] It seems that a general overhaul of the provisions of the Trademark Law concerning the bad faith trademark registrations is required too. The harmonisation of various provisions and clarifying some other would be beneficial to solving the issue of bad faith trademark registrations.

Conclusions

The uniqueness of the Chinese economy, culture, language, society, and law compared to Western countries entails that the practice presented in this article is troublesome even for international companies with vast resources at their disposal. Without proper knowledge and understanding of trademark law in China, which they most often lack, they are left vulnerable to the squatters, and are an easy target to profit from. However, these

68 M. Chen, X. Liu, *Bad faith filings…*, p. 311.
69 M. Chen, X. Liu, *Bad faith filings…*, p. 317, 320.

companies are not the only ones to blame, since they are not protected enough on grounds of the Trademark Law of the People's Republic of China. Each amendment of the Trademark Law brings gradual improvement, but even after almost 40 years since enacting the Trademark Law and adopting many international sources of law relating to trademarks, Chinese trademark law is still not good enough to sufficiently protect foreign entities in such a unique country as China. Despite that, foreign entities are not defenceless and, especially the bigger ones are able to hire professionals in areas of language, culture, and the legal system of China. Unfortunately, the support of professionals is often sought after a harmful bad faith registration has been made. Over time, with Chinese economic growth and the spread of knowledge about Chinese trademark law, the practice might start to slowly disappear, but this will not happen if the Trademark Law does not receive appropriate amendments.

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SUMMARY

Trademark Registration in Bad Faith in the People's Republic of China – the Causes and an Analysis of Provisions of Chinese Law.

Bad faith trademark registrations in the People's Republic of China are a longstanding issue. The PRC's Trademark Law amendment of 2019 changed some articles relating to the bad faith trademark registration.

The goal of this Article is to analyse the sources of this issue and examine the provisions of Chinese Trademark Law to understand how well foreign entities are protected against trademark squatters after the 2019 amendment.

The causes of this issue were found in China's unique economic position, the Chinese language, Chinese society, and Chinese culture. The analysis of the amended version of PRC's Trademark Law found that, in fact, the Chinese legislator made some enhancements, but unfortunately it seems it is not going to be sufficient to protect the rightful foreign owners of trademarks in an effective way.

Keywords: trademark law, the People's Republic of China, bad faith trademark registration, trademark squatting.

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Bartłomiej Gawrecki

Reflections on the Context of Public Law and Private Law on the Example of the Decision on the Permit for the Implementation of the Road Investment

Introduction

Already during the last decade of the twentieth century, it was possible to observe scholars adopting an intensified approach to the issues of the interface between public law and private law in Polish legal science. The progressive economic changes taking place after the political transformation in the Republic of Poland contributed to the analysis of the boundaries between these great branches of law. Public entities have become equal entities in economic turnover with entities from the private sector, and at the same time, they have not lost their sovereign powers, which are inherently associated with them and cannot be delegated to anyone else.

One of the terms used more frequently at the time was "providing administration". As indicated by Sierpowska, this denoted creative service activities and meeting the needs of citizens. The essence of this function was the provision of administration to the public and treating the administration as acting for the benefit of the public.[1] A similar understanding of this concept was presented by Szmulik, who pointed out that the concept of providing administration is understood as the administration of social services, securing living matters through public utility

1 I. Sierpowska, *Z rodowodu doktryny administracji świadczącej*, in: *Pomoc społeczna jako administracja świadcząca. Studium administracyjnoprawne*, Warsaw 2012.

institutions and supporting the administration. Providing administration should include, inter alia, communal facilities and public things (roads, squares, parks, schools). [2]

As an introduction to the remainder of the article, one should also mention the position of Kokocińska, who emphasized that more and more norms and institutions appear in legislation, the legal nature of which raises doubts not only in the doctrine but also in the process of applying the law. We define them as hybrid solutions, and the environment in which they operate – on the border of branches of laws. [3] One of the examples of such institutions is the decision on the permit for the implementation of a road investment.

Decision on the Permit for the Implementation of a Road Investment

The decision on the permit for the implementation of a road investment was introduced into the Polish legal system by the Act of April 10, 2003, on special rules for the preparation and implementation of investments in the field of national roads.[4] This legal act has been in force for more than 17 years, which constitutes a good time to summarize and analyze it, given the impact and frequency of the use of its legal instruments. It is worth noting that in the originally enacted version of the special act, Art. 45 indicated that the act would expire on 31 December 2007, and the act itself, in its original version, applied only to national roads, to which – under Article 5 Section 1 point 1 of the Act of March 21, 1985, on Public Roads[5] –

2 B. Szmulik, *Cechy administracji i jej podziały*, in: *Zarys prawa administracyjnego*, ed. K. Miaskowska – Daszkiewicz, S. Serafin, B. Szmulik, ed. 4, Warszawa 2017, p. 9.

3 K. Kokocińska, *Problematyka cywilnoprawnych form działania administracji. O przenikaniu i wzajemnym oddziaływaniu prawa*, in: *Konstytucyjne bariery stosowania prawa prywatnego w sektorze publicznym. Studium prawnoporównawcze ze szczególnym uwzględnieniem prawa polskiego i niemieckiego*, red. R. Szczepaniak, Scientific Publishing UAM Poznan 2020, p. 152.

4 Journal of Laws of 2003, no. 80, item 721, further as: the Special Act.

5 Journal of Laws of 1985, no.14, item 60, further as: Act on Public Roads.

also included highways and expressways, as well as roads lying in their paths until the construction of highways and expressways.

As indicated above, originally the Special Act was to be in force until the end of 2007, but its duration has been extended until today. According to the justification to the draft amendment, it was a regulation serving the implementation of the Government's Economic Strategy in the part concerning "Infrastructure – the key to development". It aimed to radically simplify the rules of preparation and implementation of investments in the field of national roads by the end of 2007, resulting from the need to reduce the differences in road construction between Poland and the European Union countries. The aim was to significantly accelerate the pace of construction and modernization of national roads (including motorways and expressways), and the means to achieve this goal was to simplify the procedures for the preparation and implementation of road investments. Before the entry into force of the act, the location procedure included two stages:

- determination of location indications by the minister for public administration;
- determination of the location by the voivode.

The procedure was time-consuming, therefore the Special Act included the first stage in the second stage. Article 2 Section 2 provided that the decision to determine the location of the road was issued by the voivode within 3 months from the date of submission of the application by the General Director for National Roads and Motorways.

It was also necessary to take into account the need to divide the property through which the road was to run. In the earlier legal status, the determination of the location of the road did not lead to the division of the real estate – therefore the act included the division procedure in the location procedure. In this way, the decision to determine the location of the road became at the same time the decision to approve the location project for dividing the property attached to the application. The solution functions until today without any changes.

The civil law effects of the ddecision on the permit for the implementation of a road investment, in particular concerning ownership changes, have significantly changed over the years that the Special Act has beenin force. In the original version of the Special Act, Article 13 Section 1 provided that the General Director for National Roads and Motorways purchases, on behalf of and for the State Treasury, real estate or parts thereof for road construction purposes, by way of an agreement, subject to Article 14. Article 14 Section 1 provided, however, that real estate intended for road lanes, owned by local government units, shall become the property of the State Treasury on the date on which the decision to determine the location of the road regarding these real estate becomes final. In connection with the above, it can be concluded that the ownership of real estate owned by local government units was transferred *ex lege* to the State Treasury as soon as the location decision was granted the final attribute. The competent local government units were entitled to compensation for these properties (Article 14 Section 3 of the Special Act), which was determined by the voivode by way of a decision (Article 14 Section 4 of the Special Act).

The procedure of expropriation of real estate not owned by local government units was different. Under Article 15 Section 1 of the Special Act, the initiation of expropriation proceedings concerning real estate intended for road lanes took place at the request of the General Director of National Roads and Motorways, after the expiry of the deadline for concluding the contract referred to in Article 13 Section 1, designated by the voivode in writing to the owner or perpetual usufructuary of these properties. This deadline could not be shorter than 30 days from the date of receipt by the owner or perpetual usufructuary of the property of the written offer of the General Director for National Roads and Motorways regarding the conclusion of the contract. Article 16 Section 1 of the special act stipulated that the expropriation procedure is initiated at the request of the General Director for National Roads and Motorways, and the voivode issues decisions in its course. The decision

on expropriation of the real estate specified the time limit for issuing the real estate – it could not be shorter than 30 days from the date of delivery of the decision to the owner or perpetual usufructuary of the real estate.

The property was expropriated for compensation, the allocation of which was defined in Article 18 of the Special Act. Article 18 Section 1 stipulated that the amount of compensation for expropriated real estate is determined according to its state as of the date of the decision on the determination of the location of the road and its market value on the date of the decision on the expropriation of the real estate. The value of the real estate was determined by property appraisers referred to in the Real Estate Management Act (Article 18 Section 2 of the Special Act).

The very implementation of the road investment was defined in Chapter 4 of the Special Act, entitled "Implementation of a road investment". Under Article 24 Section 1 of the Special Act, the voivode issues a decision on a permit to build a road on the terms and according to the provisions of the Construction Law,[6] subject to the provisions of this chapter. Article 24 Section 2 stated that whenever the provisions of the Construction Law refer to a decision on building conditions and land development, it also means a decision to determine the location of a road.

The amendment made by the Act of October 18, 2006, amending the Act on special rules for the preparation and implementation of investments in the field of national roads and amending certain other acts,[7] as of December 16, 2006, the scope of application of the Act was extended to the preparation of investments in the field of all public roads in meaning of the Act on Public Roads, i.e. voivodeship, district and commune roads. The changes were made taking into account the experience from the three – year period when the act was in force and the demands of local governments. These were expecting to extend the operation of the act to local government units implementing tasks with the participation

6 Act of 7 July 1994,the Construction Law, Journal of Laws of 2020, item 1333, further as: the Construction Law.

7 Journal of Laws of 2006, no. 220, item 1601.

of funds from the European Union, which was to facilitate the preparation of these tasks for implementation and accelerate the use of EU funds.[8]

The amendment in question also introduced one key change, in particular in the aspect of civil law effects – the amended Article 12 Section 4 of the Special Act stipulated that real estates separated by lines delimiting the area, indicated in the decision on determining the location of the road, shall by operation of law become the property of the State Treasury concerning national roads or the property of relevant local government units in relation to voivodeship, district and commune roads as of, in which the decision to determine the location of the road has become final. In connection with the above, the participation of the General Director for National Roads and Motorways in the procedure for issuing a decision on determining the location of the road was restricted to the extent that the purchase of real estate not owned by local government units by way of an agreement was planned. Thus, the amendment introduced an *ex lege* expropriation mechanism, which did not provide for any exceptions.

However, less than two years later, another significant amendment to the special act was adopted – utilizing the Act of 25 July 2008 amending the Act on special rules for the preparation and implementation of investments in the field of public roads and amending certain other acts,[9] which entered into force on 10 September 2008.

The amendment accelerated the procedure aimed at implementing the road investment even more – it repealed chapter 2 of the Special Act, dealing with the location of roads, and replaced it with chapter 2a, entitled "Proceedings prior to the commencement of construction works". Some provisions from Chapter 4 of the Special Act have also been repealed. In accordance with the justification to the draft

8 See: justification for the draft of the amendment.

9 Journal of Laws of 2008, no. 154, item 958.

amendment, the changes were aimed at simplifying the investment implementation procedure. Before the amendment, the procedure consisted of two stages:

- the first – location, ending with the issuance of a decision to determine the location of the road, replacing the acts in the field of spatial planning and development in the traditional investment process,
- the second – aimed at issuing a decision on a road construction permit.

By means of the amendment, an integrated, one – step procedure was created, determining all the conditions for the implementation of road investment. The previous two decisions: on establishing the location of the road and on the road construction permit, were replaced by one decision, issued according to Chapter 2a of the Special Act – the decision on the permit for the implementation of a road investment. Its elements were defined in Article 11f Section 1 of the Special Act. And so, according to it, the decision on the permit for the implementation of a road investment includes in particular:

1. Requirements for the connection of the road with other public roads, specifying their category.
2. A definition of the boundary lines of the area.
3. Conditions resulting from the needs of environmental protection, the protection of monuments and contemporary cultural goods, and the needs of the state's defence.
4. Requirements for the protection of the legitimate interests of third parties.
5. Approval of the division of real estate referred to in Article 12 Section 1.[10]

10 According to Article 12, Section 1, the decision on the permit for the implementation of a road investment approves the division of the real estate. According to Article 12 Section 3, the decision on the permit to implement a road investment constitutes the basis for making entries in the land register and in the real estate cadastre.

6. The designation of real estate or parts thereof, according to the real estate cadastre, which becomes the property of the State Treasury or the relevant local government unit.
7. Approval of the construction design.
8. If necessary, other arrangements.[11]

Changing the Decision – Procedure and Administrative Law Effects

The last major change to the procedure that is the subject of this article was the amendment made by the Act of August 5, 2015, amending the Act on special rules for the preparation and implementation of investments in the field of public roads and certain other acts, which entered into force on October 27, 2015. This amendment added Section 8 to Article 11f of the Special Act, according to which to the change of the decision on the permit for the implementation of a road investment the Article 155 of the Code of Administrative Procedure[12] applies, with the proviso that consent is given only by the party that applied for a permit to implement a road investment.

This change, although editorial in – depth, was essential in nature. Article 155 of the Code of Administrative Procedure stipulates that the final decision under which the party acquired the right may be revoked or amended at any time with the consent of the party by the public administration body which issued it, provided that special provisions do not preclude the revocation or amendment of such a decision and it is justified by the public interest or the legitimate interest of the party.

In the amendment, the legislator decided to exclude the requirement to obtain the consent of all parties to the administrative procedure. It was a decisive move, bearing in mind, in particular, that the consent of

11 These arrangements included, inter alia, conditions for securing the construction site or detailed requirements for supervision on the construction site.

