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Fruzsina Gárdos-Orosz, Krisztina Nagy

# The Development of the Hate Speech Regulation in Hungary: from Criminal Law to Civil Law and Media Regulation

## Introduction

The term 'hate speech' collectively refers to expressions which are directed against the foundations of the democratic political system, primarily by citing elements of totalitarian ideologies. More specifically, these are expressions which propagate racial, ethnic or nationality-national superiority and incite hatred on such grounds. The characteristic of hate speech is that the conduct is directed against a community, and the statement defames the common trait of the members of that community, which forms the basis of their membership and an essential feature of an individual's personality (e.g. religious belief, national-ethnic origin). In other words, this form of expression comprises statements through which the speaker, usually driven by prejudice or hatred, expresses some opinion about racial, ethnic, religious, gender groups of society or certain members of such groups, which may harm the members of the group and may incite hatred in the society towards that group.[1]

In Hungary under existing law, one of the conducts motivated by racism or xenophobia, and incitement against a community, is penalised by criminal law. In addition to that, current administrative law, civil law and media law also contain relevant provisions.[2] This paper provides an overview of these provisions and evaluates the complex system that has been created in Hungarian law since the democratic transition of 1989–1990, in order to penalise conducts inciting hatred.[3]

1 A. Sajó, *A szólásszabadság kézikönyve*, Budapest 2005, p. 68.

2 The most current summary about the Hungarian hate speech regulation: A. Koltay, *The Clear and Present Danger Doctrine in Hungarian Hate Speech Laws and the Jurisprudence of the European Court of Human Rights*, in: *Comparative Perspectives on Freedom of Expression*, ed. A. Koltay, R. Weaver, M. D. Cole, S. Edland, „The Global Papers Series", 2017, vol. II, Durham, pp. 3–44.

3 Selected parts of the paper are based on: F. Gárdos-Orosz, *The Regulation of Offensive Speech in the New Hungarian Civil Code*, „ELTE Law Journal" 2015, no. 3, pp. 103–123.

The framework defined for criminal law, also in international law, cannot be applied from a number of aspects to assess the possibilities of civil law and media-administrative law, because the subject-matter of the protection is different for the three fields of law.[4] The subject-matter protected by criminal law is public peace, first and foremost. However, in addition to the need of establishing that the public peace has been breached, the statutory definitions of crimes, to various degrees, require that absolute/subjective rights need to be directly or indirectly violated or threatened. The statutory definition of incitement against a community, however, does not require that a criminal act must be the result. In civil law regulations, the protected legal interest is different from that of criminal law: Civil law protects personality rights as absolute/subjective rights. International regulation may also reflect that no European hate speech regulatory regime has attempted to use civil law specifically and recently to sanction hate speech in general. Examples from foreign countries show instead that in most countries hate speech is only sanctioned by criminal law. In some states, relevant statutory provisions also appear in anti-discrimination law, media law or a separate anti-hate speech law and, in English-speaking countries, so-called 'public order acts' penalise certain forms of conduct.[5] There are, however, some unique (but not representative) exceptions that have historical roots.

For instance, the French Press Law of 1881 regulates hate speech but uses methods of criminal law (i.e. it gave the definitions of various crimes, including a definition of hate speech). However, Section 48–6 allows members of a community to make a claim (e.g. for damages) in a hate speech criminal procedure as if its members' rights had been violated directly.[6] This rule may be regarded as a step towards civil law (damages), but it is not an ideal answer to the original question of how hate speech may be regulated within the framework of personality rights and in administrative law and media regulation.

According to Michel Rosenfeld, in Germany it is very easy to reach the level of a criminal law violation, which is why the kind of regulation the state will develop using civil law methods is not a pressing issue.[7]

In English law, the 'hatred, contempt or ridicule' and the 'to cause to be shunned or avoided' formulas have been part of case-law since 1724 and 1679, respectively, in connection with defamation tort.[8] Today, torts are considered neither private law nor public

4 Constitutional Court Decision (ABH) 1992, 167, 172; G. Halmai, A. Tóth, *Emberi jogok*, Budapest 2003, p. 436.

5 P. B. Coleman, *Censored: how European 'hate speech' laws are threatening freedom of speech*, Vienna 2012, pp. 98–134.

6 Law on the Freedom of the Press of 29 July 1881. The relevant rule was modified in 1996.

7 M. Rosenfeld, *Hate Speech and constitutional jurisprudence, a comparative analysis*, in: *The Content and Context of Hate Speech. Rethinking Regulation and Responses*, ed. M. Herz, P. Molnár, Cambridge 2012, p. 268.

8 L. Sólyom, *A személyiségi jogok elmélete*, Budapest 1983, p. 186.

law concepts, as they contain private law, administrative law and criminal law elements.[9] It is very difficult under English tort law, but by no means impossible, to claim that offending a community resulted in a tort. If a group is relatively small and easily definable and thus the individual is able to prove that the offensive conduct affected each member of the group in person, or if the individual can give evidence that the statement concerning the group actually extended to the individual, a tort can be established under English judicial practice. In the *Knuppfer v. London Express Newspapers Ltd*. case, the court explained that, if a community is offended, it is up to the court to decide if the violation of rights should be applied to a member of the group.[10] Today, however, hate speech in the UK is primarily penalised by public order acts, which are of an administrative character.

However, the facts that there is no concrete standard in international law for the detailed regulation of hate speech and that the European models are not similar one to the other, does mean that the standards and methods based on the proportionality of the legal measures generally would not be accepted.[11] The Hungarian model has tried to implement the proportionality of the legal action against offensive speech by implementing a threefold solution that incorporates criminal law, civil law and administrative law/media regulation measures.

## The Traditional Criminal Law Measures and Their Limits

When interpreting Article 61 of the former Hungarian Constitution, the freedom of expression, in its Decision no. 30/1992. (V. 26.) AB, the Constitutional Court adopted both the justification of free speech on grounds of individual freedom and autonomy and the so-called instrumental justification that focuses on serving democratic values.[12] This means that the freedom of expression is a protected value, because being able to freely express their opinion on the realities of the world is essential for people to develop their personality freely (autonomy); but the freedom of expression is also protected on grounds that opinions contribute to the exposure of good ideas, and the expression of opinion is an indispensable condition (instrument) for the functioning of democracy. In its Decision no. 30/1992. (V. 26.) AB, the Constitutional Court found that even offensive expression enjoys the protection of freedom of speech, therefore it can be limited only if the expression perceptibly infringes individual rights and the limitation is

9 Ibidem, p. 193.

10 P., Giliker, S. Beckwith, *Tort*, London 2000, pp. 293–294.

11 J. Gerards, *How to improve the necessity test of the European Court of Human Rights*, "*International Journal of Constitutional Law*" 2013, vol. 11, p. 466.

12 G. Halmai, *Criminal law as means against hate speech? The Hungarian Legal Approach*, „Journal of Constitutional Law in Eastern and Cetnral Europe" 1997, vol. 4/1, pp. 41–42.

necessary and proportionate to the intended purpose. This means that the freedom of expression has no internal limitations, differentiation on the basis of content is unconstitutional. However, it has external limitations to safeguard the constitutional rights of others.[13]

The Constitutional Court examined the prohibition under criminal law (Section 269 of the Criminal Code) of the most dangerous forms of hate speech.

The constitutional framework of criminal law means against hate speech is defined not only by the provisions of the Constitution, but also by the content of the Constitutional Court decisions referred to above, and by the general requirements formulated by the Constitutional Court. In its Decision no. 32/1992. (V. 26.) AB, the Constitutional Court did not find it unconstitutional that those who incite hatred are threatened by criminal sanction.

Providing constitutional protection to inciting hatred against specific groups of people within the scope of free speech and free press would indissolubly contradict the political model and values expressed in the Constitution, as well as the constitutional principles of the democratic rule of law, the equality and equal dignity of people, the prohibition of discrimination, the freedom of conscience and religion, and the protection and recognition of national and ethnic minorities.

Later, however, the Constitutional Court declared all other legislative efforts intended to sanction hate speech under criminal law unconstitutional. For example, defamation and humiliation of others, or claiming that an individual or a group of individuals is inferior or superior on grounds of nationality, ethnic origin, race or religion cannot be sanctioned; neither can the offensive or degrading speech before a wide public against communities identified by law or any other acts capable of inciting hatred against communities; nor inciting hatred against communities or even provocation of violence, if the action does not reach the threshold where the means of criminal law become applicable.

In its Decision no. 18/2004. (V. 25.) AB, the Constitutional Court narrowed down the scope of punishable acts constituting incitement against a community, and as a result, the applicability of this provision has become very limited. Some statements of the decision made it clear that the issue of hate speech should not necessarily be treated by means of criminal law. As the Constitutional Court stated in its decision on the constitutionality of the statutory definition of scaremongering:

> Criminal law is the ultima ratio in the regime of legal liability, and the criminal sanction should only be applied to maintain the legal and moral standards when the sanctions imposed under the other branches of law are inadequate. By criminalising defamation, the legislator did not choose the least restrictive means to the freedom

13 P. Molnár, *Towards improved policy and hate speech – the clear and present danger doctrine in Hungary*, in: *Extreme speech and democracy*, ed. I. Hare, J. Weinstein, Oxford 2009, pp. 237–243.

> of expression to safeguard the right to human dignity. Since there are other protective measures that sanction the conducts described in the crime of defamation, which limit the freedom of speech to a lesser extent yet effectively, in case of defamation or humiliation the Constitutional Court considered the threat of a criminal sanction to be a disproportionate restriction to the freedom of expression enshrined in Article 61(1) of the Constitution.

Accordingly, the consistent view of the Constitutional Court is that the constitutional problem of hate speech cannot be treated by broadening or extending the scope of criminal law protection.

In its Decision no. 95/2008 (VII. 3.), the Constitutional Court, at the request of the President of the Republic, also reviewed the amendment that inserted blasphemy into the Criminal Code. According to the Decision, the Constitution guarantees the right to the expression of opinion equally to all, and this constitutional protection cannot be denied for the sole reason that the expressed opinion harms the interests, views or sensitivity of others, or because they are degrading or offensive for certain individuals.

The Constitutional Court, therefore, declared the crime of blasphemy newly adopted by the Parliament as unconstitutional. It stated that the use and spreading of abusive terms or the use of gestures like that itself does not pose a direct and obvious danger of violence and does not violate any individual's rights. Although the Criminal Code amendment uses the terms honour and human dignity, there is no constitutional right opposed to the freedom of expression that could be protected by the new crime.

## The New Constitutional Framework for the Further Regulation of Hate Speech

The Fourth Amendment to the Fundamental Law in 2013 supplemented Article IX on the freedom of expression in an attempt to lay the constitutional foundations of a number of items in Section 2:54 of the Civil Code.[14] The Amendment, however, did not affect

14 Following the Fourth Amendment, the following provisions comprise the constitutional environment of Section 2:54 of the Civil Code: 'Human dignity is inviolable. Everyone shall have the right to life and human dignity; the life of the foetus shall be protected from the moment of conception.' (Article II of the Fundamental Law) 'The inviolable and inalienable fundamental rights of MAN shall be respected. It is the primary obligation of the State to protect these rights. Hungary recognises the fundamental individual and collective rights of man. The rules for fundamental rights and obligations shall be laid down in an Act. A fundamental right may only be restricted to allow the application of another fundamental right or to protect a constitutional value, to the extent absolutely necessary, proportionate to the objective pursued and with full respect for the essential content of that fundamental right. Fundamental rights and obligations which by their nature apply not only to Man shall be guaranteed also for legal entities established by an

Article II of the Fundamental Law on the right to human dignity, which declares that the subjects of this right are human beings, or Article I on the possibility of restricting fundamental rights, which states that rights (including the right to human dignity and the freedom of expression) may be restricted if the requirements of proportionality and necessity are met.[15]

However, the new paragraph (5) of Article IX of the Fundamental Law states that '[t]he right to freedom of speech may not be exercised with the aim of violating the human dignity of others.' Also, according to the Fundamental Law, the right to freedom of speech may not be exercised with the aim of violating the dignity of the Hungarian nation or of any national, ethnic or religious community.

According to the relevant reasoning of the Fourth Amendment to the Fundamental Law, the proposed text's objective is to declare, at the level of the Fundamental Law, that human dignity may restrict the freedom of expression, and to lay the constitutional foundations for the possibility of penalising certain forms of hateful expressions by civil law means if the dignity of communities is violated. As it was not possible to combat hate speech effectively at the level of Acts of Parliament, it is justified to amend the Fundamental Law to this end. The proposed amendment's objective was to provide protection against communication violating the dignity of the listed communities.[16]

The *Amicus Brief for the Venice Commission on the Fourth Amendment to the Fundamental Law of Hungary*[17] edited by Gábor Halmai and Kim Lane Scheppele, includes a separate chapter evaluating this rule of the Fundamental Law. I concur with the following statements of the chapter: according to this opinion, one interpretation of the new rule of the Fundamental Law is that the amendment forms an exception, a lex specialis applicable to the assessment of restrictions on the freedom of expression and overriding the general limitation clause of Article I (3) of the Fundamental Law. However, the Amicus Brief claims that this would clearly run counter to practice recognised by international law.

Act.' (Article I of the Fundamental Law) 'Everyone shall have the right to freedom of speech. The right to freedom of speech may not be exercised with the aim of violating the human dignity of others. The right to freedom of speech may not be exercised with the aim of violating the dignity of the Hungarian nation or of any national, ethnic, racial or religious community. Members of such communities shall be entitled to enforce their claims, as provided for by an Act of Parliament, in court against the expression of an opinion which violates the community, invoking the violation of their human dignity.' (Article IX of the Fundamental Law) Another relevant provision is Section 5 of the Fundamental Law's closing and miscellaneous provisions, which declares that Constitutional Court rulings given prior to the entry into force of the Fundamental Law will no longer be effective. This provision is without prejudice to the legal effect of those rulings.

15 The concept of inviolability, which was part of the Constitution in effect until 2012, never meant that what it referred to could not be restricted. F. Gárdos-Orosz, *Alkotmányos polgári jog? Az alapvető jogok alkalmazása a magánjogi jogvitákban*, Budapest 2011, pp. 403–404.

16 http://www.parlament.hu/irom39/09929/09929.pdf [access: 14.11.2015].

17 Amicus Brief for the Venice Commission on the Fourth Amendment to the Fundamental Law of Hungary by Orsolya Salát in: "Fundamentum" 2013, vol. 3.

According to the author's opinion this is because the Fundamental Law permitted the necessary restriction earlier and, therefore, the only possible reason behind the amendment is to introduce a different standard, a lower protection to the freedom of expression than required based on the necessity and proportionality tests.

The Amicus Brief examines European examples and trends to conclude that the restriction of the freedom of expression to such extent in the interest of the Hungarian nation as a community is not acceptable in a democratic society, not even if the restriction is made through civil law means.[18]

To resolve the contradictions of the Fundamental Law, Imre Vörös recommended a solution that conforms to the theoretical/logical foundations of law and allows, through a loophole, a constitutional interpretation that meets European requirements to be reached.[19] In his opinion, a fundamental right is by definition a right with a special status and its essential content may not be restricted at all. The constitution, by incorporating a limitation standard specifying the framework of restricting fundamental rights by law, actually codifies the 'absolute, unrestricted standard' and all laws passed in connection with the fundamental right must be assessed on the basis of this standard. The special standard may not violate the general standard specified in the Fundamental Law, in contrast with the principle of civil law regulation, which is built on private autonomy. It is safe to conclude therefore that, for example, a rule affecting human dignity may not restrict the right to human dignity itself. If the content of the fundamental right understood to be part of the original standard is restricted in the Fundamental Law itself, there will be two contradictory standards in the Fundamental Law, and therefore the fundamental right will not be able to play its 'benchmark' role for legislation. According to Imre Vörös's paper, in such cases it is unclear whether the fundamental right should be understood with the content established with regard to the restriction standard of the Fundamental Law or with the content restricted by other provisions of the Fundamental Law, which makes the content of the fundamental right uncertain.[20]

Imre Vörös's conclusion is that the legislator in this way may remove from constitutional scrutiny any law regulating fundamental rights. Due to this irresolvable contradic-

18 Ibidem 35.

19 I. Vörös, *Vázlat az alapvető jogok természetéről az Alaptörvény negyedik* és ötödik *módosítása után*, "Fundamentum" 2013, vol. 3, pp. 61–64.

20 The Fourth Amendment to the Fundamental Law includes a number of other examples to this phenomenon beyond the hate speech regulations. For instance, the new paragraphs (2) and (3) added to Article VII as a result of the amendment make the fundamental right conditional in a way that is likely to be incompatible with the restriction standard of Article I of the Fundamental Law. Similarly, the new paragraph (3) of Article IX concerning political advertisements during elections presumably restricts the same right in violation of the general restriction standard; the above fundamental right therefore will not apply to election law and a constitutionality review is impossible.

tion in the logic of law, the affected fundamental rights will not be able to serve their legal protection function in accordance with the requirement of legal certainty.

The content of Article IX (5) of the Fundamental Law is uncertain due to other provisions of the Fundamental Law, the general interpretation framework of the basic right and the obligations under international law based on Article Q of the Fundamental Law. As a result, Article IX (5) alone will not explain the constitutional content of Section 2:54 of the Civil Code. It is beyond doubt that Section 2:54 (4) and (5) need to be assessed within a new constitutionality framework and the existing practice of courts and the Constitutional Court must be re-evaluated. However, there is no clean slate, and the above prove that the freedom of expression and, naturally, the right to human dignity both have a core, an essential content and restriction standard that will not be changed in a democratic society, not even by the adopter of the constitution, the legislator or the courts.[21]

## The Civil Law Regulation

After a number of fruitless attempts at regulating hate speech (offensive speech)[22] had been blocked by the Constitutional Court in recent years in Hungary, the Parliament added a new anti-hate speech rule to the new Civil Code, which took effect on 15 March 2014. Section 2:54(5) of the new Civil Code allows private individuals to enforce a claim against offenders in cases of hate speech:

> In the event of a violation of rights committed before the wider public and seriously offensive to the Hungarian nation or to some national, ethnic, racial or religious community or unreasonably insulting for these groups in its manner of expression, any member of these groups is entitled to enforce his or her personality right in relation to him or her belonging to such groups, being an essential trait of his or her personality. The right to make a claim will be precluded after a period of thirty days from the injury. With the exception of surrendering the material advantage

21 Section 2.3 of the statement of reasons of Decision 143/2010 refers to this.

22 The term "hate speech" is typically used for expressions threatening the foundations of a democratic political system and is reminiscent primarily of totalitarian ideologies. More specifically, hate speech propagates racial, ethnic or national supremacy and incites hatred for this purpose. A. Sajó, *A szólásszabadság kézikönyve*, Budapest 2005, p. 133. In this paper, with regard to the above, I use the term "hate speech" as a synonym for collective defamation, a conduct offensive to individuals through the attack towards entire communities. This meaning is reflected in the examined piece of legislation as well.

> achieved through the violation, any member of the community may enforce any sanction available with regard to violations of personality rights.[23]

In order to eliminate any concerns related to the constitutionality of the new rule, the governing parties, relying on their two-thirds majority in Parliament, adopted the Fourth Amendment to the Fundamental Law shortly after passing the new Civil Code; the amended Fundamental Law now includes a provision[24] that makes it possible to sanction hate speech.

Around the turn of the millennium, it became clear that the legal disputes related to hate speech were not resolved successfully by voluntary means, and courts were reluctant to extend, through a simple act of legal interpretation, the existing protection of personality rights to cases when the violation of the individual's rights could have been assessed with regard to conduct offending the community. As a result, such conflicts of interest or disputes were settled neither voluntarily and amicably, nor through the state's coercive measures. In 2007, Parliament specifically wanted to codify a rule in civil law allowing a member of a community suffering a serious public grievance due to his or her member status to take legal action. The rule would have authorised civil law courts to award damages to be paid by the person expressing hatred. The provision of law amending the personality rights chapter of the Civil Code was annulled by the Constitutional Court.[25]

A common criticism of anti-hate speech regulations in civil law is that they change the civil law system of personality rights, due to primarily public law considerations. However, due to the regulatory nature of personality rights, we believe that the new regulation in Section 2:54 of the Civil Code should rather be seen as a result of organic development and not as a forced restriction on private autonomy. This is because creating a personality right is simply allowing the law to define what conduct breaches the freedom of others and what does not breach it in the relevant field of regulation. A personality right therefore is a restriction but it is also a guarantee that autonomy will continue to exist within the new framework.[26]

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23 'Personality right' is a continental – especially German – concept. Under common law jurisdiction, this concept does not exist; instead, there is tort for libel etc. However, for the sake of the description of the Hungarian concept I use the expression 'personality right' with the limitations of this translation.

24 Article IX. (5) of the Fundamental Law states that "The right to freedom of speech may not be exercised with the aim of violating the dignity of the Hungarian nation or of any national, ethnic, racial or religious community. Members of such communities shall be entitled to enforce their claims in court against the expression of an opinion which violates the community, invoking the violation of their human dignity, as provided for by an Act".

25 I will discuss the reasons behind this decision below.

26 L. Sólyom, *A személyiségi jogok elmélete*, Budapest 1983, p. 274.

**Is it Possible to Regulate Hate Speech by Civil Law?**

According to an approach rooted in Roman law, pecuniary damage is handled more individually than *iniuria* (illegal behaviour towards another person, a personal insult); with regard to the latter, even the question of whether the grievance had arisen at all depended on public perception.[27] As *iniuria* grew separate from physical assaults, it started to rely not on an abstract idea of personality and not on the status of a Roman citizen but on the current social customs.[28] The pattern of conduct was defined by public morals, and the illegal conduct, in addition to insulting the targeted person, also qualified as a violation of public order. It was the *praetor* who interpreted the content of morals, and he had to assess even if the situation was clear whether the conduct had violated morality.[29] It was very uncertain whether a claim purely based on private interest would be upheld, as publicity and public order particularly substantiated a claim.[30] However, the *iniuria* as a private delict, originally concurrent with criminal law charges, was never used to protect public morals in general, as the *iniuria* was always targeted against a specific person.

In liberalism, the state wanted to provide economic guarantees to the personality to counterbalance the dominant position of the market. With the state regulating the economy and developing social functions, the protection of personality gained direct political interpretation.[31] In the 20th century, according to Szladits, a most famous Hungarian legal scholar, 'the socialisation of the private law order',[32] i.e. giving strong consideration to the community's interests, was the most dominant in the Nazi approach to private law. Advocates of the new approach believed that community considerations are the foundation of all civil law rules. Such a combination of private law and elements of public law was definitely a product of the crisis at the time, that is, a natural consequence of social and economic transformation, and an increased level of government intervention was an inherent part of these developments.[33]

Private law, however, has always been an individualistic system of laws (except for in crisis periods) because its objective is to strike a fair balance between conflicting private interests. The ideal of a *bourgeois* society, in which the weak must be protected from the stronger groups, had a noticeable impact in each field of law in the course of historical development. With the emergence of modern constitutions, it was a typical 19th century phenomenon that administrative and criminal law elements were removed

27 Ibidem, p. 148.
28 Ibidem, p. 149.
29 Ibidem, p. 151.
30 Ibidem, p. 149.
31 Ibidem, p. 314.
32 Cit per: K. Szladits, *A magyar magánjog. Általános rész. Személyi jog. Első rész*, Budapest 1941, p. 36. L. Staud, *A magánjog ethizálása – vagy pedig a természet jog felé?*, "Jogállam" 1926, vol. 1–2, pp. 38–42.
33 K. Szladits, *A magyar magánjog…*, p. 37.

from private law with the reasoning that such elements belong in the constitution.[34] The rules governing equal liberty, later equal human dignity, the prohibition of discrimination and then the requirement of equal treatment went through duplication at the levels of private law and constitutional law. However, the distribution of personality protection rules between branches of the law does not mean that the objectives and principles of these rules would be different.

The general opinion is that personality rights have three 'statutory roots': internationally recognised human rights conventions, the Hungarian Constitution and the basic principles of the Civil Code. According to Szladits, the basic difference between the rights in the Constitution and the personality rights in the Civil Code is that while the human rights specified in the Constitution must influence the entire state organisation and the conduct of individuals, the personality rights in the Civil Code are only granted to persons/entities of civil law and bodies applying civil law.[35] It is a result of the triple statutory basis of the interpretation of personality rights that the Civil Code's provisions analysed in this paper must be applied and interpreted in accordance with the foundations. These foundations can be identified not just in public law but also in the historical development of private law. For these reasons, it is not unacceptable for civil law to incorporate anti-hate speech rules.

## The Content Neutrality Principle: the Interpretation of 'Seriously Offensive' and 'Unreasonably Insulting' Conduct

As opposed to the anti-hate speech regulations common in foreign legal systems that sanction specific content regardless of the consequences,[36] the rule of the Hungarian Civil Code is content-neutral to some extent, because it requires the conduct to be of such gravity that is capable of achieving a seriously offensive or unreasonably insulting result. The violation of the personality right, therefore, does not simply consist of the expression and perception of the hateful content: the speech must have a seriously offensive and unreasonably insulting effect.

When Section 2:54 of the Civil Code is applied by the courts, it will be a key test when a 'violation of rights'[37] will qualify as a violation of rights committed before the wider public and is seriously offensive or unreasonably insulting for these groups in its manner of expression, whether this criterion will apply to the community or individuals belonging to the community, and to what extent this test will be objective or whether it will be indi-

34 Ibidem, pp. 40–44.

35 G. Jobbágyi, *Személyi jog*, Miskolc 1996, p. 51.

36 For instance, the statutory definitions of Holocaust denial in many European countries.

37 Beyond the fact that the term 'violation of rights' in this context does not make much sense grammatically, it is also an unsuitable term here because, as discussed below, neither constitutional law nor civil law grants rights to communities.

vidualised based on the person seeking legal remedy. When this is assessed by the courts, they will surely take the evaluation criteria developed for defamation cases in judicial practice into account and, in addition to identifying general guidelines of interpretation, the constitutional interpretation (as necessary also with regard to the general principles of the Civil Code) in specific cases will have to be found in such a manner that the court does not restrict the freedom of expression unnecessarily and disproportionately.[38]

According to Section 2:54 of the new Civil Code, a member of the relevant community may make a personality right claim in the event of a violation of their rights committed before the wider public and seriously offensive to or unreasonably insulting for the community in its manner of expression. It follows from the content in the previous sections that, in a personality rights context, an insult to the community rather means that the hateful conduct shown towards the community actually insults or hurts an individual belonging to the given community. A violation of rights may therefore only qualify as a violation of rights under civil law if it is indeed a violation of the rights of an individual belonging to the community in question.

On the basis of the grammatical interpretation of the phrase 'a violation of rights committed before the wider public and seriously offensive or unreasonably insulting for the community in its manner of expression', we may conclude that a less vulnerable community (such as the Hungarian nation) is less sensitive to the same insult as a vulnerable and disadvantaged minority.

The part of the rule in Section 2:54 of the Civil Code analysed in this section therefore moves back closer to the content neutrality principle, thus allowing the courts to impose sanctions for hate speech in particularly serious cases, taking the standard of necessity and proportionality into account.

## The Act on Equal Treatment in Administrative Law and Hate Speech

In Hungary, Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities is also a key regulatory reference. Compliance with the principle of equal treatment is traditionally ensured within the scope of administrative law, at least in European legal systems and in the language and institutional logic of EU directives. Its essential feature is that, unlike the logics of criminal and civil law, it imposes compulsory behaviour on the actors of both the public and the private sectors, therefore it may be appropriate to penalize phenomena and practices which cannot be effectively handled by other fields of law.

38 F. Gárdos-Orosz, *Alkotmányos polgári jog? Az alapvető jogok alkalmazása a magánjogi jogvitákban*, Budapest 2011, pp. 118–146.

In addition to that, in legal practice there are attempts to interpret the various legal regulations on discrimination in a broader sense, mainly due to strategic litigation and the innovative, law-developing efforts of human rights organisations. An example of that is the trial tactics that aim to reduce racist public speech claiming that racist statements made by politicians, state and local government officials constitute harassment, and imposing administrative sanctions for violating the principle of equal treatment. Two cases of this kind are known from the practice of the Supreme Court (Legfelsőbb Bíróság), in which the courts, in principle, did not rule out such interpretation of harassment, although the cases have not been successfully closed till the completion of this paper.

The first case was based on certain statements considered racists made by the Mayor of Edelény, Oszkár Molnár, at meeting of the municipal council on 24 June 2009, aired by the local television, which caused indignation in the local Roma community. The Equal Treatment Authority stated that the mayor's statements violated the right to human dignity and in effect, they were able to create an intimidating, hostile, humiliating, degrading or offensive environment, that is to say, the mayor violated the principle of equal treatment and committed harassment. The Metropolitan Court (Fővárosi Bíróság) in its final judgement of 22 March 2010, dismissed the mayor's claim that challenged the legality of the administrative decision. Later, the mayor applied for a review of the final judgement on grounds that, inter alia, his statements were not subject to the Act on Equal Treatment, as the complainants in the case were not residents of Edelény, and he could not be considered a mayor in relation to them, so there was no legal relationship between them. In its decision of 16 March 2011 adopted without a hearing, the Supreme Court found the mayor's request for review to be justified and repealed the decision of the Equal Treatment Authority. In the reasoning, the only issue that the Supreme Court examined was whether the mayor's statement fell within the personal scope of the act, thus the Supreme Court did not rule out the interpretation of law that considers racial hate speech widely spread in public discourse as harassment, which can be sanctioned for violating the principle of equal treatment.

Before that case, the Commissioner for Minorities had also attempted to establish a link between hate speech and the principle of equal treatment by submitting a legislative proposal, but it failed at an early stage. Nevertheless, the Equal Treatment Authority pointed out that, even under existing law, there is a possible legal interpretation that provides opportunity for the administrative intervention, taking into account Decision no. 96/2008. (VII. 3.) of the Constitutional Court.

Judgement of 18 October 2011 of the Supreme Court, which reviewed the decision of the Equal Treatment Authority concerning the mayor of Kiskunlacháza was, in many aspects, similar to the Edelény case. Here as well, the Equal Treatment Authority considered a speech against the Roma as harassment. The Metropolitan Court, in the judicial review of the administrative decision, similarly to the Edelény case, accepted the

mayor's view that the statement was not subject to the act, repealed the administrative decision of the authority and ordered a new procedure on grounds that the mayor's speech remained within the scope of the freedom of expression, as it was not delivered at a city council meeting but at a public forum, where, although he attended as mayor, he was not acting in his official capacity. In its request for review, the authority claimed that the court committed an error by stating that the mayor was not acting in his official capacity. The Supreme Court found the request for review to a lesser extent justified, but mainly unjustified and ordered a new procedure.

These two cases confirm the notion that, in terms of the protection of human dignity and the restriction of hate speech, anti-discrimination law is an exceptionally effective and flexible area of law, which is easily adaptable to new circumstances, because the concept of anti-discrimination is dynamically changing and its content is constantly expanding, and harassment provides a basis for a number of specific acts, for example fight against hate speech, as a form of discrimination.

## The Restrictions of Hate Speech in Media Regulation

### The Regulatory Framework of the Administrative and Judicial Practice on Hate Speech in the Media

The regulation of offensive speech in the Hungarian law has started with the Act 1 of 1996 on the radio and television regulation (Rttv.), that applied to the electronic media. The most important provision was the following in article 3. § (2) and (3).

> 3. § (2) The broadcaster must observe and honour the constitutional order of the Republic of Hungary, his activity may not offend human rights and must not be instrumental to the rise of hatred against individuals, sexes, populations, nations, or ethnic, linguistic or other minorities or against churches or groups of a religious persuasion."
> (3) Broadcasting must not be intended to offend or prejudice, explicitly or indirectly, any minority or majority or to present or prejudice minorities or majorities based on racial criteria.

The introduction of this regulation made it possible that the media authority (Országos Rádió *és* Televízió Testület, ORTT) could act against such media content that incited hatred or was otherwise exclusive

In the case of media law measures, unlike criminal law measures, it is not the communicating individual (the journalist or the editor) who is held responsible but the media service provider. Applying an extensive range of sanctions from simple warning to

a fine or, in case of the most serious violations, withdrawal of the right to provide media services, the media authority sanctions the media service provider. The violation is adjudicated by the media authority in an administrative procedure, and the administrative decision can be subject to judicial review.

The new regime of media regulation enacted in 2010 changed the former regulation, which had been in force for 14 years. As a significant change, the Act on the Freedom of the Press and the Fundamental Rules of Media Content specified restrictions on content not only for radio and television broadcasters but for all media service providers. The adopted law attempted to extend the previous constraints, in a substantively unchanged form, to the printed and online media. But the act was amended shortly after its entry into force, due to objections raised by the European Commission, for the reason that the regulation imposed disproportionate constraints on the freedom of the press. The amendments also affected the provisions against hate speech. The existing provisions prohibit hate speech in the media as a general rule, not only in the electronic, but also in the printed and online press:

> Section 17 (1) The media content may not incite hatred against any nation, community, national, ethnic, linguistic or other minority or any majority as well as any church or religious group.
> (2) The media content may not exclude any nation, community, national, ethnic, linguistic and other minority or any majority as well as any church or religious group.

Enforcement of the regulation remains the role of the media authority, which, just as before, adjudicates the media law violation and applies media law sanctions in an administrative procedure.

**Criminal Law Standard – Media Law Standard – Which One is Correct?**

After adoption of the media law provisions against hate speech, legal practice has come up with a crucial issue: how do the media law provisions relate to the existing criminal law restrictions? Do they describe the same conduct, are the media law standard and the criminal law standard identical, or do media regulations impose a stricter prohibition, and provide a different intervention threshold to the media authority?

There are two cases, in which the Constitutional Court reviewed the constitutionality of the media law restriction on hate speech and, in both cases, considered the new media law provisions as necessary and proportionate restrictions on the freedom of the press. In a decision adopted in 2007, which contained an assessment of the previous regulation, the Constitutional Court measured the media law restraints on hate speech and the media law prohibition of inciting hatred to the criminal law restrictions, that is to say, the Constitutional Court did not apply a new media-specific argument to justify the restric-

tions under Section 3(2) of the Act.[39] It found that the criminal law and media law provisions of incitement to hatred describe the same conduct and stated in its reasoning that:

> Criminal law is the last resort in the legal liability system. This means that, if for any socially harmful conduct, in our case, incitement to hatred, criminal responsibility is neither exaggerated, nor unconstitutional, then no restrictions on the same conduct under any other branch of law can be exaggerated or unconstitutional.

However, the Constitutional Court considered that the restriction referred to in Section 3(3) of the Act gives a constitutionally justifiable opportunity for broader intervention than the criminal law restriction, and compared the media law regulation to the crime of 'using abusing language', which had been removed from criminal law.

> According to the practice of the Constitutional Court, although, in the case of 'using abusing language' the application of the most stringent – criminal law – measures of liability is not justified, but expressing opinion in such way (as a value judgement) can also be restricted in order to protect the honour and dignity of individuals and communities. (...) The regulation aims to prevent radio and television from being an 'amplifier' of offensive, racially-motivated, and exclusionary or discriminative statements of those pursuing hatred.

Thus, while in 1992 the Constitutional Court found the criminal-law restriction of 'using abusing language' like expressions unconstitutional, the media-law restriction was considered to be "compatible with the value system of the Constitution, and its strengthening, and necessary to protect the rights of others, and the dignity of communities". That is to say, the Constitutional Court set the media law standard for intervention lower than the criminal law standard. But at the same time, it pointed out that the possibility for administrative intervention is not available based on the primary communication:

> The conduct of the broadcaster in this regard cannot be judged on the sole basis of which opinions are allowed to be presented. It is necessary to examine whether, in the light of all the circumstances of the case, it seems plausible that the given programme itself had an intention to infringe the rights of others (e.g. the preparation of the programme, the way the opinion was presented, or whether the reporter distanced himself/herself from the opinion voiced).

39 B Török, *A gyűlöletbeszéd tilalmának médiajogi mércéje*, in: *A gyűlöletbeszéd korlátozása Magyarországon*, ed. A. Koltay, Budapest 2013.