12 Act of 14 June 1960,Code of Administrative Procedure, Journal of Laws of 2020, item 256 further as: Code of Administrative Procedure.

the parties is a fundamental condition for the application of Article 155 of CPA, and its lack or defectiveness leads to a gross violation of the law.[13] The jurisprudence stated[14] that the consent of a party to revoke or amend a decision under Article 155 must be given explicitly and clearly – it cannot be presumed.[15]

Therefore, it can be assumed that the legislator resigned from the requirement to obtain the consent of all parties to the proceedings,[16] intending to accelerate them. The above confirms the justification for the draft amendment, which indicates that in the case of the implementation of large road investments, due to the wide range of parties to the proceedings, obtaining the consent of all parties to amend the decision on the permit for the implementation of a road investment is very difficult, due to a large number of parties to the proceedings.

At this point, however, the question arises as to when it is permissible to change the decision on the permit for the implementation of a road investment. It should be recalled that under Article 12 Section 4 of the Special Act, the real estate marked in the decision becomes, by operation of law, the property of the State Treasury or the competent local government units on the date of obtaining the final property. According to Art. 12 Section 4a of the Special Act, a decision establishing the amount of compensation for the real estate referred to in Section 4 is issued by the authority that issued the decision on the permit for the implementation of a road investment. Article 12 Section 4b of the Special Act stipulates that the decision determining the amount of compensation shall be is-

13 See J. Borkowski, B. Adamiak, in: *Kodeks postępowania administracyjnego. Komentarz do art. 155*, ed. 17, 2020.

14 See: the judgment of Supreme Administrative Court of July the 15th 1999, I SA 314/99; the first thesis of the judgment of Supreme Administrative Court of November the 24th 1998, I SA 380/98; the judgment of Supreme Court, 14 March 1991, III ARN 32/90.

15 P. M. Przybysz, in: *Kodeks postępowania administracyjnego. Komentarz aktualizowany, Art. 154, Art. 155*, Gdańsk 2021.

16 Before the amendment, the investor was required to obtain such approvals under Article 11c of the Special Act, according to which the provisions of the Code of Administrative Procedure apply to the procedure in matters relating to the issuance of a decision on the permit for the implementation of a road investment subject to the provisions of the Special Act.

sued within 30 days from the date on which the decision on the permit to implement a road investment becomes final. Article 12 Section 5 of the Special Act indicates that for the determination of the amount and payment of the compensation referred to in Section 4a, the provisions on Real Estate Management Act shall apply mutatis mutandis, subject to Article 18 of the Special Act.

Therefore, it should be noted that the final administrative decision on the permit for the implementation of a road investment has significant effects in the civil and administrative spheres. When it becomes final, there are changes in the ownership sphere, and the decision itself is the basis for making entries in the land register and the real estate cadastre. Moreover, the act imposes an obligation on the competent authority to issue a decision determining the amount of compensation within 30 days of the decision being final.

Since the decision on compensation is a separate decision from the decision on the permit to implement a road investment, Article 132 Section 1a of the Act of August 21, 1997, on Real Estate Management,[17] according to which in cases where a separate decision on compensation was issued, the payment of compensation takes place once, within 14 days from the date on which the decision on compensation becomes final. Therefore, it is not difficult to imagine a situation in which the final decision on the permit for the implementation of a road investment will be changed, which could have an impact on another final decision issued in connection with it – i.e. the decision to determine the amount of compensation for expropriated real estate. Interestingly, in this case, it would not necessarily have to be refunded for the expropriated property – following Article 132 Section 3a of the Real Estate Management Act, if the decision on the basis of which the compensation was paid was subsequently revoked or invalidated, the person to whom the compensation was paid or his heir shall be obliged to return the compensation after its indexation as of the date of its return. The repeal may take place,

17 Journal of Laws of 2020, item 1990, further as: the Real Estate Management Act.

inter alia, on the basis of Article 155 of the Code of Administrative Procedure, but in this case – contrary to the decision on the permit for the implementation of a road investment – consent must be expressed by all parties to whom the decision was addressed. The legislator did not stipulate the necessity to reimburse compensation in the event of a change in the decision on compensation or a change in the decision based on which the compensation was issued.

Changing the Decision – Significant Effects on the Basis of Civil Law

The very nature of the claim for compensation for expropriated real estate is not uniform, the doctrine and jurisprudence, however, take the position that it is dominated by civil elements, but with elements of administrative jurisdiction. As an example, the judgment of the Supreme Administrative Court can be mentioned: "In the opinion of the Supreme Administrative Court, the claim for compensation for the deduction of ownership or the acquisition of a real estate by operation of law is of a civil nature, although it is a consequence of a ruling (under a decision or by operation of law) deprivation of law) properties. The argument that the public entity, i.e.the State Treasury or a local government unit, is obliged to pay the compensation is irrelevant. These entities operate in civil law transactions on the same terms as private entities".[18]

However, the question about the civil law consequences of real estate expropriated through a decision granting permission to implement a road investment remains valid. Earlier it was indicated that the final decision leads to the transfer of property ownership to public entities *ex lege*. This raises the question of whether, in the event of a change or revocation of the decision, it is necessary to conduct administrative proceedings for the return of expropriated real estate based on the Real Estate Management Act, or civil proceedings aimed at the return of owner-

18 Judgment of Supreme Administrative Court of January the 21st 2016, I OSK 1083/14.

ship to the previous owner of the real estate. It should also be considered whether the transfer of ownership based on such a decision does not lead to irreversible legal consequences.

This was the situationin the case examined by the Voivodeship Administrative Court in Opole[19]. In this case, the Mayor of the City of Kędzierzyn-Koźle applied for the revocation of the decision on the permit for the implementation of a road investment under Article 155 Code of Administrative Procedure. In the justification of the application, he indicated that the decision was not implemented by the investor – the possession of only one plot of land was taken over from the properties separated based on the aforementioned decision, and no construction works were commenced. The authorities of both instances (District Head of Kędzierzyn – Koźleand the Voivode) refused to repeal the decision, referring to the fact that the decision on the permit for the implementation of a road investment deeply interferes with the property ownership right, constitutes the basis for entries in the land and mortgage register and real estate cadastre, i.e. when it becomes final, the legal status and purpose of the above – mentioned properties are irreversible.

The Voivodeship Administrative Court in Opole, in its final judgment, did not accede to the arguments raised by the authorities of both instances, in particular as regards the irreversibility of the legal effects of the decision. The court stated: "The court fully agrees with the applicant's opinion that the decision did not produce irreversible legal effects only because some plots in the demarcation lines of the road investment were expropriated to a local government unit. (...) In the resolution of 7 Justices of the Supreme Court of May 28, 1992, file ref. act III AZP 4/92, it was stated that the reversibility or irreversibility of the legal effect of the decision must be considered, taking into account the scope of competencies of public administration bodies and their competencies, i.e. empowerment to apply and unilateral legal forms of action. If

19 Judgment of Voivodeship Administrative Court in Opole of November the 14th 2019, II SA/Op 394/19.

the revocation, cancellation or reversal of the legal effects of a decision requires such actions for which the public administration body has no statutory authority, i.e. it cannot apply the form of an individual administrative act, and cannot use the administrative procedure, then the legal effect of the decision will be irreversible".

Further, the Court stated: "To reverse the effect caused by the contested decision, consisting in the expropriation of the owners of plots from their property rights to a local government unit, it is enough to simply eliminate this decision from legal circulation by the administrative authority under its powers under Art. 155 of the Code of Administrative Procedure and no additional procedures are required before a common court under the provisions of private civil law governing the protection of property rights. It is also not necessary to initiate administrative proceedings under the provisions of the Act of August 21, 1997, on real estate management (Journal of Laws of 2018, item 2204, as amended), aimed at returning the expropriated property (Section III, Chapter 6), possibly initiated by the owners of expropriated real estate or their legal successors".

When assessing the position of the Voivodeship Administrative Court in Opole, it is difficult not to deny it was right. Since the decision on the permit for the implementation of a road investment transfers the ownership of the real estate *ex lege* along the demarcation lines of the road investment, there are no grounds to conclude that changing the decision by modifying the demarcation lines could not introduce further ownership changes. Such a solution is also justified by considerations of equity – it is possible that, by mistake, in an architectural and construction design, the person preparing it will cover it with lines delimiting the property which was not the target of expropriation. Correcting such a decision should be as simple as possible – in particular, bearing in mind that only the party that applied for the permit for the implementation of a road investment expresses consent to the amendment of the decision.

Doubts of a Constitutional Nature

The aforementioned judgment does not include one more issue in its justification – the deadline for changing the final decision on the permission to implement a road investment. Article 11f Section 8 of the Special Act does not specify such a term.

It is also not indicated by other provisions contained in the act. Article 16 Section 2 of the Special Act provides that the decision on the permit for the implementation of a road investment specifies the time limit for the release of the property, or the release of the property and the emptying of premises and other rooms, respectively. This deadline may not be shorter than 120 days from the date on which the decision on the permit for the implementation of the road investment becomes final. Article 31 Section 1 of the Special Act provides that the final decision on the permit for the construction of road investment is not invalid if the application for annulment of this decision was submitted after 14 days from the date on which the decision became final and the investor started the construction of the road. Article 158 Paragraph 2 of the Code of Administrative Procedure shall apply accordingly.

Bearing in mind the above – mentioned regulations, the concept of 'starting the road construction' should be interpreted. According to the position of the doctrine, the moment of commencement of works should be assessed through the prism of Article 41 Section 1 and 2 of the Construction Law, according to which the construction starts upon the commencement of preparatory works on the construction site, which are: geodetic delineation of objects in the field, execution of land levelling, development of the construction site along with the construction of temporary facilities and execution of connections to the technical infrastructure network for construction purposes. Application of Article 31 Section 1 of the Special Act was conditioned by the occurrence of two cumulative circumstances: when the application for annulment of the decision was submitted after the expiry of the 14-day period, counted from the date of obtaining the final status

by the assessed decision, and when the investor started construction of the road.[20]

Considering the above, it should be considered that the only limitations for changing the decision on the permit for the implementation of a road investment (and thus also for changes in the sphere of civil law and administrative law) are the general clauses contained in Art. 155 Code of Administrative Procedure – social interest or the legitimate interest of a party. It should be noted that it is not only the legitimate interest of the party that applied for the permit for the implementation of a road investment – the only modification introduced by the Special Act concerns the group of people agreeing to change the decision, while the public interest or the legitimate interest of the party should be related to each of the other parties to the proceedings.

It should be noted that although the decision on the permit for the implementation of a road investment is related, it may be changed in the manner provided for in Article 155 of the Code of Administrative Procedure. This position was expressed in the jurisprudence: "The court agreed with the appeal body that the decision on the permit for the implementation of a road investment is a related decision, which means that if the conditions provided for by law are met, the competent authority has an absolute obligation to issue a positive decision, i.e. to grant permits. However, the court did not share the view that for this reason alone, the investor's application should be dealt with negatively. (...) It should also be emphasized that neither Art. 155 of the Code of Administrative Procedure or from Art. 154 of the Code of Administrative Procedure, it does not follow by any means that they were reserved only for the so-called discretionary decisions".[21] Although the jurisprudence also expressed a different view,[22]

20 M. Wolanin, *Ustawa o szczególnych zasadach przygotowania i realizacji inwestycji w zakresie dróg publicznych. Komentarz do art. 31*, 2010.

21 Judgment of Voivodeship Administrative Court in Opole of October the 10th 2019, II SA/Op 225/19.

22 See the judgment of Supreme Administrative Court of August the 9th 2013, II OSK 756/12; the judgment of the Supreme Administrative Court of February the 25th 2011, I OSK 607/10.

this position approving the possibility of changing the related decision on the permit for the implementation of a road investment is supported expressis verbis by the wording of Article 11f Section 8 of the Special Act.

Summarizing the above remarks and observations, it is necessary to consider the compliance of the regulations contained in the Special Act with the Polish Constitution. Article 64 Section 2 of the Constitution stipulates that property, other property rights and the right of inheritance are subject to equal legal protection for all. In this context, it should be pointed out that the subject of the property right should have the means to request from the state authorities an unambiguous determination as to whether he is entitled to that right and to act to protect this right.[23]

Because the change of the final decision on the permit for the implementation of a road investment, which *de facto* is also an expropriation decision, is not limited in any way in time, as well as the fact that the only party expressing consent to its change is the entity applying for it, edition, it should be stated that it is not conducive to the stabilization of private – law relations, as well as to the constitutional standards of the protection of property rights. Moreover, there is no claim on the part of the owners of expropriated real estate for the return of the expropriated real estate referred to in the Real Estate Management Act. Article 216 Section 1 of the Real Estate Management Act enumerates the acts to which the regulations on the return of expropriated real estate apply – the calculation does not include the Special Act. Such a position has been confirmed in the judicial and administrative judgments: "The Special Act in Article 23 states: "In matters not regulated in this chapter, the provisions of the Real Estate Management Act shall apply." This provision is included in Chapter 3, entitled "Acquisition of Real Estate for Roads". Therefore, it refers to the provisions of the Real Estate Management Act, but only in matters relating to the acquisition of real estate for roads. Therefore, there is no regulation in the special road act regarding the return of real estate or its part unused for

23 B. Banaszak, *Komentarz do art. 64 Konstytucji Rzeczypospolitej Polskiej*, 2012.

the implementation of road investment. (...) The enumeration in Article 216 of the Real Estate Management Act is closed. It is therefore unacceptable to apply the provisions on the return to real estate taken over by the State Treasury based on provisions other than those listed in Article 216 of the Real Estate Management Act".[24] Therefore, concerning real estate taken over by public entities based on a special act, e.g. Article 137 Section 1 of the Real Estate Management Act will not be applied, according to which the real estate is considered redundant for the purpose specified in the expropriation decision, if, despite the lapse of 7 years from the date on which the expropriation decision became final, the works related to the implementation of this purpose have not started.