In this regard, the Constitutional Court based its reasoning on the case-law of the European Court of Human Rights, and set out requirements for the implementation of the given rules on that basis.

Thus, in this decision, the Constitutional Court set media law standards lower than the threshold of criminal law intervention, and, as the practice of the media authority will show, the ORTT (the former Hungarian Media Authority) developed a system of media law intervention, which is more extensive than that of criminal law.

The provisions on incitement to hatred in the new media regulation coming into force force as of 2011 have become subject to a review of constitutionality after a relatively short period of time, at the end of 2011. In its Decision no. 165/2011. AB on the constitutional review of several elements of the new regulation, the Constitutional Court analysed the new media regulation on hate speech rather briefly, and it did not provide clear guidance on how the criminal law standard relates to the media law standard. It stated that:

> In Decision no. 1006/B/2001 AB, the Authority equated incitement to the hatred under Section 3(2) of the Act (Radio and Television Act) to the conduct element having the same content in the crime incitement against a community, since the latter is also penalised by criminal law, and accepted it as a constitutional basis for restricting the freedom of the press.

In addition, "since the Constitutional Court, in its case-law has already considered hate crimes committed by the press as a necessary restriction on the print media as well, in this ruling, the court only upheld its former view". However, the Constitutional Court did not separately review Section 17(2) of the Act, despite the fact that it is contains an independent prohibition of exclusion.[40] The absence of constitutional review on this point makes the media law standard difficult to define, also because the conduct described in the new regulation bears similarity to the provision which the Constitutional Court had previously declared to be a lower threshold of intervention than that of criminal law.

In 2007, the Constitutional Court cited the media effect as an additional argument for regulation. It advocated the constitutionality of a lower intervention threshold arguing that electronic media – given "the opinion-shaping effect of radio and television broadcasting and the convincing power of moving images, voices, and live reports" – should be prevented from becoming an "amplifier" of hate speech. However, with the extension of scope, the new media law effective as of 2011 does not only apply to electronic media, but

40 A. Koltay, G. Polyák, *Az Alkotmánybíróság határozata a médiaszabályozás egyes kérdéseiről*, "Jogesetek Magyarázata" 2012, vol. 1., pp. 11–48.

to all media content services, including the print media. The failure to constitutionally evaluate this change can be considered a serious deficiency.[41]

The 2011 decision of the Constitutional Court, as compared to the previous one, established a more obvious link between the standards of criminal law and media law intervention, while, on the other hand, it leaves a number of questions unanswered, which leads to an uncertainty concerning the constitutional assessment of the new media law intervention.

## The Practice of the Media Authority Between 1996 and 2010

### The Development of an Independent Media Law Standard

The practice of the media authority has always been based on the determination of an independent media law standard that is different from that of criminal law. Pursuant to the previous media law that was in force until 2010, the media authority regularly applied sanctions against broadcasters for hate speech, and in the event of judicial review, the court hardly ever disapproved the decision of the authority.[42] In an emblematic example of early case-law, the criminal proceeding ended without conviction, but the media authority imposed a media law sanction for hate speech. The procedure was based on a radio commentary, in which the author made openly anti-Semitic statements and called for exclusion of the Jews. Criminal proceedings were initiated against the author and the editor-in-chief for incitement against a community, but in the final judgement, following the first-instance conviction, the accused persons were acquitted by the court. According to the court, a presumed risk of infringement is not enough to establish criminal liability, as the degree and the explicitness of threat, and the degree of potential violence must be evaluated. It argued that the writing did not call for violence, and from the provocation: '*exclude them! or if you don't, they will do it to you*' it did not follow or could not be deducted that the intention of the accused was to encourage his readers/listeners to commit violent acts. In contrast to the judgement, the media authority found that the radio programme had violated Section 3(2) and (3) of the Act and it imposed a relatively high fine of 1 million HUF on the radio provider. The authority argued that the programme conveyed extremist ideology, the broadcast expressions directly targeted Hungarian Jews and were capable of inciting hatred.

The media law standard set by the ORTT has been approved by case-law. In the judicial review of the decisions passed by the authority, the court stated that 'incitement against a community regulated in Section 269 of the Criminal Code (Btk.) cannot be confused with 'incitement to hatred' under Section 3(2) of the Act (Rttv.). In a case in

41 Ibidem.

42 A. Török, *A gyűlöletbeszéd…*, p. 177.

which the authority found that a public service radio programme incited hatred, the Supreme Court finally stated that:

> There is no legal basis for the applicant's argument that Section 3(2) of the Act (Rttv.) could only be violated by a conduct capable of rebounding outrageous and hostile emotions. Neither the wording of the given provision, nor the interpretation of other provisions of the Act supports this kind of exaggerating, intensifying interpretation of the law.

The 2007 decision of the Constitutional Court on the review of the constitutionality of anti-hate speech media regulation did not substantively change the practice of the media authority, although since the judgement, the decisions of the authority have contained more elaborate theoretical arguments regarding the media law standard. The reason for this is that the Constitutional Court, as noted above, stated in this judgement that the prohibition of incitement to hatred under Section 3(2) of the Media Act was equivalent to the crime of incitement against a community. However, based on its analysis of the Supreme Court and Constitutional Court practice, the media authority maintained its position that media law sanction can be imposed even if the conduct examined does not constitute a crime of incitement against a community. A part of the argument is that, in the Constitutional Court practice, the critera for the applicability of sanctions that are milder than criminal sanctions, like pecuniary penalty, "may differ from the strict requirement of restriction to a fundamental right that limits the applicability of criminal law means" which justifies a more extensive application of the media law sanction. Another part of the argument is that, the subject of the administrative procedure is different, since media law imposes restrictions on the broadcaster.

An additional argument, which had been mentioned before in the decision of the Constitutional Court, is related to the media effect. The aim of imposing media law sanctions is to prevent the media from becoming an amplifier of hate speech. The decisions establishing infringement also contain the above-mentioned argument applied by the Supreme Court' that the media law violation cannot only be observed in case of 'extreme, flagrant behaviour that causes hostile emotions'. On the basis of all this, the media authority came to the conclusion that "the constitutional framework for the assessment of the same conduct may be different under media law and under criminal law".[43]

43 Decision of the ORTT 1949/2008

**Case-law: Context, Intent, Content, Effect**

Since the milestone decision of the Constitutional Court from 2007, the media authority has established violation of the provisions of the Act on grounds of incitement to hatred on several occasions. The media authority typically applied sanctions in case of incitement to hatred against the Roma community, anti-Semitic expressions, and incitement to hatred against other minority groups. Most of the time, news and information programmes were sanctioned, and the authority responded to hate speech expressed in specific programmes. For example, the authority described a television programme in which the presenter himself formulated a biased view about the Roma as incitement to hatred.

> The Roma population living in the countryside was shown as an aggressive, fertile group of people, leading a drinking and criminal lifestyle. It claimed that the minority's only legitimate source of income was from different allowances, which, according to the presenter, could ensure them a better standard of living than certain employed members of the majority have.[44]

The decision emphasised that the programme could directly reinforce negative stereotypes and prejudices against the Roma. In the judicial review of the decision, the court accepted the decision in approval of the reasoning presented by the authority and emphasised that also the method of editing applied, with the presenter highlighting the crimes and abuses committed by the Roma against the Hungarians, and attributing all the unlawful acts to the Roma, was capable of reinforcing the opposition between the minority and the majority.

The authority also cited Section 3(2) in the case of programmes which displayed expressions of hate speech sent by the audience via text messages[45] The media authority consistently applied media law sanctions on such programmes, since, in its view, the broadcaster should have filtered out messages that incited to violence and hatred. The authority considered that the failure to filter them out meant that from the series of text messages shown, it could be inferred that the broadcaster's intention was to incite hatred, which justifies the applicability of the media law sanction.

There are special cases in the case-law of the authority, in which the authority reviewed not news and information programmes, but rather programmes categorised as entertainment. The first decision[46] of that kind was adopted in 2003, concerning a parody programme broadcast by TV2, the second largest commercial television in the country. The fundamental question examined regarding the programme was, considering the

44 Decision of the ORTT 1949/2008.
45 Decision of the ORTT 1996/2008.
46 Decision of the ORTT 367/2003.

special features of the entertaining genre, where the limit of editorial freedom is, what kind of an expression can clearly be considered as harmful to one's interests, and inciting hatred. The programme titled *Bazi nagy roma lagzi* (Big Fat Roma Wedding) presented the Roma minority in a parodistic and stereotypical way, introducing the Roma community by presenting exclusively deviant, antisocial forms of behaviour. According to the decision of the authority, the scenes displayed in the programme, based on clearly negative stereotypes concerning the Roma minority, which are already present in society, were, without doubt, capable of strengthening prejudices against the Roma minority.

The authority found that the fact that a particular programme conveyed its message to the audience in a fictional, humorous way, could, on the one hand, exert increased impact on the audience by making people laugh, while, on the other hand, it distracted viewers from the potentially offensive and exclusionary nature of the content, that is to say, the specific genre, in this case, even enhanced the gravity of the infringement.

The responsibility of the broadcasters in connection with the editing practice of programmes belonging to the so-called talk-show genre was assessed by the authority in a similar way. In a procedure concerning afternoon talk-show programmes on the two major nationwide commercial televisions (RTL Klub, TV2), the authority established the infringement based on the review of broadcasts over a period of several months. The decisions of the authority made it clear that the programmes did not aim to present the Roma minority, still, the editing practices of the programmes conveyed an indirect message that was suitable for depicting the Roma minority in a racially offensive manner, which means that, the broadcasters violated Section 3(3) of the Act by airing these programmes.[47]

According to the reasoning of the decisions, in these programmes, the Roma minority was clearly over-represented as compared to its actual representation in society, and the themes portrayed by the Roma participants (promiscuity, domestic violence, drug abuse, alcoholism, child abuse, crime), together with the value-deficient, uncultured behaviour, vulgar speech, untidy, messy look demonstrated in the studio were suitable for reinforcing the stereotypical, prejudicial thinking that exists in the majority population about the Roma.

In the procedure conducted, the authority based its decision on investigations applying quantitative and qualitative methods. The investigation, based on a detailed set of criteria, analysed the content of the programmes of both television programmes, aired over several months, and focus group surveys. The latter were also carried out to assess and analyse the impact of the programmes.

In the course of the proceedings, the ORTT took into account the case-law of Strasbourg, which was also mentioned in the Constitutional Court decision cited before: it

47 Decisions of the ORTT 2052/2009; 2053/2009; 291/2010; 292/2010.

did not examine the responsibility of the televisions alone on the basis of the opinions expressed, but evaluated the editorial practice of the programme, the messages it conveyed, and its effects.

Concerning the case-law of the ORTT, it can be stated in summary that the authority has gradually established the framework for the interpretation of media law constraints on hate speech, and it consistently set the media law standard below the threshold of criminal intervention, and used the set of criteria developed by the European Court of Human Rights to justify the limitation of free speech.

In the last few years, beyond reacting to individual statements, the ORTT also showed efforts of media control to apply sanctions against hateful media contents that can be understood as being general phenomena in the media contents on offer.

## Practice of the media authority between 2011 and 2017

### *Restrained intervention*

In connection with the new media legislation that entered into force in 2011, many international organisations, including various institutions of the European Union have expressed sharp criticism in protection of the freedom of the press, for several reasons, including the extension of the scope of regulation to the print media, the widely formulated restrictions on content, and the lack of guarantees to ensure the independence of the media supervisory authority. Partly in response to the Commission's objections, partly by due to the Constitutional Court decision, the regulations were significantly amended within the same year. The amendments affected the media regulation on hate speech to a marginal extent only, and later the Constitutional Court – as it has been mentioned before – found the media law restrictions on inciting hatred constitutionally justifiable.

The practice of the new media authority can be characterised by restraint; in the field of content control, it intervenes in a much narrower scope than the former authority had, even though the rules would provide opportunity for a more extensive control. This general statement is also valid for measures taken against hateful and exclusionary contents. While in the last few years of the former authority, several decisions established infringements each year, the new media authority sanctioned hate speech only in one or two cases each year. While at the same time, it is generally believed that hate speech in the world of media has not decreased but much rather increased, especially due to the fact that the refugee issue has appeared as another leading topic.

### *An Independent Media Law Standard*

The practice of the media authority has not changed concerning anti-hate speech media law and criminal law standards. In line with the previous practices, the authority sets a lower threshold for media law intervention. In response to the new provisions of media

law and the ruling of the Constitutional Court explained before in detail, it interprets the content of the media law prohibition as follows:

> The Media Council finds that the prohibition of "incitement to hatred" under media law (the new Media Act, Smtv.) and "incitement to hatred" under criminal law (Criminal Code, Btk.) are essentially the same, that is to say, the reviewed content is adjudicated on the basis of the same standards. However, taking into account that the legal dogmatics and liability systems of criminal law and administrative law are different, the conditions for establishing an infringement (crime) are also different. Pursuant to Section 17(1) of the Media Act, alone the publication of media content that is capable of inciting hatred constitutes an infringement. It is therefore not necessary to arouse the feeling of hatred in the audience and, consequently, it is not required either that the attacked community is actually hurt or threatened.[48]

The aforementioned argument appeared in a decision that reviewed an essay published in a printed newspaper and its online version, in which the authority imposed media law sanction on grounds of incitement to hatred and exclusion. Reflecting on a serious criminal offence, the author of this essay depicted a 'substantial part' of the Roma minority as a group of criminalised people inclined to commit crimes, rejecting social norms, routinely violating Hungarian laws, demonstrating inhuman forms of behaviour:

> And the facts are these: a substantial part of the Roma is not capable of living together with others. They are not capable of living together with human beings. This part of the Roma consists of animals, and they behave like animals. And animals should not exist. Not at all. This is the issue we need to tackle, but immediately and in any way![49]

According to the Media Council, the opinion expressed in the article was able to incite hatred against the Roma community, even though it did not target the whole community, but "only" a substantial part of it. 'Substantial part' means generalisation that affects the community as a whole. Moreover, the author suggested retaliation, violence, private justice as a solution, which is incompatible with a democratic legal system.

> According to the Media Council, the message conveyed by the article reached the threshold of the violation of law, since, by carrying the possibility and the danger

48 Decision of the Media Council 802/2013.
49 Decision of the Media Council 802/2013.

> to foment emotions against the Roma minority, it was capable of inciting hatred against not only a substantial part of the Roma, but the whole community.[50]

By the way, the public prosecutor's office also conducted investigations because of the article, but in the end no criminal proceedings were initiated.

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**SUMMARY**

## The Development of the Hate Speech Regulation in Hungary: From Criminal Law to Civil Law and Media Regulation

In the Hungarian legal system, the anti-hate speech rules of media law provide an additional (administrative) proceeding for the media authority in parallel with proceedings under criminal law and civil law. The media authorities, over the past twenty years, have consistently set media law sanctions at a lower intervention threshold than criminal law did, and in many cases, they established media law violation in cases where criminal proceedings for incitement against a community were not initiated or ended in acquittal. The fundamental aim of media law regulation is to shape media content and the editing practices of media players with a view to ensure respect for human dignity, and to prevent media from becoming an 'amplifier' of hateful communications. In the first fourteen years of the Hungarian media regulation, the scope of interpretation concerning anti-hate speech media law restrictions developed gradually. The authority reacted not only to individual cases, and individual communications, but also carried out targeted investigations in cases that can be described as a phenomenon in the media coverage. Besides reviewing news and information programmes, it also acted against hateful contents of the entertainment programmes. The new media regulation, which entered into

force in 2011, partially amended the content of the former anti-hate speech regulation: in addition to the provisions of "incitement to hatred", the former category of "offending or prejudiced content" was replaced by the prohibition of "exclusion". The practice of the media authority has not changed as regards the assessment of the media law standard, as the authority has continued to apply it differently from the criminal law standard, considering it as a lower intervention threshold. However, in comparison with pre-2010 practice, the authority initiated considerably fewer proceedings and its approach in terms of law enforcement became less characterised by adjudicating problems that can be described as phenomenon in the media coverage, no targeted proceedings of this kind were initiated. Its practice can be characterised by a couple of high profile cases with extreme sanctions, which attract great attention. These cases are important as they designate the boundaries of public communications, but in this way, media law measures are not really suitable for making any substantial changes to the characteristics of the media coverage.

Keywords: hate speech, freedom of speech, media law, discrimination, criminal law, constitutional law

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# Freedom of Speech in the Face of Terrorism – Selected International Law Regulations

## Introduction

Freedom of speech constitutes a legal and axiological frame of a democratic society. It plays an important role in the expression, development and creativity of individuals. The public sphere is a space of exchange of information, ideas and views, which helps detect and prevent social pathologies. Preventing the spreading of views with negative connotations is so important that Article 20 of the ICCPR[1] obliges the signatory states to impose a statutory ban on war propaganda and the proliferation of national, racial and religious hatred which incites hostility, discrimination and the unjustified limitation of the freedom of expression. The propaganda referred to in Article 20.1 may be examined in the context of internal and external conflicts.[2] The ICCPR does not define the terms "propaganda" and "war". The wording of the above-mentioned article does not, however, paralyse the development of a national strategy and security policy. The legislative work has been conducted with a view to preventing the repetition of the events, which lead to immeasurable human tragedy and terror during World War II.

21st century terrorism is a hybrid, asymmetrical and amorphous phenomenon which escapes all attempts at description and analysis. Terrorism poses a hindrance to public discourse. It is responsible for deformation of events, and wreaks informative and semantic havoc.[3] Terrorist propaganda breeds violence, terror and hatred. Conducting attacks remotely, without direct confrontation makes the *modus operandi* escape the defi-

1 International Covenant on Civil and Political Rights (ICCPR) open for signature in New York on 19 December 1966 (Dz.U. 1977, no. 38, item 167).

2 A. Gliszczyńska-Grabias, *Zakaz propagandy wojennej*, in: *Międzynarodowy Pakt Praw Obywatelskich (Osobistych) i Politycznych. Komentarz*, ed. R. Wieruszewski, Wolters Kluwer Business, Warszawa 2012, pp. 505, 506.

3 B. Hoffman, *Oblicza terroryzmu*, Wydawnictwo Bertelsmann Media, Warszawa 2001, p. 28.

nition of "war" and "armed attack" as it is stipulated in Article 51 of UNC.[4] The above aspect influences the manner of interpreting "the right to self-defence"[5] and the determination of the international responsibility of non-state actors.[6] Terrorist organisations which use the media and communication technology may destabilise the functioning of states and generate chronic fear in society. The technologies used by the terrorists are being modernised and pose new threats to individuals.

The threat of international implications is related to attacks conduced in the virtual world, but with consequences in the real world, e.g the severance of diplomatic relations between the Gulf States and Qatar, which took place at the beginning of June 2017.[7] According to the Qatari Attorney General Ali Bin Fetais al-Marri, the situation was caused by a hacker attack on services belonging to the Emirates press agency. Negative comments of the Qatari emir regarding the states in the Gulf region appeared online. Saudi Arabia issued to a statement in which Qatar was accused of supporting terrorist organisations with the use of the media including the TV channel Al-Jazeera,[8] which has its headquarters in the country's capital, Ad-Dauha (Doha). Terrorist violence reaches extreme forms. Increasingly more often the attacks are of a non-military nature. Terrorism turns words into actions, which threaten the various spheres of freedom and safety.

## The Essence of Freedom of Speech in the Context of Anti-Terrorism

Article 19.1 of the ICCPR states that everyone shall have the right to hold opinions. Utterances might be verbal, written or artistic. Expressions may be as varied as human perception itself. Freedom of speech does not mean that every utterance is protected by law. Statements of anti-Semitic, racist and xenophobic nature, as well as those inciting or promoting totalitarian regimes, including the opinions that lay at their basis, have no

4 The *Charter of the United Nations* (UNC) signed on 26 June 1945 in San Francisco (Dz.U. 1947, no. 23, item 90).

5 T. Gadkowski, *Problematyka samoobrony na tle zakazu użycia siły zbrojnej w prawie międzynarodowym*, in: "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2013, issue 3, pp. 5–20; M. Kowalski, *Prawo do samoobrony jako środek zwalczania terroryzmu międzynarodowego*, Wydawnictwo „Difin", Warszawa 2013, pp. 13 *et seq*.

6 W. Czapliński, A. Wyrozumska, *Prawo międzynarodowe publiczne. Zagadnienia systemowe,* C. H. Beck, Warszawa 2014, pp. 605, 745–747.

7 *Qatar: The hackers come from the countries that announced the cut-off* , in: "Wprost" of 21 June 2017 (digital edition ).

8 *Isolation of Qatar deepens. More countries cut off diplomatic relations*, in: "Wprost" of 5 June 2017 (digital edition).

place on "the free market of ideas".[9] Freedom of speech also does not pertain to expressions (e.g. verbal, graphic, electronic), which promote terrorist ideology, as they provide fodder for actions which threaten human rights on a global scale. Media broadcasts should extinguish, not exacerbate them. In Article 19.3 of the ICCPR it was stated that the implementation of the freedom of speech "carries with it special duties and responsibilities". Information is not limited territorially. Communication technologies facilitate the spreading of information about attacks, recruiting new members, and communicating with the use of a special code. Terrorist organisations publish hostage execution videos, which transform actual violence into media-presented violence. Terrorists strive to fill information services with their content. Media publications about terrorist attacks selectively tunnel the attention of the recipient.

The media should abstain from disseminating information, so as not to become an instrument for spreading unrest in the hands of terrorists. Media activity through the visualisation of the communicated information should not transgress the limits of the freedom of expression. The law under discussion is constructed in such a way that it ensures universal expression and creativity, while simultaneously keeping one from taking it from others, or offering a "simulacrum" of freedom of speech, which in reality would come down to introducing restrictions or artificial divisions.

There are many cultures, religions and opinions in the world. Every culture has values and symbols considered fundamental, prophetic or sacred. In 2015 the French weekly "Charlie Hebdo" featured a caricature of the Prophet Muhammad, which some people considered to be provocative, offensive for Muslims, and intended to stir up hatred and conflict. The author of the caricature, the cartoonist Renald Luzier said: "This is our cover (...), not the cover the terrorists would want from us […]. I am not worried at all [...], I believe in the intelligence of people and the intelligence of humour".[10] Freedom of speech on the legal and axiological plane is characterised by an internal logic, which oscillates around the exemplification of the essence of human rights, and not the affirmation of violence. Artists sometimes use satire and caricature to express themselves. However, caricature and satirical forms should comply with the rules of social life and have a well-founded social goal – the defence of important and universally accepted values.[11] Co-existing in multicultural society requires refraining from certain behaviours when exercising one's own freedom of speech. In a democratic society media

9 A. Bodnar, M. Szuleka, *Koncepcja „nadużycia prawa" w Konwencji o ochronie praw człowieka i podstawowych wolności a mowa nienawiści,* in: *Mowa nienawiści a wolność słowa. Aspekty prawne i społeczne* eds. R. Wieruszewski, M. Wyrzykowski, A. Bodnar, A. Gliszczyńska-Grabias, Wolters Kluwer Business, Warszawa 2010, p. 151.

10 *The new issue of «Charlie Hebdo" is out. 3 mln copies, 5 language versions, sold in over 20 countries*, in: "Newsweek Polska" of 14 January 2015 (digital edition).

11 J. Sobczak, *Prawo do wizerunku, prywatności i godności wobec wolności słowa*, in: "Annales Universitatis Mariae Curie-Skłodowska. Sectio K: Politologia" 2008, vol. XV, no. 1, p. 81.

communications should be diverse and take into consideration ethnic national, religious and language minorities. We should build "bridges" not "walls", which divide and deepen social diversification and generate a climate of mutual animosity. The path to intercultural dialogue does not lead through abuse, libel and insults.

Limitations to the freedom of expression should have a legal basis and be compliant with the rule of law. General social interest should be balanced with the fundamental rights of an individual.[12] While designing and implementing antiterrorist strategies in view of the rationalisation of limitation clauses, one should refer to the axiology of human rights. Therefore, under Article 19.3 of the ICCPR freedom of expression may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals. One may note that the terms "national security" and "public order" are *subject to* extensive interpretation. When fighting terrorism one may not arbitrarily infringe civil liberties. While working on the ICCPR the legislators were aware that the freedom of expression might be turned into a tool for propagating hatred and indoctrination, and for exerting pressure on a given individual or a group of individuals.[13]

Information distribution channels should be free of apocryphal information, comments or "troll" posts disseminated to spread *chronic fear*. Reporting on terrorist attacks in the media causes a psychological chain reaction – people start to fear, which may hinder the ability for constructive actions and decision-making. It may also drastically increase the social awareness of the risk of occurrence of criminal activity. As a result vigilance might be decreased unless actual symptoms pointing to a terrorist attack transpire.

Knowledge about terrorism should be verified continuously. Public authorities should not disregard indications of planned attacks, because one may never know which of the forecast scenarios might be implemented. The Berlin Christmas Market attack of 19 December 2016 might serve as an example here. The stolen Polish truck was driven to Breitscheidplatz, which is a popular location with locals and tourists. 12 people died in the attack, and 48 were wounded. The *Reuters* News *Agency* reported that the Islamic State[14] (*Islamic State of Iraq and Sham* – ISIS) claimed responsibility for the attack. Terrorists use various means to achieve the main target: cars, underground and railway carriages, and planes. Increasingly more often attacks take on non-physical form, e.g. cyberterror-

12 A. Redelbach, *Wolność słowa w orzecznictwie Europejskiego Trybunału Praw Człowieka*, in "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2000, issue 3, pp. 19–21.

13 A. Gliszczyńska-Grabias, *Ograniczenia swobody wypowiedzi – klauzule imitacyjne z art. 19 ust. 3 MPPOiP*, in: *Międzynarodowy Pakt…*, op. cit., p. 481.

14 K. Sikorski, *Germany: A terrorist attack on Breitscheidplatz in Berlin. A truck driven into crowds at a Christmas Fair*, in "Dziennik Polska Times" of 20 December 2016 (digital edition).

ist attacks.[15] An attack may sabotage the power supply network by causing a dysfunction in the remote operation and control equipment of nuclear power plants. The terrorist toolkit also includes the electromagnetic impulse, which, by disrupting or destroying electronic circuits, may in a short amount of time paralyse the functioning of state institutions (e.g. police, banks, hospitals, airports, alarm systems) as well as international organisations. Terrorists try to blur the negative connotations of this phenomenon. With the use of media outlets they try to cause information chaos.

In Article 4b of the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Personnel,[16] the meaning of exchange of information and coordination of actions aiming to prevent this type of illegal act has been highlighted. Since the adoption of the Convention, the paradigm of terrorism and information and communication technologies such as Internet radio and television, and 4G mobile technology, have all changed dramatically. Many people do not see that terrorists are trying to paralyse the freedom of speech in terms of communicating and disseminating information about possible danger.

The weapons and technologies used by terrorists are modernised with the aim of causing chronic fear and terror in the society. Danger is connected, for example, with the possibility of using a biological weapon. Its trans-border nature, the possibility of it spreading rapidly, and difficulties in diagnosis, may cause a large number of casualties in a short period of time. Microorganisms and biological material may be used to poison water sources and food. Aerosols may be used to contaminate air. There have been cases of theft of anthrax and plague bacteria from research institutes in Russia.[17] The threat of biological materials being obtained became so real that many renowned science periodicals, especially after 9/11, begun to introduce a form of auto-censorship.[18] Scientists warn that the terrorists who obtain genetic materials may, with suitable instruction, create an

15 T. R. Aleksandrowicz, *Bezpieczeństwo w cyberprzestrzeni ze stanowiska prawa międzynarodowego*, in "Przegląd Bezpieczeństwa Wewnętrznego" 2016, no. 15 (8), pp. 15–16. See also P. W. Brunst, *Terrorism and the Internet: New Threats Posed by Cyberterrorism and Terrorist Use of the Internet*, in: *A War on Terror? The European Stance on a New Threat, Changing Laws and Human Rights Implications*, ed. M. Wade, A. Maljevic, Springer, New York 2010, pp. 51–78.

16 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Personnel prepared in New York on 14 December 1973 (Dz.U. 1983, no. 37, item 168).

17 K. Chomiczewski, *Zagrożenie użyciem broni biologicznej w zamachach terrorystycznych*, in: *Oblicza współczesnego terroryzmu*, eds. K. Kowalczyk, W. Wróblewski, Wydawnictwo Adam Marszałek, Toruń 2006, p. 165.

18 Under Article 54. 2 of the Constitution of the Republic of Poland of 2 April 1997 (Dz.U. 1997, no. 78, item 483) preventive censorship of the means of social communication and the licensing of the press is banned. Article 54.2 stipulates, however, that under the act it is admissible to introduce an obligation to obtain a licence for radio or television broadcasting. It bears noting, however, that in a democratic society, which should be characterised by pluralism, the licence obligation cannot be theoretical and cannot block or make it impossible for entities to partici-

array of viruses including virus artefacts, which do not occur in the natural environment. Terrorist organisations include groups which have laboratories and recruit specialists.[19] One should note that in this context "auto-censorship" does not aim to limit the freedom of speech or the freedom to publish the results of scientific research, but to protect the data from being obtained by unauthorised persons, who could use this information for criminal purposes. When considering the definitions and typologies of terrorism one cannot stop at recognising the circumstances or the results of a terrorist attack. It is also important to look at a given attack from a broader perspective. The qualification of a given deed should be conducted as a multi-layered analysis of the situation. The circumstances in the broader sense, as well as the transformations of the terrorist paradigm should be considered.

Individual emanations of the freedom of speech are reflected in the regional system of human rights protection. The European system of human rights protection is focused around the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).[20] Article 10.1 of the ECHR stipulates the following components of the freedom of expression: a) the freedom to hold opinions, b) the freedom to impart information and ideas, and c) the freedom to receive them.[21] According to the Strasbourg standards, the liberty to exercise freedom of speech should not be related to an arbitrary and disproportionate interference with the rights of an individual. Tabloids often find and disseminate information that creates an atmosphere drenched with violence. Information regarding terrorism meets the quasi-criteria, which means that in this context the exercise of the freedom of speech may encounter certain difficulties. A broadcasting narrative may serve the purpose of prophylaxis and prevention, or it may join the strategy of psychological and emotional manipulation and persuasion, propagating stances which, in truth, constitute the negation of the axiology of the freedom of speech.

Under Article 10.2 of the ECHR, exercising freedom of expression may "be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and im-

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pate in the audio-visual market and exercise their freedom of speech. Licence systems may be used for the protection of rights and liberties of individuals when they are not used arbitrarily.

19 S. Kowalska, *Prawa człowieka a terror i terroryzm*, Adam Mickiewicz University in Poznan and Kalisz Society of Friends of Learning, Kalisz 2008, pp. 49 *et seq*.

20 Convention for the Protection of Human Rights and Fundamental Freedoms singed in Rome on 4 November 1950 (Dz.U. 1993, no. 61, item 284).

21 M. Macovei, *Freedom of Expression. A Guide to the Implementation of Article 10 of the European Convention on Human Rights*, Council of Europe, Strasbourg 2004, p. 8.

partiality of the judiciary".[22] One should counteract asymmetry between the provisions of the law and practice. It is assumed to be "obvious that as a human right, freedom of speech cannot be an absolute value which grants everyone the right to say anything, with disregard to foreseeable results of such behaviour. Should we do that it would stop being an instrument of defending other human rights, and become a means of their infringement".[23] If by means of the freedom of speech we can strive for the truth,[24] which in the context of the subject at hand means showing the actual motivations of terrorists, it takes us beyond epistemological deliberations and towards implementing practical solutions. For anti-terrorist strategies cannot be based entirely on epistemology.

In the context of anti-terrorist actions, the right to have access to information becomes particularly important. Authorities should not limit or prevent access to public information. On receiving a negative decision an individual should have the right to seek an effective legal remedy. Under Article 3.2 of the Act of 6 September 2001 on Access to Public Information (AAPI)[25], the right to public information covers the entitlement to: a) obtain public information, including obtaining information processed within such a framework, in which it is particularly essential for the public interest, b) insight into the official documents, and c) access to the board meetings of the bodies of public authorities chosen by general elections. It is in the public interest to be informed about the occurring dangers. The second subsection is important from the point of view of developing and implementing antiterrorist strategies, which should have proper legitimacy and be subject to monitoring. It would allow the revision and removal of possible faults and lend legal provisions prospectiveness. The third aspect directs attention to matters regarding public safety, which may be related to certain duties being bestowed on the society or the introduction of additional safety measures. Under Article 3.2 of AAPI, the right to obtain public information should be implemented immediately. The provisions under discussion have particular meaning in the context of terrorism. Terrorism may disturb not only personal, economic or social rights, but also biological balance. The danger here is connected with attacks on tankers and oil platforms, the introduction poisonous substances to soil, water and air, or illegal transport and storage of radioactive substances, which may cause an environmental disaster of trans-border magnitude. In the Rio de Janeiro Declaration regarding the environment and development adopted

22 More: I. C. Kamiński, *Ograniczenia swobody wypowiedzi dopuszczalne w Europejskiej Konwencji Praw Człowieka. Analiza krytyczna*, Wolters Kluwer Business, Warszawa 2010, pp. 21 *et seq*.

23 W. Wacławczyk, *Swoboda wypowiedzi jako prawo człowieka*, in: *Prawa człowieka. Wybrane zagadnienia i problemy*, eds. L. Koba, W. Wacławczyk, Wolters Kluwer Business, Warszawa 2009, p. 258.

24 Ibidem, pp. 247, 258.

25 Act of 6 September 2001 about Access to Public Information (Dz.U. 2001, no. 112, item 1198 as amended).

at the United Nations Conference on the Environment and Development[26] the role of an efficient warning system against disasters (principle 18)[27] was highlighted. It bears emphasising that antiterrorist actions should be implemented not only *ex post*, but also *ex ante*.

The tactics of terrorism are also transformed into unexpected and ruthless forms *online,* where information may be stored or modified. Implications may even lead to an international conflict ("information war"). Many sites and Internet portals are not sufficiently secured against hacker attacks. The US Department of State regularly faces cyber-attacks. Cyberterrorism causes a great deal of damage: the theft of personal data, withdrawals of money from bank accounts, dissemination of viruses and the blocking of services. For example, before the commencement of the second round of the presidential elections in France it was reported that hackers intercepted and published 9 gigabytes of e-mails of Emmanuel Macron's staff. A portion of these documents had been falsified (the fabrication of data).[28] The Internet is a source of information, however in the hands of cyber-terrorists it may be employed to spread disinformation.

The European Court of Human Rights (ECHR) analysed the freedom of speech in the context of electronic media in the case of Youth Initiative for Human Rights v. Serbia, 2013.[29] It was stressed that the officials, while fulfilling their duties using specialist technologies, should not exceed their competences. In the above application a non-governmental organisation asked the Serbian intelligence agency BIA (*Bezbednosno-informativna agencija*) for information on how many people were under electronic surveillance at a given period of time. The applicant was denied and informed that the information is subject to privacy law. The ECHR ruled that in this case the information was crucial both for public debate as well as the protection of individual rights. The refusal was not justified.

In another case, Delfi AS v. Estonia, 2015 ,[30] the Strasbourg court analysed the matter of the responsibility of one of the Estonian Internet services for vulgar comments posted by users. The administrator should have taken appropriate steps, e.g. used anti-spam.[31] Prophylaxis and prevention may be undertaken in the media in a non-arbitrary manner,

26 The United Nations Conference on Environment and Development was organised in Rio de Janeiro 3–14 June 1992. See also *Convention on Environmental Impact Assessment in a Transboundary Context* signed in Espoo on 25 February 1991 (Dz.U. 1999 , no. 96, item 1110).

27 M. Balcerzak, *Ochrona osób w przypadku katastrof. Uwagi o projekcie Artykułów Komisji Prawa Międzynarodowego Organizacji Narodów Zjednoczonych,* in: *Kierunki rozwoju współczesnego prawa międzynarodowego*, ed. K. Karski, Wydawnictwo „Bellona", Warszawa 2015, pp. 90 *et seq*.

28 *Another hacker attack during elections. E-mails of Macron's staff leak out,* in: "Wprost" of 6 May 2017 (digital edition).