Conclusions – the Decision on the Permit for the Implementation of the Road Investment: a Good Example of the Borderline of the Branches of Law?

The decision on the permit for the implementation of road investment, although issued in a simplified and quick procedure provided for by the repeatedly amended special act, has significant civil and administrative effects. Its nature, as well as the exclusion of the application of many Real Estate Management Act provisions to it, do not favour constitutional standards of property protection. This can be seen, for example, when public authorities abandon the implementation of a road investment – the previous owner of the property is deprived of a claim for its return, and if such a decision is changed, it is only at the discretion of the public administration body, which may exclude individual fragments of the property covered by the decision from its return. And although the undoubted advantage of the procedure established by a special act is a decisive acceleration of the acquisition of real estate for roads (impossible under any other legal act), there are reasonable doubts

24 The judgment of Supreme Administrative Court of July the 19th 2017, I OSK 2785/15.

as to whether the procedure sufficiently covers the protection of the property rights of individuals.

Further doubts as to the protection of individual rights are raised by the fact that similar solutions are also used in other special acts.[25] It seems that in the institution of the decision on the permit for the implementation of a road investment, agreements that determine the essence of public law prevail[26] (although the term "public" was not included in the name of the decision) because this decision serves the performance of public tasks, is issued by the public authority and concerns public property, which is predominantly roads. However, it must not be forgotten that – similarly to the classic expropriation decision – it has significant effects in the civil law sphere because the actual expropriation of real estate for roads takes place for compensation, which is a civil institution. In conclusion, the institutions included in the special investment and construction acts are a good example for presenting another point of contact between of public and private law.

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25 The Act of 28 March 2003 on rail transport; the Act of 12 February 2009 on special rules for the preparation and implementation of investments in the field of public use airports; the Act of 24 April 2009 on investments in the liquefied natural gas regasification terminal in Świnoujście; the Act of 8 July 2010 on special rules of preparation for the implementation of investments in the field of flood protection structures.

26 SeeKokocińska K., *Problematyka*, p. 143.

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SUMMARY

Reflections on the Context of Public Law and Private Law on the Example of the Decision on the Permit for the Implementation of the Road Investment

The article aims to show the next points of contact between public law and private law by presenting the civil and administrative legal effects of the decision on the permit for the implementation of a road investment (including its amendment and repeal), referred to in the Act of April 10, 2003, on special rules for the preparation of and implementation of investments in the field of public roads. The reason for the author to analyze the topic was the fact that the author has noticed the increasingly stronger interpenetration of the areas of public law and private law and problems encountered in legal practice. The article is a synthesis of the civil and administrative legal consequences – sometimes unintentional – of issuing and changing the decision on the permit for the implementation of a road investment, which have their source in the

unilateral, imperative action of a competent public administration body. It is also another voice in the discussion on the advisability of the classic division into the two oldest branches of law.

Keywords: decision on the permit for the implementation of the road investment, the borderline of branches of laws, administrative procedure, expropriation, investment process

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Artificial Intelligence and Discretionary Decisions (The Triumph or Loss of Commander Pirx?)

Introduction

Commander Pirx, the protagonist of Stanisław Lem's short story *The Inquest*, had to confront a robot.[1] Despite the machine's many strengths, Pirx won this duel. The reason for the robot's defeat was Pirx's behaviour, which did not correspond to the training and skills of a person acting as commander. It involved hesitation at a time when an order, which was necessary under the circumstances, had to be issued. It should be made clear that this order could only be effective if issued immediately. Thus, Commander Pirx's delay could *de facto* nullify the significance of such an order. It can be said that Pirx owed his victory to the most human reflex, i.e. having doubts.

At present, humans are beginning to lose to machines in many fields[2], with the defeat of Garry Kasparov's by the IBM chess program Deep Blue being a particularly clear example.[3] Robots and other devices simply process information faster and take actions more efficiently in comparison to human decision – making.[4] It is not surprising, there-

1 S. Lem, *The Inquest*, in *Tales of Pirx the Pilot*, S. Lem, Warsaw 1968.

2 D. Acemoglu, P. Restrepo, *Robots and Jobs: Evidence from US Labor Markets*, "Journal of Political Economy", vol. 128, no. 6, p. 2188–2244 ; A. Semuels, *Millions of Americans Have Lost Jobs in the Pandemic – And Robots and AI Are Replacing Them Faster Than Ever*, „Time", 06.08.2020.

3 D. Decoste, *The Future of Chess-Playing Technologies and the Significance Kasparov Versus Deep Blue*, „AAAI Technical Report" 04.1997, p. 9–13.

4 S. Reardon, *Artificial neurons compute faster than the human brain*, "Nature" 26.01.2018.

fore, that particular types of equipment and, in a broader sense, computer programs or algorithms themselves, are becoming part of the landscape of justice.[5] The question arises as to whether machines or programmes themselves can replace humans. In this context, it is worth recalling the words of Commander Pirx: "What is this humanity that they do not have. Perhaps it really is only the marriage of illogicality with this 'good – heartedness', this 'noble heart', and this primitiveness of moral reflex, which does not include the distant links of a causal chain?".[6] The main character of Stanisław Lem's short story seems to suggest that a human being can potentially achieve more than a machine, thanks to his or her illogicality. In this context, it is worth pointing out that in the opinion of IBM programmers, the aforementioned victory of the computer was most probably the result of an error in its software.[7] In other words, the machine won because it malfunctioned, or, in human terms, it simply made a mistake.

Stanisław Lem's intuition is confirmed by various authors, who point out that the flexibility of human action gives people a certain advantage over machines or their software.[8] This raises the obvious question of setting limits to the introduction of particular devices/software into the justice system. In this context it is worth noting the extent to which the administration of justice in the USA has been handed over to so-called artificial intelligence, and, it would seem, without any clear top – down framework.[9] As can be seen from individual analyses, while at first the process of reducing human participation in the administration of justice concerned individual procedural issues, at present

5 H. B. Dixon Jr., *Artificial Intelligence: Benefits and Unknown Risks*, "The Judges' Journal" 15.01.2021.

6 S. Lem, *The Inquest*, in *Tales of Pirx the Pilot*, S. Lem, Warsaw 1968.

7 T.Hornyak, *Did a bug in Deep Blue lead to Kasparov's defeat?*, „C|NET", 27.09.2012.

8 M. Chui, J. Manyika, *M. Miremadi, Where machines could replace humans – and where they can't (yet)*, „McKinsey Quarterly", 08.07.2016.

9 H. Liu, Ch. Lin, Y. Chen, *Beyond State v. Loomis: Artificial Intelligence, Government Algorithmization, and Accountability*, "International Journal of Law and Information Technology" 2019, vol. 27, issue 2, pp. 122–141.

one can already encounter cases where almost all procedural actions are carried out on the basis of an algorithm.[10]

A comprehensive and reliable study of the subject of this handover would require the preparation of at least one monograph. Therefore, this study will only undertake an analysis in the context of the so-called discretionary decision.

The notion of artificial intelligence

To some extent, the introduction of modern technological facilities into the justice system can be equated with the moment when typewriters began to be replaced by computers in courtrooms. It should be noted, however, that despite the fundamental difference in terms of the level of technical sophistication, the function of both these devices is the same, namely taking minutes and drawing up procedural documents. The differences were therefore limited to the issue of speed and the ease of correcting documents.

However, a real significant qualitative change came with the introduction of software (algorithms) that made it possible to replace humans in at least some of the tasks related to the administration of justice. This "replacement" should be understood strictly, i.e. where decisions used to be made by humans before the current technological revolution, now these decisions are entrusted to algorithms. At the same time it should be pointed out that there is no one type of algorithm or one common way in which they all operate. The basic difference between them consists in the scope of human interference in their functioning while they perform the tasks entrusted to them.

First of all, one can point to algorithms that perform their tasks fully "independently". The "independence" consists in the fact that human intervention in the operation of an algorithm is limited to delegating

10 A. M. Carlson, *The Need for Transparency in the Age of Predictive Sentencing Algorithms*, "Iowa Law Review" no. 103, p. 303–329.

a particular task. This means that the way a given task is performed, e.g. the selection of necessary data for a case, is performed by an algorithm independently of human intervention. In the case of such "independent" algorithms, we can speak of artificial intelligence *sensu stricto*. If a human intervenes in the performance of a given task, e.g. by determining the meaning of the data which an algorithm has access to, then one can speak at most of artificial intelligence *sensu largo*. In addition, in my view, it seems that interference in the way an algorithm performs its tasks means that in such cases we should not speak of artificial intelligence (even *sensu largo*), since it can be argued that, at a certain level of human interference, considering a case on the basis of an algorithm can be similar to solving tasks in Excel. These are cases where a human determines both the data itself and how it is used. It therefore seems reasonable to assume that the use of an algorithm in a fully human – dependent manner represents the same qualitative leap in the performance of individual tasks as the previously mentioned replacement of typewriters by computers.

Taking this into account, a real change in the use of algorithms in the administration of justice, and therefore also in administrative proceedings, will be the use of artificial intelligence *sensu stricto* and *sensu largo* where human intervention will not reduce a particular mechanism (software) to the above – mentioned excel function. It is on these categories of artificial intelligence that I will focus henceforth. However, in order to simplify the discussion, a single term – "artificial intelligence" – will be used, with the idea that it covers both categories of algorithms specified above.

Discretionary decisions

At the outset, it is necessary to clarify that the term "discretionary decision" is used mainly in two contexts, i.e. in relation to the institution of administrative discretion and the so-called "constrained decision".

It should be noted that none of the three cited concepts (i.e. "discretionary decision", "constrained decision" and "administrative discretion") has been given a legal definition.[11] What is more, none of these concepts were mentioned in legal texts; their names do not even appear. Only legal scholarship and court rulings have contributed to them being distinguished and established in the field of legal studies.

In order to explain the meaning of a discretionary decision itself, one should first refer to the term "administrative discretion". To begin with, it should be pointed out that the understanding of this term has been subject to changes over the years. "Initially the term 'free discretion' was used, denoting the scope of administrative action, which had not yet been constrained by law."[12] As a consequence, authorities could resolve the matters entrusted to them in a discretionary manner.[13]

The approach presented above cannot be accepted. If considered only from the perspective of an administered entity, "free discretion" would mean that a given authority could, for example, freely deprive an individual of rights or impose obligations. Undoubtedly, in such a case one could not speak of legal certainty or even a democratic state ruled by law[14]. The perception of "administrative discretion" (in the past, "free discretion") therefore had to change. There has thus been a "shift away from (...) a discretionary assessment of the facts to the adoption of the structure of the rule of law and to making the possibility of acting under administrative discretion subject only to an explicit legal basis".[15]

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11 On lack of definition and its consequences: J. M. Biłasz, *Sądowa kontrola decyzji uznaniowych wydawanych przez organy administracji*, "Rocznik Samorządowy" 2015, no. 4, p. 28.

12 M. Jaśkowska, *Instytucje prawa administracyjnego System Prawa Administracyjnego 1*, in *Uznanie administracyjne a inne formy władzy dyskrecjonalnej administracji publicznej*, eds. R. Hauser, A. Wróbel, Z. Niewiadomski, Warszawa 2015.

13 K. Radzikowski, *Zasady podejmowania i kontroli sądowej decyzji w sprawie umorzenia zaległości podatkowych w świetle uznania administracyjnego*, „Kwartalnik Prawa Publicznego" 2006, no. 6/4, p. 157.

14 M. Jędrzejczyk, *Koncepcje ograniczające swobodę organu w ramach uznania administracyjnego*, "Przegląd Prawniczy, Ekonomiczny i Społeczny" 2012, no. 3, p. 4.

15 P. Janiszewski, *Aksjologiczne uwarunkowania uznania administracyjnego*, "Folia Iuridica Universitatis Wratislaviensis" 2020, vol. 9, 1, p. 104.

In other words, the possibility of resolving a case within the framework of "administrative discretion" is allowed only if the relevant provision so stipulates.

Moving on to the current understanding of the concept of administrative discretion, one may cite the position of E. Ochendowski, who points out that "administrative discretion exists when the administration may choose between different solutions in order to implement a legal status. Discretion occurs when a legal norm does not unequivocally determine a legal effect, but clearly leaves such a choice to an administrative body".[16]

A. Błaś proposes to define "administrative discretion" as "the autonomy granted to a public administration body by a blanket legal norm, most often constructed in such a way that, when the hypothesis is fully developed, the disposition has a disjunctive form, which means that the administrative body in the conditions specified in the hypothesis has a choice between different ways of behaviour".[17]

As regards the way of understanding "administrative discretion" adopted in court rulings, one should refer to the study by M. Jaśkowska. On the basis of the analysis of administrative courts' judgments, the author stated that "in the light of court rulings, administrative discretion is as a separate, fully – formed legal institution, characterized by specific features. It is treated as a particular form of authorization of public administration bodies to shape the content of administrative acts"[18].

Summarizing the above, it may be said, in a simplified manner, that "administrative discretion" should be understood as a situation in which a body may choose the manner of settlement, provided that the provision of law so provides. It should be noted that such an understanding of "administrative discretion" is referred to as a narrower approach. In legal scholarship one can encounter the position that the notion of

16 E. Ochendowski, *Prawo Administracyjne. Część ogólna*, Toruń 1998, p. 182.

17 A. Błaś, *Prawne formy działania administracji publicznej*, in *Prawo administracyjne*, ed. J. Boć, Wrocław 1997, p. 287.

18 M. Jaśkowska, *Uznanie administracyjne w orzecznictwie sądów administracyjnych*, „Zeszyty Naukowe Sądownictwa Administracyjnego" 2010, no. 5–6.