29 Application of Youth Initiative for Human Rights v. Serbia, 2013, no. 48135/06.

30 Application Delfi AS v. Estonia, 2015 r., no. 64569/09.

31 S. Kowalska, *W poszukiwaniu ochrony przed bezprawnością i arbitralnością – strasburskie standardy praw człowieka*, Wydawnictwo „K & HP", Poznań 2014, pp. 149 *et seq*.

when it is "necessary in a democratic society" as it was established in the judgement of 30 May 2017 in the case Carlos Trabajo Rueda v. Spain.[32] Therefore, these actions should be implemented on the vertical and horizontal plane.

It bears highlighting that the point of reference in those cases should be human dignity, which is a guideline not only in the scope of meeting legal obligations, but also moral duties.[33] It should motivate the adoption of appropriate stances characterised by respect for the freedom of expression and the proper explanation of antiterrorist strategy.

In the context of antiterrorism one cannot disregard the prevention of radicalisation of the public mood. Actions in that area should be implemented starting with local communities, as it is there that the detection, uncovering and identification of such phenomena is the easiest. The role of subsidiarity is especially evident in this context. The idea of subsidiarity was set out in the Protocol on the Application of the Principles of Subsidiarity and Proportionality to the EU Treaty, in which it was stated that the decision process should take place as close as possible to the inhabitants.[34] The principle of subsidiarity may be applied both in the case of law-making, as well as the application of law. In the context of this paper it creates a space for compromise between the international and regional systems of human rights protection.[35] Society is where public interest and individual interests clash. In order to protect citizens against a terrorist attack, a decision might be taken to interfere with their rights and liberties, e.g. with their private life and freedom of expression. In case of the application of Margaret Murray et. al v. Great Britain,[36] the army entered private property without a warrant. The house was searched, information gathered, photographs taken. Two brothers of the applicant had previously left for the United States, where they were sentenced for crimes related to the purchase of arms for a terrorist organisation. The applicant was suspected of collecting and transferring money for the purchase of arms for the Irish Republican Army. The European Court of Human Rights stated that in the

32 Application Carlos Trabajo Rueda v. Spain, 2017, no. 32600/12.

33 M. Urbańczyk, *Od godności dobrze urodzonych po egalitarne szlachectwo dla wszystkich. Szkice ze studiów nad ideą godności człowieka*, in: "Czasopismo Prawno-Historyczne" 2014, vol. LXVI, issue 2, p. 183. See also idem, *Liberalna doktryna wolności słowa* a *swoboda wypowiedzi historycznej*, Wydawnictwo Poznańskie, Poznań 2009.

34 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community signed in Lisbon on 13 December 2007 (Journal o Laws of 2009 , no. 203, item 1569).

35 M. Klimkowski, *Znaczenie zasady pomocniczości dla międzynarodowego systemu ochrony praw człowieka*, in: *Uniwersalny system ochrony praw człowieka. Aksjologia. Instytucje. Efektywność*, ed. J. Jaskiernia, Wydawnictwo Adam Marszałek, Toruń 2015, p. 191.

36 Application Margaret, Thomas, Mark, Alana, Michaela and Rossina Murray v. Great Britain, 1994 , no. 14310/88.

above circumstances Article 8 of the ECHR was not breached, as the British authorities took justified and proportional action against an existing terrorist threat.[37]

In many countries at the moment there is an observable radicalisation of social moods. Attempts to counteract radicalisation should be broadened to encompass the prevention of hate speech in the media, the so-called "online radicalisation".[38] The information space should not be directed and determined by terrorists. Lack of consistent action may lead to extremism and the spread of malignant forms of violence. Current reasons for radicalisation include the deteriorating economic situation, unemployment, and marginalisation and social exclusion due to ethnicity, gender, age, health condition and religion. The growing wave of migration constitutes another challenge for European countries. Therefore, it can be concluded that the fight against terrorism should also include actions for the improvement of the social situation, as well as the inclusion of individual persons as active participants in society.

## Concluding Remarks

Ensuring that there is a diversity of ideas and opinions is a condition for the development of democratic society. Terrorists use the media to depreciate the law, the state and human rights, to manipulate society and generate a certain state of mind, as well as to deprive information of its pluralist nature. Freedom of expression should not be "decorative" in civil society, but a binding agent that joins and makes human rights the prime focus. Care for public safety cannot lead to indifference to the needs of individuals nor to the absolutisation of the interest of the state. The notion of the "common good" in the context of terrorism prevention should be referred through the essence of human rights.

Exercising freedom of speech objectively may provide protection against the ideological trap set by terrorists. The media constitute an important source of information about potential threats. Public discourse helps reach an objective perception of this subject matter. This prevents the creation of a multiplied image and a pseudo-reality. Freedom of speech should be an actually exercised right of an individual, as it creates a space of

37 C. Walker, *Terrorism and the Law*, Oxford University Press, Oxford 2011, pp. 145, 146–147. See. M. Vermeulen, *Assessing Counter – Terrorism as a matter of Human Rights: Perspectives from European Court of Human Rights*, in: *The Impact, Legitimacy and Effectiveness of EU Counter – Terrorism*, eds. F. Londras, J. Doody, Routledge Research in Terrorism and the Law, Routledge Taylor Q Francis Group, London-New York 2015, p. 88.

38 Communication from the Commission to the European Parliament, the Council, the European Economic and Social and the Committee of the Regions supporting the prevention of radicalisation leading to violent extremism, Brussels, 14 June 2016 [COM (2016) 379], p. 8–9. See application Magyar Tartalomszolgáltatók Egyesülete and Index.hu v. Hungary, 2016, no. 22947/13 – hate speech online.

expression, consolidates society in the face of danger, and motivates governments to take responsible action and not set "double standards" for human rights.

## Literature

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**SUMMARY**

**Freedom of Speech in the Face of Terrorism – Selected International Law Regulations**

The essay presents freedom of speech from the perspective of international law regulations. The phenomenon of terrorism is one of the most asymmetrical, amorphous and hybrid threats to international security and human rights. The author discusses freedom of speech in the context of anti-terrorism measures. Freedom of speech is a legal and axiological framework of democratic society. The media constitute an important source of information about social pathologies and threats. Terrorists use the media to depreciate the law and the state, and to generate chronic fear in society. The essay stresses the fact that a rational and informed approach to human rights should serve as a reference point for anti-terrorism. However, one cannot limit i*ndividual* freedom in an arbitrary way. Public discourse helps reach an objective perception. This prevents the creation of a multiplied image, pseudo-reality and "double standards" for freedom of speech.

Keywords: freedom of speech, terrorism, anti-terrorism, international law, human rights

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# Internet Access as a New Human Right? State of the Art on the Threshold of 2020

## Introduction

The recognition and operationalization of a new human right is a long process that requires the consensus of international actors, the common accord of academics and experts in its conceptualization and, last but not least, the willingness of governments to bind themselves to another human rights obligation. This is why it took more than 25 years from launching the debate on the right to water and sanitation[1] to the adoption of the separate General Comment by the Committee on Economic, Social and Cultural Rights (2002) and the General Assembly resolution on this matter (2010). Yet in the 1990s one could find major studies from the field of human rights that did not mention the issue of water at all.[2] Suffice to say that the case of the right to water and sanitation was relatively straightforward, as water is mentioned *expressis verbis* in Article 11 of the International Covenant on Economic, Social and Cultural Rights[3] (hereafter ICESCR) and the inclusion of this specific right was indeed discussed during the negotia-

1 One of the resolutions adopted by the UN Water Conference on 1977 stated *expressis verbis* that "all peoples (…) have the right to have access to drinking water in quantities and of a quality equal to their basic needs". See: United Nations, Report of the United Nations: Water Conference in Mar del Plata, New York 1977, p. 66. This study draws a parallel between the right to Internet access and the right to water, for several reasons. Firstly, both rights (if the right to Internet access is to be ever recognized) are protected under the ICESCR. Secondly, the right to water was originally not perceived as a separate human right and has only recently been recognized as such. It may be that the right to Internet access will follow the same path. Thirdly, the enjoyment of both rights imposes on states not only the duty of non-interference, but the duty to provide services to the society, i.e. to develop water facilities in the case of the right to water and to expand Internet infrastructure in the case of the right to Internet access.

2 P. H. Gleick, *The human right to water*, in: "Water Policy" 1998, no. 1, pp. 488–489.

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

tions of the Covenant.[4] Moreover, the issue of access to water had been already recognized in various international documents, including *inter alia* treaties.[5] Some may even say that this long process was rather an emancipation than recognition of a purely new right, as the importance of access to water in the enjoyment of the right to an adequate standard of living was indeed explicitly mentioned in Art. 11 of the ICESCR.

Knowing these dynamics, we should be skeptical when reading another newspaper headline announcing that UN has recognized Internet access as a human right. Such headlines had flashed around the world for the first time in 2011, when the Human Rights Council adopted the report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Frank La Rue. The majority of media outlets did not bother to check whether the reports of Special Rapporteurs are sources of law.[6] Nevertheless, the report did indeed stress that cutting off users from Internet access, regardless of the justification provided, is disproportionate and thus violates Article 19 of the International Covenant on Civil and Political Rights (hereafter ICCPR).[7] Moreover, Frank La Rue pointed out that ensuring universal access to the Internet should be a priority for all states.[8] These observations, however, remained nothing more than merely recommendations. But either way, the report elevated the so far mostly academic debate about the nexus between human rights and the Internet to the UN fora. Another milestone was achieved in 2016 with the adoption of the resolution on the promotion, protection and enjoyment of human rights on the Internet by the Human Rights Council.[9] This time, once more, media disseminated information that the UN had declared a new right, namely the right to Internet access. The resolution itself, however, did not declare a new right, but rather enumerated well-established rights for the realization of which the Internet has become an indispensable means, e.g. the right to freedom of expression, the right to freedom of peaceful assembly and association and the right to education. In this light, the recent resolution should be interpreted rather as another step on the path than the final act of declaring a new right.

4 S. L. Murthy, *The Human Right(s) to Water and Sanitation: History, Meaning, and the Controversy Over – Privatization*, in: "Berkeley Journal of International Law" 2013, vol. 31, no. 1, p. 92.

5 CESCR Committee, General Comment no. 15: The Right to Water (2003), E/C.12/2002/11, § 4.

6 N. Jackson, *United Nations Declares Internet Access a Basic Human Right*, in: "The Atlantic", 3 June 2011, https://www.theatlantic.com/technology/archive/2011/06/united-nations-declares-internet-access-a-basic-human-right/239911/. J. Wilson, United Nations Report Declares Internet Access a Human Right, Time, 7 June 2011, http://techland.time.com/2011/06/07/united-nations-report-declares-internet-access-a-human-right/ [access: 31.01.2018].

7 Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, 16 May 2011, A/HRC/17/27, § 78.

8 Ibidem, § 85

9 UN General Assembly, The promotion, protection and enjoyment of human rights on the Internet, 27 June 2016, A/HRC/32/L.20.

Some may express their doubts whether we are witnessing this process at all. The arguments of critics are well known and were pointed out by *inter alia* P. de Hert & D. Kloza[10] or V. Cerf.[11] Nevertheless, those arguments did not stop the Human Rights Council from bringing up this issue in 2016 and adopting the abovementioned resolution without a vote .[12] Another sign that we may be witnessing this process is the presence of Internet-related issues in the works of the UN treaty-based bodies. Internet access is frequently mentioned by most of them in various contexts when formulating recommendations. Suffice to say that the Internet appears in those recommendations much more frequently than, for instance, electricity which is repeatedly claimed to be a service so necessary for human beings that it should be recognized as a separate human right.[13] Even more compelling is the fact that the Internet-related recommendations formulated under the Universal Periodic Review (hereafter UPR) mechanism are as numerous as those related to the right to food and the right to water – both of which are relatively well-established human rights. For instance, in 2016 18 recommendations concerning the Internet were formulated, 21 regarding right to food and 31 related to the right to water.

Further parts of this study are devoted to a comprehensive analysis of the recommendations formulated by the UN treaty-based bodies in the period between 2007 and 2017. The results may shed new light on the scope and normative content of the potential right to Internet access as well as answer the question of whether we are indeed witnessing the process a new right being recognized. Section 2 of the study is devoted to a quantitative analysis of the concluding observations adopted by under the UN treaty-based reporting mechanisms, which is supplemented by the overview of the recommendations formulated within the UPR mechanism. Section 3 provides a detailed insight into the content of the recommendations (qualitative analysis). In Section 4 the author proposes that Article 15(1)b of the ICESCR (the right to benefit from scientific progress and its applications) is the provision that may serve as a legal departure point for the conceptualization of the right to Internet access.

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10 P. De Hert, D. Kloza, *Internet (access) as a new fundamental right. Inflating the current rights framework?*, in: "European Journal of Law and Technology", 2012, no. 3.

11 V. G. Cerf, *Why Internet Access is a Human Right: What We Can Do To Protect It*, in: "The New York Times", 4 January 2012, http://www.nytimes.com/2012/01/05/opinion/internet-access-is-not-a-human-right.html [access: 31.01.2018].

12 UN General Assembly, The promotion, protection and enjoyment of human rights on the Internet, 27 June 2016, A/HRC/32/L.20.

13 S. Tully, *Access to Electricity as a Human Right*, in: "Netherlands Quarterly of Human Rights" 2006, vol. 24, no. 4, pp. 557–588. A. J. Bradbrook, J. C. Gardam, *Placing Access to Energy Services within a Human Rights Framework*, in: "Human Rights Quarterly" 2006, vol., pp. 389–415.

## Statistics Don't Lie? Internet Access in the Works of UN Treaty-Based Bodies and the UPR

The issue of the Internet, in various contexts, appears in the concluding observations of the following committees: the Human Rights Committee (HR Committee), the Committee on Economic, Social and Cultural Rights (hereafter CESCR Committee); the Committee on the Elimination of Racial Discrimination (hereafter CERD Committee), the Committee on the Elimination of Discrimination against Women (hereafter CEDAW Committee), Committee on the Rights of the Child (hereafter CRC Committee), and the Committee on the Rights of Persons with Disabilities (hereafter CRPD Committee).[14] All in all, between 2007 and 2017 committees mentioned the word 'Internet' in 246 recommendations. The most active in this matter is the CRC, with 154 recommendations[15] while at the other extreme the Committee on Migrant Workers made only one recommendation.[16] The busiest period for the committees was 2012 (44 recommendations) and 2013 (36 recommendations), which might have been a temporary effect the Frank La Rue's report adopted in May 2011. Interestingly, 2012 was also a the peak for the CRC's activity and the following years witnessed increasing interest in the nexus between human rights and the Internet among the other committees, mainly the CERD, CESCR, CEDAW and CRPD. In this light, 2017 is marked by shocking decline in addressing the implications of the Internet for human rights. There might be two explanations – either the issue of Internet access has finally been integrated into the existing human rights framework or we are undergoing a so-called 'Internet winter' and after a period of silence, the issue will be taken up again in the future.[17]

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14 Two UN treaty bodies, namely the Committee against Torture (CAT) and the Committee on Migrant Workers (CMW), were excluded from detailed analysis due to their little interest in Internet-related issues. Nevertheless, the CAT Committee sometimes recommends that concluding observations as well as other documents and training tools be disseminated via the Internet (e.g. official websites). See: CAT Committee, Concluding observations: Germany (2011), CAT/C/DEU/CO/5, § 37.

15 This number does not include another 177 recommendations formulated by the CRC Committee within the monitoring procedures under the Optional Protocols to the Convention. They were excluded from statistics as they substantively overlap with recommendations adopted by the Committee under the procedure of monitoring the implementation of the CRC itself.

16 Committee recommended to guarantee the right to vote of Filipino migrant workers living abroad by introducing Internet voting. See: CMW Committee, Concluding observations on the second periodic report of the Philippines (2014), CMW/C/PHL/CO/2, § 39.

17 This thesis builds upon the analogy with the period of 'AI winter' in the 1980s. Progress in the development of artificial intelligence (AI) in the 1970s sparked optimism among the scientists, however the following decade failed to bring any breakthrough. It resulted in disillusionment and decreasing interest in the field of the AI. See: J. Hendler, *Where Are All the Intelligent Agents?*, "IEEE Intelligent Systems", 2007, vol. 22 no. 3, pp. 2–3 https://doi.org/doi: 10.1109/MIS.2007.62. Some authors indicate that currently we are witnessing an 'AI spring'. J. Markoff, *Behind Artificial Intelligence, a Squadron of Bright Real People*, in "The New York Times", 14 Oc-

| Committee | 2017 | 2016 | 2015 | 2014 | 2013 | 2012 | 2011 | 2010 | 2009 | 2008 | 2007 | **Overall** |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| CRC | 1 | 7 | 9 | 12 | 25 | 37 | 19 | 15 | 11 | 5 | 13 | 154 |
| CERD | 1 | 2 | 5 | 3 | 4 | 2 | 1 | 3 | 1 | 2 | 0 | 24 |
| CEDAW | 1 | 1 | 2 | 6 | 1 | 1 | 0 | 2 | 1 | 0 | 1 | 16 |
| CCPR | 2 | 2 | 2 | 0 | 2 | 3 | 0 | 1 | 0 | 0 | 0 | 12 |
| CESCR | 1 | 4 | 5 | 4 | 1 | 1 | 1 | 0 | 0 | 0 | 0 | 17 |
| CRPD | 3 | 5 | 0 | 2 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 11 |
| CMW | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 |
| CAT | 0 | 0 | 0 | 1 | 2 | 0 | 4 | 1 | 0 | 0 | 1 | 9 |
| HRC (UPR) | N/D | 18 | 36 | 40 | 33 | 17 | 6 | 19 | 7 | 2 | 0 | 178 |
| **Overall** | 9 | 39 | 59 | 69 | 69 | 61 | 31 | 41 | 20 | 9 | 15 | 422 |

Table 1. The overall number of recommendations mentioning the word 'Internet' that were adopted by the UN treaty-based bodies and formulated by the states under the procedure of Universal Periodic Review in the period 2007–2017. The numbers reflect the total amount of recommendations that mentioned the Internet (i.e. it may have happened that one concluding observations includes more than one Internet-related recommendation).

One may say that the presented numbers are too scarce to make any argument regarding potential recognition of a new human right.[18] Indeed, these numbers indicate that if we are witnessing any such process, we are at the very beginning. However, adding recommendations formulated during the interactive dialogue of the UPR almost doubles the number to 422. Interestingly, since 2014 there have been more recommendations concerning the Internet formulated under the UPR mechanism than within the reporting procedures under the respective human rights treaties. It seems that under the UPR this issue serves as a double-edged sword – democratic states urge autocratic states to ensure freedom of expression and access to information on the Internet (by *inter alia* the abolishment of censorship),[19] while non-democratic regimes

tober 2005, http://www.nytimes.com/2005/10/14/technology/behind-artificial-intelligence-a-squadron-of-bright-real-people.html [access: 31:01.2018].

18 The amount of concluding observations that are adopted annually differs among UN treaty bodies. For instance, in case of CMW Committee this number does not exceed 10, for CESCR Committee and HR Committee it remains between 15 and 20, and the most active are CEDAW Committee, CERD Committee and CRC Committee with more than 20 (including concluding observations adopted within the reporting procedure under the Optional Protocols to the CRC, this amount almost doubles).

19 See for instance: HRC, Universal Periodic Review: Turkmenistan (2013), A/HRC/24/3, par. 112.62. HRC, Universal Periodic Review: Tajikistan (2016), A/HRC/33/11, § 118.56.

(e.g. Iran, China, Libya) recommend that Western democracies intensify efforts to combat xenophobia,[20] Islamophobic propaganda[21] etc. in cyberspace. Approximately 68% of these recommendations were accepted by the states, which indicates the general consensus in this matter (to compare, the percentage of total recommendations accepted exceeded 66% at the end of 2017). Leaving aside numbers, it is worth investigating the content of the recommendations. As the UPR recommendations very frequently refer to or follow the ones adopted by the UN treaty-based bodies, further analysis will be limited to the latter.

## The Content of Internet-Related Recommendations Formulated by the UN Treaty-Based Bodies

The CRC Committee most commonly urges state parties to combat child pornography and the sexual exploitation of children on the Internet (e.g. recruitment for prostitution), cyberbullying[22] and grooming.[23] On various occasions the Committee has emphasized the necessity of adopting a law that specifies the obligations of Internet Service Providers (ISPs) if child pornography is detected[24] and of strengthening the mechanisms for monitoring and prosecuting ICT-related violations of children rights.[25] States parties frequently receive recommendations to educate children on Internet safety as well as to raise awareness among parents, guardians and teachers about opportunities and risks relating to the use of Internet and other ICT technologies, e.g. Internet addiction.[26]

The second most active is the CERD Committee. It frequently recommends combatting the proliferation of racism and hate speech in the media, particularly through the

20 HRC, Universal Periodic Review: Sweden (2015), A/HRC/29/13, par. 145.60, 145.76, 145.80, 147.13, 145.77.

21 HRC, Universal Periodic Review: Finland (2012), A/HRC/21/8, § 90.4.

22 CRC Committee, Concluding observations: Maldives (2016), CRC/C/MDV/CO/4–5, § 39.

23 CRC Committee, Concluding observations: Austria (2012), CRC/C/AUT/CO/3–4, § 32.

24 CRC Committee, Concluding observations: Malaysia (2007), CRC/C/MYS/CO/1, par. 102. More detailed recommendations on this matter are formulated by the CRC within the reporting procedure under the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. For instance, CRC Committee recommended to adopt legislation that requires ISPs, telephone service providers and banking services to report the detection of pornographic content involving children. See: CRC Committee, Concluding observations: Portugal (2014), CRC/C/OPSC/PRT/CO/1, § 30.

25 CRC Committee, Concluding observations: Sweden (2015), CRC/C/SWE/CO/5, § 25.

26 CRC Committee, Concluding observations: Republic of Korea (2012), CRC/C/KOR/CO/3–4, § 59.

Internet.[27] The Committee urged *inter alia* that relevant legislation should be adopted[28] (including criminal law provisions)[29], that social media should be monitored[30] or, where appropriate, that websites devoted to inciting racial discrimination should be blocked.[31] The Committee encourages the active promotion of awareness of values such as diversity and non-discrimination by ISPs .[32] Considering the report submitted by Turkmenistan in 2012, the Committee noticed that Internet-based sources (e.g. blogs, websites) play an important role in the promotion of human rights concerning minorities and thus the state should refrain from restricting access to these sources.[33]

In the works of the CEDAW Committee, the Internet is considered as an important vehicle for the promotion of the Convention among women[34] and as a means of combatting gender-based stereotypes.[35] The Committee is aware of the fact that many Internet-based sources portray women as sexual objects, but at the same time notes that technology provides innovative measures that can considerably enhance dissemination of the concepts such as the equality of women and men.[36] The Committee recommended on various occasions that countermeasures be taken against so-called 'Internet marriages' (Internet brides).[37] Only recently did the Committee notice the potentially beneficial influence of e-administration on women's health and recommended that the state party ensure that rural, elderly and marginalized women receive appropriate digital education and are therefore able to register for a health appointment via the Internet.[38] Moreover, the Committee stated that the Estonian government shall ensure that these groups have adequate Internet access.[39] When considering the report submitted by Ukraine, the Committee recommended improving the access of women and girls to the ICT by enrolling them in computer literacy programmes.[40]

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27 CERD Committee, Concluding observations: Serbia (2018), CERD/C/SRB/CO/2–5, par. 14.
28 CERD Committee, Concluding observations: New Zealand (2013), CERD/C/NZL/CO/18–20, § 9.
29 CERD Committee, Concluding observations: Germany (2008), CERD/C/DEU/CO/18, § 16.
30 CERD Committee, Concluding observations: Republic of Korea (2012), CERD/C/KOR/CO/15–16, § 10.
31 CERD Committee, Concluding observations: Germany (2015), CERD/C/DEU/CO/19–22, § 9.
32 CERD Committee, Concluding observations: Netherlands (2015), CERD/C/NLD/CO/19–21, § 12.
33 CERD Committee, Concluding observations: Turkmenistan (2012), CERD/C/TKM/CO/6–7, § 25.
34 CEDAW Committee, Concluding observations: Tuvalu (2009), CEDAW/C/TUV/2, § 18.
35 CEDAW Committee, Concluding observations: Malta (2010), CEDAW/C/MLT/CO/4, § 19.
36 CEDAW Committee, Concluding observations: Bolivarian Republic of Venezuela (2014), CEDAW/C/VEN/7–8, § 17.
37 CEDAW Committee, Concluding observations: Cameroon (2014), CEDAW/C/CMR/CO/4–5, § 21. CEDAW Committee, Concluding observations: Senegal (2015), CEDAW/C/SEN/3–7, § 23.
38 CEDAW Committee, Concluding observations: Estonia (2016), CEDAW/C/EST/CO/5–6, § 31(d).
39 Ibid.
40 CEDAW Committee, Concluding observations: Ukraine (2017), CEDAW/C/UKR/8, § 37(e).

The CRPD Committee has only recently recognized the vast opportunities that the Internet brings for persons with disabilities, but was among most active in this matter in 2016 and 2017. The majority of recommendations concern dissemination of the concluding observations *inter alia* via Internet (in accessible formats).[41] However, there are also numerous recommendations urging that access to information be provided for persons with disabilities via the Internet on an equal basis with others (so-called web accessibility).[42] Considering the report submitted by Canada, the Committee recommended promoting and facilitating the use of accessible formats, modes and means of communication as well as to provide software and assistive devices to all persons with disabilities.[43] Moreover, the Canadian government was encouraged to redouble its efforts to ensure that services offered by the private entities through the Internet remain accessible to all.[44]

Paradoxically, although the Internet is frequently classified as a means of communication, the HR Committee relatively rarely formulates recommendations that refer to the ICT. Nearly all of them concern the tension between combating racial and religious hatred and the freedom to seek, receive and impart information.[45] Interestingly, only once has the Committee pointed out the implications of Internet use on privacy.[46] On one occasion the Committee stressed the role of social networks in exercising the right to freedom of expression.[47]

The CESCR Committee brought up the issue of the Internet in 2013 and since then remains among the most active UN treaty-based bodies in this matter. The Committee's recommendations can be grouped into two categories. The first one considers the Internet from the perspective of the right to education and the second one through the prism of cultural rights. Regarding the obligations derived from the right to education, the Committee recommended setting up educational and information centers that focus on the use of ICT and the Internet,[48] in particular for disadvantaged and marginalized groups, e.g. indigenous peoples[49] or people living in

41 CRPD Committee, Concluding observations: Honduras (2017), CRPD/C/HND/CO/1, § 74.
42 CRPD Committee, Concluding observations: Republic of Korea (2014), CRPD/C/KOR/CO/1, par. 18. CRPD Committee, Concluding observations: Armenia (2017), CRPD/C/ARM/CO/1, § 36.
43 CRPD Committee, Concluding observations: Canada (2017), CRPD/C/CAN/CO/1, § 40(b).
44 Ibidem, § 40(c).
45 HR Committee, Concluding observations: Bosnia and Herzegovina (2017), CCPR/C/BIH/CO/3, § 22. HR Committee, Concluding observations: Cameroon (2017), CCPR/C/CMR/CO/5, § 42.
46 HR Committee, Concluding observations: Islamic Republic of Iran (2011), CCPR/C/IRN/CO/3, § 27.
47 HR Committee, Concluding observations: Tajikistan (2013), CCPR/C/TJK/CO/2, § 22.
48 CESCR Committee, Concluding observations: Ecuador (2012), E/C.12/ECU/CO/3, § 34.
49 CESCR Committee, Concluding observations: Guatemala (2014), E/C.12/GTM/CO/3, § 27.

rural and remote areas.[50] The Committee recognized on various occasions the beneficial effect of the Internet on the enjoyment of cultural rights. Thus, the Committee recommended expanding the availability of the Internet across the country[51] and intensifying efforts aimed at expanding broadband Internet access, in particular to rural areas.[52] In 2011 the Committee urged that the practice of censoring electronic communication and blocking of the Internet should cease. In the following years the Committee stressed that respect for the freedom of expression is a precondition for enjoying the right to take part in cultural life.[53]

Analysis of the recommendations formulated by the UN treaty bodies indicates that we can distinguish two major dimensions of Internet access: freedom of expression in cyberspace (covered mostly by the CRC, CERD, CRPD, CCPR and CEDAW Committees) and physical access to the Internet (covered mostly by the CESCR, CRPD and CEDAW Committees). The latter encompasses infrastructure (e.g. broadband infrastructure), various facilities (e.g. educational and information centers), services (e.g. e-administration, e-voting) and technological accommodations (e.g. assistive devices for persons with disabilities). Although recommendations concerning freedom of expression on the Internet prevail in terms of quantity, however, the second group has been rapidly increasing since 2014. Moreover, under the UPR mechanism there are state delegations that formulate recommendations regarding the expansion the Internet infrastructure.[54]

## Internet Access as a Human Right – Do We Have any Legal Grounds?

Assuming that we are indeed witnessing the process of a new human right being recognized, one may ask for the legal grounds in the existing international human rights law. Undoubtedly, having a legal foothold in the international human rights treaty that encompasses both dimensions of Internet access makes it more likely to happen. As the analysis of the works of the CESCR Committee has shown, obligations derived from the so-called cultural rights (Art. 15 of the ICESCR) have already been interpreted widely enough for the purpose of defining a right to Internet access. The Committee

50 CESCR Committee, Concluding observations: Poland (2016), E/C.12/POL/CO/6, § 56.

51 CESCR Committee, Concluding observations: Lithuania (2014), E/C.12/LTU/CO/2, § 25. CESCR Committee, Concluding observations: Uzbekistan (2014), E/C.12/UZB/CO/2, § 26.

52 CESCR Committee, Concluding observations: Ireland (2013), E/C.12/IRL/CO/3, § 34.

53 CESCR Committee, Concluding observations: Sudan (2015), E/C.12/SDN/CO/2, § 56.

54 HRC, Universal Periodic Review: Rwanda (2016), A/HRC/31/8, § 133.34. HRC, Universal Periodic Review: Cuba (2013), A/HRC/24/16, § 170.196, § 170.198. HRC, Universal Periodic Review: Turkmenistan (2013), A/HRC/24/3, § 112.65.

frequently stresses the importance of freedom of expression in exercising cultural rights and on various occasions specifically addressed the Internet.[55] The activity of the Committee is even greater in the case of expanding infrastructure across the country[56] and ensuring affordability of Internet access.[57]

It may be that hitherto forgotten Art. 15(1)b of the ICESCR that established the right to benefit from scientific progress and its applications (hereafter RBSP) will be rediscovered for this purpose. By now, there is neither a General Comment providing the Committee's interpretation, nor much interest from the academics in this matter.[58] In 2009 a group of experts adopted the Venice Statement on the Right to Enjoy the Benefits of Scientific Progress and its Applications that sheds some light on the normative content of Art. 15(1)b, however the document includes – as the authors stressed at its very beginning – only preliminary findings and proposals.[59] Although the document does not mention *expressis verbis* the Internet, it refers to the applications of scientific progress and the Internet is undoubtedly one of them. Thus, if the right to Internet access is ever to be recognized, it may emancipate from the RBSP – as was the case with the emancipation of the right to water from the right to an adequate standard of living (Art. 11 of the ICESR).

## Concluding Remarks

As the analysis has shown, the Internet is a matter of concern for the UN treaty-based bodies. Although the Internet is a relatively new technology, the number of recommendations concerning it is much higher than those addressing, for instance, access to electricity. Although recommendations formulated in the context of other "emancipated" rights, namely the right to food and the right to water, are being adopted by the UN treaty-based bodies more frequently, this difference almost completely disappears in the case of the UPR recommendations. As under the UPR procedure there are representatives of states, not the group of independent experts,

55 CESCR Committee, Concluding observations: Sudan (2015), E/C.12/SDN/CO/2, § 56. CESCR Committee, Concluding observations: Turkmenistan (2011), E/C.12/TKM/CO/1, § 29.

56 CESCR Committee, Concluding observations: Philippines (2016), E/C.12/PHL/CO/5–6, § 58. CESCR Committee, Concluding observations: Kenya (2016), E/C.12/KEN/CO/2–5, § 62.

57 CESCR Committee, Concluding observations: Gambia (2015), E/C.12/GMB/CO/1, § 29.

58 There are, nevertheless, some studies. See: Audrey R. Chapman, Towards an Understanding of the Right to Enjoy the Benefits of Scientific Progress and Its Applications, Journal of Human Rights, 2009, 8, pp. 1–36.

59 Venice Statement on the Right to Enjoy the Benefits of Scientific Progress and its Applications , adopted during the conference that was held in Venice, Italy on 16–17 July 2009. For the full text vid.: https://www.aaas.org/sites/default/files/VeniceStatement_July2009.pdf.

who are formulating recommendations, the emphasis that is being put on Internet-related issues indicates the growing consensus of the states on the scope of treaty-based obligations related to this new technology. Moreover, those recommendations are not limited to the duty of non-interference, but stress the necessity of expanding Internet infrastructure, ensuring its affordability, and the importance of building digital literacy in the society, particularly in the most disadvantaged and marginalized groups. Of course, it may take years, or even decades, until international community finally defines the normative content of the new right, nevertheless current developments allow us to claim that we may be indeed witnessing a process of a new human right being recognized, or rather forged.

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**SUMMARY**

**Internet Access as a New Human Right?
State of the Art on the Threshold of 2020**

The aim of this study is to analyze the role that the Internet plays in the enjoyment of human rights and answer the question of whether we may be in the process of recognizing a new right, namely the right to Internet access. The conclusions are built upon a quantitative and qualitative analysis of the Internet-related recommendations adopted by the UN treaty-based bodies in the period between 2007 and 2017. Moreover, the paper is supplemented by a brief overview of the relevant recommendations formulated under the mechanism of the Universal Periodic Review. Analysis of the content of recommendations allowed them to be classified into two groups – the first one integrates recommendations that refer to the duty of non-interference, and the second concerns the duty to expand Internet infrastructure across the country. The article ends with a call for further investigation of the normative potential of Article 15(1)b of the International Covenant on Economic, Social and Cultural Rights, as this hitherto forgotten provision might shed a new light on the proposed right to Internet access.

Keywords: Internet access, human rights, cultural rights, right to benefit from scientific progress and its applications

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# The European Committee of Social Rights as a Monitoring Body in the System of the European Social Charter[1]

## Introduction

International human rights law is the field of international law which has undergone the greatest developments in the past few decades. Not only is it a field that has emerged relatively recently, but it is also marked by its distinctiveness among other fields of international law. This field of international law abounds in *self-executing* rights, i.e. those applicable directly to individuals. Such rights undoubtedly set new trends for future developments with regard to who are the subjects of international law. In no other field of international law is the status of an individual as high as in international human rights law. It empowers individuals to invoke their rights before international authorities, including judicial bodies. The way to achieve this is through the right to formulate and submit complaints against a state that violates its obligations under treaties it is signatory to.

The development of international human rights law has taken place over a relatively short period of time, albeit in a very dynamic manner. The current landscape of international human rights law has been shaped in the course of particularly large-scale international cooperation, on both the global and regional level, between states and numerous international organisations. Such cooperation resulted in building up a very extensive system of international human rights law encompassing both universal and regional regulations. The former ones were adopted and are in place within the framework of the United Nations, whereas the latter – within the framework of other international authorities which are regional in their outreach. The universal vs. regional distinction in relation to international human rights protection occurs naturally. Regional regulations naturally reflect the international cooperation for international human rights protection, hence supplementing and enhancing the regulations set out in universal treaties. Regional regulations can undoubt-

1 This article is a result of the research conducted in the project no. 2014/15/N/HS5/00662 financed by the Polish National Science Centre.

edly be better tailored to the specific political, economic and social conditions of particular geographic regions, due to their individual characteristics. Moreover, it is easier to create a more effective legal and monitoring system within the bounds of a geographic region due to the naturally occurring collective interests and cultural legacy. Finally, we need to consider the fact that the international community is deeply divided. Therefore, the collective interests of a regional community are the driving force for more dynamic developments of law in these areas of cooperation which are prioritised by countries in each geographic region. In view of this, it needs to be noted that the regional systems of human rights protection in the field of international human rights law have played a very important role and will continue to do so in the future. In practice, the protection of fundamental rights and freedoms appears to be even stronger in particular regional systems within the framework of international human rights law. The *acquis* of the Council of Europe is the best example of such detailed regional treaty regulations within the framework of international human rights protection. This article discusses the part of the Council of Europe's *acquis* which relates to the monitoring role of the European Committee of Social Rights.

The Council of Europe's *acquis* comprises more than 200 conventions. Those relating to international human rights law are of particular importance. The most crucially important of these is undoubtedly the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950.[2] This convention, along with its additional protocols, which were undoubtedly inspired by the provisions of the Universal Declaration of Human Rights, constitutes the most advanced system of regional protection of human rights. This system is equipped with effective international monitoring mechanisms, including judicial procedures in the European Court of Human Rights.[3] These procedures will not be discussed in this article, though. The Council of Europe's *acquis* with respect to the so-called second-generation human rights as well the monitoring mechanisms will be discussed at length. This body of law is referred to as the system of the European Social Charter and consists in particular of the two following Council of Europe conventions: the European Social Charter and the Revised European Social Charter. The European Social Charter was signed in Turin on October 18, 1961. It came into force on February 26, 1965.[4] Currently 27 member states of the Council of Europe are parties to the Charter.[5] Poland ratified the Charter on June 25, 1997, and it came into force in Poland on July 25, 1997.[6] The Revised European Social Charter was signed in Strasbourg on May 3, 1996 and came into force on July 1, 1997.[7] Currently 34 member states of the Council of Europe are parties to the

2 European Treaty Series ("ETS") no. 005.

3 M. A. Nowicki, *Wokół Konwencji Europejskiej,* Warszawa 2009.

4 ETS no. 035.

5 Treaty Office of the Council of Europe, http://www.coe.int/en/web/conventions.

6 ETS no. 035. Analysis of the provisions of the Charter, vid. e.g. A. Świątkowski, *Prawo socjalne Rady Europy,* Kraków 2006, pp. 12 et seq.

7 ETS no. 163.

Revised Charter.[8] Poland has not ratified it so far. Two additional protocols and one amending protocol also form part of the system of the European Social Charter: the Additional Protocol of May 5, 1988, which came into force on September 4, 1992,[9] and which was adopted following the earlier adoption of the Declaration on Human Rights by the Council of Europe on April 27, 1978;[10] the Additional Protocol of November 9, 1995, which came into force on July 1, 1998,[11]; and the Protocol amending the European Social Charter of October 21, 1991, which coincided with the 30th anniversary of signing of the Charter.[12] There are also 4 important conventions drafted and adopted by the Council of Europe which also form part of the system of the European Social Charter: the European Code of Social Security of April 16, 1964[13], drafted in cooperation with the International Labour Organization, revised on November 6, 1990[14]; the European Convention on Social Security of December 14, 1972[15]; the European Convention on Social and Medical Assistance of December 11, 1953[16]; and the European Convention on the Legal Status of Migrant Workers of November 24, 1977.[17] The system of the European Social Charter provides for a particular monitoring system in which the European Committee of Social Rights plays a crucial role.

## The European Committee of Social Rights as a Specific Human Rights Treaty Body

The effective application of the legal regulations of international human rights law depends to a large extent on the effectiveness of the monitoring system provided therein. In general, universal treaties on international human rights law provide for two monitoring systems. The first one of these, referred to as the political system, is based on the

8 Treaty Office of the Council of Europe, http://www.coe.int/en/web/conventions.

9 ETS no. 128.

10 A. Świątkowski, *Karty Społeczne Rady Europy*, "Państwo i Prawo" 2003, no. 8, p. 38. Currently 13 member states of the Council of Europe are parties to the Protocol. Poland has not yet ratified the Protocol.

11 ETS no. 158. Currently 13 states are parties to the protocol. Poland has not yet ratified the Protocol.

12 ETS no. 142. This protocol has not come into force yet. 23 states parties of the European Social Charter are parties to the Protocol. In accordance with art. 8, it will come into force only once it has been ratified by all states parties to the Charter. Poland ratified the Protocol on June 25, 1997.

13 ETS no. 048. The protocol came into force on March 17, 1968. Poland is not party to the protocol.

14 ETS no. 139. The Protocol has not come into force yet. Poland is not party to the protocol.

15 ETS no. 078 Convention came into force on March 1, 1977. Poland is not party to the Convention.

16 ETS no. 014. The Convention came into force on July 1, 1954. Poland is not party to the Convention.

17 ETS no. 093. The Convention came into force on May 1, 1983. Poland is not party to the Convention.

United Nations Charter. In this system the United Nations Human Rights Council has been the monitoring body since 2006, replacing the United Nations Commission on Human Rights (established in 1946), both being subsidiary bodies of the UN General Assembly.[18] The second system, known as the treaty system, is composed of monitoring bodies established in the universal treaties adopted within the United Nations framework.[19] This system operates within the framework of the two International Covenants of Human Rights (ICCPR and ICESCR) as well as other international human rights treaties.[20] In this system it is the specific treaty bodies that serve the monitoring function.

In the European Council system, which constitutes a European regional system of international human rights protection, there are monitoring bodies that in their nature can be considered as "treaty bodies". It should be noted, however, that the monitoring bodies established in the two above-mentioned major Council of Europe conventions are very distinct from each other.

The Convention for the Protection of Human Rights and Fundamental Freedoms, which is the most fundamental Council of Europe treaty with regard to international human rights law, has developed its own specific monitoring system, which is very effective. According to the original provisions of the Convention, the monitoring functions were exercised by three institutions, namely: the European Commission on Human Rights established in 1954, the European Court of Human Rights established in 1959, and the Committee of Ministers of the Council of Europe. This monitoring system was significantly changed under the provisions of Protocol 11 concerning the transformation of the monitoring mechanisms established by the Convention. It was signed on May 11, 1994, and came into force on November 1, 1998.[21] Poland ratified this Protocol on May 20, 1997. Most importantly, the Protocol abolished the European Commission of Human Rights and reformed the European Court of Human Rights, which had hitherto not been a permanent court, into a full-time institution. The evolution of the Convention's monitoring system also triggered a change in the role of the Committee of the Council of Ministers in the monitoring process.[22] Currently in the system of the Convention the European Court of Human Rights is a treaty body. Protocol 14 and Protocol

18 A/RES/60/251.

19 R. Wieruszewski, *ONZ-owski system ochrony praw człowieka,* in: *System ochrony praw człowieka,* B. Banaszak, A. Bisztyga, K. Complak, M. Jabłoński, R. Wieruszewski, K. Wójtowicz, Kraków 2005, pp. 61 et seq.

20 A. Gadkowski, *Europejski Komitet Praw Społecznych w systemie organów traktatowych międzynarodowej ochrony praw człowieka*, "Adam Mickiewicz University Law Review" 2014, vol. 3, pp. 71 et seq.

21 ETS no. 155.

22 M. Balcerzak, *Procedury ochrony praw człowieka i kontroli wykonywania zobowiązań przez państwa,* in: *Prawa człowieka i ich ochrona,* B. Gronowska, T. Jasudowicz, M. Balcerzak, M. Lubiszewski, R. Mizerski, Toruń 2010, pp. 170 et seq.

14bis to the Convention introduced further changes to the claims processing system, especially with regard to the claims admissibility procedure. These protocols reformed the Convention's monitoring system to facilitate and simplify complaint processing.[23]

It needs to be noted that the status of the ECHR is markedly different than that of other treaty bodies serving a monitoring function, both in the UN system and in the system of the European Social Charter. The ECHR is a judicial treaty body which handles two types of complaints: individual and inter-State complaints.[24] Art. 32 of the Convention defines the ECHR's jurisdiction, which is to hear and determine all cases related to interpretation and application of the Convention and its protocols, which are submitted to the ECHR in accordance with articles 33, 34 and 47. The complaint system and its functioning within the framework of the Convention for the Protection of Human Rights and Fundamental Freedoms, which is the subject of extensive literature, will not be discussed in detail in this article.[25] It has been mentioned only in the context of the role of treaty bodies in the process of implementing international human rights law in the UN system, and of other treaty bodies in the system of the Council of Europe, in particular the European Committee of Social Rights.

The second fundamental normative regulation of the Council of Europe in the field of international human rights law is the European Social Charter. It also operates its own monitoring system which has evolved significantly. Its original monitoring system was set out in Part IV of the Charter of 1961. These provisions established a mechanism supervising the compliance with the Charter. They provided for the obligation of states to submit reports and defined the status of the Committee of Experts as a monitoring body. The Committee had to submit its findings with respect to its monitoring function on the application of the Charter's provisions to a special Governmental Social Committee, which in turn had to submit reports to the Council of Europe's Committee of Ministers, together with recommendations for states which in its view failed to comply with the provisions of the Charter. The Amending Protocol of 1991 reformed the Charter's supervisory machinery. The Protocol instituted a Committee of Independent Experts, a new treaty body granted the exclusive right to interpret and apply the provisions of the Charter. The protocol also granted the Committee the right to submit requests for

23 Protocol 14, signed on May 13, 2004, came into force on June 1, 2010. (ETS no. 194). Poland ratified the Protocol on October 12, 2006. Protocol 14 bis, signed on May 27, 2009, came into force on October 1, 2009. (ETS no. 204). Poland has not ratified it so far.

24 M. A. Nowicki, *Reforma systemu kontroli przestrzegania Europejskiej Konwencji Praw Człowieka, Biuletyn Centrum Europejskiego Uniwersytetu Warszawskiego* 1998, Nos. 3–4.

25 Examples of papers on the topic: A. Bisztyga, *Europejski system ochrony praw* człowieka, in: *Prawa i wolności obywatelskie w Konstytucji RP,* eds. B. Banaszak, A. Preisner, Warszawa 2002, pp. 810 et seq. and R. Hliwa, *Model ochrony praw człowieka w systemie Rady Europy. Mechanizmy Europejskiej Konwencji o Ochronie Praw Człowieka i Podstawowych Wolności,* in: *Ochrona praw człowieka w świecie,* ed. L. Wiśniewski, Bydgoszcz-Poznań 2000, pp. 197 et seq.

relevant information directly to the authorities in the Contracting Parties. The Protocol also gave the Committee the right to hold meetings with representatives of the authorities of the Member States or regional groups from those countries. Moreover, national organisations which were members of the international organisations of employers and trade unions were invited to meetings of a sub-committee of the Governmental Social Committee. Furthermore, the Protocol diminished the role of the Parliamentary Assembly and other Council of Europe institutions in the process of supervising the application of the Charter.[26] In 1998 the Committee was renamed the European Committee of Social Rights,[27] which is its current name.

The most extensive reform of the supervisory machinery of the European Social Charter was introduced by the Additional Protocol of 1995 which provided for a system of collective complaints. It is worth noting that by introducing this mechanism, the Protocol granted the right of international organisations of employers and trade unions, as well as other international non-governmental organisations, to submit complaints alleging unsatisfactory application of the Charter by the Contracting states-parties to the Charter and Protocol. Such organisations are free to exercise this right should the state be non-compliant with the standards set out by the Charter.[28] Some authors emphasize that because the Committee was granted the right to examine collective complaints in a specially prescribed procedure, this subsequently means it was raised to the status of a quasi-judicial treaty body.[29] Part IV of the Revised European Social Charter sets out further regulations related to the monitoring system. Even though at the substantive-law level the Revised Charter is very novel, its monitoring system still makes use of the institutions and mechanisms established earlier, particularly in the 1961 Charter and the Additional Protocol of 1995.

In most general terms, the European Committee of Social Rights can be described as the counterpart of the Committee on Economic, Social and Cultural Rights in the system of the International Covenant on Economic, Social and Cultural Rights. Using a certain degree of simplification, it could also be said that due to its quasi-judicial functions it could be perceived as the counterpart of the European Court of Human Rights in the system of the Convention for the Protection of Human Rights and Fundamental Freedoms.

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26 A. Świątkowski, *Karty Społeczne Rady Europy*…, op. cit., pp. 39–40.

27 Ibidem, p. 38.

28 A. Gadkowski, op. cit., pp. 71 et seq.

29 A. Brillat, *A New Protocol to the European Social Charter Providing for the Collective Complaints,* "European Human Rights Law Review" 1996, no. 1, pp. 52 et seq., M. Jager, *The Additional Protocol to the European Social Charter Providing for a System of Collective Complaints*, "Leyden Journal of International Law" 1997, no. 10, pp. 69 et seq. and A. Świątkowski, *Quasi-jurysdykcyjna funkcja Komitetu Praw Społecznych Rady Europy,* "Państwo i Prawo" 2004, no. 9, pp. 46 et seq.

The most important functions of the European Committee of Social Rights are listed below. As a treaty body the Committee:

- supervises the compliance of Member States with the provisions of the treaties constituting the system of the European Social Charter; in this capacity the Committee sets out the European standards of labour law, social security and social policy;
- examines the reports prepared and submitted by Member States, decides whether the national regulations are compliant with the standards set out in the Charter; and then formulates conclusions which must be respected by the states, even if they are not directly enforceable; such conclusions are then submitted to the Governmental Committee, and finally to the Committee of Ministers of the Council of Europe;
- examines collective complaints lodged by entitled entities against states violating the obligations imposed on them by the European Social Charter, prepares final reports on specific complaints, on the basis of which the Committee of Ministers of the Council of Europe issues a relevant resolution or recommendation.

The fact that the Committee examines reports and reviews complaints makes it similar to other treaty bodies in the process of implementing international human rights law. The status of the Committee in relation to other treaty bodies is distinct, though. It acts as a quasi-judicial body whilst reviewing the collective complaints. However, this function does not yet warrant its classification as a judicial treaty body.

## The Special Role of the European Committee of Social Rights in the Process of Reviewing Collective Complaints

In principle, the European Committee of Social Rights, as a treaty body in the European Council system of international protection of human rights, is not a judicial body. Therefore, it does not handle individual complaints regarding violations of treaty obligations by states-parties of the European Social Charter. The Committee is not composed of judges but a panel of 15 independent experts. The Committee's competence in reviewing collective complaints is crucial for understanding its special role as a monitoring body in the system of the European Social Charter.

In the monitoring systems under specific international human rights law treaties, complaints may be lodged with both judicial treaty bodies and non-judicial treaty bodies. In the UN system there is a clear distinction between two types of complaints: individual and inter-State complaints. A similar distinction can be found in the monitoring system of the Council of Europe within the framework of the Convention for the Protection of Human Rights and Fundamental Freedoms.

In this context, it should be emphasized that the monitoring system of the European Social Charter is significantly different than these standard solutions. This is due to the fact that Art. 1 of the 1995 Additional Protocol granted the following organisations the right to submit collective complaints: international organizations of employers and trade unions referred to in paragraph 2 of Article 27 of the Charter; other international non-governmental organizations which have consultative status with the Council of Europe and have been put on a list established for this purpose by the Governmental Committee; representative national organizations of employers and trade unions within the jurisdiction of the Contracting Party against which they have lodged a complaint.

Such complaints may be submitted in the event of alleged unsatisfactory fulfilment of treaty obligations related to social rights by the Contracting Parties. This clearly defines collective complaints against the backdrop of the standard distinction between individual and inter-State complaints, because the *locus standi* of entities entitled to submit collective complaints is markedly different than in the case of individual and inter-State complaints. Moreover, the Committee notifies the international organisations of employers and trade unions, specified in Art. 27 of the European Social Charter, through the Secretary General of the Council of Europe, about the proceedings in order to enable them to submit their observations on the matter. This implies that they may serve as *amici curiae* in particular cases. Despite the fact that such collective complaints are not lodged by states, the features described above liken them to *actio popularis*, which in turn is characteristic of inter-State complaints and not individual ones.[30] Collective complaints may be lodged in the common interest of all people and not only in the interest of employees or other insured entities under the authority of a state-party in the system of the European Social Charter. Therefore, as pointed out by A. Świątkowski, collective complaints may be lodged to protect the interests and rights of a specific group of individuals, and not individuals on their own.[31]

In principle, The European Committee of Social Rights is not a judicial treaty body. However, as can be seen in the rules governing the procedure of handling collective complaints, in practice its competence is that of a quasi-judicial body. The collective complaints proceedings before the Committee are adversarial. Pursuant to Art. 7 of the 1995 Additional Protocol, both parties are required to submit their claims in writing, substantiated by evidence supporting their allegations included both in the complaint itself and in the response to the complaint. The European Committee of Social Rights issues decisions which terminate the proceedings. They must be respected by the States concerned; however, they are not enforceable in the domestic legal system. In practice, this means that when the Committee rules that the situation in a country is not in

30 J. M. Belorgey, *La Charte sociale en pratique: la jurisprudence du Comité européen des Droits sociaux*, "Revista Europea de Derechos Fundamentales" 2009, no. 13, pp. 245 et seq.

31 A. Świątkowski, *Prawo socjalne Rady Europy…*, op. cit., pp. 255–256.

compliance with the Charter system, the complainant organisation cannot require the Committee's decision to be enforced in domestic law as would be the case with a ruling by a court in the State concerned. The decisions are declaratory, which means that they set out the law. On this basis, national authorities are required to take measures to give them effect under domestic law.[32] The collective complaints procedure has undoubtedly strengthened the role of the social partners and non-governmental organisations by enabling them to directly apply to the Committee for rulings on possible non-implementation of the Charter in the countries concerned, namely those States which have accepted its provisions and the complaints procedure.

Other characteristics of collective complaints in the European Social Charter system are equally interesting. Collective complaints may be lodged even if the case is pending with another authority or has already been decided by another authority (*res iudicata*); none of these grounds constitute a formal obstacle to lodging a collective complaint with the Committee. The rule of *ne bis in idem*, according to which no legal action can be instituted twice for the same cause, also does not apply in the collective complaints procedure. For example, complaints about violations of freedom of association are examined both by the Committee on Freedom of Association of the International Labour Association and the European Committee of Social Rights. In view of this, the fact that an organisation has lodged a complaint with one of the monitoring bodies does not preclude its right to seek interpretation and legal opinion on the compliance of domestic collective labour law with the regulations of ILO Convention no. 87 of June 17, 1948 on Freedom of Association and Protection of the Right to Organise, as well as with the provisions of the European Social Charter and its system.[33] Similarly, examination of the case by the European Committee of Social Rights as part of its reporting procedure does not preclude the right to lodge a complaint on the same matter to the Committee by entitled entities.[34] In addition, there is no limitation period for submitting a complaint. What is also an interesting feature of collective complaints is that they can be lodged without domestic remedies having been exhausted, i.e. the principle of subsidiarity does not need to be satisfied.[35]

The above-mentioned characteristics of collective complaints and some of the procedural rules which govern the handling of such complaints indicate that to a certain extent the European Committee of Social Rights, being a treaty body within the frame-

32 *Collective Complaints Procedure*, Council of Europe, Strasbourg 2016, p. 5, www. coe. int.

33 UNTS vol. 1218, p. 87.

34 A. Świątkowski, *Prawo socjalne Rady Europy…*, op. cit., pp. 256 et seq.

35 A. Gadkowski, *Charakterystyka quasi-sądowych funkcji Europejskiego Komitetu Praw Społecznych w procesie rozpatrywania skarg zbiorowych*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2016, vol. LXXVIII (3), pp. 42 et seq.

work of the European Social Charter, acts as a quasi-judicial body as it is competent in reviewing collective complaints and setting out the relevant procedures therefor.

## Concluding Remarks

The European Social Charter, or rather the treaties which constitute the Charter system, are distinct from other international human rights treaties. One of the distinguishing elements of the European Social Charter system is the fact that it operates its own special monitoring mechanism overseeing the application of the treaty provisions. The European Committee of Social Rights is undoubtedly the most important monitoring body in the European Social Charter system. On the one hand, the Committee is one of numerous treaty bodies which operate both in the universal system of international protection of human rights and in regional systems. Similar to other treaty bodies, the Committee serves the traditional monitoring function. In this capacity its main task is to examine the reports of states-parties of the Charter. However, its position within the system is special as it reviews collective complaints which is an important monitoring instrument. In the preamble to the 1995 Additional Protocol, which introduced collective complaints to the monitoring system of the European Social Charter, collective complaints are defined as "new measures to improve the effective enforcement of the social rights guaranteed by the Charter". In addition, their role was to strengthen the participation of management, labour and non-governmental organizations in the monitoring system of the European Social Charter. Ever since the collective complaints procedure was established more than 20 years ago, it has grown to be one of the most important mechanisms in the monitoring system of the European Social Charter.

Over the period from 1998 to 2016, 140 collective complaints were lodged with the European Committee of Social Rights. The Committee handed down 221 decisions as follows: 112 decisions on admissibility including 5 decisions on inadmissibility, 94 decisions on the merits, 8 decisions on both admissibility and the merits, 5 decisions on immediate measures including 1 decision on admissibility and immediate measures and 2 decisions to strike out a complaint. 21 new complaints were lodged in 2016. During the seven sessions it held in 2016, the European Committee of Social Rights adopted 5 decisions on the merits, 3 on admissibility and 3 on both admissibility and the merits.[36]

Despite the prevailing positive opinion about the monitoring system of the European Social Charter, including the collective complaints procedure of the European Committee of Social Rights, the system does have certain drawbacks. Most notably, only 13 countries have ratified the 1995 Additional Protocol, which is not a significant num-

36 *European Committee of Social Rights Activity Report 2016*, Council of Europe, Strasbourg 2017, p. 19.

ber compared to the total number of Contracting Parties to the Charter and the Revised Charter. Therefore, it appears natural to postulate that the subjective scope of the 1995 Additional Protocol is extended. This will not be easy to implement, given that in the last six years no member state of the Council of Europe has ratified this document. Some countries explicitly declare their lack of interest in ratifying the Protocol. At the same time, they emphasize that in their opinion collective complaints are not very effective in practice. It has also been proposed that the role of the European Committee of Social Rights and the Committee of Ministers of the European Council in the monitoring process should be strengthened, and similarly this postulate will be a difficult one to implement.

Due to various reasons, especially political ones, it is not always possible to satisfy the rational demands related to the need for the state to ratify a specific international agreement. For many years there has been an ongoing discussion on the need for Poland to ratify the 1995 Additional Protocol.[37] Authors discussing this issue often quote the following opinion of the Polish Ministry of Foreign Affairs: "Poland has not ratified the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints because the provisions of the Charter are interpreted too broadly by the European Committee of Social Rights which means that a monitoring body engages in law-making. Moreover, we need to take into account the possible financial ramifications of implementing the Committee's decisions. The hesitant attitude is due to the past instances of the Committee, being a monitoring body, treating the scope of the complaint in a flexible manner, which enables it to issue a decision regardless of the initial subject of the complaint".[38]

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**SUMMARY**

**The European Committee of Social Rights as a Monitoring Body in the System of the European Social Charter**

The aim of this article is to present the European Committee of Social Rights as a monitoring treaty body in the system of the European Social Charter. The author pays particular attention to the mechanism of collective complaints, which was introduced to the Charter's supervisory system on the basis of the 1995 Additional Protocol. In the author's opinion, on the basis of the competence of the European Committee of Social Rights to hear collective complaints, it is arguable that this important treaty body in the system of the European Social Charter performs the function of a quasi-judicial organ in the monitoring process, which distinguishes it from other treaty bodies in the field of the international protection of human rights.

Keywords: international protection of human rights, human rights treaty bodies, European Social Charter system, European Committee of Social Rights, collective complaints

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# Immigration Problems Facing the European Union from the Perspective of UN Human Rights Council Mechanisms

## Introduction

The European Union (EU) Member States are the main destination for the constantly rising number of migrants from Asia and Africa. Irregular migrants who try to enter the EU territory often put their lives at risk and are exposed to serious human rights violations. The 2015 migration crisis highlighted the urgent need to reform the EU policy framework. One year later, the problem still remains unresolved.

The topic of immigration and the many problems the EU faces in this regard is complex and can therefore not be presented comprehensively, in all its aspects. Thus, the aim of this article is to analyse how this issue is reflected in two UN Human Rights Council's mechanisms: the Special Procedures and the Universal Periodic Review (UPR). This approach allows the independent assessment of the EU's activities related to migration made by the Special Rapporteur on migrants to be confronted with the recommendations taken up in the UPR of EU Member States. The subject of the analysis will be the thematic and country reports prepared by the Special Rapporteur on migrants and the UPR recommendations addressed to three countries visited by the Special Rapporteur: Italy, Greece and Malta.

## The Special Rapporteur's Study on the Management of the External Borders of the EU

The Special Procedures of the Human Rights Council consist of country and thematic mandates established to address human rights issues. Mandate holders exercise their functions as Special Rapporteurs, Independent Experts or members of Working Groups. One of the most important activities of Special Procedures is carrying out country visits and presenting annual reports to the Human Rights Council. Both of them were used

by the Special Rapporteur on the human rights of migrants, François Crépeau, who decided to focus on the management of the external borders of the European Union and its impact on the human rights of migrants in the first year of his mandate. For this reason, he made visits to Greece[1], Italy[2], Tunisia and Turkey in 2012 and prepared the annual report[3] which includes the results and recommendations of the one-year study submitted to the Human Rights Council in April 2013. The follow-up to this study was conducted two years later and its conclusions were also presented in the last Special Rapporteur's annual report "*Banking on mobility over a generation*"[4]. In December 2014, the Special Rapporteur visited Italy[5] (the follow-up mission) and Malta[6].

The underlying message of the two thematic reports is the necessity of changing the focus of migration policy from a security-based approach to human rights-based one. The analysis outlines the elements of the migration system which affect the rights of migrants, although it does not invoke examples of concrete violations. Reports of country missions submitted as the addenda to the annual reports contain more specific remarks and recommendations, however, they share the same diagnosis of the situation. The follow-up report, prepared during the escalation of immigration problems in Europe is more detailed and contains more concrete recommendations. It underlies the need for far-reaching changes in the EU's approach towards migration as the increase of migrants arriving in Europe is inevitable.

The Special Rapporteur identified numerous problems related to the impact of the management of the EU borders on the rights of migrants. In general, the guarantee of these rights is assessed as not being adequate, especially with regard to the situation of irregular migrants. The regulations of the migration system prioritize security over the rights of migrants and focus on the eradication of irregular migration, often by ensuring the quickest possible return to the country of origin or the first entry. The lack of the human rights-based approach is noticed even more in practice. The implementation of this approach, which "remains largely absent"[7], was also recommended to Italy, Greece and Malta in the country missions reports.

One of the main concerns of the Special Rapporteur is the process of the externalization of border control. The responsibility of preventing irregular migration is transmitted outside the EU to the countries of departure or transit mainly by readmission

1 The mission report: A/HRC/23/46/Add.4.
2 The mission report : A/HRC/23/46/Add.3.
3 A/HRC/23/46.
4 A/HRC/29/36.
5 The mission report : A/HRC/29/36/Add.2.
6 The mission report: A/HRC/29/36/Add.3.
7 A/HRC/23/46, § 36.

agreements and mobility partnerships[8]. These tools are criticized for their insufficient guarantees of the rights of migrants. In the 2013 report the capacity-building of foreign agents operating in border control was also indicated as a way of promoting externalization. In this regard, the negative assessment of the Special Rapporteur casts doubt, since it is difficult to condemn the assistance offered to non-EU countries. However, the Special Rapporteur seems to perceive the whole process of externalization as replacing the practices of push-backs challenged by the European Court of Human Rights in *Hirsi Jamaa and Others v. Italy* and allowing the EU "to wash its hands of its responsibility to guarantee the human rights of those persons attempting to reach its territory"[9]. One of the recommendations taken up by the Special Rapporteur in this regard is to monitor the protection of human rights of returnees as has been done in Pakistan and Ukraine since 2014, when a pilot project of the European Commission was started. The problem of externalization was also noticed in the country mission reports. In the case of Italy, returning migrants to Libyan shores against their will and "quick return" agreements with Tunisia and Egypt were invoked.

Another problem identified in the Special Rapporteur's study is the use of detention as a regular tool in border control. Moreover, detention is often applied to migrants without prospects of removal, prolonged and not decided on a case-by-case basis. It contravenes the requirements of the international human rights law according to which the detention must be prescribed by law, necessary, reasonable and proportional to its objectives and the regulations of the Return Directive[10]. This was stressed in particular in the Greece report. Greece was reminded that detention should be a measure of the last resort and it was recommended that the policy of systematic detention of all irregular migrants should be ended.

The inadequate conditions of detention are emphasized as well, including the militaristic or prison-like style of the detention centres, insufficient health care, lack of access to proper legal aid and consular and interpretation services, lack of recourse to effective remedies, and lack of a proper system of guardianship for children. Not only are the EU and its Member States reluctant to explore alternatives to detention themselves, but they also encourage and financially support the creation of the detention centres in neighbouring states, e.g. in Turkey and Albania. Detention problems are also tackled in the country mission reports. Some of the recommendations concern more specific

8 Special Rapporteur invokes both the examples of readmission agreements signed by the EU (e.g. with Turkey) and EU Member States (e.g. Italy-Egypt or Greece-Turkey. As for the mobility partnerships, four them are mentioned in the 2015 report, i.e. with Azerbaijan, Jordan, Morocco and Tunisia.

9 A/HRC/23/46, § 58.

10 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, Chapter IV.

issues, such as informing detainees in a language they understand of the reason for and duration of the detention and their rights, training programs for people working in the detention centers (Greece, Malta, Italy - both reports), reduction of the maximum period of detention for the purposes of identification to 6 months (Italy - 2013 report), establishing a fairer and simpler system for migrant detainees to challenge expulsion and detention orders (Italy - 2015 report).

It is worth mentioning that some burning issues discussed in Europe today were tackled in the 2013 report, which proves that the EU and its Member States have not managed to resolve the problems in spite of being notified about them. First of all, the burden of dealing with the migration crisis continues to rest on Member States situated at the external border. In relation to this, the Special Rapporteur criticized the provision of the Dublin II Regulation[11] which stated that asylum claimants can only apply for asylum in the country of their first entry to the EU[12]. This forced many people to continue their journeys, often in precarious conditions, without assurance that without trying to change their irregular status. Secondly, the difficulties with rescuing people in distress on boats noted in the 2013 report are still present. In this regard, the Special Rapporteur emphasized the lack of cooperation by States with private entities. Thirdly, the EU's migration policy is shaped by Member States that have been influenced by an increasingly anti-immigrant public opinion, which has even become worse in the past two years.

In the Greek report, the Special Rapporteur drew attention to the discriminatory attitudes of society which should be counteracted by the state. It was recommended that Greece should inter alia investigate all cases of xenophobic violence and attacks against migrants, initiate strong public discourse on social diversity and inclusion, conduct public campaigns on racism and xenophobia, and include human rights education and awareness-raising in the educational curriculum of public schools.

The EU is also advised to acknowledge and address the "push" and "pull" factors of immigration. In the 2015 report, it was suggested that the EU and its Member States "take a global leadership role in relation to the Syrian civil war and other humanitarian crises"[13]. As for the "pull factors", the EU should address the demand for a seasonal and low-skilled workforce opening up legal ways to enter its territory.

After the issuance of the 2013 report, the immigration problems in Europe have escalated and the management of the EU external border has not changed in line with its recommendations. For this reason, the follow-up report contains similar conclusions to

11 *Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national*, *Official Journal L 050 , 25/02/2003 P. 0001 – 0010.*

12 In Dublin III Regulation (No 604/2013 of 26 June 2013, *Official Journal L 180/3 , 29/06/2013) which replaced Dublin II this provision was repeated, however, its application was suspended by Germany and Czech Republic in August/September 2015.*

13 A/HRC/29/36., § 100.

the previous one, while also stressing the impossibility of "sealing" the borders and the inevitability of the increase in immigration. The EU and its Member States are advised to develop a 25-year strategy with short-, medium- and long-term interventions, taking into consideration the demographic and labour market changes that Europe will face in this period of time.

To sum up the conclusions of the Special Rapporteur's study, the human rights-based framework of migration policy proposed by him should be presented. The elements of this framework are the following: increasing search and rescue capacity, facilitating access to justice, developing alternatives to detention, reinforcing labour inspections mechanisms to guarantee the rights of migrant workers, creating resettlement programmes for refugees, and multiple labour migration visa opportunities[14].

The press release issued last year by the Special Rapporteur confirmed the obvious diagnosis – the EU and its Member States had not managed to implement the suggested framework and ensure adequate respect for migrants rights. On 25 August 2015, François Crépeau again called on the European Union to establish a human rights-based migration policy. He expressed his disbelief in the effectiveness of the EU activities in the words: "Let's not pretend that what the EU and its member states are doing is working. Migration is here to stay. Building fences, using tear gas and other forms of violence against migrants and asylum seekers, detention, withholding access to basics such as shelter, food or water and using threatening language or hateful speech will not stop migrants from coming or trying to come to Europe."[15] The Special Rapporteur encouraged the EU to offer more regular ways to enter its territory and to create a massive resettlement programme for refugees like the Syrians and Eritreans. He also welcomed the positive steps in rescuing migrants and asylum seekers at sea.

## The Universal Periodic Review Recommendations on Migrants and Refugees

The Universal Periodic Review (UPR) is a cooperative mechanism which allows all states to address questions, statements and recommendations concerning the fulfillment by each UN Member of its human rights obligations and commitments. The first cycle of the UPR started in 2008 and ended in 2011. The second cycle will be completed in 2016.

The peer review is based on a national report prepared by the state, a compilation of information from Treaty Bodies, Special Procedures and UN agencies and a summary of information from civil society, both prepared by the Office of the High Commissioner

14 A/HRC/29/36., § 70.

15 http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16344&LangID=E#sthash.7Qrrj4ec.dpuf [access: 31 March 2016].

on Human Rights. Hence, some of the Special Procedures' recommendations addressed in the reports to the state under review are included in the compilation available for the UPR actors. It is then justified to pose the question of whether the problems highlighted by Special Procedures mandate-holders are also tackled in the UPR process. The aim of this paper is to specifically answer the question of whether the immigration problems in the EU countries are reflected in the UPR recommendations to the extent as they are in the activity of the Special Rapporteur on migrants.

The EU Member States have received 840 recommendations on migrants, asylum-seekers and refugees out of the total of 2273[16] (almost 40%). Out of all the UN Member States, Italy was the recipient of the majority of the recommendations on migrants. Germany, Malta, Spain and Portugal were also among the top ten states of the list. The statistics are quite different for the EU countries as recommenders. They accounted for 316 recommendations on migrants, asylum-seekers and refugees, which is 13% of the total number. The percentage is lower when only recommendations on migrants are considered – 9 %. No EU Member State is among the first twenty five countries that made most of the recommendations on migrants. 28 EU Member States constitute less than 15% of all UN Members, so this level of engagement concerning the specific issue comes as no surprise. It has to be seen, however, in light of the general involvement of the EU Member States in the UPR process[17]. More than 30 % of all recommendations were made by EU countries, which puts the EU in the first place among the organizations whose members take up the recommendations in the UPR. In the case of many issues, the involvement of the EU countries accounts for 50% of all the submitted recommendations, e.g. torture, the death penalty, freedom of the press, freedom of association, sexual orientation and gender identity, and human rights defenders. Taking into consideration these facts, it is clear that the EU countries do not prioritize the issue of migrants. Their reluctance to raise the problems of migrants during the UPR exposes them to accusations of selectivity.

The review of Italy in the second cycle, which took place in January 2015[18], is an adequate example for comparing the Special Rapporteur's conclusions with the UPR recommendations. Italy's immigration problems are widely known, so it was not surprising that a quarter of all recommendations concerned migrants, asylum-seekers and

16 All the statistics provided include the sessions up to the 20th one and they are based on the website http://www.upr-info.org [access: 31 March 2016].

17 A more detailed analysis on the EU Member States performance in the UPR is included in the *Report on the analysis and critical assessment of EU engagement in UN bodies* prepared in the FRAME Project funded under the European Commission's Seventh Framework Programme. The report is available on the project website: http://www.fp7-frame.eu/reports/ [access: 31 March 2016].