"administrative discretion" "also includes the interpretation of vague notions"[19]. Such an understanding of "administrative discretion" is referred to as a broader approach. At the same time, it should be pointed out that "modern legal scholarship and court rulings have adopted a narrower understanding of this term, permanently departing from the concept of identifying administrative discretion with the interpretation of vague terms and phrases"[20]. Such a trend in the doctrine and judicature should be assessed positively, as it should be noted that the use of imprecise phrases by the legislator does not mean that an authority may interpret them in an arbitrary manner, or freely choose one of the possible interpretations in a given factual state. It may also be pointed out that within the framework of substantive legal regulations there are numerous provisions containing such imprecise phrases. Thus, if one were to accept the existence a broader approach to "administrative discretion", there would be a danger that authorities would even be able to freely assess the facts. Consequently, there could be an indirect return to the concept of free discretion.

As an aside to the above remarks, it should also be noted that the institution of administrative discretion, and, as a consequence, also of a discretionary decision, is present also in legal systems other than the Polish system. For example, "administrative discretion in the German legal system does not mean discretion to make decisions in the sense of unlimited activity of the administration, as it is subject to legal regulation. Discretion is an authorisation for the administration, but at the same time it establishes its obligation to make a decision taking into account the legal boundaries of discretion and the criteria of purposefulness"[21]. As a result, it can be said that administrative discretion is an indispensable element of administrative law, regardless of the specific solutions in national regulations.

19 A. Szot, *Słuszność a uznanie administracyjne*, „Studia Iuridica Lublinensia" 2011, no. 15, p. 176.
20 *Ibidem*.
21 K. Gębala, *Uznanie administracyjne w systemie prawa niemieckiego*, „Państwo i Prawo" 2011, no. 1.

In the light of the above comments, it should be clarified that a constrained decision should be understood as the opposite of a discretionary decision. Thus, in the case of issuing a related decision, the authority does not have the discretion to decide.

The admissibility of taking discretionary decisions by artificial intelligence

Firstly, attention should be drawn to the current legal status. Neither the Polish Code of Administrative Procedure nor any other act regulating in part or in whole the proceedings conducted by public administration bodies contains a regulation directly prohibiting the use of algorithms during the performance of particular procedural actions, even issuing decisions. It also seems that on the basis of the text of the Constitution it is not possible to formulate a thesis on the prohibition of replacing humans by artificial intelligence units in the administration of justice. However, to paraphrase F. Bastiat[22], what is important is not only what is explicitly written in a legal text, but also what can be discovered through the interpretation of individual provisions.

It is therefore worthwhile to look at the whole of the analysed issue from the perspective of two particularly important constitutional regulations. These are the principle of a democratic state of law and the protection of inherent and inalienable human dignity, which is the source of human and civil liberties and rights. In simple terms, the Polish state, through its bodies, should not apply the law in a way that is inadequate to the changing requirements of reality and leave the individual in a kind of "no – win" situation. Thus, from this perspective one should look at the administrative, tax or other proceedings conducted by public administration bodies, which end with issuing a discretionary decision. In order to better illustrate the presented issue, one can recall

22 F. Bastiat, *Dzieła zebrane*, *1*, Warszawa 2009.

Article 48 of the Tax Ordinance Act[23] (further Tax Code), i.e. the regulation providing for the possibility to grant the postponement of deadlines. In accordance with Article 48(1) of the Tax Code, a tax authority may, at the request of the taxpayer, in cases justified by an important interest of the taxpayer or by the public interest, defer the time – limits provided for in tax law (…). In the assessment of legal scholarship, this regulation provides grounds for assuming that "a tax authority is only obliged to properly determine the factual circumstances, i.e. the conditions for tax deferment referred to in Article 48 § 1 of the Tax Code. Therefore, it must clarify all the factual circumstances that are relevant to the issuance of a decision in this case. Even if it establishes the existence of such conditions, it may still, in the exercise of its administrative discretion, refuse to defer the deadline".[24] Thus, the authority may, as it were, arbitrarily decide to defer the deadlines binding on the taxpayer.

The freedom of an authority presented above is limited in an indirect way, just as in the case of issuing other decisions. On the basis of the abovementioned provision, court rulings indicate that "when issuing a decision, a tax authority is bound by the general rules of tax proceedings. In the "decision – making process", when examining the presence or absence of conditions justifying the granting of a tax relief under Article 48 § 1(2) of the Tax Code, the authority should exhaustively collect evidence (Article 187 § 1 of the Tax Ordinance), thoroughly explain the factual situation (Article 122 of the Tax Code) and assess, based on the collected evidence, whether a given circumstance has been proven (Article 191 of the Tax Code)".[25] In this respect, however, there are no fundamental differences between proceedings concluded with a constrained or discretionary decision. What makes it possible to distinguish the two decisions is the requirements in the literature and court

23 Journal of Laws of 2020, item. 1325.

24 A. Mariański, *Komentarz do art. 48*, in *Ordynacja podatkowa. Komentarz*, ed. A. Mariański, Warszawa 2021.

25 Judgment of the Voivodship Administrative Court in Opole of 19 March 2004, I SA/Wr 3478/01.

rulings ascribed to the manner and scope of their justification and the judicial review carried out in relation to them.

Both in the case of decisions issued on the basis of the above – cited Article 48 of the Tax Code and other procedural regulations, it is assumed that the justification for such a decision should be extensive. Thus, it is pointed out that "discretionary decisions should be convincingly and clearly justified, as regards both the facts and the law, so that there is no doubt that all circumstances relevant to the case have been comprehensively assessed and considered, and the final decision is a logical consequence thereof."[26]

In the second place, it should be pointed out that, in contrast to the scope of the verification of constrained decisions, "an administrative court's review of the lawfulness of a discretionary decision is limited to examining whether the administrative body deciding the case did not exceed the limits of its discretion and whether it properly justified its decision."[27]

Bearing the above in mind, it is worth noting that a unit equipped with artificial intelligence, and above all in its variant *sensu stricto*, will, by definition, be able to perform its tasks only according to a paradigm specified top – down, as even possible changes in resolving cases will only constitute an evolution as regards the initially adopted decisions. Therefore, it may be argued that the adopted solutions will, as a rule, only fit within the spirit of the assumptions of static interpretation.

Taking into account the above – mentioned requirements as to a discretionary decision, as well as the scope of control over such decisions, it may be safely assumed that the courts will not be able to propose the modification of the adopted position. Thus, it may be said that "surrendering" proceedings ending in discretionary decisions to artificial intelligence makes it impossible to handle administrative cases adequately

26 Judgment of the Voivodship Administrative Court in Wrocław of 17 October 2019, IV SA/Wr 296/19.

27 Judgment of the Voivodship Administrative Court in Białystok of 06 November 2019, I SA/Bk 305/19.

from the perspective of Articles 2 and 30 of the Constitution, especially those that may be classified as so-called precedents.

In order to avoid the above problem, only such artificial intelligence units that were programmed to adapt to the changing reality could be employed in administrative proceedings. In such a case, it can be said that the decisions taken will, at least in principle, be made in the spirit of dynamic interpretation. However, two circumstances should be noted.

First, the way in which an artificial unit is to "develop" will be designed by people who, for the sake of simplicity, can be called engineers. These engineers, by creating a developing unit of artificial intelligence, become at least indirectly responsible for the direction in which the interpretation of legal provisions will follow, including those that underlie the issuing of discretionary decisions. It seems that such a state of affairs is incompatible with the principle of a democratic state ruled by law, insofar as it states that only individuals designated by the legislator may be responsible for the shape and development of the legal system.

Secondly, it can be asserted that the development of an artificial intelligence unit is a kind of learning. Two other problems should be emphasized here. First of all, it should be noted that, as has been described before, administrative courts cannot correct discretionary decisions to the extent that a specific decision is made under administrative discretion. Consequently, there is no significant benchmark for the further development of artificial intelligence. It can also be said that the individual preferences of engineers designing specific units of artificial intelligence cannot be adjusted.

Secondly, it should be pointed out that an artificial intelligence unit will "learn" when issuing decisions on the rights, freedoms and obligations of people. Therefore, it can be assumed that at least some of this science will be based on identifying and analyzing mistakes made, e.g. on too creative or too conservative approaches to the interpretation of legal provisions. Obviously, a human being also makes mistakes when issuing discretionary decisions. It seems, however, that human error is not the same kind of error as that committed by the device.

It should also be pointed out that the development of an artificial intelligence unit is not the same as human development. Among other things, the point here is the different selection of messages and the lack of human sensitivity in units of artificial intelligence. Therefore, it is worth noting that the legislator creates individual regulations with a human approach to the interpretation of legal provisions in mind. In turn, "dehumanizing" the process of interpretation also leads to the fact that the result of the interpretation may also be "dehumanized". Therefore, one can at least express concern as to whether the replacement of humans by artificial intelligence units in the process of issuing discretionary decisions will be detrimental to human dignity.

In response to the above accusations, it could be said that artificial intelligence units should be controlled by a human, both with regard to the manner of conducting the proceedings and in the scope of issuing final decisions. It is worth noting, however, that in this approach, the use of artificial intelligence units in administrative matters is in fact the same activity as the use of Excel, mentioned at the beginning of the discussion.

Conclusions

On the basis of the presented considerations, it can be said that giving artificial intelligence units the competence to issue discretionary decisions is a bit like Alice's jump into the rabbit hole. It is not known whether this will lead to opening a Pandora's box, or whether the process of issuing discretionary administrative decisions will be improved – or maybe it will simply be a box of Forrest Gump chocolates, where you never know what you will end up with.

It should be noted, however, that in the situation in question it is not about a chess match with a computer, but about making decisions which affect the rights, freedoms and obligations of individual people. Taking into account the above – mentioned limited power of courts over discretionary decisions, it seems that entrusting the issuing of decisions to artificial intel-

ligence units would constitute an unacceptable experiment, the conduct of which would attack the foundations of a democratic state ruled by law.

It also seems that replacing people with artificial intelligence units in the process of issuing discretionary decisions would be associated with indirect transfer of influence on the application of the law to persons not authorized by the legislator.

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SUMMARY

Artificial Intelligence and Discretionary Decisions. The Triumph or Loss of Commander Pirx?

The aim of the considerations is to determine whether artificial intelligence units can take the place of humans in administrative proceedings ending with the issuance of discretionary decisions. The author starts from presenting the essence of discretionary decisions and guide the scope of judicial control over them. The presented considerations relate primarily to the potential placement of such devices in the "administrative justice system" that can be defined as artificial intelligence units in the strict sense. Therefore, this concerns devices for which human intervention is usually limited to switching on and technical supervision. However, the considerations can also be applied to such devices where human interference in their operation is slightly greater. It should be emphasized, however, that it this does not concern devices that are fully or almost fully controlled by humans.

Keywords: artificial intelligence, discretionary decisions, human being.

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Magdalena Jacolik

The Data-Driven Economy. Remarks in the Light of Selected Issues in the Competition Law

Introduction

With the efforts to create a digital Europe, the significance and the development of state – of – the – art technologies substantially increases.[1] On 19 February 2020, the European Commission (hereinafter the EC, the Commission), published the European strategy pertaining to data,[2] which presupposes a novel and genuinely unprecedented approach to development.[3] Data has begun to play a vital role in global, EU-wide, and domestic economies, as it constitutes "the driving force of economic development".[4] The data economy is thus a notion which

1 The implementation of the single digital market is comprehensively outlined in Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions A Digital Single Market Strategy for Europe, SWD 2015, 100 final, Brussels, 06.05.2015, Document 52015DC0192, COM, 2015, 192 final.

2 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions *A European strategy for data*, Brussels, 19.02.2020, Document 52020DC0066, COM, 2020 66 final, hereinafter as A European strategy for data.

3 In the EU strategy EUROPA 2020, the approach to development presupposed an economy based on knowledge and innovation, which was how intelligent development was envisioned. At present, the European strategy for data sets out a new approach to development, where the economy is data – driven. For the previous paradigm seeCommunication from the Commission *EUROPE 2020 A strategy for smart, sustainable and inclusive growth*, Brussels, 03.03.2010, Document 52010DC2020, COM, 2010, 2020 final, p. 11 ff.

4 A European strategy for data, p. 2 ff. Concerning the impact of data on economic development, see G. Koloch, K. Grobelna, K. Zakrzewska – Szlichtyng, B. Kamiński, D. Kaszyński, *Intensywność wykorzystania danych w gospodarce a jej rozwój – analiza diagnostyczna.*

describes the utilization of data potential[5] in the private and public sectors, shared[6] in order to achieve economic growth.[7] This strategy is expected to be implemented across the EU Member States within the next 5 years.[8] The European strategy for data represents a successive stage in the process of building the Digital Single Market.[9] It was published simultaneously[10] with the Communication of the Commission: Shaping Europe's Digital Future[11] and the White Paper on Artificial Intelligence – A European approach to excellence and trust.[12] This conception, formulated by means of political acts which determine the goals and directions of development, should be reflected in the legislation. The adoption of the General Data Protection Regulation (GDPR),[13] the regulation on the free flow on non – personal data,[14] the cybersecurity act[15]

5 Commission Staff Working Document: Guidance on sharing private sector data in the European data economy accompanying the document Communication from the Commission to the European Parliament, the Council, the European economic and social Committee and the Committee of the Regions "Towards a common European data space" COM, 2018, 232 final, Brussels, 25.04.2018, SWD, 2018, 125 final, p. 1. Hereinafter: Guidance on sharing private sector data.

6 Proposal for a Regulation of the European Parliament and of the Council on European data governance Data Governance Act, Brussels, 25.11.2020, Document 52020PC0767, COM, 2020, 767 final, 2020/0340, COD, p. 1. Hereinafter: Data Governance Act and A European strategy for data, p. 7 ff.

7 Guidance on sharing private sector data, p. 1.

8 A European strategy for data, p. 1.

9 <https://www.gov.pl/web/cyfryzacja/gospodarka-oparta-o-dane-przemysl->.

10 A European strategy for data, p.1 ff.

11 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Shaping Europe's digital future, Brussels, 19.02.2020, Document 52020DC0067, COM, 2020, 67 final. Hereinafter: Shaping Europe's digital future.