18 The documents of this review are available on the OHCHR website: http://www.ohchr.org/EN/HRBodies/UPR/Pages/ITSession20.aspx [access: 31 March 2016].

refugees. However, it is striking that only 3 out of 49 recommendations were put forward by EU Member States. Sweden recommended that Italy suspend summary returns to Greece, which corresponds with the Special Rapporteur's recommendation to prohibit the practice of informal automatic "push-backs" to Greece[19]. The Netherlands addressed the issue of the training, time and ability to identify persons who want to apply for asylum, which is necessary for people involved in the reception process, and reminded that anyone claiming to be an unaccompanied minor should benefit from the specific protections guaranteed under Italian law, pending a properly conducted age determination. Denmark also referred to unaccompanied children seeking asylum, recommending that Italy introduce legislation to ensure assistance and protection for them. The other EU countries used the opportunity to address the human rights situation in Italy to deal with inter alia the ratification of international instruments, the lack of a national human rights institution, women's and LGBTI rights, and detention, whereas they did not mention the problems of migrants.

In contrast, non-EU countries paid special attention to the issue of migrants and refugees. Several examples of recommendations are worth referring to. Israel recommended that Italy develop a comprehensive national system of data collection, analysis and dissemination as regards to immigration policies and practices to be used as a foundation for rights-based policymaking on migration. It is an exact citation of the recommendation made by the Special Rapporteur on migrants after his country mission[20]. Kyrgyzstan advised that the issues of immigrant women be mainstreamed into employment policies and that undocumented migrants be allowed to protect their rights and file complaints irrespective of their immigration status. The Holy See suggested strengthening efforts in providing life-saving assistance for migrants and initiating the new Asylum, Migration and Integration Fund 2014–2020. It was also recommended that Italy e.g. conduct an active campaign against the creation of negative stereotypes in relation to migrants and minorities (by Uzbekistan), establish programmes to encourage the economic and social integration of refugees (by Mexico), improve the identification of victims of trafficking in human beings by setting up a coherent national mechanism (by Moldova), continue to give consideration to the human rights perspective in its migration policy, in collaboration with other European countries which are final destinations of migrants (by Japan), and to reactivate dialogue on migration with the North African States, namely Libya, Tunisia, Algeria, Morocco and Egypt (by South Sudan). Some recommendations concerned the ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. However, the silence of the EU Member States on this matter is understandable as none of them ratified the Convention.

19 A/HRC/23/46/Add.3, § 102.
20 A/HRC/23/46/Add.3, § 91.

In the review of Malta in October 2013[21] five EU Member States (Austria, France, Netherlands, Portugal and Sweden) put forward 7 out of 40 recommendations on migrants and refugees concerning the practice and the conditions of detention and the rights of children. According to these recommendations, the practice of detention of migrants should be limited and effective remedies should be provided to challenge a detention or expulsion. Additionally, it was recommended that Malta continue to address the specific needs of children, including unaccompanied minors, who should be given the benefit of the doubt until their age has been determined.

The second review of Greece took place in May 2016. In the first cycle Greece was the recipient of 10 recommendations on migrants and refugees by five EU countries (Netherlands, Poland, Slovakia, Slovenia and Sweden)[22]. Nine recommendations referred to the implementation of the national action plan on asylum reform and migration management. Besides that, Poland suggested that Greece ensure that no individual is directly or indirectly "refouled" to their country of origin, or any other country where they may face persecution.

The examples of Malta and Greece show greater involvement of the EU states in raising the issue of migrants than was the case with the review of Italy. The use of double standards with regard to Italy could be one explanation, but it is almost impossible to prove. The more likely reason is the reluctance of EU countries to tackle migrant problems because it is expected that other states are going to do it. Another possibility is the sense of responsibility shared by all the EU Member States who do not want their own weaknesses to be pointed out. Although these explanations seem reasonable, it is hard to accept this attitude because of its consequences. The EU Member States give the impression that they ignore the immigration problems they share and provide grounds for accusations of selectivity. This strongly influences the perception of the EU as a human rights actor by weakening its credibility.

## Conclusions

The Special Rapporteur on migrants' assessment of the EU approach to immigration problems is very negative. The expert study shows that the EU Member States prioritize security over respect for human rights. This approach triggers many problems which were identified by the Special Rapporteur. The EU countries fail to protect the rights of migrants and refugees, depersonalizing them by treating as a part of the general problem of border control and security. The Special Rapporteur stated "Talking about 'flows', 'marauders', and 'swarms' is an unsubtle way of dismissing the legitimacy of the

21 http://www.ohchr.org/EN/HRBodies/UPR/Pages/MTSession17.aspx [access: 31 March 2016].
22 http://www.ohchr.org/EN/HRBodies/UPR/Pages/GRSession11.aspx [access: 31 March 2016].

asylum seekers and migrants' claim to human rights, by creating images linking them to toxic waste or natural disasters. (…) Migrants are human beings with rights. When we dehumanise others, we dehumanise ourselves"[23]. This dehumanization of certain groups constitutes a serious threat to the idea of the universality of human rights.

Immigration problems in Europe are also reflected in the Universal Periodic Review. The EU Member States receive many recommendations concerning the rights of migrants and asylum-seekers. However, they are not interested in taking up this type of recommendation. Being familiar with the difficulties faced by Italy in resolving immigration problems, most EU countries avoided raising this issue. In consequence, the objectivity of the Universal Periodic Review is contested. Moreover, the prioritisation of certain human rights in the UPR casts doubts on respecting the interdependence and indivisibility of human rights.

The burden of migrants will be impossible to control if it is not properly organised and shared between the EU Member States. In this regard, it is crucial to adopt and implement the human rights-based approach of migration policy. The EU needs to live up to its own ideals and make human rights universally available to all the people within its territory.

## Literature

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http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16344&LangID=E#sthash.7Qrrj4ec.dpuf [access: 31 March 2016].

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23 ttp://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16344&LangID=E#sthash.7Qrrj4ec.dpuf [access: 31 March 2016].

**SUMMARY**

**Immigration Problems Facing the European Union from the Perspective of UN Human Rights Council Mechanisms**

The scale of immigration problems in Europe today is well-known and broadly discussed. The article identifies how this issue is reflected in two Human Rights Council mechanisms: Special Procedures and the Universal Periodic Review. The Special Rapporteur on the human rights of migrants, François Crépeau, undertook a regional study on the management of the external borders of the European Union and its impact on the human rights of migrants. The analysis of the annual and country visits' reports allows the main immigration problems facing the EU countries and threats for the protection of human rights to be identified. The recommendations made by the Special Rapporteur are confronted with those taken up in the UPR process. Special attention is given to the EU countries' position on the problem of immigrants. Their reluctance to raise this issue in the UPR weakens the credibility of EU Member States and puts the objectivity of the mechanism into question.

Keywords: international protection of human rights, immigration, Universal Periodic Review, UN Special Procedures

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Julia Wojnowska-Radzińska

# Procedural Guarantees for EU Citizens against Expulsion in the Light of Directive 2004/38/EC[1]

## Introduction

Protection against the expulsion of EU citizens and their family members is enshrined in Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) no. 1612/68 and repealing Directives 64/221/EEC,68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC[2]. This regulation lays down the conditions governing the exercise of the right of free movement and residence within the territory of Member States by EU citizens and their family members, the right of permanent residence in the territory of the Member States for EU citizens and their family members, and protection against expulsion. The Directive applies to all EU citizens who move to or reside in a Member State other than that of which they are a national, and to their family members who "accompany or join" them.

However, it should be noted that EU citizens are entitled to protection against expulsion guaranteed under the international human rights treaties, as applicable to the territories of the Member States of the European Union.[3] All EU Member States are members of the Council of Europe. Therefore, States Parties to the European Convention on Human Rights (ECHR) no longer enjoy absolute and uncontrolled discretion in

1 This article is based on the research project entitled "The Alien's Access to the File in Expulsion Proceedings in the light of Polish and European law" (No 2015/17/D/HS5/00406) financed by the National Science Centre in Poland.

2 *Official Journal of the European Union* of 2004, L 158/77. This Directive replaced the Directive 64/221/CEE of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health.

3 P. Boeles, M. den Heijer, G. Lodder, K. Wouters, *EuropeanMigration Law*, Antwerp-Oxford-Portland, 2009, p. 36.

immigration policy and have to exercise it consistently with the obligations expressed in the Convention. The ECHR requires that State Parties tailor their immigration laws to respect human rights.[4] In the jurisprudence of the Court of Justice of the EU, human rights treaties play a significant role as a source of inspiration for the fundamental principles of European law.[5] According to Article 6 para. 3 of the Treaty on the European Union (TEU): "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law".

This paper examines the scope of protection of EU citizens against expulsion under Directive 2004/38/EC and in the case law of the Court of Justice of the European Union (CJEU). It aims to provide the reader with an overview of the current state of law on the expulsion of EU citizens.

## General Rules Governing the Protection against Expulsion

Under Article 2(1) of the Directive 2004/38/EC the term "EU citizen" is defined as a person who holds the citizenship of one EU Member State. According to Article 20 of the Treaty on the functioning of the European Union (TFEU): "Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship".[6] Needless to say, the right to move freely shall be exercised in compliance with the legal order of each Member State. For that reason, pursuant to Article 27(1) of Directive 2004/38/EC, a Member State may limit the freedom of movement and residence of EU citizens on the grounds of public policy, public security or health. The expulsion decision taken on the grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned.[7] In other words, the principle of proportionality has fundamental significance in assessing whether the

4 J. Wojnowska-Radzińska, *The access to secret evidence in expulsion proceedings under the European Convention on Human Rights*, "Netherlands Quarterly of Human Rights" 2017, Vol. 35(4), p. 231.

5 *J. Nold, Kohlen und Baustoffgroshandlung v. Commission of the European Communities*, Case no. C-4/73, Judgment of the Court of Justice of the EU of 14 May 1974, para. 13: "International treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law".

6 *Official Journal of the European Union* of 2012, C 326/1 (consolidated version).

7 Art. 27(2) of Directive 2004/38/EC.

expulsion is arbitrary or not. The personal conduct of the individual must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, "which implies, in general, the existence in the individual concerned of a propensity to act in the same way in the future".[8] Under Article 27(2) of the Directive, justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted. The European legislator guarantees that previous criminal convictions shall not in themselves constitute grounds for taking such a decision. Pursuant to the discussed provisions, it is granted that expulsion proceedings against EU citizens or their non-EU family members are carried out after examining each case individually.

Protection against expulsion depends on the length of residence in the host EU Member State. In the expulsion proceedings, the domestic authorities need to take into account how long an EU citizen has resided in the territory of the Member State, his/her age and state of health, family and economic situation, social and cultural integration into the Member State, and the extent of his/her links with the country of origin.[9] Member States are obliged to follow these provisions. Article 28(2) stipulates that an individual who has the right of permanent residence in the host EU Member State's territory can be expelled only on serious grounds of public policy or public security.

Nevertheless, Directive 2004/38/EC states that the greater the degree of integration of EU citizens and their family members in the host Member State, the greater the protection against expulsion should be. Only in exceptional circumstances, where there are imperative grounds of public security, should an expulsion measure be taken against EU citizens who have resided for many years in the territory of the host Member State, particularly when they were born and have resided there throughout their life.[10]

The Court of Justice of the EU took the view that the concept of "imperative grounds of public security" presupposes not only the existence of a threat to public security, but also that such a threat is of a particularly high degree of seriousness, as is reflected by the use of the words "imperative grounds".[11] According to the Court, there must be a particularly serious threat to one of the fundamental interests of society, which might pose a direct threat to the peace and physical security of the population.[12] Article 28(3) of Directive 2004/38 provides that imperative grounds of public security are to be defined by the Member States. The Commission, in its Report on the application of Directive

8 *P.I. v. Oberburgermeisterin der Stadt Remscheid*, Case no. C-348/09, Judgment of 22 May 2012 of the Court of Justice of the EU, para. 34.

9 Art. 28(1) of Directive 2004/38/EC.

10 Item 24 of Directive 2004/38/EC.

11 *P.I. v. Oberburgermeisterin der Stadt Remscheid*, Case no. C-348/09, Judgment of 22 May 2012 of the Court of Justice of the EU, para. 20.

12 Ibidem, para. 28.

2004/38, states that the difference between the scope of Articles 28(2) and Articles 28(3) of the Directive cannot be trivialized, and nor should the concept of public security be extended to measures that should be covered by public policy.[13]

A decision to expel an EU citizen or a non-EU family member should be issued in an individualized due process. First of all, an individual shall be notified in writing of the expulsion decision, which needs to be properly justified in such a way that he is able to comprehend its content and possible implications. Article 30(3) of the Directive stipulates that "the notification shall specify the court or administrative authority with which the person concerned may lodge an appeal, the time limit for the appeal and, where applicable, the time allowed for the person to leave the territory of the Member State".

## Procedural Safeguards

The general rule is that, according to Article 30(2) of Directive 2004/38/EC, an EU citizen who is the subject of a measure restricting his/her freedom of movement and of residence on public policy, public security or public health grounds should be informed, precisely and fully, of the grounds for such a measure. By way of exception, only the interests of State security can preclude him/her from being informed. The Court of Justice of the EU has recognized that "Community law precludes the deportation of a national of a Member State based on reasons of a general preventive nature, that is one which has been ordered for the purpose of deterring other aliens, in particular where such measure automatically follows a criminal conviction, without any account being taken of the personal conduct of the offender or of the danger which that person represents for the requirements of public policy".[14] The domestic courts have to take account of facts which occurred after the final expulsion decision was made, since the evidence may point to cessation or a substantial diminution of the threat the person concerned poses to public policy.[15]

However, there appears a question as to what extent Member States under Article 30(2) of Directive 2004/38/EC can derogate from the right to inform an EU citizen, precisely and fully, of the grounds for an expulsion decision without unduly affecting the

13 Report from the Commission to the European Parliament and the Council on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States of 10 December 2008, Com(2008) 840, p. 8, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0840:FIN:pl:PDF> accessed 25 June 2018.

14 *Georgios Orfanopoulos and Others and Raffaele Oliveri v. Land Baden-Wurttemberg*, Case no. C-482/01 and C-493/01, Judgment of 29 April 2004 of the Court of Justice of the EU, para. 68.

15 Ibidem, para. 82.

procedural rights he/she may rely on. Without a doubt, the obligation to present reasons is closely linked to the principle of respect for the rights of the defence and the guarantee of effective judicial protection. The purpose of the aforementioned obligation is to enable those concerned to ascertain the reasons for the measure so that they can assess whether it is well-founded, and to enable the competent court to exercise its power of review.[16] Nevertheless, those who face expulsion will be treated unfairly if they do not have access to the information that has caused a government to issue an expulsion decision. Without this information, an EU citizen may not be in a position to contradict errors, identify omissions, challenge the credibility of informants or refute false allegations.[17] This problem is serious in itself. According to the principle of fundamental justice, a fair hearing in immigration law requires that the affected person should be informed of the case against him or her and should be permitted to respond to that case[18]. Effective defence is impossible or at least extremely difficult if an EU citizen, as a party of expulsion proceedings, is deprived of access to the classified evidence in the expulsion proceedings.

Despite the fact that Article 346(1)(a) of TFEU stipulates that "no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security", it does not rule out the application of EU law, and its fundamental rights in particular. The Court of Justice of the EU stressed that although this "article refers to measures which a Member State may consider necessary for the protection of the essential interests of its security or of information the disclosure of which it considers contrary to those interests, [this] article cannot, however, be read in such a way as to confer on Member States a power to deport from the provisions of the TFEU based on no more than reliance on those interests".[19] Consequently, it is for the Member State which seeks to take advantage of Article 346 TFEU to prove that it is necessary to have recourse to that derogation in order to protect its essential security interests. The opinion of Y. Bot, Advocate General, concerning Case no. C-300/11 is worth mentioning here.[20] He took the view that: "[if a] Member State wishes to invoke interests of State security to prevent the grounds of public security justifying the expulsion of an EU citizen being disclosed to him, (…) it must (…) provide proof that legitimate security concerns about the nature and sources of intelligence information taken into account in the adoption of the decision concerned militate in favour of a restriction or non-disclosure of the grounds. In the absence of such proof, the national court must always uphold the principle that the EU citizen must be informed, precisely and in full,

16 Judgment of 29 June 2010 of the Court of Justice of the EU, no. C-550/09, para. 54.

17 J. Wojnowska-Radzińska, op. cit., p. 235.

18 Ibidem.

19 *European Commission v. Finland*, Case no. C-284/05, Judgment of 15 December 2009 of the Court of Justice of the EU, para. 23.

20 Opinion of the Advocate General, Y. Bota, delivered on 12 September 2012 concerning Case no. C-300/11, *ZZ v. Secretary of State for the Home Department*.

of the grounds justifying his expulsion".[21] What is more, in its assessment of the merits of the decision taken by a competent national authority not to disclose, precisely and fully, the grounds for an expulsion measure, the national court must bear in mind that the derogation provided for in Article 30(2) of Directive 2004/38 "must be interpreted strictly, but without depriving it of its effectiveness".[22] The grounds of public security justifying an EU citizen's expulsion should be forwarded to him/her in compliance with the duty to protect national security.

As. Y. Bot noted "to be consistent with Article 47 of the Charter[23], the infringement of the [EU citizen's] right of the defense and effective judicial protection caused by the application of the derogation under Article 30(2) of Directive 2004/38 must be counterbalanced by appropriate procedural mechanisms capable of guaranteeing a satisfactory degree of fairness in the procedure. It is only on this condition that the infringement of the Union citizen's procedural rights could be regarded as proportionate to the objective for a Member State to protect the essential interests of its security".[24]

The European Court of Justice recognized that even within the context of national security, States have a core minimum obligation to disclose Union citizens the "essence" of the grounds of the expulsion decision.[25] The CJEU indicates that throughout the judicial review proceedings, restrictions on access to documents and evidence should go no further than strictly necessary to protect State security interests and balance the right to effective judicial protection. In the light of the need to comply with Article 47 of the Charter of Fundamental Rights of the EU, that procedure must ensure, to the greatest possible extent, that the adversarial principle is complied with, in order to enable the person to challenge the grounds on which the expulsion decision is based and to make submissions on the evidence relating to this decision and, therefore, to put forward an effective defence. In particular, the EU citizen must be informed, in any event, of the essence of the grounds on which a decision taken under Article 27 of Directive 2004/38/EC is based, as the necessary protection of State security cannot have the ef-

21 Ibidem, para. 74.

22 *ZZ v. Secretary of State for the Home Department*, Case no. C-300/11, Judgment of 4 June 2013 of the Court of Justice of the EU, para. 49.

23 Art. 47 of the Charter of Fundamental Rights of the European Union states: "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice".

24 Opinion of the Advocate General, Y. Bota, delivered on 12 September 2012 concerning Case no. C-300/11, *ZZ v. Secretary of State for the Home Department*, para. 83.

25 *ZZ v. Secretary of State for the Home Department*, Case no. C-300/11, Judgment of 4 June 2013 of the Court of Justice of the EU, para. 65.

fect of denying the person concerned of his/her right to be heard.[26] Hence, it should be explicitly highlighted that whenever a Member State invokes the derogation provided for in Article 30(2) of Directive 2004/38/EC, it must be decided whether a fair balance has been guaranteed between the EU citizen's right to effective judicial protection and the grounds of State security.

Nevertheless, the CJEU does not give much guidance on how the conflicting interests of State security and the protection of due process rights are to be reconciled by domestic courts.[27] The relevant procedural mechanisms are within the procedural autonomy of the Member States. The institution of "special advocate" adopted by British law seems to satisfy the requirements outlined by the CJEU as it may provide for the maintenance of confidential State security data and the EU citizen's due process rights.[28] Simultaneously, it is worth mentioning that the European Court of Human Rights also referred to the solution of appointing special advocates.[29] The role of a special advocate is to protect the interests of a foreign national in immigration proceedings when information or other evidence is heard, in the absence of the person concerned and their counsel.[30] Special advocates have the required government security clearance that enables them to access confidential information. This person is provided with a copy of all information that is provided to the judge but is not disclosed to the foreign national and his or her counsel. One of the main goals of a special advocate is to challenge the reliability of charges against the alien as well as arguments forwarded by proper bodies to keep certain information confidential. He or she also participates in the proceedings held in camera, during which they may cross-examine witnesses, and are present when evidence is verified. However, special advocates are unable to communicate with the affected alien after having received classified information unless they gain special permission from the

26 Ibidem

27 N. de Boer, *Secret Evidence and Due Process Rights under EU Law: ZZ Case C-300/11, ZZ v Secretary of State for the Home Department. Judgment of the Court (Grand Chamber) of 4 June 2013*,"Common Market Law Review" 2014, Vol. 51, pp. 1235–1262.

28 The UK Parliament enacted the Special Immigration Appeals Commission Act of 1997, which provided, in part, for the use of a special advocate in immigration proceedings to represent the interests of a complainant on appeal where classified materials were relied upon by the State. Section 6 of the SIAC Act provides for the appointment of special advocates.

29 J. Wojnowska-Radzińska, op. cit., pp. 230–246.

30 See J. Ip, *The Rise and Spread of the Special Advocate*, Public Law 2008, pp. 717–741; C.C Murphy, *Counter-Terrorism and the Culture of Legality: The Case of Special Advocates*, King's Law Journal 2013, no. 23, pp. 19–37; C. Forcese, L. Waldman, *Seeking Justice in an Unfair Process. Lessons from Canada, the United Kingdom, and New Zealand on the Use of "Special Advocates" in National Security Proceedings*, 2007. This study was commissioned by the Canadian Centre for Intelligence and Security Studies, with the support of the Courts Administration Service, <http://aix1.uottawa.ca/*cforcese/other/sastudy.pdf> accessed 20 June 2018; Opinion of the Advocate General, Y. Bota, delivered on 12 September 2012 concerning Case no. C-300/11, *ZZ v. Secretary of State for the Home Department*, para. 89.

court.[31] Therefore, in light of the principle of proportionality the special advocates could perform a crucial role in counterbalancing the lack of full disclosure and the lack of full, open adversarial hearing in expulsion procedures by testing the secret evidence.

According to Article 31(1) of Directive 2004/38/EC, an EU citizen has the right to appeal against the expulsion decision. However, there is no indication that judicial review of such a decision is required. It does not require the appeal to have a suspensive effect unless the expulsion decision is accompanied by an application for an interim order to suspend the enforcement of that decision.[32] In such circumstances, actual removal from the territory of the Member State may not take place until the decision on the interim order has been taken, except: "where the expulsion decision is based on a previous judicial decision; where the persons concerned have had previous access to judicial review; or where the expulsion decision is based on imperative grounds of public security under Article 28(3) of Directive".[33] Member States are obliged not only to provide an individual with the possibility of taking legal action before an expulsion decision is executed, but also to let such a person apply to a competent court.[34] The Court of Justice of the EU expressed the view that Member States must take all steps to ensure that safeguard of the right of appeal is in fact available to anyone against whom an expulsion measure has been adopted. Otherwise, according to the Court "this guarantee would become illusory if the Member States could, by the immediate execution of a decision ordering expulsion, deprive the person concerned of the opportunity of effectively making use of the remedies which he is guaranteed".[35]

Moreover, the provisions of Directive 2004/38/EC prescribe that the review procedure shall allow for an examination of the legality of the expulsion decision, as well as of the facts and circumstances on which the proposed measure is based. Member States shall ensure that the expulsion decision is not disproportionate, particularly in view of the requirements laid down in Article 28. However, Member States may exclude the EU citizen from their territory pending the review procedure, but they may not prevent the individual from submitting his/her defence in person, except when his/her appearance may cause serious trouble to public policy or public security, or when the appeal or judicial review concerns a denial of entry to the territory.[36]

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31 Ibidem

32 Art. 31(2) of Directive 2004/38/EC.

33 Ibidem.

34 Item 26 of Directive 2004/38/EC.

35 *Jean Noel Royer*, Case no. C-48/75, Judgment of 8 April 1976 of the Court of Justice of the European Communities, paras. 55 and 56.

36 Art. 31(3) of Directive 2004/38/EC.

## Conclusions

When analysing Directive 2004/38/EC, one may draw the conclusion that the provisions stipulated by this regulation are more favourable to this group of foreign nationals as they differ from the provisions relating to all foreign nationals. Its preferential nature lies in freedom of movement, on the one hand, and in European citizenship, which grants every EU member a right to move and stay within the territory of Member States, on the other. For holders of a right of permanent residence, the expulsion criteria are even stricter than those to be applied to holders of short-term residence rights. While EU citizens having a right of residence can be expelled on the grounds of public policy or public security, those having a right of permanent residence can be expelled only on serious grounds of public policy or public security. Those having resided in the host Member State for the previous ten years can be expelled only on imperative grounds of public security.

When a State invokes national security or public order as a reason for expelling an EU citizen, it is obliged to submit any material or evidence capable of corroborating that the interests of national security or public order are at stake. Full disclosure of secret evidence in expulsion proceedings is not obligatory, but the affected person must be informed of a core of information sufficient to challenge the allegations against him or her in expulsion proceedings. The institution of "special advocate" adopted by British law seems to satisfy the requirements outlined by the CJEU on the procedural safeguards which must accompany the expulsion of EU citizens.

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**SUMMARY**

**Procedural Guarantees for EU Citizens against Expulsion in the Light of Directive 2004/38/EC**

The present paper analyses the scope of protection of EU citizens against expulsion under Directive 2004/38/EC and in the case-law of the Court of Justice of the European Union. According to the provision of this Directive, an EU citizen threatened with expulsion must have access to relevant documents and accessible information on the legal procedures to be followed in his/her case. Even if the government claims that national security interests keep courts from disclosing the evidence to the EU citizen, it is obliged to submit any material or evidence capable of corroborating that the interests of national security or public order are at stake. The CJEU requires that the evidence has to be scrutinised by the adversarial proceedings. In particular, the EU citizen must be informed, in any event, of the essence of the grounds on which an expulsion decision is based, as the necessary protection of State security cannot have the effect of denying the person concerned of his/her right to be heard.

Keywords: procedural guarantees, EU citizen, due process rights, expulsion

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# The Up-to-Dateness of the Debate on Responsibility to Protect

## Towards Sovereignty as Responsibility

No doubt we have been observing in recent years the phenomena inclining us towards reflection about the possible axiological and normative transformation of the international law paradigm[1]. In general, we observe an attempt to constitutionalize international law that evolves from a primitive set of first-order rules to a broadly understood system with a complex internal structure. Some authors even talk about the rise of *Global Law*[2] built over traditional international law. Others call it *Humanity's Law*[3]. It must be admitted that constitutionalization is nowadays a very attractive concept, albeit still "the unsolved riddle"[4]. The doctrine also indicates a tendency to the opposite process, i.e. international law fragmentation caused by the increasing differentiation of individual spheres of international cooperation[5]. Autonomous normative systems that regulate individual spheres of international relations are created – they include both substantive and procedural rules. Contemporary international law is no longer limited only to resolving interstate conflicts, but has become a versatile instrument to regulate broadly understood international relations. International law that until recently operated mainly in the area

1 J. Zajadło, *Aksjologia Prawa Międzynarodowego a filozofia prawa (uwagi na marginesie doktryny Responsibility to Protect)*, [in]: *Aksjologia współczesnego prawa międzynarodowego*, ed. Wnukiewicz-Kozłowska A., Wydawnictwo Uniwersytetu Wrocławskiego, Wrocław 2011, p. 307 *et seq*.

2 J. Zajadło, *Konstytucjonalizacja prawa międzynarodowego*, in: *Leksykon prawa międzynarodowego publicznego. 100 podstawowych pojęć*, eds. A. Przyborowska Klimczak, D. Pyć, C. H. Beck, Warszawa 2012, pp. 131–138; cf. among others R. Domingo, *The New Global Law*, Cambridge University Press, New York 2011

3 R. G. Teitel, *Humanity's Law*, Oxford University Press, Oxford-New York 2011.

4 I. de la Rasilla del Moral, The Unsolved Riddle of International Constitutionalism, International Community Law Review, 2010, vol. 12, no 1, pp. 81–110.

5 A. Wiśniewski, *Fragmentacja prawa międzynarodowego*, in: *Leksykon prawa międzynarodowego publicznego…*, op. cit., pp. 65–68

of law dogmas must, if it wants to be effective, also open up to other areas of knowledge: ethics, the philosophy of law, political philosophy, theory of international relations etc.[6] Revaluation of the sovereignty rule is certainly the most frequently contested attempt to revise the fundamental categories of international law. It seems that joint actions undertaken by international communities to solve problems concerning risks to peace or security or infringements of human rights occur against the legal nature of sovereignty that forms an integral part of the fundamental rules of international law. The number of advocates of a new theory of state sovereignty in international relations is nearly the same as the number of those who oppose all changes. However, it must be strongly emphasized that the responsibility to protect principle does not endanger state autonomy; just the opposite – as Kofi Annan, the Secretary-General of the United Nations claimed, it rather supports and strengthens state autonomy. Despite multi-faceted links between the international community and the ongoing development of international law, the sovereignty principle still remains the core category of international relations. We observe, however, progress in the process of changes and R2P is one of its hallmarks. The role of the state is not based solely on supreme authority and absolute self-governance (to refer to Cezary Berezowski's rhetoric), but it also generates responsibility. Moreover, the doctrine more and more openly tends to empower the individual, although it provides an individual only with selected elements of the capability to participate in international relations[7]. Some are even of the opinion that an international community as a whole should be deemed a holder of rights[8].

## From an Idea to the Official Doctrine

The *Responsibility to Protect* concept was created as the result of an initiative of a group of intellectuals. Initially it was a reaction to problems resulting from the clash between fundamental principles of international law, such as the equality of sovereignty between nations, non-interference in their internal affairs, the use of force in inter-state relations, and the need to protect and comply with human rights. A problematic intervention in Kosovo was the pretext for attempts to re-interpret former positions concerning the prohibition on both formulating threats and the use of force in inter-state relations. In its definition of the term *responsibility to protect*, the ICISS report made reference – terminologically – to the sovereignty as responsibility concept formulated by Francis M. Deng

6 J. Zajadło, *Aksjologia prawa międzynarodowego*…, p. 8.

7 A. Peters, *Humanity as A and Ω* [Omega] *of Sovereignty*, European Journal of International Law, 2009, vol. 20, no 3, pp. 513–544.

8 A. A. C. Trynidade, *International Law for Humankind*, Brill, Boston-Leiden 2010, pp. 275–288; in particular chapter XI *Humankind as a Subject of International Law*.

(the then Representative of Internally Displaced, later the Secretary-General's Special Advisor on the Prevention of Genocide), and – conceptually – to the humanitarian intervention concept, which makes use of the premises derived from the just war theory. The report authors postulated a re-conceptualization of the whole debate on the use of force and humanitarian intervention and, in order to change the perspective, proposed a new formula of responsibility: responsibility to prevent, responsibility to react and responsibility to rebuild. The unfortunate timing of the end of the work on the report – a few days before the terrorist attacks on the USA of September 11th – justified the concern that R2P would die a natural death. When the whole world was engaged in the war with terrorism and the war in Afghanistan it was difficult to popularize such an innovative idea. Some even predicted the end of humanitarian intervention[9]. However, the concept that initially seemed to be only an idea proposed by a group of scholars, soon transformed into one of the most dynamically developing theories of modern international relations. If we compare the effectiveness of theCommissions established to solve contemporary global problems, only the World Commission on Environment and Development headed by Gro Harlem Brundtland achieved a success similar to that of ICISS in implementing its concepts: "The role that international or independent commissions have played in linking ideas and institutions has not received the attention it merits. The names of many of the key commissions, often best remembered by the individuals who headed them – Brandt, Palme, Brundtland, Carlsson/Ramphal, for example – continue to be recognized. But the impact of commissions – what they have achieved, and how they have done it,both individually and collectively – has been too often neglected"[10]. The analysis of the growth dynamics shows the international community's quickly progressing acceptance of the new idea. The enthusiasm for the concept was seen for the first time at the 2005 World Summit (i.e. four years after the idea's formulation) – R2P was included in the Summit Outcome Document. It must be noted that the concept ceased to be the topic for the solely theoretical considerations of a group of experts, as it was used to express the position of the United Nations member states – even if only in the form of non-binding arrangements. Some even recommended including the responsibility to protect principle in the official UN doctrine[11].

9 T. G. Weiss, *The Sunset of Humanitarian Intervention? The Responsibility to Protect in the Unipolar Era, Security Dialog,* 2004, vol. 35, no 2 ; N. MacFarlane, C. J. Thielking, T. G. Weiss, *The Responsibility to Protect: is anyone interested in humanitarian intervention?*, Third World Quarterly, 2004, vol. 25, no. 5; Sung-han Kim, *The End of Humanitarian Intervention?*, Orbis A Journal of World Affairs, 2003.

10 More about it – vid. *International Commissions and The Power Of Ideas*, eds. R. Thakur, A. F. Cooper, J. English, United Nations University Press, New York 2005, p. X.

11 Jerzy Zajadło wrote that "Something that just yesterday seemed to be a chimera of intellectuals, today is an official doctrine of the United Nations, and tomorrow may become a binding legal norm" in: J. Zajadło, *Konstytucjonalizacja prawa międzynarodowego*, Państwo i Prawo, 2011,

## Internal R2P Dynamics

Further development of the concept was only a matter of time – the idea started to live a life of its own. Numerous international documents and rich literature referred to states' responsibility for the protection of their citizens and the international community's responsibility for its reactions to the violations of citizens' rights. However, R2P dynamics meant not only acceleration in time, but also changes in the concept structure. In the initial version proposed by the ICISS report, responsibility to protect rested primarily with the state. Only if the state is unwilling or unable to perform its duties, or is the author of violations itself, is the responsibility to protect shifted to the international community. Eventually the responsibility to protect means not only the responsibility to undertake action, but also to prevent and rebuild. Extended work conducted within the UN system and numerous discussions held at the General Assembly meetings revealed the states' doubts concerning individual elements of the concept. In 2009 the Secretary-General presented the *Implementing the Responsibility to Protect* report, which included a thorough interpretation of Summit Outcome Document paragraphs and created a new vision of the responsibility to protect concept. The modified R2P version took into account a theory added to three responsibility pillars adopted by ICISS: to prevent, to react, and to rebuild[12]. The first pillar outlines that it is primarily the state that is responsible for protecting its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. The second pillar asserts that the international community should help states to protect their populations. And finally, it is the international community that is responsible for a timely and decisive response aimed at crime prevention if a state is manifestly failing to protect its population.

## External R2P Institutionalization

The fact of active institutionalization of the R2P concept and the development of infrastructure around it is also unparalleled. Two new offices for R2P effective development and implementation were established: the Special Adviser of the Secretary-General on the Prevention of Genocide[13] and the Special Adviser of the Secretary-General on the Responsibility to Protect[14]. Moreover, numerous international structures have been established that cooperate on the popularization of the R2P concept. Civil society organ-

vol. 3, p. 17; R. J. Hamilton, *The Responsibility to Protect: From Document to doctrine – but what of implementation*?, Harvard Human Rights Law Journal, 2006, vol. 19, pp. 289–297.

12 More about it – vid. A. J. Bellamy, *Global Politics and the Responsibility to Protect: From Words to Deeds*, Routledge, London-New York 2011, pp. 35 *et seq*.

13 Initially held by Francis M. Deng; then, from July 2012, by Adam Dieng.

14 Initially held by Edward C. Luck; then, from 2012, by Jennifer Welsh; now, from 2016, by Ivan Šimonović.

isations, such as the Global Centre for the Responsibility to Protect and the International Coalition for the Responsibility to Protect, as well as non-governmental regional organisations, such as the Asia-Pacific Centre for the Responsibility to Protect, have been established to actively support R2P development. The concept is also popularized on a virtual basis – in the form of the www.responsibilitytoprotect.org website and the *Global Responsibility to Protect Journal* published since 2009. Numerous direct and indirect references to R2P in the UN documents cited above, Security Council resolutions in particular, are undoubtedly expressions of the concept's institutionalization on a normative level.

## Risks and Deficiencies

Opinions about the *Responsibility to Protect* concept take both the form of praise and criticism. Even if we acknowledge all the above-mentioned positive aspects and advantages of R2P, it is hard to ignore the risks that may result from the erroneous interpretation of the concept or its overuse for instrumental purposes, as well as its deficiencies connected with the still unresolved problem of the gap between the legality and legitimacy of the use of force in international relations. The new world order offers an equal number of benefits and risks. The theory – initially only intellectually challenging – started to gain normative characteristics. It must be remembered, however, that it is still an idea that requires a great deal of work before it is effectively realized. Thus, many postulates *de lege ferenda* are still formulated. The risk that the concept might be used for inappropriate purposes is still high. In the past there were several attempts to use R2P in situations that did not fulfil the prerequisites of legitimacy. In 2008 the government of Russia invoked the responsibility to protect concept in the context of its military intervention in Georgia – the Russian authorities claimed that there was a direct risk of crime against the populations of South Ossetia and that they initiated action solely out of humanitarian motives. The analysis of the Russo-Georgian War shows that an intervention under R2P pretext should fulfil three main prerequisites. Firstly, Russia's claim that it protected its own citizens in another country did not fulfil the responsibility to protect criterion and could only be used as the grounds for self-defence. Secondly, the scale and the range of Russian actions undertaken there far exceeded the limits of direct protection of peoples against human rights violations. And thirdly, the lack of unanimous consent of the United Nations Security Council's permanent members means there is a lack of legal authorisation to use force under the framework of the Responsibility to Protect. Thus, in this case no criteria were fulfilled that could justify the use of the R2P concept. References to R2P were also made in the context of a humanitarian disaster, after the destruction caused in Myanmar in May 2008 by Cyclone Nargis. Opinions differ

in this case. On the one hand, Bernard Kouchner, the ex-Minister of Foreign Affairs of France, invoked R2P and justified its application due to the occurrence on a mass scale of suffering, hunger and death. It must be remembered, however, that the responsibility to protect has been limited to four crimes and this catalogue should not be extended. Ramesh Thakur acknowledged that it is inadequate to refer to R2P in the context of the Myanmar crisis: "I can think of no better way to damage R2P beyond repair in Asia and most of the rest of the developing world than have the humanitarian assistance delivered into Burma backed by Western soldiers fighting in the jungles of Southeast Asia again"[15]. The risk occurs also in the situation when the concept has initially fulfilled criteria of legality, but as a result of its application has lost the legitimacy of the international community – as happened in the case of Libya. Thus, there is both a risk the concept will be used for inadequate purposes, like in case of Georgia and Myanmar, and a risk that concept expansion will be used during interventions that have already been undertaken, as in case of Libya where the concept evolved from the need to protect civil population to the intention to change the regime and call Muammar Gaddafi to account. At the same time we must notice the positive influence of R2P on the United Nations Security Council – the Council suggested that its members not use their veto rights in situations that do not endanger their interests. However, the problem of the authorization of military action by the Security Council is still unresolved and returns every now and again. Thus, it is hard to envision the future of the *Responsibility to Protect* concept.

Observation of current events in the world (in Libya, Syria, and Ukraine, among others) leads to the sad conclusion that the risk of constant arguments and never-ending conflicts of various aetiology is inevitable. That is why Gareth Evans is of the opinion that the perspective of the ineffectiveness of international community's reactions may cause frustration, disappointment and disgust[16]. Although he optimistically notices at the same time that the R2P principle is universally supported and the only thing that is missing is its actual application in the most difficult situations. Nevertheless, the responsibility to protect concept – so innovative and controversial in its premises – rather than lose its value, gains in importance in the eyes of the international community and gradually leads to a legal theory being formed[17]. We still can hope that current international law will gradually support and incorporate the R2P concept and the international

15 Cited from: *Cyclone Nargis and the Responsibility to Protect Myanmar/Burma Briefing no. 2* of 16 May 2008, Asia-Pacific Center for the Responsibility to Protect, available at http://www.responsibilitytoprotect.org/legacyDownload.php?module=uploads&func=download&fileId=539.

16 G. Evans, *The evolution of the Responsibility to Protect: from concept and principle to actionable norm*, in: *Theorising the Responsibility to Protect*, eds. R. Thakur, W. Maley, Cambridge University Press, Cambridge 2015, p. 37.

17 M. Hakimi, *Toward a Legal Theory on the Responsibility to Protect*, The Yale Journal of International Law 2014, vol. 39, no. 2, pp. 247–281.

community will show a greater enthusiasm for establishing a legal framework for the concept and determining the correct guidelines for its application.

## The Up-to-Dateness of the Debate in the Literature

Numerous publications concerning R2P are the best illustration of the fact that it is a very topical subject. The analysis of all doctrinal issues focusing on new challenges for contemporary international law would go far beyond the scope of this article; that is why it is advisable to limit our considerations to key trends in the international discourse on R2P.

Firstly, we observe a visible change in the international law paradigm. It can be seen in the symptomatic titles of selected works: *The Responsibility to Protect (R2P): A new Paradigm of International Law?*[18], *The Responsibility to Protect in International Law. An emerging paradigm shift*[19], or *Theorising the Responsibility to Protect*[20] edited by Ramesh Thakur (one of the "fathers" of R2P concept) and William Maley.

Secondly, more and more often we hear that a moral norm transforms into a legal one[21]. Although the conclusions of the 2005 World Summit (paragraphs 138 and 139 of the Outcome Document) are perceived as *soft law* at its best[22] or an *opinio iuris* expression of the collective action of states in the spirit of the newly formed R2P norm[23], it is hard to deny that at present the implementation of the norm has got the features of a legal norm. When reviewing the development of the R2P concept, its implementation and the institutional engagement of the international community, Gareth Evans clearly sees the concept evolving towards an operating norm[24] and Luke Glenville demonstrates that R2P clearly affects the actions of states, particularly in situations when military intervention is taken into account[25].

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18 P. Hilpold, *The Responsibility to Protect (R2P): A new Paradigm of International Law?*, Brill, Leiden-Boston 2014.

19 S. Breau, *The Responsibility to Protect in International Law An emerging paradigm shift*, Routledge, London-New York 2016.

20 *Theorising the Responsibility to Protect*, eds. R. Thakur, W. Maley, Cambridge University Press, Cambridge 2015.

21 P. G. Ercan, *Debating the Future of the 'Responsibility to Protect': The Evolution of a Moral Norm*, Palgrave Macmillan, London 2016.

22 J. Welsh, *Norm Contestation and the Responsibility to Protect*, Global Responsibility to Protect, vol. 5, no. 4, p. 376.

23 A. Bloomfield, *Resisting the Responsibility to Protect*, in: *Norm Antipreneurs and the Politics of Resistance to Global Normative Change*, eds. A. Bloomfield, S. V. Scott, Routledge, London-New York 2017, pp. 20–39.

24 G. Evans, op. cit., p. 16–37.

25 L. Glenville, *Does R2P matter? Interpreting the impact of a norm,* Cooperation and Conflict, Vol. 51, no. 2, pp.184–199.

Thirdly, the international community makes increasingly effective use of the instruments it has got at hand to apply the third pillar of R2P[26] (i.e. responsibility to react): economic sanctions, arms embargoes, targeted diplomatic sanctions, effective international criminal law jurisdiction, cooperation with regional and sub-regional organisations, and, as a last resort, force measures authorized by the Security Council. Tragic events occurring nowadays (e.g. in Libya, Syria, the Central African Republic – to mention just a few of them) show an urgent need to conduct discussion on the effectiveness of creating and using practical instruments for the application of the R2P third pillar. The authors of *The Responsibility to Protect and the Third Pillar*[27] collective publication attempt to analyze the operationalization of the responsibility to protect norms within the third pillar: its legitimacy, proportionality, and effectiveness of undertaken actions: "Pillar three of the Responsibility to Protect (RtoP) focuses on the international community's responsibility to take 'timely and decisive action' to prevent and halt genocide, ethnic cleansing, war crimes and crimes against humanity in those instances where a state is unable or unwilling to protect its own populations. A range of tools have been devised to aid in this 'timely and decisive action': economic sanctions, international criminal trials and, most controversially, the use of force. The recent crises that have erupted in places such as Libya, Syria and the Central African Republic highlight the continued relevance of the RtoP debate, but it also gives rise to the need to better understand the processes, opportunities and risks involved in moving from the RtoP as a norm to its operationalization under the third pillar. Important questions related to the timeliness, legitimacy, proportionality and effectiveness of pillarthree responses need fleshing out and critically analyzing. Furthermore, there is further scope in apprehending how third pillar activities interact with, and mutually affect, the first and second pillars, and preventive and re-building initiatives aimed at avoiding pillar-three situations from occurring in the first place".

And finally, the application of R2P concept on the regional level stirs a growing interest – the African continent and the African Union as a regional organisation are the best examples here. In the literature this tendency can be seen in the publication entitled *Humanitarian Intervention and the AU-ECOWAS Intervention Treaties Under International Law*[28]. It seems to be an understandable trend, because at such a level it is sometimes easier to achieve ef-

26 *Implementing the Responsibility to Protect*, the third pillar of the R2P concept defined in the Report of the Secretary-General of 20 January 2009 concentrates on the responsibility of the international community for timely and decisive response aiming at the prevention and stopping of genocide, ethnic cleansing, war crimes, and crimes against humanity if a state is manifestly failing to protect its population.

27 *The Responsibility to Protect and the Third Pillar. Legitimacy and Operationalization*, eds. D. Fiott, J. Koops, Palgrave Macmillan, 2015, p. 1.

28 J. M. Iyi, *Humanitarian Intervention and the AU-ECOWAS Intervention Treaties Under International Law. Towards a Theory of Regional Responsibility to Protect*, Springer International Publishing, 2016

fective operationalization among states connected by the same culture, tradition or level of economic or political development: "Thus, by the dawn of the twenty-first century, just as the ICISS was working to reconceptualise sovereignty, ECOWAS and the African Union (successor to the OAU) were revising the legal framework of collective security in their respective constitutive documents. But the old debates largely remained. The tension between sovereignty and human rights protection, the legality of unauthorised use of force by regional organisations and the legitimacy of the contemporary international legal order in the face of the failure to protect people from genocide and other mass atrocity crimes dominated the debates. In most of these debates, Africa's conflict zones often provided the analytic framework for evaluating the effectiveness of the UN in responding to mass atrocities and the role of international law in the process. The broad consensus in the assessments by the different commissions and studies mentioned above was that the existing system was not effectively responding to the protection of populations from gross violations of human rights within states and that there was an urgent need for reform. The new approach to collective security by ECOWAS and the AU were feeding into this lacuna. However, the legal basis of this AU and ECOWAS approach calls for examination as it raises several legal issues with respect to the UN Charter law on the use of force although the approach may well become the paradigm for future action on the Responsibility to Protect (R2P)"[29].

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**SUMMARY**

**The Up-to-Dateness of the Debate on Responsibility to Protect**

The aim of the article is to review the contemporary debate on the concept of Responsibility to Protect. Numerous publications concerning R2P are the best illustration of the fact that it is a very topical subject. Analysing the doctrinal issues focusing on new challenges for contemporary international law the author focuse on a visible change in the international law paradigm, transformation of moral norm into legal one and the effective use of the instruments of R2P application.

Keywords: Responsibility to Protect, public international law

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# When 'the Use of Force' is Prohibited? – Article 2 (4) and the 'Threshold' of the Use of Force

## Introduction

Article 2 (4) of the UN Charter demands that 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations'.[1] The prohibition of the use of force was introduced into the international legal order to – using the language of the Charter's preamble – 'save succeeding generations from the scourge of war'. Thus, beyond all doubt, it was established to prevent States from armed interventions, armed conflicts, aggression and any other major forms of armed measures. However, some authors ponder whether the prohibition of the use of force covers all kinds of coercion, even minor ones, or whether perhaps it was supposed to regulate interstate relations only, at a level necessary for preventing large-scale forcible measures. This issue is related to the question of the so-called 'threshold of the use of force'.

This article advances the thesis that there is no threshold for the use of force. i.e. no level of the use of force which decides whether and which forcible actions undertaken by States are prohibited. The examples of actions discussed in the doctrine of law which supposedly would be 'below' such a threshold in fact either are regulated by

1 Moreover, the prohibition of the use of force nowadays also constitutes a customary norm (A. Randelzhofer, *Commentary to Article 2 (4)* in: *The Charter of the United Nations: a Commentary*, ed. B. Simma, Oxford 2002, p. 134; T. Hillier, *Sourcebook on Public International Law,* London 1998, p. 595; C. Kreß, *Major Post-Westphalian Shifts and Some Important Neo-Westphalian Hesitations*, in: "Journal on the Use of Force and International Law", 2015, vol. 1 no. 1, p. 11, 40; E. Gordon, *Article 2 (4) in Historical Context*, in: "Yale Journal of International Law", 1984–1985, vol. 10, p. 271, 275; M. Shaw, *International Law. Sixth Edition,* Cambridge 2008, p. 1123; I. Brownlie, *International Law and the Use of Force by States Revisited*, in: "Chinese Journal of International Law", 2002, no. 1, p. 1, 1; S. T. Helmersen, *The Prohibition of the Use of Force as Jus Cogens Explaining Apparent Derogations*, in: "Netherlands International Law Review", 2014, vol. 61, p. 167, 175; A. Cassese, *International Law,* Oxford 2005, p. 56).

other principles of international law, are not considered as regulated by *ius ad bellum*, or States deliberately resign from calling them a use of force for both legal and extra-legal reasons. Thus, the existence of such a threshold is not confirmed by States' practice. This thesis will be explored using three examples: the cases of the evacuation of nationals and extraterritorial abductions demonstrate that the presence of armed forces of one State on the territory of another State does not have to be always related to the use of force, and may also involve other principles of international law than the one from Art. 2 (4); the third example of the Falklands/Malvinas Islands invasion of 2 April 1982 discusses a specific situation when a State did not invoke the use of force in the face of an armed invasion, which proves that even the lack of an assertion of a breach of the prohibition of the use of force does not mean that a full-scale invasion can be considered as being below the threshold of the use of force. The article starts with a brief discussion of the opinions expressed in the doctrine of international law on the threshold, as well as the applicable case law.

## The Doctrine of Law and Case Law

In the discussion over the threshold, multiple authors point out that there is indeed such a scale of forcible measures. O. Corten assumes that there is a threshold, 'below which the use of force in international relations (…) cannot violate Article 2 (4)'. Thus, according to Corten there are two separate bodies of rules applicable to the use of force: the first relates to cases of police measures, which are based on customary rules or treaty provisions and thus do not constitute a case of the use of force in international relations prohibited by Art. 2 (4). The second category of rules covers a violation of the prohibition of the use of force when the *jus contra bellum* rules are at stake. Moreover, in order to distinguish those cases of the use of force which are below the threshold, Corten offers two criteria: the gravity of the coercive act, and State's intention to resort to force against another State. As examples of actions below the threshold of the use of force, he enumerates the arrest of a person by authorities of one State in another State's territory without informing that State; inspection of a foreign vessel; and police measures against a foreign aircraft that has entered a State's airspace without authorization.[2]

Likewise, R. Higgins points out that 'minor coercion' does not 'involve the use of force at all; or may involve it to a very low degree'. She claims that the term 'force', as used in UN practice, 'excludes low-level non-military coercion', while by 'low level' Higgins understands 'coercion enough to limit the freedom of action of the State at which it is di-

2 O. Corten, *The Law against War: The Prohibition on the Use of Force in Contemporary International Law*, Oxford and Portland, Oregon 2012, pp. 50–55, 67–76.

rected, but not adversely enough to affect its national security."[3] C. Kreß indicates that there are a number of situations when it is difficult to stipulate whether the threshold of the use of force has been reached. In this context, he enumerates 'intrusion or otherwise uninvited presence of military (or even police organs) on foreign soil without actual fighting' and actions involving minimal coercion, like 'arrest of a person, the seizure of foreign fishing vessel, or the opening of a diplomatic bag'; and includes transnational computer attacks as being at stake as well.[4] O. Dörr enumerates some examples of actions which were not 'treated in practice under the principle of the non-use of force': the deliberate cross-frontier employment of natural forces; cross-border pollution; the expulsion of parts of a population and causing a massive influx of refugees.[5] F. R. Teson, referring to the special case of extraterritorial abductions, calls them 'low-intensity operations'. According to him, such operations are justified when there is a moral reason behind them; the government which conducts the operation is a legitimate one; the targeted State or government is illegal; the operation does not violate human rights; and the operation is necessary and proportionate.[6]

On the other hand, Tom Ruys claims that 'excluding the small-scale or "targeted" forcible acts from the scope of Article 2(4) is "conceptually confused, inconsistent with customary practice, and undesirable as a matter of policy.' He argues that States' practice does not support the existence of a threshold of the use of force, pointing out that any use of lethal force on the territory of another State triggers Art. 2 (4), and that setting the threshold in order to legalize some law enforcement actions is counterproductive. However, when it comes to the forcible actions against civil aircraft, merchant vessels and private individuals, he claims that these cases should be assessed on a case-by-case basis.[7] Among those examples which seem to be the most discussed in the context of the alleged threshold, he enumerates, *inter alia*, rescuing nationals abroad, 'hot pursuit' operations, small-scale counterterrorism operations, and territorial incursions by the military or police units of another State.

Bearing the above in mind, the majority of commentators argue for the existence of a threshold of the use of force, which would relate to low-level coercion. However, it

3 R. Higgins, *The Development of International Law Through the Political Organs of the United Nations*, Oxford 1963, pp. 175–176.

4 C. Kreß, *The International Court of Justice and the "Principle of Non-Use of Force"* in: *The Oxford Handbook of the Use of Force in International Law*, ed. M. Weller, Oxford 2015, pp. 575–576.

5 O. Dörr, *Use of Force, Prohibition of*, in: "Max Planck Encyclopedia of Public International Law", http://opil.ouplaw.com, par 12.

6 F. R. Teson, *International Abductions, Low-Intensity Conflicts and State Sovereignty: A Moral Inquiry*, in: "Columbia Journal of Transnational Law", 1994, vol. 31 issue 3, pp. 551, 553–554.

7 T. Ruys, *The Meaning of "Force" and the Boundaries of the Jus Ad Bellum: Are "Minimal" Uses of Force Excluded From UN Charter Article 2(4)?*, in: "American Journal of International Law", 2014, vol. 108, pp. 159, 159, 208–210.

seems that some of the examples invoked in the legal doctrine are not regulated by the *jus ad bellum* at all (like a massive influx of refugees), while others require a case-by-case analysis, since specific cases of intrusions on the territory of another state or of rescuing nationals abroad may involve considerably different levels of the use of force.

When it comes to the case law, the International Court of Justice (ICJ) has never issued any comprehensive and clear statements on the threshold of the use of force, although the Court has differentiated between different levels of the use of force.[8] Probably the most discussed case in relation to the threshold of the use of force is the *Corfu Channel* case. The ICJ, in its judgement of 9 April 1949, decided that the passage of four British warships through the Corfu Channel, 'close to the Albanian coast, at a time of political tensions in this region' amounted to an intention 'not only to test the Albania's attitude, but at the same time to demonstrate such force that she would abstain from firing against passing ships'.[9] However, the ICJ arrived at the conclusion that these activities did not constitute a violation of Albania's sovereignty.

The Court also ruled on minesweeping, which was treated by the United Kingdom as 'a new and special application of the theory of intervention, by means of which the State intervening would secure possession of evidence in the territory of another State, in order to submit it to an international tribunal and thus facilitate its task'.[10] This reasoning, called 'the policy of force', was invoked to justify the United Kingdom's conduct as an action taken on behalf of the international community.[11] However, the ICJ did not recognize this argumentation, pointing out that 'the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses (…) cannot (…) find a place in international law'.[12] Moreover, in response to another argument presented by the United Kingdom – that the minesweeping operations

8 Much of the case law quoted in the doctrine of law under the notion of the threshold of the use of force refers not to the threshold in the meaning of breach of Art. 2 (4), but to the qualification of the use of force as an armed attack (e.g. ICJ's case law in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America*, *Oil Platforms (Islamic Republic of Iran v. United States of America)*). The present author is aware of this case law but it does not contribute to the problem discussed in this topic. For a comprehensive study on the differences between the use of force and armed attack vid. M. Kowalski, *Prawo do samoobrony jako* środek *zwalczania terroryzmu międzynarodowego* [Right to Self-Defence as a Means of Counter-terrorism], Warszawa 2013, pp. 76–83.

9 *Corfu Channel case, Judgment of April 9th*, *194,* ICJ Reports 1949, p. 4, 31. One should also note that Albania became a UN Member in 1955, so it was not a Member State when the dispute was adjudicated before the ICJ. However, Albania accepted 'in the present case all the obligations which a Member of the United Nations would have to assume in a similar case'; *Corfu Channel case*, Judgment on Preliminary Objection: ICJ Reports 1948, p. 17.

10 Ibidem, p. 34.

11 C. Gray, *A Policy of Force* in: *The ICJ and the Evolution of International Law* ed: K. Bannelier, T. Christakis, S. Heathcote, Abingdon 2012, p. 4.

12 *Corfu Channel case,* p. 35.

were a method of self-protection or self-help – the ICJ noted that 'Between independent States, respect for territorial sovereignty is an essential foundation of international relations'.[13] However, despite that, the ICJ did not refer to Art. 2 (4) of the UN Charter at all.

Although some commentators claim that the ICJ's analysis indicates that the Court considered minesweeping as being below the threshold of the use of force[14], it is important to bear in mind that the ICJ was asked to adjudicate on whether the sovereignty of Albania had been violated, and it did not have to refer to the possible breach of Art. 2 (4) of the Charter.[15] Nevertheless, it is true that the Court's language was very vague. T. Ruys quotes the passage from the very last paragraph of the judgment, that the Court 'does not consider that the action of the British Navy was a demonstration of force for the purpose of exercising political pressure on Albania', pointing out that the phrase 'demonstration of force for the purpose of exercising political pressure' can be subjected to different interpretations. Thus, one may deduce that, for instance, the minesweeping in fact fell within the scope of Art. 2 (4) since the prohibition of the use of force is not limited only to 'exercising political pressure'[16]. On the other hand, C. Gray points that by using such careful language and avoiding direct reference to the prohibition of the use of force, the ICJ may have tried to 'avoid controversy about its power to determine the existence of an act of aggression and/or about the possible consequences of such a determination.'[17] However, in case of the Corfu Channel dispute, it was the United Nations Security Council (UN SC) which recommended that the United Kingdom and Albania have recourse to the ICJ in order to obtain a judicial resolution of the dispute.[18]

One should also mention the judgement in *Land and Maritime Boundary between Cameroon and Nigeria*,[19] when the ICJ was asked by Cameroon to decide whether Nigeria had, by invading and occupying its territory, violated 'the principle of non-use of force set out in Article 2, paragraph 4, of the United Nations Charter and the principle of non-intervention repeatedly upheld by the Court'.[20] Nigeria responded to these allega-

13 Ibidem, p. 35.

14 A. Shibata, *The Court's decision in silentium on the sources of international law* in: K. Bannelier, T. Christakis, S. Heathcote (eds.), op. cit., § 13.5.

15 T. Ruys, *The Meaning…*, p. 166.

16 Ibidem.

17 C. Gray, *The ICJ and the Use of Force* in: *The Development of International Law by the International Court of Justice*, eds. C. J. Tams, J. Sloan, Oxford 2013, p. 4, available at: http://dx.doi.org/10.2139/ssrn.2311217 [access: 20 January 2018].

18 Ibidem, p. 5.

19 C. Gray mentions this case, all along with *Certain Activities Carried Out by Nicaragua in the Border Area*, as examples of when 'The Court avoided a decision on responsibility for unlawful use of force arising out of a boundary dispute' (Ibidem, ft 8).

20 *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, ICJ Reports 2002, p. 303, § 310.

tions by claiming that it deployed force to respond to Cameroon's campaign of systematic encroachment on Nigerian territory and that it acted in self-defence.[21] However, the Court did not address the problem of violation of the prohibition of the use of force by either of the parties to the conflict, but only observed that both Cameroon and Nigeria were under an obligation to withdraw their administrative and military and police forces from the territories that fell under the sovereignty of the other State expeditiously and without condition. [22]

Similarly, the ICJ avoided any conclusive statements as to the use of force in *Certain Activities Carried Out by Nicaragua in the Border Area.* Costa Rica asked the Court to find that Nicaragua breached the prohibition of the use of force, by, *inter alia*, incursion into and occupation of Costa Rican territory. The Court observed that '[t]he fact that Nicaragua considered that its activities were taking place on its own territory does not exclude the possibility of characterizing them as an unlawful use of force. This raises the issue of their compatibility with both the United Nations Charter and the Charter of the Organization of American States. However, in the circumstances, given that the unlawful character of these activities has already been established, the Court need not dwell any further on this submission',[23] in the meantime asserting that Nicaragua had violated the territorial sovereignty of Costa Rica by excavating channels and establishing a military presence on Costa Rican territory. Thus once again, even though the ICJ was asked to decide on the prohibition of the use of force, it avoided mentioning it.

Summing up, the ICJ avoided any complex statements not only on the threshold of the use of force, but also on qualifying certain activities as a breach of the use of force, despite explicit claims in this regard made by parties to these disputes. However, one needs to observe that in place of the prohibition of the use of force, the ICJ mentioned other principles of international law, including the sovereignty and territorial integrity of the States concerned.

## States' Practice Towards a Threshold of the Use of Force

### Rescuing Nationals Abroad

The doctrine of international law uses the phrase 'intervention to rescue nationals abroad' to name a foreign intervention of a State aimed at rescuing its nationals who find themselves in danger while staying in a third State. According to some authors, such inter-

21 Ibidem, § 311.

22 Ibidem, § 314–315.

23 *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, ICJ Reports 2015, p. 665, § 97.

ventions are justifiable and legal under international law since they do not violate the 'territorial integrity or political independence' of the State where the intervention takes place, a State is obliged to assist its nationals if their life is endangered, or the attack on nationals abroad amounts to an attack on the State itself and thus triggers the right to self-defence.[24]

Among the most widely discussed interventions whereby States have invoked right to protect their nationals by armed interventions, one may enumerate: the US attempt to rescue the hostages kept in the US Embassy in Teheran;[25] the Russian intervention in Georgia in 2008;[26] the UK (and French) intervention in Egypt in 1956;[27] the Israeli intervention in the Entebbe airport;[28] the US intervention in Panama;[29] the Belgian intervention in Congo in 1964;[30] the US intervention in Grenada in 1983;[31] as well as the Russian intervention in Ukraine in 2014.[32] However, it should be kept in mind that in none of these cases did the intervening State claim that the operation was justified because it did not reach the threshold of the use of force. Indeed, the intervening States were aware that their actions involved armed force and sought solid legal justifications thereof. What's more, none of the States mentioned above invoked the customary norm allowing a state to forcibly rescue nationals abroad, but rather argued that the

24 D. W. Bowett, *The Use of Force in the Protection of Nationals*, The Grotius Society. Transactions for the Year 1957, pp. 111, 111–113; T. D. Gill, P. A. L. Ducheine, *Rescue of Nationals* in: *The Handbook of the International Law of Military Operations*, ed. T. D. Gill, D. Fleck, Oxford 2010, p. 218; J. Kranz, *Kilka uwag na tle aneksji Krymu przez Rosję* [A few remarks on the annexation of Crimea by Russia], in: "Państwo i Prawo", 2014, no. 8, pp. 23, 33; R. Amer, *The United Nations' Reactions to Foreign Military Intervention – A Comparative Case Study Analysis,* Umeå Working Papers in Peace and Conflict Studies 2007, vol. 2, p. 7; R. P. Chatham, *Defense of Nationals Abroad: The Legitimacy of Russia's Invasion of Georgia*, in: "Florida Journal of International Law", 2011, vol. 23, pp. 75, 88–89.

25 *Letter Dated 25 April 1980 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council*, S/13908.

26 *Letter dated 11 August 2008 from the Permanent Representative of the Russian Federation to the United Nations addressed to the President of the Security Council*, S/2008/545.

27 *Middle East (Situation). The Secretary of State for Foreign Affairs*, HC Deb 31 October 1956 vol. 558, c 1565–1566.

28 UN Security Council Official Records, 31st year: 1939th meeting, 9 July 1976, S/PV.1939, § 98, 104, 115, 119.

29 *Letter Dated 20 December 1989 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council*, S/21035.

30 *Letter Dated 24 November 1964 from the Permanent Representative of Belgium Addressed to the President of the Security Council/ Letter Dated 21 November 1964 Addressed to Count de Kerchove de Denterghem, Ambassador of Belgium at Leopoldville/ Statement by Mr. P.H. Spaak, Minister of Foreign Affairs of Belgium, on 24 November 1964*, S/6063, pp. 1–2, 5.

31 *Ambassador Kirkpatrick's Statement*, UN Security Council, Oct. 27, 1983, Department of State Bulletin, vol. 83, no. 2061, December 1983, p. 75.

32 UN Security Council Provisional Records, 69th year: 7124th meeting, 1 March 2014, S/PV.7124, p. 5.

rescue operations were legal under the right to self-defence; or because the organs of the State where the intervention took place consented to it (no matter how dubious such consent was, to mention only the US intervention in Panama[33] or Russian intervention in Ukraine[34]); or that the intervention was authorized by a regional organization. However, it is important to note that all of the above mentioned interventions were ultimately condemned by the international community.

In attempting to justify the legality of the operations carried out, Belgium and the UK set out the criteria for a lawful intervention to rescue nationals abroad. Thus, Belgium assumed that such interventions are legal if the life of nationals is endangered; peaceful negotiations are ineffective; the situation is continuing to deteriorate; and the purpose of the intervention is only to assist the nationals of the intervening State.[35] On the other hand, the UK government claimed that an intervention to rescue nationals abroad is allowed under customary law if there is an imminent threat to the nationals; the State where the nationals are located cannot or is not willing to provide them with the sufficient protection; and that the operation is limited in its goals.[36] To sum up, both the UK and Belgium argued that their operations were legal because they were necessary and proportional to the ends meant to be achieved, not because they did not reach the threshold of the use of force. Moreover, the Belgium intervention in Congo and the Israeli intervention in Uganda are considered to be model operations of their kind,[37] not however because they did not involve the use of force, but because of their effectiveness as well as the limited measures and goals.

In addition to the above, one needs to also take note of more recent cases of operations to rescue nationals abroad which were neither widely discussed nor explicitly condemned. Here one may mention the operations carried in Albania in 1997 and in

33 A. Tancredi, *The Russian annexation of the Crimea: questions relating to the use of force*, in: "Questions of International Law", Zoom out 2014, vol. I, p. 5, 16; L. Henkin, *The Invasion of Panama Under International Law: A Gross Violation,* Columbia Journal of Transnational 1991, vol. 29, pp. 293, 299; *Fighting in Panama: The State Dept.; Excerpts From Statement by Baker on U.S. Policy*, New York Times, 21 December 1989, available at: http://www.nytimes.com/1989/12/21/world/fighting-in-panama-the-state-dept-excerpts-from-statement-by-baker-on-us-policy.html, [access: 20 January 2018].

34 S/PV.7124, p. 2; J. A. Green, *Editorial Comment: The annexation of Crimea: Russia, Passportisation and the Protection of Nationals Revisited*, Journal on the Use of Force 2015, vol. 1 no. 1 p. 3, 6; O. Corten, *The Russian intervention in the Ukrainian crisis was jus contra bellum 'confirmed rather than weakened'*, in: Journal on the Use of Force and International Law 2015, vol. 2 no. 1, pp. 17, 19.

35 S/6063, p. 1.

36 *Middle East (Situation)*.

37 J. H. H. Weiler, *Armed Intervention in a Dichotomized World: The Case of Grenada* in: *The Current Legal Regulation of the Use of Force*, ed. A. Cassese, Dordrecht/ Boston/ Lancaster 1986, p. 250; L. Henkin, *The Invasion*…, p. 297.

Lebanon in 2006 by a few Western States;[38] the US evacuations of nationals from Liberia in 1990 and Lebanon in 1976; or numerous French operations in African States[39]. Probably the most recent case of this type of operation took place in Libya in 2011. After the breakout of the civil war in that state, over twenty States decided to evacuate their nationals from Libya. There was no single pattern on how to proceed with these evacuations. Some States, like the UK, sent in their Special Forces, which travelled around the Libya gathering British nationals and other foreigners stuck in Libya.[40] Many States acted similarly, sending their warships (like Germany), chartered ships (India), chartered planes (South Korea) or military planes (e.g. Canada). Others, like for example Bangladesh or Vietnam, requested the assistance of international organizations, neighbouring States, or foreign companies employing their nationals.[41] None of these States faced any criticism of their evacuations, except for Netherlands' operation – which was termed by Libyan authorities as an unauthorized, and thus unlawful, incursion into the Libyan airspace.[42] No international organs ever debated over these evacuations or objected to them. Moreover, none of the States, even those which sent in their militaries to evacuate nationals, attempted to offer a legal justification, nor were they were requested to do so by any State or international organization.

To sum up, the operations mentioned above vary considerably, both when it comes to the grounds for these operations and the reactions of the international community towards them. T. Ruys suggests abandoning the 'one size fits all' approach and making a case-by-case assessment of such operations.[43] However, it seems that one can go even a step further since one needs to clearly distinguish between forcible interventions which involve the use of considerable military measures (not to mention those where the label 'protection of nationals' is used only to cover up the real reasons behind the intervention, like in case of the Russian intervention in Ukraine), and evacuations which, even if carried out with military means such as armed forces, warships and military planes, cannot be considered as 'use of force'. Thus, one may contrast the British intervention in Egypt in 1956, which started with the ultimatum to the Egyptian government and bombardment of Egyptian airports,[44] with the evacuation of the British nationals

38 CNN, *Westerners flee Lebanon any way they can*, 19 July 2006, available at: http://edition.cnn.com/2006/WORLD/meast/07/18/lebanon.evacuation.int/, [access: 20 January 2018].

39 T. Ruys, *The 'Protection of Nationals' Doctrine Revisited*, in: "Journal of Conflict and Security Law", 2008, vol. 13 issue 2, pp. 233, 251–253.

40 F. Grimal, G. Melling, *The Protection of Nationals Abroad: Lawfulness or Toleration? A Commentary*, in: "Journal of Conflict & Security Law", 2012, vol. 16, pp. 541, 544.

41 BBC News, *Libya protests: Evacuation of foreigners continues*, 25 February 2011, available at: http://www.bbc.com/news/world-middle-east-12552374, [access:] 20 January 2018.

42 F. Grimal, G. Melling, op. cit., p. 545.

43 T. Ruys, *The 'Protection*…, op.cit., p. 271.

44 Q. Wright, *Intervention, 1956,* in: American Journal of International Law 1957, vol. 51, pp. 257, 257–258.

from Libya, carried out by special forces that lasted only a few days and was limited only to this end. The former case undoubtedly constitutes an example of the use of force, while the latter should not be considered as such.

Taking the above into account, one needs to observe that, first of all, not every presence of military forces on the territory of another State amounts to the use of force. Thus, if military forces are present in third State only to evacuate their States' nationals and not to 'intervene' into the internal affairs of that State, Art. 2 (4) of the UN Charter is not at stake at all. Secondly, in cases where the State on whose territory the evacuation takes place does not object to the evacuation, it cannot be treated as an illegal intervention. Thus such evacuations are certainly allowed in cases when the territorial State agreed to the operation.[45] At the same time, one can assume that such evacuations are also allowed in the case of a civil war, where there are no reliable authorities to consent to the operation.[46] Thirdly, the difference between a mere evacuation and a prohibited intervention can be very vague and change over the course of the operation. Finally, the evacuation should be genuinely aimed at providing assistance to foreigners in leaving the State, and any measures used during the evacuation should be limited only to this strict end, without causing material damage or fatalities. Thus, in general evacuations of nationals under the conditions as mentioned above cannot be considered in the category of the use of force.[47] This view is also confirmed by State practice, since not only has no State has claimed that any of the evacuations mentioned in the previous paragraph constituted a breach of the prohibition of the use of force, but also not even that they constituted a violation of the State's sovereignty or the principle of non-intervention.