12 White Paper on Artificial Intelligence – A European approach to excellence and trust, Brussels, 19.02.2020, Document 52020DC0065, COM, 2020, 65 final.

13 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, Official Journal of the European Union of 04.05.2016, L 119/1, Document 32016R0679.

14 Regulation EU 2018/1807 of the European Parliament and of the Council of 14 November 2018 on a framework for the free flow of non – personal data in the European Union, Official Journal of the European Union of 28.11.2018, L 303/59, Document 32018R1807.

15 Regulation EU 2019/881 of the European Parliament and of the Council of 17 April 2019 on the European Union Agency for Cybersecurity and on information and communications

and the open data directive[16] make up the legislative output to date, thanks to which the data economy may be shaped and pursued.[17]

The adoption of a new approach to development entails a range of issues of alegal, economic and social nature that need to be examined and studied in greater detail. However, the scope of these issues is very broad indeed, which is why this paper focuses on the data economy as it relates to selected questions in competition law.[18] Specifically, this includes observations regarding threats associated with thesharing of confidential business data, or data subject to intellectual property protection laws,[19] between participants in the market economy, i.e. enterprises,[20] as well as actions which restrict competition in the light of the new approach to development.

Sharing Confidential Company Data in the Private Sector

Exploiting the potential of data sharing in the private sector[21] naturally links the data economy and competition law.[22] In accordance with the

technology cybersecurity certification and repealing Regulation EU No 526/2013, Official Journal of the European Union of 07.06.2019, L 151/15, Document 32019R0881.

16 Directive EU 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re – use of public sector information, Official Journal of the European Union z 26.06.2019, L 172/56, Document 32019L1024.

17 A European strategy for data, p. 4.On the implementation of development policy, see the Development Policy Act of 6 December 2006, Journal of Laws 2020, item 1378 and e.g. K. Kokocińska, *Prawny mechanizm prowadzenia polityki rozwoju w zdecentralizowanych strukturach władzy publicznej*, Poznań 2014; K. Kokocińska, *Współzależność prawa i programowania*, in: *Administracja a strategie i polityki publiczne*, ed. A. Jurkowska – Gomułka, Warsaw 2016, pp. 25–37, K. Kokocińska, *Wybrane formy prowadzenia polityki rozwoju*, in: *Instrumenty i formy prawne działania administracji gospodarczej*, ed. B. Popowska, K. Kokocińska, Poznań 2009, pp. 135–180, K. Kokocińska, *Współdziałanie podmiotów władzy publicznej na rzecz rozwoju*, „Ruch prawniczy, ekonomiczny i socjologiczny" 2015, vol 3, pp. 181–191.

18 A European strategy for data, pp. 5 and 14.

19 Data Governance Act, p. 1, note 3.

20 Enterprises and consumers as participants of the market economy are discussed in K. Strzyczkowski, *Prawo gospodarcze publiczne*, Warsaw 2011, p. 388.

21 A European strategy for data, p. 7.

22 Ibidem, p. 5 and 14. On the risk of potential breaches of the competition law, see Recital (29) of the Data Governance Act.

proposal for a EU data governance regulation [hereinafter the Data Governance Act] sharing data as part of the new approach to development also applies to data which is commercially confidential and regulated by intellectual property protection laws.[23] This creates a risk of competition being restricted and enterprises potentially losing their competitive advantage[24] as well as – in the opinion of this author – thepossibility of the freedom of economic activity being violated.

Here, the principal deliberations set out with Art. 11(1)and (3–6) of the Act on Combating Unfair Competition of 16 April 1993 [hereinafter the CUC], pursuant to which the disclosure, use or obtaining of information which is confidential to the enterprise constitutes an act of unfair competition.[25] The aforementioned statute is intended to protect this-

23 Data Governance Act, p. 1, note 3.

24 Recital (29) of the Data Governance Act and A European strategy for data, p. 7.

25 Art. 11(1) of the Act on Combating Unfair Competition of 16 April 1993, Journal of Laws of 2020, item 1913. Hereinafter: CUC. See also Art. 11(3) CUC: "Obtaining confidential enterprise information constitutes an act of unfair competition, in particular when this occurs without the consent of the entity entitled to use or dispose of the information, and results from the unlawful access, appropriation, or duplication of documents, objects, materials, substances, or digital files which encompass that information or enable inferences about their content"; Art. 11(4) CUC: "Use or disclosure of confidential information of an enterprise constitutes an act of unfair competition, in particular when this occurs without the consent of the entity entitled to use or dispose of the information,and violates the obligations to restrict its use or disclosure arising under the statute, legal transaction or otheract, or when it has been effected by a person who obtained the information by committing an act of unfair competition"; Art. 11(5) CUC: "Disclosure, use, or obtaining information which is confidential to the enterprise constitutes an act of unfair competition also when at the moment of its disclosure, use or obtaining a person had the knowledge or, maintaining due diligence, could have the knowledge that the information had been obtained directly or indirectly from one who had used or disclosed it in the circumstances specified in Section 4"; and Art. 11(6) CUC: "Use of confidential information of an enterprise which consists in producing, offering, marketing, as well as inbound or outbound movement and storage of goods for that purpose constitutes an act of unfair competition, if a person who performed the act in question had the knowledge or, maintaining due diligence, could have the knowledge that the properties of the goods, including aesthetic and functional properties, their manufacturing or selling process have been to a substantial extent formulated as a result of the act referred to in Section 1, effected in the circumstances specified in Section 4." See also Directive EU 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know – how and business information against their unlawful acquisition, use and disclosure, Official Journal of the European Union of 15.06.2016, L 157/1, Document 32016L0943.

kind ofinformation. Assets and resources are what determines the competitive advantage of enterprises,[26] while their confidentiality is one of the crucial elements of that advantage.[27] Sharing such data creates a risk of the potential restriction of competition as well as potential loss of the advantage if the law-sector-specific and competition related provisions – is not adequately aligned[28] with the needs of the data – driven economy.[29]

Given the above, this author undertakes a somewhat broader analysis. It needs to be noted that there is a notion in jurisprudence according to which the freedom of economic activity, ensured under Articles 20 and 22 of the Polish Constitution[30] not only spans the freedom to engage in, conduct, and terminate economic activity,[31] but also covers free competition.[32] It seems legitimate, therefore, to conclude that a potential limitation of competition due to sharing the confidential data of an enterprise may result in a violation of the freedom of economic activity. This approach may be inferred from the rationale to the judgment of the Constitutional Tribunal of 19 January 2010, file no. SK 35/08 which,

26 D. Grego – Planer, *Potencjał konkurencyjny ukrytych liderów polskiej gospodarki*, Toruń 2016, p. 63. Regarding assets and resources see also M. J. Stankiewicz, *Konkurencyjność przedsiębiorstwa. Budowanie konkurencyjności przedsiębiorstwa w warunkach globalizacji*, Toruń 2002, p. 22 ff. Also, data constitutes a resource required to manufacture goods or/and provide services; see A European strategy for data, p. 2 ff.

27 A. Michalak, *Ochrona tajemnicy przedsiębiorstwa. Zagadnienia cywilnoprawne*, Zakamycze 2006, p. 21.

28 Certain Member States have already begun adjusting their legislation. One of the examples is the "(…)Finnish law on secondary use of health and social data, creating a data permit authority"; see A European strategy for data, p. 6 see also note 15.

29 Ibidem, p. 6 see also note 16.

30 Articles 20 and 22, Constitution of the Republic of Poland of 2 April 1997, Journal of Laws of 1997, no. 78, item 483 as amended. Hereinafter: CRP.

31 E. Kosiński, *Aspekt prawny wolności gospodarczej*, „Kwartalnik Prawa Publicznego" 2003, vol. 3, no. 4, 2003, p. 13 ff.

32 See e.g. K. Pawłowicz, *Prawo człowieka do swobodnej działalności gospodarczej*, in: *Prawa człowieka w społeczeństwie obywatelskim*, ed. A. Rzepliński, Warsaw 1993, p. 69 ff., J. Węgrzyn, *Wolność prowadzenia działalności gospodarczej*, in: *Realizacja i ochrona konstytucyjnych wolności i praw jednostki w polskim porządku prawnym*, ed. M. Jabłoński, Wrocław 2014,p. 522, J. Kołacz, *Swobody cząstkowe a swoboda działalności gospodarczej*, „Ruch prawniczy, ekonomiczny i socjologiczny", 2008, vol. 2 – 2008, p. 80.

invoking the jurisprudence in the domain of public economic law, states as follows: "The essence of conducting economic activity, construed as a public subjective right, is the freedom of a private – law entity to engage in and carry out such an activity. Both public authorities and other legal entities are charged with the obligation to refrain from intervening – whether through legal or factual actions – in the sphere of free economy. An entity exercising their freedom makes fundamental decisions in several areas. In particular, they decide about: (…) the methods and the scope of conducting the activity, including activity in the fields of: (…) competition (…)".[33] Effective competition is characterized by competing – a rivalry[34] of enterprises (on equal terms) and striving to produce and then supply the consumerwith products or/and services of the best possible quality and at the most advantageous prices.[35] Consequently, sharing data that is "(…) vital for competition (…) enables enterprises to gain knowledge concerning market strategies of their actual or potential competitors (…) including information relating to future prices, production costs, quantities and volumes, turnover, sale, or capacities"[36] will, in the opinion of this author, affect the resources which have an impact on the competitiveness of an enterprise.[37] Again, this may lead to potential restriction of competition[38] and, in the broad sense, a potential violation of economic freedom. It may be argued that

33 Rationale to the Judgment of the CT of 19 January 2010, SK 35/08., p. 10.

34 On competition or rivalry of businesses,see e.g. D. Miąsik, *Reguła rozsądku w prawie antymonopolowym*, Zakamycze 2004, pp. 28–31., C. Norgren, *Sprawnie funkcjonujące rynki – wyzwanie dla urzędów antymonopolowych i rządów,* in: *Ochrona konkurencji i konsumentów w Polsce i Unii Europejskiej (studia prawno – ekonomiczne)*, ed. C. Banasiński, Warsaw 2005, p. 49 and M. J. Stankiewicz, op. cit., p. 18.

35 <https://www.europarl.europa.eu/factsheets/pl/sheet/82/polityka-konkurencji>. Concerning competition, see also E. Próchniak, J. Zygadło, *Ochrona konkurencji i konsumentów,* Bydgoszcz 1998, pp. 9–12.

36 Recital 29 of the Data Governance Act.

37 On the assets and resources of businesses see M. Błaszczyk, *Przedsiębiorstwo jako elastyczny system zasobów*, "Handel Wewnętrzny" 2017, vol. I, no. 3, pp. 29–39.

38 On the potential restriction of competition in connection with the sharing competitively sensitive data, see Recital 29 of the Data Governance Act.

data will be shared in the public interest[39] while respecting the private interests of the entrepreneurs.[40] However, the counter argument to this is that, due to hypothetically detrimental phenomena which inhibit competition and infringe the liberty of economic activity, the balance between public interest and the interests of the entrepreneurs will be undermined.[41]

At this point, it may be briefly noted that data sharing among enterprises will influence the parameters of competition.[42] Based on the Data Governance Act, which sets forth that: "(…) data – based products and services developed in one Member State may need to be customised to suit the preferences of customers in another Member State (…). As such, data needs to be able to flow easily through EU – wide and cross – sector value chains (…)",[43] it may be inferred that implementation of the new approach to development will promote increased quality of products and/or services.[44] The data used by businesses[45] will reflect the needs of the market[46] and therefore be a "vehicle of information"

39 A European strategy for data, p. 6, 21.

40 Ibidem, p. 13 note 39 and p. 18.

41 On preserving the balance of interests, see Summary of the Opinion of the European Data Protection Supervisor on EDPS Opinion on the European strategy for data, 2020/C 322/04, p. 1., Hereinafter: EDPS Opinion Summary.

42 On the actions of entrepreneurs which affect the parameters of competition,see Communication from the Commission – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co – operation agreements, Official Journal of the European Union of 14.01.2011, C 11/1, Document 52011XC0114 04. Hereinafter: the Guidelines on horizontal co – operation agreements. On the question of impact of data sharing on the product quality, price, innovativeness and production, see G. Koloch, K. Grobelna, K. Zakrzewska – Szlichtyng, B. Kamiński, D. Kaszyński, *Intensywność wykorzystania danych w gospodarce a jej rozwój – analiza diagnostyczna*.

43 Data Governance Act, p. 3.

44 For instance, Finland saw an increase in the quality of healthcare. In that respect, see also: *Intensywność wykorzystania danych.*...

45 Sectors in which data access applies are outlined in Data Governance Act, p. 2.

46 *Intensywność wykorzystania danych.*…
Concerning examples of prospectively shared data, see Communication from the Commission to the European Parliament and the CouncilGuidance on the Regulation on a framework for the free flow of non – personal data in the European Union, Brussels, 29.05.2019, Document 52019DC0250, COM, 2019, 250 final, hereinafter Guidance on the Regulation on non – personal data.

and at the same time a "key" to satisfying social and economic demand. Although this paper does not delve into the issue, it is still worth noting(referring briefly to product quality) that this is a compelling area for further, detailed jurisprudential studies.

The Data Economy and the Potential Risk of Monopolies, Oligopolies and Collusion Between Enterprises

The data economy involves the wide application of state-of-the-art technologies,[47] which is why the new approach to development necessitates appropriate conditions in which the approach can be implemented (e.g. the introduction of adequate safeguards to protect data,[48] cloud services or quantum computations).[49] On the other hand, modern technologies may cause monopolies and oligopolies to emerge,[50] therefore actions to foster an economy which efficiently utilizes data can indeed entail potential risks in that respect.[51] Nonetheless, the above market types are formed[52] in connection with the digital infrastructure required to implement the new approach and assure conditions for the subse-

47 *Intensywność wykorzystania danych…*

48 EDPS Opinion Summary, p. 1.

49 <https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/ITRE/PR/2021/02–23/1212999PL.pdf>.

50 M.K. Kolasiński, *Unijne prawo konkurencji*, in: *Podstawy prawa Unii Europejskiej z uwzględnieniem Traktatu z Lizbony*, ed. J. Galster, Toruń 2010, p. 548 ff.

51 By way ofanalogy toA. Jurkowska – Gomułka, see*Polityka elektromobilności i polityka konkurencji: korelacje*, in: *Prawne i ekonomiczne aspekty rozwoju elektromobilności*, ed. K. Kokocińska, J. Kola, Monografie Prawnicze, Warsaw 2019, pp. 19–38 and M. Jacolik, *Rozwój elektromobilności w Polsce w kontekście wybranych zagadnień prawa konkurencji*, „Zeszyt Studencki Kół Naukowych Wydziału Prawa i Administracji UAM", No. 9, Poznań 2019, pp. 69–82. Furthermore, the potential emergence of monopolies and oligopolies may be deduced from the questions asked in the Draft Report on a European strategy for data, namely: "Who will this trend benefit? Will the data create opportunities for companies of all shapes and sizes, or will data be concentrated in the hands of a few technological giants?"; see Draft Report on a European strategy for data p. 9.

52 M.K. Kolasiński, op. cit., pp. 546 and 548.

quent functioning of data – driven economy,[53] but it does not occur as a result of sharing a specific range and category of data (although it is possible for monopolies and oligopolies to be established in this case as well). This appears to follow from the assertions made in *Przemysł+*, a study prepared by the Ministry of Digital Affairs, in which "the data – driven economy is the next, fourth stage of digital development (…). (…) a race in which the future shape of the data economy is at stake gathers pace, with (…) major technological concerns, (…) economic blocs (…) as actively involved participants."[54]

The emergence of a monopolistic market is likely to be observed in two stages. Technologically advanced enterprises[55] may rise to be leaders in the process of implementing the new approach to development. Hypothetically, this creates a situation where rules and conditions – governing the use of digital infrastructure, for instance – can be dictated and actually made binding. Consequently, an advantage is achieved over businesses with inferior capital already in the initial phase of implementation.[56] It is evident that only large technological companies can afford to become involved in developing the data – driven economy[57] (unlike SMEs[58]). Mechanisms which jeopardize free competition, such as monopolies[59] can also materialize at a later stage, when the data economy has already begun to function.Businesses with considerable capital have the ability to employ highly advanced technologies to carry out data –

53 On the required digital infrastructure see Shaping Europe's digital future, pp. 1–6.

54 M. Borowik, L. Maśniak, R. Kroplewski, H. Romaniec, *Przemysł +*, p. 7.

55 At present, solutions such as cloud services enjoy little popularity in Europe. On data – related infrastructure and technologies see: A European strategy for data, p. 9 ff.

56 Conclusion derived from the description of unequal standing on the market; see A European strategy for data, p. 8.

57 Research into new technologies is an option available exclusively to businesses with substantial financial resources; see M.K. Kolasiński, op. cit., p. 549.

58 Ibidem. Also concluded from the description of unequal position on the market; see A European strategy for data, p. 8.

59 Monopolization and cartelization are defined as threats to the mechanisms of free competition; see K. Strzyczkowski, op. cit., p. 382.

based operations[60] while relying on big data solutions or business analytics methods.[61] Consequently, data sharing can be taken advantage of in a more efficacious fashion.[62]

Oligopolistic markets promote cartel collusion;[63] thus, hypothetically, technological giants may potentially be inclined to enter into such agreements, for instance with regard to terms and conditions/prices of access to cloud services.

Briefly recapitulating the above, while the status of a monopolistic or dominant enterprise is not prohibited, a prescription is imposed on such conduct or operations of a monopolistic business which violate competition law.[64] Thus, it is contrary to the provisionsof the Competition and Consumer Protection Act of 16 February 2007 [hereinafter CCPA][65] to engage in any practices which interfere with competition, such as abuse of dominant position[66] and any collusionbetween enterprises.[67]

However, businesses may agree on an arrangement which "contributes to the improved production and distribution of goods" or to "technological or economic progress", and those constitute exceptions from the general prohibition set forth in Art. 6(1)CCPA.[68] Such agreements may be arrived at as

60 A European strategy for data, p. 8.

61 *Intensywność wykorzystania danych…*

62 Ibidem, p. 90.

63 M.K. Kolasiński, op. cit., p. 547.

64 Office of Competition and Consumer Protection, *Polityka ochrony konkurencji i konsumentów*, Warsaw 2015, p. 35 ff.

65 Competition and Consumer Protection Act of 16 February 2007, Journal of Laws of 2021, item 275, hereinafter asCCPA

66 Art. 9 CCPA, Art. 102 Treaty on the Functioning of the European Union, Official Journal of the European Union C 202 of 07.06.2016, p. 47,hereinafter as TFEU. See also M. Szydło, *Prawo konkurencji a regulacja sektorowa*, Warsaw 2010, p. 310, M. Szydło, *Nadużywanie pozycji dominującej w prawie konkurencji*, Warsaw 2010, p. 105 ff. and C. Kosikowski, *Publiczne Prawo Gospodarcze Polski i Unii Europejskiej*, 1st edition, Warsaw 2005, p. 311.

67 Art. 6 CCPA, Art. 101(1)TFEU. On the impact of horizontal cooperation agreements on the parameters of competition see the Guidelines on horizontal co – operation agreements.

68 Art. 8(1)(1)CCPA. See also Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements, Official Journal of the European Union of 18.12.2010, L 335/36, Document 32010R1217.

part of the efforts contributing to the data – driven economy.[69] For instance, within the framework of the single European health data space,[70] this may involve the creation of digital infrastructure to gather and process data for future medical research or pharmacovigilance. Also, one may aim to develop an application to monitor health or support a patient's compliance with their dosing regimens.[71] The general prohibition on agreements of thiskind is suspended to allow for benefits that might not be achieved otherwise,[72] such as the aforementioned contribution to technological progress, and the enhanced production/distribution of goods, in other words the pursuit of general economic goals and ensuring[73] welfare to the consumers.[74] It is conceivable that the requirements specified inArt. 8(1)CCPA[75] are likely to be satisfied in connection with actions undertaken to implement the new approach and, ultimately, to function in a genuine data economy.

Conclusions

The data – driven economy offers tremendous opportunities for the EU and domestic economies.[76] At the same time, there area number of risks and negative outcomes involved.[77] These include the sharing of company confidential data as well as information which is subject to intellectual property protection laws and the potential loss of competitive

69 By way of analogy to A. Jurkowska – Gomułka, op. cit., pp. 19–38 and M. Jacolik, op. cit., pp. 69–82.

70 On the single European space for health data,see A European strategy for data, pp. 29–30.

71 On the use of shared health data and related applications, seethe Guidance on the Regulation on non – personal data, p. 10.

72 Art. 8 (3)(1)CCPA and Office of Competition and Consumer Protection, op. cit., p. 32.

73 M. Sachajko, *Sankcjonowanie naruszeń zakazu praktyk ograniczających konkurencję na podstawie unijnego oraz krajowego prawa ochrony konkurencji*, Poznań 2018, p. 260 ff.

74 M. Krasnodębska – Tomkiel, *Przedmowa*, in: *Wyłączenia grupowe spod zakazu porozumień ograniczających konkurencję we Wspólnocie Europejskiej i w Polsce*, ed. A. Jurkowska, T. Skoczny, Warsaw 2008, p. 7.

75 Art. 8(1) CCPA.

76 See also M. Borowik, L. Maśniak, R. Kroplewski, H. Romaniec, *Przemysł* +…, p. 5.

77 See G. Koloch, K. Grobelna, K. Zakrzewska – Szlichtyng, B. Kamiński, D. Kaszyński *Intensywność wykorzystania danych w gospodarce a jej rozwój – analiza diagnostyczna*….

advantage for certain enterprises. Also, there may be foreseeable violations of the freedom of economic activity – the cornerstone of the social market economy which in its turn is a mainstay of the economic system in the Republic of Poland.[78] To the furthest extent possible, the legal system should ensure the elimination of the potential threats arising from the implementation of the new approach to the development and subsequent functioning in the realities of an economy which efficiently utilizes data, by means of adjusting sectoral regulations and the competition law.[79]The risk of establishing monopolies and oligopolies may result in hypothetically detrimental outcomes in the development of an economy that makes effective use of data. However, the circumstances laid down as exceptions from the prohibition of collusion, which qualify as admissible under the CCPA, may actually promote that development.

At this point, another question may be posed. The discussed transformation is no doubt an opportunity for the economy[80], but it remains to be resolved whether this applies to all businesses or only the SMEs, the "weaker" players in the market economy, especially given the vision which accommodates the needs of the SMEs in particular.[81]

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78 Art. 20 CRP.

79 Legislative adjustments have already been undertaken by some Member States. For instance French Digital Republic Brill allowing the public sector to access certain private sector data of general interest, or the Finnish Forest Act obliging forest owners to share information related to the management of the forest with the public sector. Discussions on adapting the competition rules to make them better equipped for the data economy are for example ongoing in Germany. See A European strategy for data, p. 6 notes 14 and 16.

80 Ibidem, p. 4 ff.

81 Guidance on sharing private sector data, p. 1. See also Draft Report on a European strategy for data, p. 9.

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SUMMARY

The Data – Driven Economy – Remarks in the Light of Selected Issues in the Competition Law

Data has begun to play a vital role in global, EU-wide and domestic economies. On 19 February 2020, the European Commission published the EU's strategy for data, which outlines a new and unprecedented approach to development.The vision thus described – a data-driven economy – is to be implemented within the next five years.However, this broad undertaking gives rise to a number of legal, economic and social issues which deserve to be more thoroughly examined.

In this paper, the author considers how the data economy relates to aspects of competition law, including threats associated with the sharing of confidential company data, and information protected under intellectual property laws, among the participants of the market economy, i.e. businesses. Also, observations are made concerning the hypothetical emergence of monopolies and oligopolies, as well as collusive agreements between enterprises on the grounds of the new approach to development.

Keywords: Data-driven economy, data economy, competition law, company confidentiality, freedom of economic activity, practices restricting competition

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Bartosz Nieścior

The Ostmarkgesetz of 14 April 1939 – One of the Normative Grounds of the Annexation Of Austria

Introduction

This study addresses the issue of the Ostmarkgesetz and its role as an instrument for the annexation of Austria into the Third Reich. It was an act of constitutional rank, which changed the political and administrative principles of the Austrian state. This act defined in detail the individual stages of change on both the central and local government levels. It divided the country into districts managed by governors appointed by the Third Reich government.

This paper is the first of its kind to present the legal model (based on the Ostmarkgestz) for the incorporation of Austria into the Nazi state, along with an outline of the changes following its implementation. The aim is to determine the legality of this act, as well as the entire process, according to the laws of the time, along with the significance of the benefits of doing so for the Third Reich. The research problems will include the following aspects: first, an assessment of the extent to which the Austrian authorities at the time could have prevented this, and second, an evaluation of the degree to which the regulations introduced by the Third Reich took into account the Austrian norms in force at the time (e.g. acts, ordinances, etc.) and, indeed, whether they did so at all).

The Political and Legal Background to the Passing of the Ostmarkgesetz

On March 12–13, 1938, Nazi Germany annexed Austria, which, first in fact and then in law, ended Austria's existence as a separate state. Hitler's first, unsuccessful, attempt to annex the country had been made in July 1934. In the previous year, authoritative rule in Austria had been taken over by the leader of the Austrofascists, Engelbert Dollfuss.[1] The Austrofascists were supporters of Austrian independence, and ideologically they were closer to fascist Italy, with which they also sought closer political ties.[2] Following Dollfuß's seizure of power, the Austrian parliament was dissolved and replaced by a so-called "cadet parliament" (only 76 of the 165 elected deputies were present), which on May 1, 1934, passed a new corporatist-fascist constitution in flagrant violation of the law.[3] In practice, it was imposed by Dollfuß on a submissive parliament.[4]

Shortly thereafter, the Austrian Nazis staged an attempted putsch that resulted in the death of Chancellor Dollfuß, who, after suppressing the Nazi revolt was succeeded by Kurt von Schuschnigg.[5] Hitler refrained from renewed action because he feared the reaction of Benito Mussolini.[6] However, the Nazi pressure on the Austrian authorities did not cease.

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1 For more on this person, see: G. Walterskirchen, *Engelbert Dollfuss. Arbeitermörder oder Heldenkanzler*, Wien 2004; P. Kaźmierczak, *Morderca robotników czy bohaterski kanclerz? Austriackie spory o Engelberta Dollfussa*, in A.P. Bieś ed., *Pamięć. Historia. Polityka*, Kraków 2012, pp.323–354.

2 For more on this subject, see: E. Czerwińska – Schupp, *Faszyzm austriacki (1934–1938) – założenia filozoficzno-ideowe, ustrojowe i praktyka polityczna*, „Filozofia Publiczna i Edukacja Demokratyczna", T.I, 2012, no. 2, pp. 87–100.

3 S. Pawłowski, *Kwestia tożsamości państwa przykładzie Austrii*, „Gdańskie Studia Prawnicze", T. XXXI, 2014, p.341. The constitution, in force since 1929, allowed it to be amended only by referendum, not by a resolution of parliament. H. Wereszycki, *Historia Austrii*, Wrocław 1986, p.295. It is noteworthy that within a few hours he approved hundreds of decrees issued during the Dollfuß government. P. Kaźmierczak, *Morderca robotników czy bohaterski kanclerz?…*, p.343. Certainly the procedure for their approval was not democratic.