**Extraterritorial Abductions**

One of the most frequently discussed cases of the unlawful presence of armed forces of one State on the territory of a third State in the context of the threshold of the use

45 The lawfulness of the presence of the military forces of one State in the territory of another State under the consent of that State is widely accepted, for example under the special agreements concluded between States. Only if the armed forces are present on the territory of the third State in contravention of that agreement or beyond the State's consent, may their presence amount to an aggression (W. A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford 2016, p. 316).

46 T. Ruys, *The 'Protection*…, *op.cit*. p. 252.

47 A. Thomas and A. J. Thomas claim that such actions are not directed against territorial integrity or political independence of the territorial State since their aim is merely to rescue nationals (*The Dominican Republic Crisis 1965 – Legal Aspects*, Hammarskjöld Forum 1996, p. 16). However, the present author does not claim that the use of force is allowed when it is not directed against territorial integrity or political independence of the State, but simply that the evacuation operations constitute a different category of States' actions than the use of force.

of force are so-called 'extraterritorial abductions'.[48] Such 'abductions' take place when a State carries out an operation in order to capture and transfer a suspect from the territory of a third State, which is either unaware of this plan or unwilling to give its consent for the extradition. This problem may occur even if there is an extradition treaty between the States, which in principle should resolve all problems connected with extradition. However, in the first place, most international agreements concerning extradition allow States to block this procedure under certain circumstances;[49] as a result, the cooperation of States is not secured even when there is an appropriate extradition treaty. Secondly, States tend to use abductions anytime they consider it in their national interest to bring the alleged criminal in front of their domestic justice system. K. B. Weissman points out that extraterritorial abductions may be considered as a type of armed reprisal.[50] Even if such a statement may be considered an exaggeration, States may treat abductions as a kind of revenge against the criminals they wish to prosecute.

One of the most famous examples of an extraterritorial abduction was the Israeli Security Forces' operation in Argentina in 1960, which was aimed at capturing Adolf Eichmann, the Nazi war criminal, and transferring him to Israel. The Israeli intelligence agents who took part in the operation in Buenos Aires and captured Eichmann, interrogated him for a week on Argentinian territory and finally transported him to Israel.[51] This operation was preceded by observation of Eichmann, which was launched when the Israeli Security Services obtained information that he might be an Argentinian resident.

The Israeli government was aware of the unlawfulness of its actions, since the Israeli ambassador to the United Nations called this operation as the violation of Argentinian law and an interference into the sovereignty of Argentina. Also, the Prime Minister of Israel addressed a letter to the President of Argentina, expressing 'our most sincere regret for any violation of the laws of the Argentine Republic'.[52] However, at the same time the Israeli government justified the operation by its 'special significance' and its 'supreme moral force', owing to the nature of crimes committed by Eichmann. Likewise, the Israeli Supreme Court, assessing the potential violation of Eichmann's rights and lack of

48 M. Shaw names such cases as 'unlawful apprehension' (M. Shaw, op. cit., p. 680), while M. J. Glennon mentions 'state-sponsored kidnapping' and 'state-sponsored abductions' (M. J. Glennon, *State-Sponsored Abduction: A Comment on United States v. Alvarez Machain,* American Journal of International Law 1992, vol. 86, pp. 746–756.

49 K. B. Weissman, *Extraterritorial Abduction: The Endangerment of Future Peace*, in: "University of California David Law Review", 1993–1994, vol. 27, pp. 459, 467–468.

50 Ibidem, p. 471.

51 M. Bohlander, R. Boed, R. Wilson, *Defense in International Criminal Proceedings*, Leiden/Boston 2014, p. 58.

52 *Note Verbale of the Embassy of Israel in Buenos Aires to the Ministry for Foreign Affairs and Religion of the Argentine Republic, dated 3 June 1960*, par 8; *Letter from Prime Minister Ben-Gurion to President Frondizi dated 7 June 1960*, p. 5 in: *Letter Dated 21 June 1960 from the Permanent Representative of Israel to the President of the Security Council*, S/4342.

Israeli jurisdiction, stated that 'the mode of bringing the accused into the area of the State has no relevance to his trial'.[53]

Argentina protested that the 'illicit and clandestine transfer of Eichmann from Argentine territory constitutes a flagrant violation of the Argentine State's right of sovereignty',[54] and demanded 'the only appropriate reparation for this act', that is 'returning Eichmann within the current week and punishing the persons guilty of violating our national territory'.[55] Moreover, Argentina based its case upon Art. 33 of the UN Charter,[56] 'because of the dangers which this act and any others like it may involve for the maintenance of international peace and security.'[57] However, despite Argentina's assertion that the Eichmann abduction was 'an act of force',[58] it claimed that the threats to international peace and security came not from the use of forcible measures, but resulted from 'the supreme importance of the principle impaired by that violation: the unqualified respect which States owe to each other and which precludes the exercise of jurisdictional acts in the territory of other States.'[59]

During the debate within the UN Security Council, the majority of States, like the USSR, the USA or the UK, attempted to not make any decisive statements on the Israeli operation. The USSR representative claimed that Argentina had the obligation to arrest and extradite Eichmann but added that 'the violation of State sovereignty is inadmissible under any circumstances and can in no way be justified.'[60] The US ambassador stated that the case under discussion could not be considered in isolation from the crimes committed by Eichmann; however, he also asserted that the USA understood the Argentinian concerns.[61] Likewise, the UK representative claimed that '[t]he kidnapping by nationals of one State of a person or persons within the territory of another State is clearly an illegal act', but at the same time asserted that the United Kingdom under-

53 *Attorney General v. Eichmann*, American Journal of International Law 1962, vol. 56, p. 41.

54 *Letter Dated 15 June 1960 from the Representative of Argentina Addressed to the President of the Security Council*, S/4336, p. 3.

55 *Letter dated 60/06/10 from the Permanent Representative of Argentina addressed to the President of the Security Council*, S/ 4334, § 8.

56 Article 33 of the UN Charter: 1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice. 2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

57 UN Security Council Official Records, 15th year: 865th meeting, 22 June 1960, New York, S/ PV.865, § 5.

58 Ibidem, § 43.

59 Ibidem, § 34.

60 UN Security Council Official Records, 15th year: 866th meeting, 22 June 1960, New York, S/ PV.866, § 60, 68.

61 Ibidem, § 71, 76.

stood the reasons behind the Israeli conduct.[62] Other States, like Ceylon, unequi ocally called the Israeli operation 'a violation of the sovereign rights of Argentina'.[63] The only State that mentioned the use of force was Ecuador, whose representative claimed that 'The United Nations constitutes in fact a supreme effort to eliminate the use of force in any degree whatsoever in international relations' and referred to the UNSC Resolution 135.[64] However, the representative of Ecuador did not claim explicitly that the abduction amounted to a use of force.

Ultimately, the UN Security Council adopted Resolution 138 (1960) which did not mention the use of force, and only declared that 'acts such as the one under consideration, which affect the sovereignty of a Member State and therefore cause international friction, may, if repeated, endanger international peace and security' (par. 1).[65] The Resolution was supported by 13 States, with 2 abstentions (Poland and the USSR)[66].

It follows from the above quotations that the Eichmann abduction was not considered as a violation of the prohibition of the use of force, neither by Argentina itself nor by any other State. One may claim that the attitude adopted by States is in fact reflected in the position taken by the Permanent Court of International Justice in the *Lotus* judgement, when the Court stated that the 'first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State'.[67] Thus, it seems that extraterritorial abductions are considered rather as a violation of principle of non-intervention and as a breach of a State's sovereignty.[68] Even if T. Ruys correctly suggests that Argentina's attitude was the result of its awareness that claiming the use of force in

62 Ibidem, § 88–89.

63 UN Security Council Official Records, 15th year: 868th meeting, 22 June 1960, New York, S/PV.868, § 12.

64 UN Security Council Official Records, 15th year: 867th meeting, 22 June 1960, New York, S/PV.867, § 51–52.

65 UN Security Council Resolution 138 (1960) of 23 June 1960, S/RES/138.

66 S/PV.868, § 52.

67 *Case of the SS Lotus*, ICJ Series A No 10, p. 18. The question of illegal abductions is in fact the question within the domain of international criminal law, as connected with the problem of jurisdiction and extradition (for example: *International Criminal Law. Second Edition*, eds. I. Bantekas, S. Nash, , London/Sydney/Portland, OR 2003, pp. 218–225; T. Henquet, *Accountability for Arrests: The Relationship between the ICTY and NATO's NAC and SFOR* in: *International Criminal Law Developments in the Case Law of the ICTY*, eds. G. Boas, W. A. Schabas, Leiden/Boston 2003, pp. 113–155).

68 Likewise, M. Shaw points out that 'unlawful apprehension of a suspect by state agents acting in the territory of another state (…) constitute[s] a breach of international law and the norm of non-intervention involving state responsibility' (M. Shaw, op. cit., p. 680). J. Paust mentions also the violation of territorial integrity (J. Paust et al., *International Criminal Law: Cases and Materials*, Durham 1996, pp. 435–437) and L. Henkin points out the possible violation of human rights of a person arrested, by the way of abduction (L. Henkin, *Correspondence*, American Journal of International Law 1993, vol. 87 issue 1, pp. 100, 101).

a case where a Nazi war criminal was involved would be politically difficult, and not necessarily because the Argentinian government really considered the Eichmann abduction as a merely unlawful coercion,[69] at the end even the States which were the most critical towards Israel's conduct did not mention the use of force.

Taking these considerations into account, it seems that extraterritorial abductions are not considered by States as a violation of the prohibition of the use of force, but rather as a violation of the principle of non-intervention. However, as M. H. Cardozo correctly points out, if all States decided they could abduct the alleged criminals they wished to bring to domestic justice from any State in the world, it would create incredible chaos.[70] He refers to the example of Andrija Artukovic, a war criminal prosecuted by the Serbian administration of justice who was hiding in California, and rightly asserts that it would have been unthinkable if a group of Serbs, 'inspired by hatred, revenge and patriotism had decided to literally kidnap Artukovic from US territory[71] as Israel had done in the Eichmann case. Uncontrolled and discretionary abductions on a large scale would certainly constitute a threat to international peace and security. Thus, it may happen that an extraterritorial abduction, conducted with the use of weapons and harming third persons or causing substantial material losses, will be qualified differently.

**Falkland/Malvinas Islands**

On 2 April 1982 at 5 a.m., the Argentinian armed forces launched the invasion of Falkland/Malvinas Islands, starting the 1982 Argentinian – British conflict over that territory. Only a few hours later, at 1:25 p.m., the UK Governor called for a ceasefire and surrendered. As the result of fights conducted on that day, one Argentinian soldier was killed, one British serviceman was seriously wounded, and there were some materials losses. Approximately 3.000 Argentinian troops and the British Royal Marines regiment took part in the fights. The Government in London, alarmed by these events, sent the British naval task forces which were ready to leave and continue the fight over the islands right away. The conflict terminated in June 1982[72].

On the very day the invasion was launched, the United Kingdom submitted a draft resolution to the UN SC. The draft referred to a statement of the President of the Security Council calling on both the UK and Argentina to refrain from the threat or use of

69 T. Ruys, *The Meaning*…, *op.cit*. pp. 168–169.

70 Apart from the Eichmann case, one needs to observe that there were at least a few famous cases of extraterritorial abductions, to name only such cases as *United States v. Alvarez-Machain*, *Ker* v. *Illinois, Frisbie* v. *Collins (within the US jurisdiction), State* v. *Ebrahim (South Africa), R.* v. *Horseferry Road Magistrate's Court, ex parte Bennett (United Kingdom) (*T. Henquet, op. cit., pp. 153–154). In none of these cases, breach of the prohibition of the use of force was mentioned.

71 M. H. Cardozo, *When Extradition Fails, is Abduction the Solution?*, in: "American Journal of International Law:, 1961, vol. 55, pp. 127, 132.

72 K. Kubiak, *Falklandy – Port Stanley 1982*, Warszawa 2007, pp. 57–62.

force; determining that the 'armed forces of Argentina' launched an invasion and stating that 'there exists a breach of peace in the region of Falkland Islands'; the statement also demanded the cessation of hostilities, withdrawal of all Argentinian forces from the Falkland islands, and search for a diplomatic solution.[73] Thus, the United Kingdom labelled the Argentinian action an 'invasion' and not the use of force. However, later, before the UN SC, the UK called the Argentina's conduct as 'an armed attack' and 'armed invasion'.[74] Moreover, in House of Lords Prime Minister Margaret Thatcher called the events of 2 April an act of 'aggression',[75] and in a letter of 28 April to the President of the UN SC the UK called the Argentinian invasion a breach of Art. 2 (4).[76] It was only the draft resolution submitted by the UK that did not mention the use of force.

Other States which took part in the discussion within the UN SC had no doubts about the character of the Argentinian action: France, Ireland, Australia, Canada, New Zealand[77], Japan, the USA, Uganda, Togo, Zaire and Guyana[78] called the invasion not only a 'glaring' and 'clear' violation of Art. 2 (4), but also an act of aggression. Jordan and Spain condemned the Argentinian conduct more moderately and did not explicitly call it a breach of Art. 2 (4).[79] The representatives of Brazil, Bolivia, Peru, Panama, Paraguay, the USSR and Poland supported the Argentinian action,[80] claiming that the islands were never legally acquired by the UK, and thus Argentina could not be guilty of using force against its own territory.

It is hard to say why the United Kingdom avoided mentioning the use of force in its draft resolution, which it subsequently endorsed; all the more so since a few weeks later it had no doubts as to the character of the Argentinian actions. Moreover, the scholarly literature does not mention such reasons. The rationales behind such an attitude could be the fact that the UK was aware that it did not have strong legal title to the islands (the UK had occupied the islands since 1833, facing protests on the part of

73 *United Kingdom of Great Britain and Northern Ireland: draft resolution*, S/14947. The resolution, almost without any amendment (S/14947/Rev.1), was adopted on 4 April, as the UN SC Resolution 502 (1982).

74 UN Security Council Official Records, 37th year: 2350th meeting, 3 April 1982, S/PV.2350, §157, 160.

75 *Text of Falkland Speech by Prime Minister Thatcher in House of Commons*, The New York Times 21 May 1982, available at: http://www.nytimes.com/1982/05/21/world/text-of-falkland-speech-by-prime-minister-thatcher-in-house-of-commons.html?pagewanted=all accessed 20 January 2018.

76 *Letter dated 28 April 1982 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council*, S/15007.

77 UN Security Council Official Records, 37th year: 2349th meeting, 2 April 1982, S/PV.2349, § 7, 10–12, 22, 28, 33.

78 S/PV.2350, § 66, 73, 215, 222–223, 248, 260.

79 Ibidem, § 57, 203–207.

80 Ibidem, § 47–55, 77–83, 85–92, 93–133, 148–153, 230–231, 265.

Argentina which continuously claimed sovereignty over them); the direct reason for the invasion, which was the defence of Argentinian salvage workers from South Georgia Island;[81] or the opinions expressed by British politicians and journalists that the invasion was a 'humiliating affront' to the UK, which ended with the resignation of Lord Carrington, the British Foreign Secretary.[82] The fact that the British government had little doubts as to the character of the Argentinian actions from the very beginning is supported by the fact that the Resolution 502 mentions the 'breach of peace', which can be considered as a euphemism for 'the use of force', since if the UN SC determines there has been a 'breach of peace', it does so because the use of armed force occurred.[83]

Summing up, the fact that a State, even the one which was attacked, does not mention the use of force does not necessarily mean that it considers the actions taken against it as being below the threshold of the use of force. The determination of a breach of the prohibition of the use of force may be uncomfortable or undesired for political reasons, which may cause a State to refrain from making such firm allegations before the events evolve. Moreover, as the example of invasion of the Falkland/Malvinas Islands shows, a State may refrain from claiming a violation of Art. 2 (4) even if in fact it considers that the prohibition was breached.

## Conclusions

The suggestions made in the legal doctrine that some measures involving a low level of the use of force are not covered by the prohibition of the use of force, since they are below certain 'threshold' of violence, are not confirmed by States' practice. This article has discussed two cases of actions mentioned in the scholarly literature as being below such a threshold, i.e. operations to rescue nationals, as well as extraterritorial abductions. The operations aimed at assisting nationals abroad may take the form of an armed intervention, but the use of armed forces may also be limited exclusively to evacuation, wherein no force is actually used. On the other hand, extraterritorial abductions are not considered in the category of the use of force, but rather as violations of the principle

81 J. F. Gravelle, *The Falkland (Malvinas) Islands: An International Law Analysis of the Dispute Between Argentina and Great Britain*, in: Military Law Review 1985, vol. 107, pp. 5, 14–15.

82 The New York Times, *Foreign Secretary Resigns in Britain in Falkland Crisis*, 6 April 1982, available at: http://www.nytimes.com/1982/04/06/world/foreign-secretary-resigns-britain-falkland-crisis-text-carrington-letter-page-a6.html, [access: 20 January 2018].

83 M. Wood compares the 'breach of peace' to the term 'aggression', claiming that it is more specific than 'threat to peace'; on the other hand, the difference between the 'breach of peace' and 'aggression' is that the latter term refers rather to more serious the breach of peace (M. Wood, *Peace, Breach of* in: *The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia of Public International Law*, eds. F. Lachenmann, R. Wolfrum, Oxford 2017, p. 925).

of non-intervention. Finally, the example of Argentinian invasion over the Falkland/Malvinas Islands shows that the fact that an invaded State does not mention the breach of the prohibition of the use of force does not necessarily mean that it considers the action against it as being below the 'threshold'. At the same time, one needs to highlight the indispensable need to make a case-by-case analysis.

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**SUMMARY**

**When 'the Use of Force' is Prohibited? –
Article 2 (4) and the 'Threshold' of the Use of Force**

This article advances the thesis that there is no threshold of the use of force. i.e. no level of the use of force which decides whether and which forcible actions undertaken by States are prohibited. The examples of actions discussed in the doctrine of law which supposedly would be 'below' such a threshold in fact either are regulated by other principles of international law, are not considered as regulated by *ius ad bellum*, or States deliberately resign from calling them a use of force for both legal and extra-legal reasons. Thus, the existence of such a threshold is not confirmed by States' practice. This thesis will be explored using three examples: the cases of the evacuation of nationals, the extra-territorial and the Falklands/Malvinas Islands invasion of 2 April 1982. The article starts with a brief discussion of the opinions expressed in the doctrine of international law on the threshold, as well as the applicable case law.

Keywords: extraterritorial abduction, evacuation of nationals, Falklands/Malvinas, threshold, use of force

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# The Issues of Secession in the Process of the Rise and Fall of States in the Light of International Law

## Introduction

The rise and fall of a state are events that produce specific legal consequences. These effects, especially in the field of succession, are regulated – to a greater or lesser extent – by international law[1]. An equally important issue is to determine whether the very rise and fall of the state is regulated by international law. International law deals with the state from outside, as an existing phenomenon. This statement remains valid as far as the creation of the state is concerned. As for the fall of the state, international law has never really been a mere witness of this event. If in earlier times, annexation was one of the reasons for the state's collapse (if not the main reason), it was international law that determined the conditions of its legality. To a much greater extent, the fall of the state is regulated by modern international law. This is connected not only with the prohibition on the use of force and the resulting prohibition on annexation, but also with the right of nations to self-determination. Annexation is nowadays an illegal act and therefore does not cause the state to fall, not only because it is a consequence of the use of force, but also because it is incompatible with the right of peoples and nations to self-determination. A nation can not be deprived of its own state against its will.

The right of nations to self-determination is in this respect complementary to the basic law of the state – the right to exist. According to contemporary international law, the loss of statehood (and thus the loss of subjectivity of international law) can only take place on a voluntary basis. However, there are also reasons for the fall of a state, for which international law was and still is really only a witness (e.g. when the existing state is divided into several parts: In any case, it can be initially established that at least some cases of state collapse are regulated by international law. The situation is different

1 Vid. R. Kwiecień, *Status prawny i rola państw w społeczności międzynarodowej a podmiotowe granice prawa międzynarodowego*, in: *Państwo i terytorium w prawie międzynarodowym*, eds. J. Menkes, E. Cała-Wacinkiewicz, Warszaw 2015, p. 85.

when it comes to the creation of states. Here, international law is always only a witness registering the fact of its creation. For international law is indifferent with regard to the way in which the state was created. The rise of the state in the wake of a civil war is no less "legal" than the rise of states as a result of the independence granted by the metropolis. Those two examples of how the state was founded can and should be distinguished, but only from the point of view of the genesis of a given state, which may consist of various elements which are real (e.g. civil war) as well as legal (metropolitan legal acts, international agreements or the resolutions of relevant UN bodies) – in the light of international law there is no significance in the creation of a state. The creation of a state is an act independent of its origin. The state does not have to prove its genesis. Undoubtedly, these or other elements of the genesis of the state may facilitate or hinder the international situation of the state in the initial period of its existence, may, in particular, be important for its the recognition by other states[2]. In the course of the decolonization process that followed the Second World War, many new countries emerged, especially in Asia and Africa. These countries were created during the period when the right to self-determination became a rule of international law. Therefore, it can be said that these states arose as a result of the peoples of these countries (i.e. former colonial areas) realizing their right to self-determination. Due to the importance of the right to self-determination for the genesis of the state in our modern times, it requires more detailed discussion. On the other hand, the right to self-determination also plays a specific role in the event of a state failure.

## The Rise and Fall of the State and International Law

According to C. Berezowski, there are certain reasons for the creation of a state, some of which are connected with the creation of a state in a direct way, and therefore they can be called causes that are closer to the creation of the state[3]. The entirety of these causes determines the formation of the state, constituting its genesis[4]. The beginning of the origin of the state is the first proximate cause, and thus certain events t can be legally assessed as

2 Vid. E. Dynia, *Uzananie państwa w prawie międzynarodowym*, Rzeszów, 2017, p. 304.

3 Vid. C. Berezowski, *Powstanie pa*ństwa *polskiego w* świetle *prawa międzynarodowego*, Warszawa 1934, p. 31; J. Crawford, *The creation of states in international law*, Oxford, Oxford University Press 2006; M. Shaw, *International Law*, Cambridge University Press, Cambridge 2003; T. Grant, *The Recognition of States: Law and Practice in Debate and Evolution*, Greenwood Publishing Group, Westport 1999; J. Crawford, *The Creation of States in International Law*, Oxford University Press, 2nd ed. Oxford 2006; A. Klafkowski, *Prawo międzynarodowe publiczne*, Warszawa 1971, p. 112.

4 C. Schreuer, *The waning of the sovereign State: Towards a new paradigm for international law?*, in: "European Journal of International Law", 1993, p. 447; *Yearbook of the International Law Commission* , 1975/II, p. 93.

being in direct relation with the state's establishment[5]. According to C. Berezowski, the beginning of the genesis of the state takes place when the legal order existing in a given area makes concessions for emancipation, i.e. when it recognizes the possibility of its manifestations. In the event of an armed uprising, such a concession is the state's recognition of insurgents. An example of gaining independence following armed struggle is the creation of Algeria on July 1 1962. In 1954, the National Liberation Front was created, and in 1958 – the Provisional Government; on March 19 1962, in Evian, the French government concluded with the Provisional Government of Republic Algerian a so-called a general arrangement in which steps were planned which would lead to Algeria's independence. The overwhelming majority of states created as a result of decolonization gained independence through it being granted by the metropole. In these cases, the genesis of individual states consists of the legal acts of the metropolis. A special procedure was applicable to fiduciary areas. Here the decisive role was played by the resolutions of the UN General Assembly on the expiry of relevant trust agreements. C. Berezowski expresses the view that in the case of fiduciary areas, the beginning of a new state is the conclusion of a trust deed.

The legal acts of the metropole, agreements between the metropole and the organs of the national liberation movement, and the resolutions of the UN General Assembly concerning specific areas, are individualized acts as elements of the genesis of a specific state. In addition, the right to self-determination has a significant impact on the origin of the states that arise from the decolonization process. The right to self-determination understood as the right of colonial peoples to independence (part II) has the character of a general norm requiring colonial powers to carry out decolonization. If a colonial people make a claim for independence, grounds for this are found in international law and the metropole is obliged to take appropriate steps to satisfy this claim. In other words, the right to self-determination as a general norm will determine, as soon as the colonial people invoke it, the origin of the state. The creation of the state, however, is an act independent of its origin. Regardless of whether the home state cooperates in the process of the formation of a new state (i.e. according to the popular term "grants independence") or actively combats this process, the act of forming a state is of a primary nature. In the event of independence by the colonies, the metropole most often gradually passed individual competencies to local authorities. However, the original character of the act of establishing a state denies that the new state takes power away from another country. The power of the new state is always its primary power, which it derives from its own (and not given) sovereignty. The state always arises from its own power, regardless of its origin. The state is not, therefore, established on the basis of a legal act of the metropolis granting independence on the basis of an international treaty or a resolution of the

5 L. Antonowicz, *Powstanie i upadek państw jako podmiotów prawa Międzynarodowego*, in: "Sprawy Międzynarodowe", 1968, no. 2, p. 71.

General Assembly of the United Nations, as these are only elements of its genesis. Since the state is always created by its own power, the manner in which the state is founded cannot be subject to legal assessment. In the literature, the establishment of a state is usually referred to as a historical fact, poetic, sociological or extralegal. While circumstances connected with the creation of a state may be available for legal assessment, the examination of the compatibility of the act of establishing a state with international law is ruled out. From the point of view of international law, it is a matter of indifference how the state was created. *International law does not accept earlier matters in relation to obtaining the characteristics of statehood and, consequently, remains indifferent to the ways that a certain community can use to form the state*[6]. The legal status of a well-organized community is not affected by either the moral defects of the genesis or the violation of the law which could have been accompanied by its establishment. International law is limited to confirming the establishment of a state, referring to the features of statehood. While – as claimed by J. Symonides – the process and causes leading to the emergence of the state are of secondary significance, it is of prime importance to determine the criteria and the origin of the state, because with this date certain legal effects are connected, as the state it becomes the subject of rights and obligations[7].

The existence of a state as a sovereign territorial organization *determinines its effectiveness*[8]. According to H. Kelsen, the moment of the establishment of the state is determined by positive international law in accordance with the principle of efficiency[9]. J. Symonides defines the principle of effectiveness as the principle according to which the actual (effective) existence or non-existence of the actual situations prescribed by international law causes ipso facto legal effects, or is a necessary condition for their emergence. Referring to the earlier considerations, it can be concluded that unless there is a legal norm regulating the way the state was established, the principle of effectiveness determines its creation. The principle of effectiveness does not regulate the way the state is founded, but – and this is its significance – allows the answers to two important questions to be ascertained: whether the state was founded at all and when it arose. As far as the first issue is concerned, in accordance with the principle of effectiveness, a specific factual situation must be not only real: "The condition of the effectiveness of the actual

6 T. Grant, op. cit.; C. Drew, *The Meaning of Self-determination: The Stealing of the Sahara Redux?*, Karin Arts & Pedro Pinto Leite, International law and the question of Western Sahara (Leiden, IPJET, 2007), p. 87.

7 J. Symonides, *Terytorium państwowe w świetle zasady efektywności*, Toruń 1971, pp. 178–179; W. Multan, J. Symonides: *Powstanie Ludowej Republiki Bengalii – niektóre aspekty prawnomiędzynarodowe*, in: "Sprawy Międzynarodowe" 1972, nr 6, pp. 50–51.

8 J. Sondel, *'Ius postliminii', jako podstawa uznania ciągłości I i II oraz II i III Rzeczypospolitej*, [w:] *Na szlakach Niepodległej. Polska myśl polityczna i prawna w latach 1918–1939*, ed. M. Marszał, M. Sadowski, Wrocław 2009, p. 22.

9 H. Kelsen, *Principles of International Law*, New York 1959, s. 258.

situation is to have a firm and stable character. The uncertain and unstable situation usually does not have legal consequences." This condition of stability and sustainability plays an important role in the formation of the state. The requirement of stability and durability, stemming from the rule of principle, makes it possible to state which territorial communities that regard themselves as states. Therefore, Mandżukuo (1932–1945), Slovakia (1939–1945) and Croatia (1941–1945) were not states operating under international law. Rhodesia, whose authorities proclaimed independence from British law in 1965, was not a state, but not because of its genesis and its system, which did not correspond to the will of the majority of the population, but because the existing situation there did not meet the requirement durability and stability[10].

## The Right to Self-Determination and the Rise and Fall of the State

The principle of self-determination means not only the right to create one's own state[11]. Its reach also includes nations that already have their own countries. In this case, the subject of the right to self-determination is a nation identified with the entire population of an already existing state. The right to self-determination here means the right of every nation to choose the form of government and the political and social system that suits it[12]. The principle of self-determination is here closely related to the principle of sovereignty and the principle of non-interference in the internal affairs of other states. Since every nation has the right to determine, without foreign interference, the system of its state, it is even more entitled to maintain this state. No nation, therefore, can be deprived of its own state against its will[13]. In this context, the principle of self-determination is closely related to the prohibition of the use of force and the threat of its use. It also complements the

10 G. Kreijen. ÔThe *Transformation of Sovereignty and African Independence: No Shortcuts to StatehoodŌ*, in: State Sovereignty and International Governance, ed. G. Kreijen, Oxford University Press, Oxford 2002, p. 45.

11 C. Drew. *The Meaning of Self-determination: The Stealing of the Sahara Redux?*, in: Karin Arts & Pedro Pinto Leite, International law and the question of Western Sahara (Leiden, IPJET, 2007), p. 87. "Wszystkie narody mają prawo do samostanowienia. Z mocy tego prawa swobodnie określają one swój status polityczny i swobodnie zapewniają swój rozwój gospodarczy, społeczny i kulturalny". Art. 1 ust. 1 Międzynarodowego Paktu Praw Obywatelskich i Politycznych (Dz.U. z 1977 r. Nr 38, poz. 167, zał.).

12 F. Przetacznik, *The Basic Collective Human Right to Self-Determination of Peoples and Nation as a Prerequisite for Peace: its Philosophical Background and Practical Application*, in: "Revue de Droit International. De Sciences diplomatiques et politiques. The International Law Review" 1/1992, p. 25.

13 Vid. J. Kolasa, *Odzyskanie przez Polskę niepodległości w 1918 r. w świetle prawa międzynarodowego*, in: "Przegląd Sejmowy" 5/2008, p. 29; Vid. S. Hubert, *Odbudowa państwa polskiego jako problemat prawa narodów*, Lwów 1934; idem, *Rozbiory i odrodzenie Rzeczypospolitej. Zagadnienie prawa międzynarodowego*, Lwów 1937; J. Sondel, op. cit., p. 22.

fundamental right of the state to exist. The right to self-determination also implies that every nation can renounce its own statehood, either by establishing with a new nation or nations a new state (the unification of states) or by joining another state (incorporation).

If, however, there are circumstances that raise doubts as to the voluntary nature of such an act, it can be assumed that the right to self-determination implies the presumption of the continued existence of the state even after its collapse. It seems that such a presumption is a fundamental consequence of the right to self-determination considered in connection with the problems of the state's collapse. This presumption now serves to reinforce the general presumption of the continuity of the state that derives from international law. The right of every nation to form its own state was formulated as a political postulate. According to W.I. Lenin "... through self-determination of nations is understood as their state detachment from the national teams, it means the creation of a self-contained nation-state." Lenin's concept of the right to self-determination, as opposed to the Western (Wilsonian) concept of the right to self-determination, did not include colonial lands, excluding the provinces of the Ottoman Empire, if they were considered as "colonial areas"[14]. In any case – as L. Dembiński states – "irrespective of various theoretical interpretations of the Wilsonian and Leninist concept of the principle of self-determination, their political application was almost entirely restricted to the European peoples who had never had, or were deprived of, independent existence"[15]. In the interwar period, the principle of self-determination was the only political principle, but it played a significant role as the only basis for shaping the international order. The right to self-determination was elevated to the rank of a principle of international law only with the entry into force of the United Nations Charter. However, the provisions of the UN Charter are very general in this respect (Articles 1 and 55). The development of the principle of self-determination took place in the resolutions of the UN General Assembly. Resolution 637 A / VII concerning the right of peoples and people for self-determination and the declaration on granting independence to colonial countries and peoples (res 1514 / XV) should be mentioned here[16]. In a broader context, the principle of self-determination has been defined in the declaration of the international rules regarding friendly relations and the cooperation of states in accordance

14 W. I. Lenin: *O prawie narodów do samostanowienia*, in: *Dzieła wybrane*, Warszawa 1949, t. 1, p. 70.

15 L. Dembiński: *Samostanowienie w prawie i praktyce ONZ,* Warszawa 1969, p. 20.

16 At the opposite extreme, however, the right of peoples to self-determination was invoked as the basis for the intervention of the organized international community. The UN Charter begins with the words, "We, the peoples…" and the right of self-determination, based on the UN Charter, has emerged as a fundamental principle of modern international law. In an opinion on Namibia, given in 1970 in relation to the illegal presence of South Africa in the territory concerned, the International Court of Justice had already declared that "the injured entity is a people which must look to the international community for assistance" Legal Consequences for States of the Continued Presence of South Africa in Namibia [South West Africa ] Notwithstanding Security Council Resolution 276, Advisory Opinion, I.C.J. Reports 1971, p. 56.

with the UN Charter (Resolution 2625 / XXV). In a special context, the right to self-determination is dealt with by the UN General Assembly resolution on the definition of aggression (Res. 3314 / XXIX). Naturally, Art. 1 of both UN Covenants on Human Rights establishes the right to self-determination for "all peoples". In UN practice, there is a special relationship between the right of peoples to self-determination and decolonization. In Resolution 637 / A / VII, the General Assembly recommended that "States member of the United Nations recognize and support the implementation of the right to self-rule nations that are under their administration and facilitate the exercise of this right for nations in such areas, in accordance with the principles and spirit of the United Nations Charter, in each area and in accordance with the free will of the nations concerned." Resolution 1514 / XV /, calling for independence for countries and peoples, clearly highlights this relationship. Similar conclusions can be drawn from the content of other UN resolutions. The connection between the right of peoples to self-determination and decolonization was also emphasized in doctrine. L. Dembiński states that from the Second World War "the problem of self-management was closely related to the problem of the colony, and so much that it was impossible to separate them separately." A similar opinion is expressed by H. Bokor-Szegó when he writes that nowadays a typical form of applying the right to self-determination is the separation of a territory dependent on the colonial power and the creation of its own non-independent state. International community has recognized that people of dependent areas has the right to independence, what it confirmed by the practice on the United Nations, its States and the views of scholars.

## Secession as a Form of Insurrection and Collapse of the State

Does the right to self-determination also mean the right of orthers than colonial peoples to independence? Does the right to self-determination include the so-called right to secession[17]? This issue is contentious. In addition to the view that "the introduction of self-determination into international law necessarily entails the recognition of the right to secession", one can find the opinions of authors who deny the existence of such a right or at least doubt its existence[18]. Considering this problem, it must be claimed that existence or non-existence can only be inferred from the practice of the post-World War II period. Since before that the right to self-determination was only a political and moral prin-

17 G. Abi-Saab, *Conclusion*, in: *Secession : A Contemporary International Law Perspective*, dir. M. Kohen, Cambridge University Press, 2006, p. 470; W. Czapliński, *Samostanowienie-secesja-uznanie (uwagi na tle inkorporacja Krymu do Federacji Rosyjskiej*, [w:] *Państwo i teryritorium w prawie międzynarodowym*, eds. J. Menkes, E. Cała-Wacinkiewicz, Warszawa 2015, pp. 245–246.