4 H. Wereszycki, *Historia…*, p.295.

5 P. Kaźmierczak, *Morderca robotników czy bohaterski kanclerz*?…, p.347.

6 J. Kozeński, *Zabór Austrii w 1938 r. i przezwyciężenie idei Anschlussu po II wojnie światowej*, „Przegląd Zachodni" 1968, no. 3, p.79. For more on Mussolini's attitude toward

A decisive turning point in Austrian-German relations was the July 1936 *Juliabkommen*, in which Austria agreed to a series of concessions to Germany, including the entry of two avowed Nazis into the government: Guido Schmidt and Edmund Glaise-Horstenau. In 1937, the Austrian Nazi leader Arthur Seyss-Inquart joined the ranks of Nazi ministers in the Austrian government. All of them, as Joseph Kozenski wrote years ago, "*systematically undermined Austria's existence from within, rendering it incapable of resisting Germany*".[7]

Hitler's pressure on Austria intensified after February 12, 1938. During Schuschnigg's meeting with Hitler in Berchtesgaden, the Austrian chancellor was not only forced to tolerate the Nazis in his cabinet, but also to agree to the Nazis extending their control over the military. On February 20, Hitler publicly announced that he was forced to concern himself with the fate of 10 million Germans outside the Reich, which also meant a tougher course toward Austria. Schuschnigg, in order to protect Austria from the Anschluss and hoping that the majority of the population was against it, announced a referendum on Austria's accession to the Reich for March 13, 1938. Under pressure from Hitler, however, Schuschnigg was forced to resign on March 11, and his place was taken by Seyss-Inquart.[8] Another Nazi, Ernst Kaltenbrunner, joined his cabinet that day as Secretary of State for Security, with the task of suppressing possible civil resistance. The next day, the German army entered Austria with "Operation Otto," and Hitler, welcomed by Seyss-Inquart, was enthusiastically received by the population, especially in Linz.[9]

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the Anschluss see, among others: G. Ch. B. Waldenegg, *Hitler, Göring, Mussolini und der „Anschluß" Österreichs an das Deutsche Reich*, "Vierteljahrshefte fur Zeitgeschichtes" 2003, H.2, pp.147–182.

7 J. Kozeński, *Zabór Austrii w 1938 r*…, p.79.

8 N. Foster, *Austrian Legal System and Laws*, Routledge – Cavendish 2003, p. 16; L. Jedlicka, *Bundesprasident Wilhelm Miklas am 13 Marz 1938*, „Mitteilungen des Instituts für Österreichische Geschichtsforschung", LXXX, 1963, pp. 492–498.

9 H. Batowski, *Rok 1938: dwie agresje hitlerowskie*, Poznań 1985, pp. 204–205; K. Grünberg, *Adolf Hitler. Biografia führera*, Warszawa 1988, p.204; N. Foster, *Austrian Legal System.*…, p.16.

In this way, the political and military part of the Anschluss was executed, paving the way for its legal part, which is more important from the point of view of the issue addressed in the present study. The key to the execution of such intentions was the promulgation by the Seyss-Inquart government on March 13, 1938 of the act *Bundesverfassungsgesetz über die Wiedervereinigung Ósterreich mit dem Deutschen Reich.*[10] The law, with identical wording, was also published in the German official gazette.[11] It consisted of four articles. According to Article 1, Austria was to become one of the Lands of the German Reich (*Ősterreich is ein Land des Deutschen Reiches*). This article set April 10th, 1934 as the date for a referendum on Austria's unification with the Reich, which was to decide Austria's future status by a majority of votes cast. The law took effect on the day it was promulgated. The law announced the gradual implementation of Reich legislation in Austria. Existing Austrian legislation was to remain in force and German law was to be introduced gradually by decrees of the Fuehrer and the Reich Chancellor or Reich Minister empowered by the Fuehrer (Article 2). In addition, the Reich Minister of the Internal Affairs, in cooperation with other competent Reich Ministers, was given the authority to issue the necessary legal or administrative orders for the implementation and supplementation of the Basic Laws.

In practice, the legal Anschluss of Austria was only a matter of time, and neither the Austrians nor the Austrian state had any influence over it. In the words of Henryk Batowski, this law "*also formally abolished Austria's existence as a separate stat*e''.[12] According to the prevailing thesis in the Austrian scholarly literature, Austria had not lost its legal capacity. From the perspective of international law, Austria was first the victim of aggression and was then an occupied territory, and not a legal-

10 *Bundesverfassungsgesetz über die Wiedervereinigung Ósterreich mit dem Deutschen Reich*, BGBl I. Nr 138/75.

11 *Bundesverfassungsgesetz über die Wiedervereinigung Ósterreich mit dem Deutschen Reich*, RGBl I, 1938/237.

12 H. Batowski, *Rok 1938*…, s.205.

ly incorporated one.[13] However, this is relevant to the later assessment of the legal effects of the Anschluss.

The first decree based on the law of March 13, 1938, sometimes referred to as the "Unification Law," was issued on March 15, 1938, and contained a provision extending the validity of German official gazettes to Austria. According to its provisions, laws of the Reich that were promulgated after the entry into force of the Unification Law were also to apply in Austria, unless otherwise stipulated. This decree incorporated the basic constitutional principles of the Reich into the Austrian legal system.[14] The results of the referendum announced in the Unification Law were used as an important argument in favor of the legality of such measures. According to official announcements, 99.73% of all voters were in favor of the Anschluss, which was seen as a confirmation of the Austrians' wish to belong to the German Reich.[15]

It is worth noting here that the legal aspect of the *Anschluss* was largely prepared due to the longstanding dependence of a weakening Austria on an increasingly powerful Reich, which deepened over time, but also due to earlier attempts at convergence between the legal systems of the two countries. Even before the Anschluss, attempts had been made to unify the judiciary and legal norms in the spirit of national socialist justice. Even before 1938, concepts such as "Führerwillens" or "National Socialist Weltanschauung" had been pushed in Austria, as well as the idea that the NSDAP program should be regarded as the legal source of law and authority.[16]

13 Sz. Pawłowski, *Kwestia tożsamości państwa…*, p.341.

14 H. Luterpacht, *Annual digest and reports of public international law cases. Being a Selection from the Decisions of International and National Courts and Tribunals given during the Years 1941–1942*, Cambridge 1987, p.105.

15 N. Foster, *Austrian Legal System…*, p.16; O. Jung, *Plebiszit und Diktatur: die Volksabstimmungen der Nationalsozialisten*, Tübingen 1995, p. 121.

16 B. Rüthers, *Die Unbegrenzte Auslegung*, in U. Davy ed., *Nationalsozialismus und Recht. Rechtssetzung und Rechtswissenschaft in Österreich unter der Herrschaft des Nationalsozialismus*, Wien 1990, p. 15 and ff. In the literature, differences in the referendum result are encapsulated in fractional values. O. Rathkolb, *The Neglected Factors Leading to the "Anschluss" 1938*, "Wien Klin Wochenschr" 2018, no. 130, p. 285.

In fact, all of these measures and their supporting circumstances paved the way for the erasure of Austria's political and cultural distinction. As early as April 14, 1938, the law abolished the *Gesetz über den Aufbau der Verwaltung in der Ostmark* (*Ostmarkgesetz*)[17], to which separate attention is given in this study, and the name Austria (*Őesterreich*) was replaced by the name *Ostmark*. As in the Reich, it was divided into provinces. Their names also broke with Austrian tradition. This proved that Hitler's intention was to absorb Austria completely into the Reich and to erase any traces of its separateness.

The Legal Grounds of the Ostmarkgesetz – Layout and Structure

The formal basis for the Ostmarkgesetz was the Unification Law of March 13, 1938, which was passed as a law of the Reich and not as a law of the Austrian Republic, while the material basis was the result of the referendum of March 10, 1938, in which, as noted above, almost all participants voted to incorporate Austria into Germany. Researchers warn against the hasty conclusion that the astonishing results of the vote were solely the result of brutal terror, propaganda pressure unprecedented in its aggression and scale, or vote – counting fraud. According to the Austrian historian Olivier Rathkolb, the almost unanimous vote in favor of the Anschluss was the result of opportunism, the real convictions of the voters and enormous propaganda pressure, the like of which the Austrians had never encountered before. He also points out that the Austrian Jews were denied the right to participate in the referendum.[18] Assuming that all the Jews voted against the Anschluss, the vote of the Jews would have been of little consequence for the final outcome of the referendum. According to data from 1934, there were 191,481 Jews in Austria (176,034 of whom lived in Vienna alone), ac-

17 *Gesetz über den Aufbau der Verwaltung in der Ostmark*, RGBl I 1939/77.
18 O. Rathkolb, *The Neglected Factors Leading…*, p.284–285.

counting for 2.83% of the total population.[19] Their exclusion from the referendum, however, must be taken into consideration when evaluating its legality, especially since they were not the only ones excluded from participating in the referendum on April 14, 1938. In total, about 10 percent of Austrian citizens were affected by exclusion, for various reasons.[20]

The results of April 14, 1938, although they may be considered authoritative in some sense for the reasons stated above, were used by the authors of the Ostmarkgesetz as a plea for achieving the fundamental goal of the Anschluss. Austria was included in the group of countries known as *Altreich*[21] thus, legal and political unification was one of Hitler's fundamental priorities. Achieving this goal meant abolishing Austria's legal separateness and reducing it to the role of one of the federal states.[22]

The Ostmarkgesetz was one of the main instruments of Austria's incorporation into the German Reich. Although the Ostmarkgesetz did not abolish the previous administrative division of the country, it did, however, completely change Austria's position through the change of name and the organization of state and administrative power. The law in question in was a rather concise legal act, but due to its subject matter it had the rank of a constitutional law. It consisted of three articles, divided into smaller editorial units: paragraphs and sections. In article 1 §1 of the Constitution it provided for the creation of the following Reich Districts (*Reichsgaue*) within the territory of the Federal State of Austria (*des Landes Österreich*): Vienna (*Wien*, main administrative center Vienna), Carinthia (*Kärnten*, Klagenfurt), Lower Danube (*Niederdonau*, Krems on the Danube), Upper Danube (*Oberdonau*, Linz), Salzburg

19 J. Tomaszewski, *Żydzi w II Rzeczpospolitej*, Warszawa 2016, p. 15.

20 O. Jung, *Plebiszit und Diktatur*…, p. 121

21 J. Gumkowski, T. Kułakowski, *Zbrodniarze hitlerowscy przed Najwyższym Trybunałem Narodowym*, Warszawa 1965, p 95.

22 Cf. Statistischen Reichsamt, *Amtliches Gemeindeverzeichnis für das Deutsche Reich, Teil I: Altreich und Land Österreich*, Vierte Auflage, Berlin 1939, pp. 218–235.

(*Salzburg*, Salzburg), Styria *(Steiermark*, Graz), and Tyrol (*Tirol*, Innsbruck). A separate administrative district and self-governing unit was also created from the former state of Austria, Vorarlberg, under the authority of the Reich Governor of Tyrol. The names of the individual Reichsgaue omitted those that contained the word Österreich (except for the name of the Land). As a result, former Lower Austria was renamed *Lower Danube* and Upper Austria *Upper Danube*. The old Austrian names were retained for the former Austrian provinces of Carinthia, Styria, Tyrol and Vorarlberg. The intention of the authors of this law was not to use such names, but to blur the distinction between Austria and the *Altreich*. This was contained in the title of the law regulating the administration and organization of the authorities in *Ostmark* (East Margraviate), although in the detailed provisions the term Land Austria (*des Landes Österreich*) was used. In accordance with the intentions of the legislator, the title of the law determined its place in the legal system of the Third Reich. With this law, the internal structure of Austria was broken down and reshaped as a federal state of the Third Reich.[23]

The Reich Districts were, according to Article 1 § 2, State administrative districts and territorial administrative units. They were headed by the Reich Governor (Article 1 §3.1) who was empowered to control all major areas of life in subordinate districts and to issue orders regarding the necessity of taking essential measures in relation to them, as well as to enact laws on the territory of this unit in the form of statutes. These could be repealed only by the highest authorities of the German Reich (Article 1 §3.2). The authority of the Governor of the Reich was indivisible, in the sense that he could not cede the powers granted to him by this law to subordinate officials (Article 1 §3.3). The appointment of the Reich Governor in the Reich Districts was subject to the provisions

23 W. Stickler, *Führungsstruktur und inszenierte Befehlsausgabe im Nationalsozialismus. Die »Politischen Leiter« der NSDAP im Reichsgau Wien und die Dienstappelle Baldur von Schirachs*, Wien 2012, pp. 3–4.

of the *Verbindung mit dem Reichsstatthaltergesetz* of 30 January 1935 (§ 5. 2).[24]

At the level of the Reich District, the Reich Governor exercised, under the supervision of the Minister of the Internal Affairs (Article 1, § 6. 1) and in accordance with the instructions of the Reich Ministers within the scope of their jurisdiction, the function of the state administration as the administration of the Reich (Article 1, § 4.1). Matters of justice, finance, national railroads, and the postal service were excluded from this jurisdiction. The remaining departments and non – associated administrative bodies within the Reich District were subordinated to the Governor. He administered them through administrators appointed by him (article 4, §4.2). The administrative bodies within the Governor's jurisdiction included several districts, and the *Führer*, whom the law also named Reich Chancellor (Article 4 § 4.3), was responsible for their administration. This was undoubtedly a circumstance conducive to strengthening the party and political position of some Governors at the expense of others, and probably an incentive for the latter to make personal efforts in this direction. The Reich Governor was represented in the state administration by the "Government President" (*Regierungspräsident*), who was an official of the Reich, and in local administration, the state governor (*Gauhauptmann*), who was an official of a local government unit.

The status of the Reich District of Vienna was somewhat different, as it was regulated separately in the Ostmarkgesetz. In matters not regulated, the Austrian capital was subject to the provisions of the *Deutsche Gemeindeordnung (DGO) vom 30. Januar 1935*.[25] The Ostmarkgesetz, in accordance with Article 1, Section 8, divided its administration into state and municipal level (Section 1), constituted it as an independent municipality, which also performed the tasks specific to higher level municipal associations and at the same time had the tasks of higher level municipal associations (Section 2). According to further provisions of

24 *Verbindung mit dem Reichsstatthaltergesetz*, RGBl I, 1935/23.
25 *Deutsche Gemeindeordnung (DGO) vom 30. Januar 1935*, RGBl I, 1935/55.

the cited article, the Governor of the Vienna Reich District was represented in the government, like others, by the President of the government, but in local administration by the Mayor, which office was to be held by the first councillor of the city of Vienna (*Ersten Beigeordneten der Stadt Wien*) (Section 3), and his advisors in matters of municipal administration were councillors of the city of Vienna (sec. 4). The special regulation of Vienna in the law in question was probably determined by the importance the Nazi authorities attached to the Austrian capital as the country's main socio – political and economic center, and the role it could play in consolidating the achievements of the Anschluss policy.

The Reich Governor also controlled regional farmers' unions and regional social insurance companies. In the regional authorities of the former, he was represented by the president of the board, and in the board of the latter – by the national starost (Article 1 § 4 (1)). In terms of the powers of the Reich Governors, the Ostmarkgesetz was a *lex specialis to the Verbindung mit dem Reichsstatthaltergesetz*. As per Article 1 (5) sec. 2 of the former, he kept all the powers that the latter gave to governors. This meant that the Reich Governors appointed on the basis of the Ostmarkgesetz regulations had special powers relating only to the federal state of Austria, which were not possessed by the Reich Governors operating in other areas.

The Ostmarkgesetz also regulated the issue of the succession of the powers of the highest authorities of the former Austrian federal states. Pursuant to the provisions of Article 4 § 4 (5) of the Act, they were transferred by law to the Governor, unless the Reich Minister of Internal Affairs, in agreement with the competent Supreme Authorities of the Reich, did not delegate these powers. Ultimately, therefore, it was the highest authorities of the Reich that decided whether the function of the Governor would be assumed by the current president of the federal state (*Bundespräsident*) or whether it would be delegated to another person, more trusted by the Reich authorities. In practice, the offices of governors were filled with gauleiters from the newly created NSDAP Reich Districts.

In the scholarly literature, attention is drawn to the special position that the Ostmarkgesetz assigned to the Governor of the Reich. This was due to the fact that he was also the Nazi Party *Gauleiter* of the Reich District of the same name. In other words, the *Reichsstatthalter-Gauleiter* was at the same time the *Reichsstatthalter*, as a state organ it had the statutory powers indicated above and was subordinate to the Reich Minister of Internal Affairs, while as *Gauleiter* he was responsible directly to the *Fuehrer*. He also had the opportunity to consult him directly, which gave him many opportunities in the day-to-day performance of his function.[26]

This situation was a source of tension between the *Gauleiters* and the Minister of Internal Affairs, especially when the latter rescinded the Gauleiters' instructions in accordance with the law. As Wolfgang Stickler writes, from an organizational point of view this was a "strange construction" (*merkwürdige Konstruktion*), as it violated the coherence of the system of state power and led to the aforementioned conflicts of competence between the *Reichsstatthalter* and the Reich Minister of Internal Affairs. This solution was due in large part to Josef Bürckel, Commissioner for Reunification with Austria, who initially pushed the idea of a governor fully independent of the central state administration, but met with resistance from the departmental ministers. As a result of the compromise he proposed, railroad, postal, judicial and financial matters were excluded from the *Reichsstatthalter's* sphere of competence and made dependent on the Reich Minister of Internal Affairs.[27] As Stickler writes, inconsistencies such as in the legal empowerment of the *Reichsstatthalter* in the Ostmarkgesetz were nothing special and reflected the primacy of politics over law typical for the Nazi state, stemming from the fundamental assumption that the political goals of National Socialism, the political will of the NSDAP and the *Fuehrer* were paramount. In general, the regulations adopted in the Ostmarkge-

26 W. Stickler, *Führungsstruktur und inszenierte*…, p.4.
27 Ibidem, p.4.

setz placed the *Reichsstatthalter* in a privileged position with respect to the ministers of the Reich, over whom they could, in case of real need, gain an advantage.[28]

The Ostmarkgesetz regulated the issues of district and city administration in Article II. The former were to be districts of state administration and territorial administrative units headed by a starost, while the latter were territorial administrative units headed by a senior mayor (Oberbürgermeister) (sections 2–3). The district starost (chief administrative officer) was responsible for the administration of the district (art.2 § 10), while retaining the powers hitherto delegated by the Reich Minister of Internal Affairs in consultation with the Reich High Authority (section 2). On a similar basis, the state administration in urban districts was to be headed by a mayor, but police matters could be excluded from his jurisdiction unless a separate regulation was in force or was intended to be adopted (Art. 2 § 11).

The issue of territorial administration was regulated by the Ostmarkgesetz in article 2 § 12. In municipal districts, this task was entrusted to the starost (district chief administrative officer), with the assistance of the district councils as advisory bodies (section 1.). The district as a unit of local self-government performed public tasks on its own responsibility (section 2.) and conducted its activities on the basis of its statutes (section 3). Direct supervision over the district as a territorial administrative unit was exercised by the Reich Governor, and on the central level by the Reich Minister of Internal Affairs (section 4).

The final provisions (Art. III) dealt mainly with temporal issues related to the implementation of the provisions of the Ostmarkgesetz and thus the termination of the previous legal status, and the bodies obligated in this regard. The date of entry into force of the Ostmarkgesetz was set at 1 May 1938 (Article III, Section 19), and the deadline for the establishment of the Reich Districts, the legal successors to the former Austrian federal states (Section 14(2)), i.e. *de facto* implementation of

28 Ibidem, p.4

the law, was set at 30 September 1939 (Section 14(1)), because until this date the law in question extended the term of validity of the decree of the *Fuehrer* and the Reich Chancellor on the appointment of the Commissioner for the Reunification of Austria with the German Reich of 23 April 1938 (Bestellung des Reichskommissars für die Wiedervereinigung Österreichs mit dem Deutschen Reich). (*Bestellung des Reichskommissars für die Wiedervereinigung Österreichs mit dem Deutschen Reich*).[29] The date of September 30, 1939 therefore marked the time horizon for the full implementation of the Ostmarkgesetz. It also established a kind of "road map" for this process. Detailed regulations were to be issued by the Reich Minister of Internal Affairs in accordance with Article III, § 18 of this law. Together with the Reich Minister of Finance, he was also responsible for introducing property regulations that were necessary for the implementation of the Ostmarkgesetz. These were to be adopted after consultation with the appropriate Governors (art. III, § 15). It should be added that these regulations were important not only because of the timely execution of the law, but also because of the urgency of the dispossession of the Austrian Jews.

After its entry into force, all authorities and institutions of the Reich District, if they were not authorities and institutions of the Reich District as territorial administrative units, municipalities, associations of municipalities, entities with legal personality, institutions and foundations under public law, became authorities and institutions of the Reich, and the persons sitting on them became officials of the Reich (§ 13).

Until the appointment of governors, the administration in the former Austrian federal states was to be led by their former prime ministers; however, it is worth noting, not under Austrian law but under Reich law, i.e. the Ordinance on Legislative Law in the Land of Austria of 30 April 1938 (*Verordnung über das Gesetzgebungsrecht im Lande Österreich*).[30]

29 *Bestellung des Reichskommissars für die Wiedervereinigung Österreichs mit dem Deutschen Reich*, RGBl I, 1938/65.

30 *Verordnung über das Gesetzgebungsrecht im Lande Österreich*, RGBl I, 1938/43.

On this basis, they could also issue ordinances (Art. III § 17 section 1 sentence 1). The same powers with respect to Vienna were to be exercised by the Commissioner for the Reunion of Austria with the German Reich, represented by the mayor (§ 17 section 1, sentence 1). According to the Ostmarkgesetz, the deadline for its implementation was September 30, 1939. The process of its implementation can be described as a "legal Anschluss", i.e., a complete adaptation of the legal status to the actual state that had been created after March 13, 1938. The analyzed act had the rank of a constitutional act. It was signed by Adolf Hitler and the Reich Chancellor, Minister of Internal Affairs, Frick, Hitler's deputy R. Hess, Reich Finance Minister Graf Schwerin von Krosigk, and Minister and Chief of the Reich Chancellery Lammers. The location of the issuance of the document is significant: Berchtesgaden. This means that the decisions about the *Anschluss*, including its legal aspects, were made at the highest levels of the NSDAP and were above all an exponent of its expansionist policy, of which Austria was the first victim.

Changes in the Legal and Real State Introduced by the Ostmarkgesetz

The Ostmarkgesetz can be regarded as the legal act legalizing the de facto annexation of Austria by Adolf Hitler, calling it reunification with the Reich, on March 13, 1938. Its provisions, which were based on the extremely favorable referendum results of April 14, 1938, marked the beginning of a process of "reunification" whose end horizon was set for September 30, 1939. At the same time, there are no sufficient grounds for questioning the legitimacy of these results. As has been mentioned, the literature expresses the view that they were to a large extent an exponent of the Austrian position at the time, influenced either by genuine convictions or opportunism. Other factors, such as aggressive propaganda and brutal terror (the first deportations of the Jews from

Austrian territory to Dachau took place as early as April 1, 1938[31]) did not affect the outcome of the referendum of April 10, 1938. For the assessment of the legal effects of the Ostmarkgesetz, the referendum was of little importance. It could, however, be taken into account in subsequent Austrian claims for damages that the law had caused to Austrian statehood and Austrian citizens, by bringing about facts that proved to be irreversible after the fall of the Nazi Reich.

The Ostmarkgesetz thus initiated a months – long process of legal, organizational, and political changes that gave the Anschluss its material dimension and shape. The Ostmarkgesetz introduced an administrative order on Austrian territory that incorporated Austria into the German Reich as a federal state. The Ostmarkgesetz also created the conditions for the transformation of property referred to in Article III, § 17. It did not even set a reference date, so as not to bind the authorities responsible for its implementation and thus give them a free hand in making the changes as quickly as possible. The changes in question were not to be limited to Austria itself, but affected the entire Reich. This was the so-called Aryanization of property, i.e., the taking over of Jewish property by the Nazi authorities.[32] The passing of the Ostmarkgesetz on 14 April 1938, preceded by the deportations of the Austrian Jews to Dachau on 1 April and their exclusion from participation in the referendum, is worthy of mention in a sequence of legal acts that appeared shortly after this date as part of the "Aryanization of property". Attention should be drawn in particular to the decree of the Ministry of Internal Affairs dated 26 April 1938, inspired by Hermann Göring, obliging all the Jews to register their property (*Verordnung über die Anmeldung des Vermögens von Juden war eine Verordnung*).[33] It was an expression of the state's involvement in the "Aryanization of property", aiming at

31 O. Rathkolb, *The Neglected Factors*…, p.285.

32 Rudawski B., *Mienie i rasa. Wybrane aspekty „aryzacji" majątku żydowskiego w trzeciej rzeszy i w Kraju Warty*, „Meritum" 2016, VIII.

33 *Verordnung über die Anmeldung des Vermögens von Juden war eine Verordnung*, RGBl, I, 1938/35.

its complete control over this process.[34] It is noteworthy that this decree appeared less than two weeks after the promulgation of the Ostmarkgesetz. It seems reasonable to conclude that this law opened the way for a radical acceleration of the "Aryanization" of the estates of the Austrian Jews. Other effects began to appear gradually as the law was implemented, according to the calendar set forth in the law. The final result of the Ostmarkgesetz was the dismantling of Austria's national identity and its relegation to a state within the German Reich.

Conclusion

The Ostmarkgesetz is undoubtedly an example of a legal act legitimizing the annexation of the territory of a foreign state. From a formal legal standpoint, it institutionalized the results of the referendum of April 10, 1938, on Austria's accession to the Reich, which was extremely favorable to Hitler. In fact, it legitimized the military occupation of Austria by Nazi Germany on March 13, 1938, which the Nazi-dominated, Seyss-Inquart-led Austrian cabinet supported by passing a law on Austria's accession to the German Reich on the same day. As can be seen, the Austrian government at the time did little to prevent this. In this way, the results of the aforementioned referendum of April 10, 1938, became yet another act of the Austrian people's desire to "reunite" as an *Altreich* country with the Nazi Third Reich. The Ostmarkgesetz gave this will the form of legal norms under which Austria was to be joined to the latter as another federal state. Some local laws continued to be in force; however, upon annexation, most laws, ordinances, and other acts lost their validity.

34 C. Goschler, *The Dispossession of the Jews and the Europeanization of the Holocaust*, in *Business in the Age of Extremes. Essays on Modern German and Austrian Economic History*, D. Ziegler ed., Washington 2013, p. 195; B. Rosenkötter, Treuhandpolitik, *Die „Haupttreuhandstelle Ost" und der Raub polnischer Vermögen 1939–1945*, Essen 2003, pp. 151–152.

In essence, the Ostmarkgesetz was a legal instrument which the Nazi authorities granted to themselves in order to carry out their political intentions. Therefore, more than from the perspective of the legislation, this act should be seen as a blatant case of the political instrumentalization of the law.

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SUMMARY

The Ostmarkgesetz of 14 April 1939 – One of the Normative Grounds of the Annexation of Austria

The article presents the political and legal changes that accompanied the passing and then the introduction of the Ostmarkgesetz in Austria in 1939. It also contains a detailed analysis of the structure and layout of this normative act. The Ostmarkgesetz was extremely important because it thoroughly changed the administrative organization and introduced a new administration of the state in this area. The consequences had a significant impact on the Austrian legal order. This law is considered to be one of the main tools of the direct annexation of Austria by the Third Reich. This was the beginning of the subsequent war conquests of the Nazi state.

Keywords: Third Reich, Austria, Annexation, Law, Ostmarkgesetz, law, administrative changes.

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