18 S. Kaur, *Self-Determination in International Law*, in: "Indian Journal of International Law" 1970, vol. 10, p. 493; R. Emerson, *Self-Determination*, in: "American Journal of International Law" 1971, vol. 65, p. 464; M. Shaw, *International Law*, Cambridge University Press, Cambridge 2003.

ciple, from the fact that with the independence of some European nations after the First World War the right to self-determination was invoked, no conclusions can be drawn about the "right to secession". By secession, we mean the separation of an integral part of the state territory. Most countries ceased to treat independence in the colonial areas at the time when self-determination became the rule of international law as secession. According to the prevailing view, the area is not self-governing is not an integral part of the metropolitan territory. The United Nations Declaration in Resolution 2625 / XXV states that the territory of a colony or other non-dependent area has, by virtue of the UN Charter, a status which is distinct and different from the territory administering it, while such separate and different status under the Charter should exist until such time as the people of the colony or non-dependent area will exercise their right to self-determination in accordance with the Charter, in particular with its aims and principles[19]. For this reason – as L. Antonowicz notes – *the issue of the independence of colonial territories differs from the issue of secession of other types of territories*[20]. In the course of the codification work on the secession of states in relation to the treaties, the International Law Commission clearly opposed the independence of the colonies in the UN period, the former cases of independence by the colonies, and so in the period when they were considered "as being in the full sense, the territories of the colonial power."

The right of the colonial peoples to independence is, therefore, an issue different from the "right to secession", i.e. on the basis of the right of these peoples to independence, one can not infer the right to secession to exist. Based on the current practice of states and international organizations (e.g. the negative position of the United Nations and the Organization of African Unity with regard to the movements of secession in Katanga and Biafra) the thesis can be put forward that international law does not acknowledge the right to secession, because – in the light of this practice – it does not stem from the principle of self-determination of the state. The principle of international law: the "right to secession", as the right of a specific nation or people inhabiting an integral part of the state (and a territorially constituent minority in it) to separate from it and create its own state, would be – in the light of understood practice – only a political principle. This is, of course, the transformation of the future "right to secession" into a legal principle. The above thesis is not the only possible interpretation of the principle of self-determination. In any case, it must be emphasized at this point that the statement that international law does not acknowledge the "right to secession" cannot lead to the conclusion that it is forbidden. In particular, the principle of territorial integrity does not prohibit secession, as this applies to relations between states, not relations between a state and a population of territories within its territory. But secession violates the principles of territorial

19 Vid. J. Symonides, op. cit., p. 178–179; W. Multan, J. Symonides, op. cit., pp. 50–51.

20 L. Antonowicz: *Likwidacja kolonializmu ze stanowiska prawa międzynarodowego*, Warszawa 1964, pp. 131–132.

integrity. Due to the fact that UN practice limited the application of the right to self-determination to colonial peoples, the establishment of a state in the former colonial area puts them in a situation which in the light of UN law is more advantageous than that of the situation of astate resulting from secession. However, the right to self-determination itself does not create any state, neither does the state create a legal act of another state or states. The state always arises from its own power (chapter III). Therefore, the right to self-determination matters only to the genesis of the state.

## Conclusion

In the end, it must be emphasized that if international law "does not prohibit" secession, this does not mean that it refers back to the state and secessionist group. The right of sel – determination remains hostile to secession. Establishing a presumption against the effectiveness of secession and in favor of the territorial integrity of the pre-existing State. Effectivities thus often have a greater role to play in terms of acquiescence, or rather the resignation of the pre-existing State (which, compelled by the force of facts, realizes that it no longer really has a choice and abandons its attempts at recovery), than that of the "automatic" birth of a new state.

The myth of the "absolute neutrality" of the law, advocated by the theory of effectiveness, does not, therefore, seem to correspond exactly to reality. Relying on, inter alia, the resolutions and declarations of the Security Council concerning secessionist crises in Bosnia, Croatia, Georgia, Moldova, Azerbaijan etc., some writers have even wondered if some emerging trends indicate a prohibition on secession and the legalization of repression. Perhaps the argument would be stronger if the case of Kosovo did not weaken it not so much, which is a real "anomaly" within the system and could constitute a very dangerous precedent, as evidenced by the numerous references to the possible independence of Kosovo by various independence movements or other actors.

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**SUMMARY**

**The Issues of Secession in the Process of the Rise and Fall of States in the Light of International Law**

The aims of this contribution is to check the validity of the old theory, which goes back to Jellinek but is still dominant, which states that secession as well as the process of forming a new state, fall under the scope of a "simple fact" and thereby escape through definition to any law of way. According to this theory, secession is not a question of "Law" but a question of pure fact, failure or success: if a secessionist movement succeeds in establishing a new effectiveness, that is to say, puts in place the "Constituent elements" of a state, a new state is born. It is interesting to observe that with the phenomenon of the rise or the collapse of States, from the global perspective of international order and especially from the point of view of international law, the States concerned are, in practice, not simply left to their fate. On the contrary, the rise or the collapse of a State anywhere in the world is seen as a matter of concern for the international community, since the international system as a whole is felt to be affected. In such cases, international reactions have not been manifested primarily through the States as such, either individually or together. Basically, these reactions had to cope with the dilemma of choosing between two fundamental principles of legitimacy in international law: on the one hand, the sovereignty and equality of States and, on the other, the right of peoples to self-determination.

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

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# The International Legal Issue of Attribution of Conduct to a State – The Case Law of the International Courts and Tribunals

## Introduction

Draft Articles on Responsibility of States for Internationally Wrongful Acts (henceforth referred to as the ILC Articles) were adopted by the International Law Commission on 10 August 2001. Four months later, on 12 December 2001, the General Assembly of the United Nations commended the work to the attention of governments without prejudice to the question of their future adoption or other appropriate action.[1] Despite the fact that almost two decades have passed, still no decision has been made as to the final form of the document. The need for regulation was emphasised right from the beginning of the existence of the ILC – in 1949 the topic "State responsibility" was selected as one of the fourteen topics suitable for codification. It was recognized as of major importance in the relations of States; therefore it took more than forty years to conclude the work with the draft articles and produce a detailed commentary on the subject. Throughout that time basic concepts of State responsibility, such as attribution, breach, excuses and consequences were examined and set out in 59 Articles. The second Special Reporter of the ILC – Robert Ago established the basic structure of the document, which originates from the division of norms into primary and secondary. The ILC Articles aim to present the general conditions for State responsibility – the emphasis is on the secondary rules of State responsibility, without the ambition to define the content of the primary obligations of States.[2]

In the final form, the ILC Articles are divided into four parts and subdivided into chapters. Part One, entitled "The internationally wrongful act of a State", recognizes the requirements for the international responsibility of a State to arise. Article 2 may therefore be treated as its core provision, since it states that in order to invoke the interna-

1 General Assembly Resolution, 28 January 2002, UN Doc. A/RES/56/83.

2 Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Yearbook of the International Law Commission, 2001, vol. II, Part Two, UN Doc. A/56/83 (2001), General commentary, §§ 1.

tional responsibility of a State, it is essential to establish both that a conduct in question is attributable to a State and that it constitutes a breach of its international obligation. Commentary to the ILC Draft describes the process of attribution as a normative operation, which must be distinguished from the second constituent element of the international responsibility of a State, i.e. characterization of a State's act as internationally wrongful.[3] Therefore, both "subjective" and "objective" conditions must be met, although the ILC Articles themselves avoid such terminology. Apart from formulating principles, which enable the characterization of an act of a State as internationally wrongful, one of the main purposes of the document was to determine under what circumstances given conduct can be attributed to a State as a subject of international law. That important topic is dealt with in Articles 4–11 – the second chapter of the ILC Articles broadens the subject of attributing conduct to a State. A general rule of attribution is expressed in Article 4[4], which states that only the conduct of the organs of government is attributable to a State. States as peculiar juridical abstractions[5] act only through their organs, instrumentalities and officials which constitute part of its organization. Of course it is the role of internal law to decide on the structure of a State – appointment of its organs and determining the functions assigned to them. On the other hand, the task of international law is to prevent States' attempts to avoid responsibility by recalling their internal structure – therefore national law is not the only tool used in the process of classification[6]. The basic danger of such an approach would be the possibility of carrying out unlawful conduct through allegedly non-state actors without incurring responsibility. Even if internal law denies the existence of a formal link between an individual and a State, that person can still be equated with *de facto* State organ if there is a relationship of 'complete dependence' on the State.[7] Legal status established under internal law is therefore not the only factor determining the potential responsibility of a State.

3 Commentary to the ILC Articles, p. 39, § 4.

4 Article 4 of the ILC Articles: "1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State. 2. An organ includes any person or entity which has that status in accordance with the internal law of the State".

5 The term used by J. Crawford and S. Olleson in *The Nature and Forms of International Responsibility*, in: *International Law*, ed. M. D. Evans, Oxford 2003, p. 454.

6 "(…) international law does not permit a State to escape its international responsibilities by a mere process of internal subdivision. The State as a subject of international law is held responsible for the conduct of all the organs, instrumentalities and officials which form part of its organization and act in that capacity, whether or not they have separate legal personality under its internal law". See Commentary to the ILC Articles, p. 39, §7.

7 In *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* the International Court of Justice held that: "(…) persons, groups of persons or entities may, for purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities

Apart from the general rule, the second chapter of the ILC Articles provides for more complex scenarios, where a State is responsible for the conduct of private persons. Those specific circumstances involve:

- the conduct of a person or entity, which is not an organ of the State but is empowered under national law to exercise delegated governmental functions (Article 5);
- the conduct of State organs placed at a disposal of another State (Article 6);
- conduct in excess of authority (Article 7);
- conduct directed or controlled by a State (Article 8);
- conduct carried out in the absence or default of the official authorities (Article 9);
- the conduct of an insurrectional or other movement, which succeeds in becoming the new Government of the State (Article 10);
- conduct acknowledged and adopted by a State as its own (Article 11).

## The Topic of Attribution in the Case Law

Long before the final adoption of the ILC Articles, the International Court of Justice (henceforth referred to as the ICJ) had dealt with the issue of attribution. In the *United States Diplomatic and Consular Staff in Tehran* case[8] it observed that in order to prove the responsibility of the Islamic Republic of Iran it is crucial to "determine how far, legally, the acts in question may be regarded as imputable to the Iranian State".[9] Therefore, the Court had to examine the relationship between the Iranian students who had attacked the United States embassy and the government of Iran. In this regard it examined statements made by various governmental authorities in Iran and held:

> the policy thus announced by the Ayatollah Khomeini, of maintaining the occupation of the Embassy and the detention of its inmates as hostages for the purpose of exerting pressure on the United States Government was complied with by other Iranian authorities and endorsed by them repeatedly in statements made in various

act in "complete dependence" on the State, of which they are ultimately merely the instrument. In such a case, it is appropriate to look beyond legal status alone, in order to grasp the reality of the relationship between the person taking action, and the State to which he is so closely attached as to appear to be nothing more than its agent: any other solution would allow States to escape their international responsibility by choosing to act through persons or entities whose supposed independence would be purely fictitious". ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Hercegovina v. Serbia and Montenegro), Judgement of 26 February 2007, § 392.

8 ICJ, *Case Concerning United States Diplomatic and Consular Staff in Teheran* (United States of America v. Iran), Judgement of 24 May 1980.

9 Ibidem, § 56.

> contexts. The result of that policy was fundamentally to transform the legal nature of the situation created by the occupation of the Embassy and the detention of its diplomatic and consular staff as hostages. The approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetuate them, translated continuing occupation of the Embassy and detention of the hostages into acts of that State. The militants, authors of the invasion and jailers of the hostages, had now become agents of the Iranian State, for whose acts the State itself was internationally responsible.[10]

By this means the Court acknowledged that an act which constitutes a breach of international law should be attributed to the State, if it was publicly approved *ex post facto*. Under such circumstances, persons directly responsible for such conduct should be equated with *de facto* agents of the State – the scenario currently provided for in Article 11 of the ILC Articles.[11] This deals with cases in which conduct was not attributable to a State at the time of the commission, however an unequivocal and unqualified acknowledgement and adoption may be granted a retroactive effect, making a State responsible *ab initio*.[12] In the words of the commentary, such a solution "avoids gaps in the extent of responsibility for what is, in effect, the same continuing act".[13] As for the requirement of subsequent acknowledgement or adoption, it is worth pointing out that in order to transform the legal nature of private conduct, it must extend mere support or endorsement.[14] In other words, Article 11 provides for a situation where the State identifies the conduct and translates it into its own acts.

The case at hand can, moreover, be seen as a significant contribution to the discussion on accountability for prevention, since the Court pointed out that Iran was responsible for its failure to prevent crimes against internationally protected persons.[15] Such a mechanism may be used when the rules of attribution do not allow a State to be held accountable for the unlawful acts of private actors. Under such circumstances a State

10 Ibidem, § 74.

11 Article 11 of the ILC Articles: "Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own".

12 Commentary to Article 11, § 4.

13 Ibidem.

14 Commentary to Article 11, § 6.

15 The responsibility of Iran for failure to take any steps to prevent the attacks was distinguished from accountability for private conduct: "The Iranian authorities' decision to continue the subjection of the premises of the United States Embassy to occupation by militants and of the Embassy staff to detention as hostages, clearly gave rise to repeated and multiple breaches of the applicable provisions of the Vienna Conventions even more serious than those which arose from their failure to take any steps to prevent the attacks on the inviolability of these premises and staff". *Case Concerning United States Diplomatic and Consular Staff in Teheran*, § 76.

may still be held responsible for its own conduct which consists in lack of prevention, since as M. Dixon puts it: "irrespective of the question of attributability, a State may incur primary responsibility because of a breach of some other international obligation, even though this obligation arose of the situation created by a non-attributable act".[16] In other words, instead of being responsible for purely private conduct, a State is held accountable for a separate delict, which amounts to failure to comply with its obligation, whether positive or negative.[17] Such an approach is reflected in the 'separate delict theory', expressed in the fourth report on State responsibility submitted by the Special Rapporteur R. Ago in 1972. According to the document, in the case of failure to fulfil an obligation to prevent unlawful conduct of private actors, the state is "responsible for having violated not the international obligation with which the individual's action might be in contradiction, but the general or specific obligation imposing on its organs a duty to provide protection".[18]

The same stance was taken in the case *Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide.* Admittedly, the ICJ held that the conduct of VRS and paramilitary groups was not attributable to Serbia and Montenegro, since they did not constitute organs of the Respondent (whether *de jure* or *de facto*). However, the Court held Serbia and Montenegro responsible for infringement of its obligation to prevent the genocide, since it did nothing to prevent the atrocities committed by the Bosnian Serbs in Srebrnica. That kind of responsibility was expressly distinguished from accountability for *de jure* or *de facto* state organs[19].

Another facet of the issue of attributing private conduct to a State has also been the subject of consideration of arbitral tribunals, including the Iran-United States Claims Tribunal. In the *Kenneth P. Yeager* case[20] it had to assess whether the conduct of the Iranian revolutionary "Komitehs" or "Guards" could be attributed to Iran. Admittedly, international law did not recognize them as part of the official authorities, but the actual

16 M. Dixon, *Textbook on International Law*, Oxford 2007, p. 252.

17 Vid. E. Nielsen, *State Responsibility for Terrorist Groups*, in: "U. C. Davis Journal of International Law and Policy" 2010, Vol. 17, p. 167.

18 The fourth report on State responsibility, by Roberto Ago, Special Rapporteur – The internationally wrongful act of the State, source of international responsibility (continued), Yearbook of the International Law Commission, 1972, Vol. II, UN Doc. A/CN.4/264, § 140.

19 E. Nielsen, op. cit., p. 167.

20 *Kenneth P. Yeager v. Islamic Republic of Iran*, Iran-U.S. Claims Tribunal Reports, 1987, vol. IV, p. 92. It was one of the cases concerning unlawful expulsion of a United States national from the territory of Iran during the Iranian revolution in 1979. For further comment on the case vid. M. Leigh, *Yeager v. Islamic Republic of Iran. AWD 324–10199–1; AND Rankin v. Islamic Republic of Iran. AWD 326–10913–2*, "The American Journal of International Law" 1988, Vol. 82, no. 2, pp. 353–362; M. Haddadi, H. Khosroshahi, *Disguised Expulsion from Iran-United States Tribunal to the International Law Commission's Draft on the Expulsion of Aliens,* "International Journal of Academic Research in Public Policy and Governance" 2015, Vol. 2, no. 1, p. 18.

exercise of governmental authority in the absence of the previous State apparatus and tolerance to the exercise of public functions by revolutionary guards gave rise to the claim that Iran was responsible for their unlawful acts. Therefore, once again, despite the lack of an official relationship between the perpetrators of the act and the State, responsibility of the latter was established that time by reference to the then Article 8(b) of the 1975 ILC Articles, which expressed the principle that a State is responsible for the acts of private persons if they were "in fact exercising elements of governmental authority in the absence of the official authorities and in circumstances which justified the exercise of those elements of authority"[21] – the situation currently dealt with in Article 9.[22]

After the final adoption of the ILC Articles, they have been applied on numerous occasions by international courts and tribunals. What is more, the jurisprudence acknowledged the fact that the provisions of the document constituted in fact customary international law. The International Court of Justice, which made reference to provisions of the Articles on a number of occasions, has adopted that approach *inter alia* on the occasion of its aforementioned considerations of whether the actions of VRS and paramilitary groups in relation to the genocide in Srebrnica were attributable to Serbia and Montenegro. In the course of its examination on the relationship between the respondent and perpetrators of genocide, operating on the territory of Bosnia and Herzegovina, the Court observed that "on this subject the applicable rule, which is one of customary law of international responsibility, is laid down in Article 8 of the ILC Articles on State Responsibility".[23]

The principles connected with the process of attribution expressed in the ILC Articles have not only been reaffirmed on numerous occasions, but have also become the source of controversies stemming from different understandings of its provisions. For instance, references to the aforementioned Article 8 have led to disputes on the interpretation of the notion "control". Under its provisions "[t]he conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct". Commentary to Article 8 formulated in this regard the requirement of "a real link between the person or group performing the act and the State machinery"[24] but at the same time acknowledged that the issue of determining

21 Yearbook of the International Law Commission 1975, UN Doc. A/CN.4/SER.A/1975/Add. 1.

22 Article 9 of the ILC Articles: "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority".

23 *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, § 398.

24 Commentary to Article 8, § 1.

whether the unlawful conduct was carried out under the direction or control of a State is a complex one.

The verdict which initiated discussion on that issue and in fact gave rise to Article 8 provisions was delivered by the ICJ in 1986 in the *Military and Paramilitary Activities in and against Nicaragua* case. In this case the Court had to assess whether the conduct of the contras was attributable to the United States. To this end it analysed the degree of control that United States exercised over these rebel groups operating on a territory of Nicaragua. Having examined the material available it found:

> (…) despite the heavy subsidies and other support provided to them by the United States, there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the contras as acting on its behalf. (…) United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the contras, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the contras in the course of their military or paramilitary operations in Nicaragua. All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the contras without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.[25]

However, the problem of attribution has not always been resolved on the basis of the "effective control" test. Further judgements, described below, prove that different kinds of tests have been applied to establish State responsibility. In particular, another famous verdict – always recalled in the context of that issue – formulated different standards in

25 The ICJ, *Case Concerning Military and Paramilitary Activities In and Against Nicaragua* (Nicaragua v. United States of America), Judgement of 27 June 1986, paras. 109, 115. By holding in the Commentary to the ILC Articles that "(…) conduct will be attributable to the State only if it directed or controlled the specific operation and the conduct complained of was an integral part of that operation. The principle does not extend to conduct which was only incidentally or peripherally associated with an operation and which escaped from the State's direction or control" the ILC implicitly endorsed the position adopted by the ICJ in the *Military and Paramilitary Activities in and against Nicaragua* case and approved of the principle of effectiveness.

that regard. In the *Tadić* case the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (henceforth referred to as ICTY) examined the factual relationship between the Bosnian Serb Army and the Army of the Federal Republic of Yugoslavia (FRY) and based its verdict on the assumption that varying degrees of sufficient control should be established in each case.[26] In that context, the Tribunal paid attention to the possible dangers of rigid interpretation of norms reflecting the principles of attribution, emphasising that it may lead to attempts to avoid responsibility by invoking individuals' perpetration of the unlawful conduct.[27] In the light of the above, the Tribunal reached the decision that "[i]n the case at issue, given that the Bosnian Serb armed forces constituted a military organization, the control of the FRY authorities over these armed forces required by international law for considering the armed conflict to be international was *overall control* going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations. By contrast, international rules do not require that such control should extend to the issuance of specific orders or instructions relating to single military actions, whether or not such actions were contrary to international humanitarian law".[28]

The same problems were considered by the ICJ after the final adoption of the ILC Articles. In the case concerning *Armed Activities on the Republic of the Congo*[29] the Court had to assess whether the conduct of paramilitary groups (MLC – Movement for the Liberation of Congo) carried out on a territory of the DRC was attributable to Uganda. Although it did not clearly express its opinion on a preferred "control test", it seems that by referral to the *Military and Paramilitary Activities in and against Nicaragua* case it implicitly approved

26 "The principles of international law concerning the attribution to States of acts performed by private individuals are not based on rigid and uniform criteria. (…) The degree of control may (…) vary according to the factual circumstances of each case. The Appeals Chamber fails to vid. why in each and every circumstance international law should require a high threshold for the test of control. Rather, various situations may be distinguished". ICTY, *Prosecutor v. Duško Tadić*, Appeals Chamber Judgement of 15 July 1999, Case no. IT-94–1-A, § 117.

27 "Under this Article [Article 8], if it is proved that individuals who are not regarded as organs of a State by its legislation nevertheless do in fact act on behalf of that State, their acts are attributable to the State. The rationale behind this rule is to prevent States from escaping international responsibility by having private individuals carry out tasks that may not or should not be performed by State officials, or by claiming that individuals actually participating in governmental authority are not classified as State organs under national legislation and therefore do not engage State responsibility. In other words, States are not allowed on the one hand to act de facto through individuals and on the other to disassociate themselves from such conduct when these individuals breach international law. The requirement of international law for the attribution to States of acts performed by private individuals is that the State exercis.es control over the individuals". Ibidem.

28 Ibidem, § 145.

29 ICJ, *Case Concerning Armed Activities on the Republic of the Congo* (Democratic Republic of the Congo v. Uganda), Judgement of 19 December 2005.

of the "effective control" test. In the course of its considerations the ICJ rejected three possible scenarios on which the responsibility of Uganda could have been established: first, that the MLC constituted an organ of Uganda (Article 4), second implying that it was an entity exercising elements of governmental authority on its behalf (Article 5), and third – based on the lack of probative evidence – that it acted on the instructions of, or under the direction or control of Uganda (Article 8).[30] As far as the last circumstance is concerned the Court held that "(…) no issue arises in the present case as to whether the requisite tests are met for sufficiency of control of paramilitaries".[31] Therefore, the remaining margin of autonomy of the MLC prevented the Court from qualifying the unlawful conduct as attributable to Uganda.

By contrast, in the aforementioned case *Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* the ICJ was highly critical of the interpretation advocated by the majority in the *Tadić* case and resolved the dispute between two opposing approaches in favour of an "effective control" test, emphasising that

"(…) the overall control test has the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf. That is true of acts carried out by its official organs, and also by persons or entities which are not formally recognized as official organs under internal law but which must nevertheless be equated with State organs because they are in a relationship of complete dependence on the State. Apart from these cases, a State's responsibility can be incurred for acts committed by persons or groups of persons — neither State organs nor to be equated with such organs — only if, assuming those acts to be internationally wrongful, they are attributable to it under the rule of customary international law reflected in Article 8 cited above. This is so where an organ of the State gave the instructions or provided the direction pursuant to which the perpetrators of the wrongful act acted or where it exercised effective control over the action during which the wrong was committed. In this regard the overall control test is unsuitable, for it stretches too far, almost to breaking point, the connection which must exist between the conduct of a State's organs and its international responsibility".[32]

30 "The Court concludes that there is no credible evidence to suggest that Uganda created the MLC. Uganda has acknowledged giving training and military support and there is evidence to that effect. The Court has not received probative evidence that Uganda controlled, or could control, the manner in which Mr. Bemba put such assistance to use. In the view of the Court, the conduct of the MLC was not that of "an organ" of Uganda, nor that of an entity exercising elements of governmental authority on its behalf. The Court has considered whether the MLC's conduct was "on the instructions of, or under the direction or control of" Uganda and finds that there is no probative evidence by reference to which it has been persuaded that this was the case." Ibidem § 160.

31 Ibidem, § 160.

32 *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, § 406.

Moreover, it disputed the ICTY's argument that control does not have to extend to the issuance of specific orders or instructions relating to single military actions and held that it is required "that the State's instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations".[33]

It is worth mentioning that the interpretation of the majority of the ICJ encountered opposition from Vice President Al-Khasawneh, who advocated for variations in the rules of attribution in accordance with the stance taken by the ICTY. In a dissenting opinion appended to the judgement of the Court he observed that a required level of control should vary according to the circumstances of each case.[34] To support his claim he pointed out that the subject of varying degrees of sufficient control was debated during the sessions of the ILC, when some of its members drew attention to possible scenarios in which States admittedly did not give any formal and explicit instructions or did not exercise direct control, but at the same time facilitated or encouraged individuals or groups to commit unlawful conduct.[35] In that context, the Vice President again brought up arguments put forward in the *Tadić* case and continued that "[t]he inherent danger in such an approach [ICJ's approach in case *Concerning Application of the Convention*…] is that it gives States the opportunity to carry out criminal policies through non-state actors or surrogates without incurring direct responsibility therefore".[36]

Personally, I adhere to the ICJ's view that "[t]he rules of attributing alleged internationally wrongful conduct to a State do not vary with the nature of the wrongful act in question in the absence of a clearly expressed *lex specialis*".[37] This means that the general rule of attribution expressed in Article 8 must be identical, despite the peculiar circumstances of each case.[38] If not determined by the factual circumstances, the requisite degree of control should therefore be regarded as an invariable standard. However, the requisite level of State involvement in private conduct may vary according to the legal nature of the case.[39]

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33 Ibidem, § 400.

34 "(…) with great respect to the majority, a strong case can be made for the proposition that the test of control is a variable one". Ibidem, Dissenting Opinion of Vice President Al-Khasawneh, § 37.

35 Report of the International Law Commission on the work of its fiftieth session, 20 April–12 June and 27 July–14 August 1998, Official Records of the General Assembly, Fifty-third session, Supplement no. 10, UN Doc. A/53/10, § 394–396.

36 *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide,* Dissenting Opinion of Vice President Al-Khasawneh, § 39.

37 Ibidem, § 401.

38 See also S. Wittich, *The International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts Adopted on Second Reading*, "Leiden Journal of International Law" 2002, Vol. 15, Issue 4, p. 894.

39 Having concluded that the factual and legal situation of both cases was different, the Court also acknowledged that it is not required to resolve the two issues of different nature on the

It should be noted that such the stark contrast of views on the required level of control between the ICJ and the ICTY may be attributable to differences that occur on a jurisdictional level. Issues covered by the mandate of the ICJ concern State responsibility, while ICTY's jurisdiction is criminal and extends only over persons.[40] Therefore, the issue of control was examined in different contexts – the ICJ decided on attribution requirements, whereas the ICTY's considerations aimed at establishing the character of the conflict in order to find applicable rules of international humanitarian law. In this regard, proving the relationship between Bosnian Serbs and the FRY was necessary to determine whether it was of an international character. That is why the commentary to the ILC Articles points out that not only the factual situation, but also the legal issues of both cases were different.[41]

## Conclusion

The ILC Articles determine and describe two constituent elements of international responsibility – conduct needs to be attributable to a State and inconsistent with its international obligations. This article has surveyed, albeit briefly, the main principles of attribution which were affirmed in international judicial decisions. Under the general rule of attribution, States incur responsibility only for the conduct of its organs. However, under specific circumstances, the process of attribution may also extend to acts of persons authorized, directed or controlled, as well as to private conduct publicly approved. Besides this, in cases when it is impossible to hold a State responsible for private conduct under the principles of attribution, it may still incur responsibility for its failure to prevent the unlawful act in conformity with a 'separate delict theory'. Analysis of international jurisprudence leaves no doubt that the Draft Articles on the Responsibility of States for Internationally Wrongful Acts constitute a primary point of reference in relation to those issues and that the underlying principles of the document have been reaffirmed many times since their final adoption.

basis of the same control test: "(…) the degree and nature of a State's involvement in an armed conflict on another State's territory which is required for the conflict to be characterized as international, can very well, and without logical inconsistency, differ from the degree and nature of involvement required to give rise to that State's responsibility for a specific act committed in the course of the conflict". *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, § 405.

40 See the stance taken by the ICJ: "First, the Court observes that the ICTY was not called upon in the Tadić case, nor is it in general called upon, to rule on questions of State responsibility, since its jurisdiction is criminal and extends over persons only. Thus, in that Judgment the Tribunal addressed an issue which was not indispensable for the exercise of its jurisdiction". Ibidem, § 403.

41 Commentary to Article 8, § 5.

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**SUMMARY**

## The International Legal Issue of Attributing Conduct to a State – The Case Law of the International Courts and Tribunals

The article aims to broaden the subject of the attribution of conduct to a State by presenting different grounds for attributing State responsibility. It surveys main the principles of attribution, which were affirmed in international judicial decisions and specifies circumstances which extend beyond the general rule under which States incur responsibility only for the conduct of its organs. The provisions of the Articles on the Responsibility of States for Internationally Wrongful Acts constitute a primary point of reference of the research and are followed by examples of their practical application.

Keywords: responsibility of States, attribution of conduct, *de facto* State organs, effective control test, overall control test

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# The Development of the American Private Sector in Relation to International Law. From the First Artificial Satellite to The American Space Commerce Free Enterprise Act

## Introduction

On October 4, 1957, the Soviet Union launched the first artificial satellite. This started the space era. It was said that the process of exploring the cosmos was inevitable as it was the next stage of the development of civilization. For many years, humanity had been preparing for this very moment, not only in terms of scientific and technological achievements, but also due to the requirements of the law of nature.[1] This global initiative quickly found its reflection in international agreements regulating the issues of the study and exploration of outer space. The beginning of the space exploration era brought enormous benefits to humanity at the time when international law was becoming universal.[2] At the beginning, the only actors taking part in the exploration were the bodies referred to in the convention, i.e. states. However, over time, the private sector joined space exploration in spite of the fact that no particular international regulations applied to private bodies.

## The Beginning of Commercialization

The commercialization and privatization of the space industry commenced in the 1980s, with the activities of the United States of America. This increasing cooperation of states with the private sector was triggered by the evolving global commercialization related to space activities, technological development and high costs that could

1 A. Blagonravov, *Christian Science Monitor*, 1967, quoted from: M. Lachs, *The Law of Outer Space. An Experience in Contemporary Law-Making,* A.W.Sijthoff International Publishing Company, Leiden 1972, p. 4.

2 M. Lachs, *The Law of Outer Space. An Experience in Contemporary Law-Making*, A. W. Sijthoff International Publishing Company, Leiden 1972, p. 14.

not be afforded by the states.[3] Nonetheless, such cooperation entails the responsibility of the states to provide continuous supervision over the private sector, as according to the Outer Space Treaty of 1957 only states shall be responsible for damages caused by space objects.

The commercialization process in the USA began in 1965, as Early Birth - the first commercial satellite, was launched into space.[4] Since then, the private sector has gradually expanded its participation in space activities. Perhaps it is not a widely known fact that the famous spacecraft from NASA Apollo mission, which enabled the first human landing on the moon, was designed and constructed by private enterprise.[5] A significant precedent was the establishment of a Communication Satellite Corporation (COMSAT) in the USA, which comprised both states and private companies. It should be noted that the United States was the only Western country, which provided the service of putting objects into space.

The situation changed when the European Space Agency began to develop in Europe. In the years 1963–1982, more and more private manufacturers of space vehicles were set up in the USA. The US President at the time, Ronald Regan, ran a policy supporting the private space sector, encouraging private enterprises by creating long-term government plans.[6] In 1982, after the first successful private launch into space, he issued an order "National Space Policy" on national security, in which he stated that the expansion of the private sector became a national goal. On May 16 1983, the President issued another act regarding the commercialization of the expansion of space vehicles, in which he stated that the government would fully support and facilitate the commercialization of space vehicles. In addition, the document contained a statement that the US government would license, supervise or regulate commercial operations in the United States solely to the extent required to meet its domestic and international obligations and to ensure public safety. The wording of the act ensured the act was not considered contrary to international law. In 1984, the US Congress adopted the vital legislation of the National Aeronautics and Space Act. The legislation covered three substantive areas: licensing and regulations, introducing requirements of civil liability insurance and access of private companies to state facilities.[7] In the early years private enterprises focused on telecommunication services and the construction of space facilities. The next area private entrepreneurs were allowed to expand to was launching objects into space. They obtained permission to build and launch cargo space systems and service them in NASA space

3 L. Łukaszuk, *Współpraca i rywalizacja w przestrzeni kosmicznej. Prawo, Polityka, Gospodarka*, Dom Organizatora, Toruń, 2012, p. 302.

4 A. Velocci, *Commercialization in Space*, Harvard International Review, 2012, http://hir.harvard.edu [access: 6.09.2017].

5 Ibidem.

6 L. Łukaszuk, op. cit., p. 309.

7 https://www.faa.gov/.../history/.../Commercial_Space_Industry.pdf [access: 6.09.2017].

centres.[8] In the following years, the private sector focused on the construction of a reusable space vehicle and the production and processing of objects on research facilities in space. For more efficient management of private projects, NASA has created an additional department to coordinate private sector activities. The United States, through the involvement of the private entities, has undoubtedly gained many benefits, although it should be mentioned that the profits were mutual. Private entrepreneurs gained financial profits and the public sector could boost its technological development.[9]

Currently, the key commercial use in the space sector can be found in telecommunications, the financial markets and many other important sectors. However, the current activities of the private sector are heading towards a completely different model. This is due to the growing number of enterprises involved in the conquest of outer space. The international community has entered the process of re-evaluating existing sources regulating activities in space. Anthony Velocci in his article "Commercialization in Space" for the Harvard International Review suggests that we are entering a "new era of commercial space". In 2012, he argued that in the next decade the sceptics would be witnessing the new aspects in commercial space.[10] It must be said that he was right, as evidenced by the latest draft of the American Space Commerce Free Enterprise Act of 2017.

It can be considered that this act is the result of continuous efforts of the private sector. The technological level has reached the point at which the act can be adapted to commercial ventures. The private sector can also be proud of the knowledge gained during decades of cooperation with the government. However, before we proceed to the analysis of the latest US bill, let us focus on the two aspects that prove the necessity of a new reform.

## Why Reform for the Private Sector was Necessary

In the United States, it is said that the Act aims to fulfil the earlier unregulated area of the space private sector, both in terms of current operations and potential future missions. It is a great step that aims to regulate issues associated with the American commercial space industry and opens the door for new space missions.

With the development of satellite remote sensing, considerations of its privatization started to develop. The fiasco of the development efforts in the 1970s and 1980s led to a belief that remote sensing was a public good, and the private sector could not obtain any benefits from its development. As a result of the private sector's undervaluation, the archaic remote sensing regime became too onerous. The current restrictions that

8 L. Łukaszuk, op. cit., p. 310.

9 Ibidem.

10 A. Velocci, *Commercialization in Space*, Harvard International Review, 2012.

limit the implementation to only existing methods and create barriers for entrepreneurs are ineffective and very unfavourable for the United States and the global space economy.

The second aspect is the difficulty related to the lack of principles regulating new space missions involving the private sector. Currently, the activities of private entities in space, such as suborbital flights, mining raw materials from asteroids, sending rovers to Mars, are not subject to any supervisory authority. To this point, no act has regulated these space activities, which raises the concerns of space entrepreneurs. These circumstances put the private sector in an uncomfortable and unsafe position that may impede new initiatives and technological and economic development. The status quo may entail United States losing share in a global space market to other countries that have such regulations.[11]

## The American Space Commerce Free Enterprise Act and International Law

The Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, also known as the Outer Space Treaty, was signed on January 27 1967. It is a kind of constitution for one hundred signatory states. This document contains a set of rules that should guide countries operating in space. These are:

1) Exploration and use of outer space, including the Moon and other celestial bodies, should be carried out without obtaining property benefits and in the interest of all humanity.

2) Space is free for exploration and use for all states without any discrimination, on the basis of equality and in accordance with international law.

3) Space shall not be subject to appropriation either by proclaiming sovereignty, by means of use or occupation, or by any other means.

4) States Parties to the Agreement shall operate in the field of research and use of outer space, in accordance with international law, including the United Nations Charter, in the interest of maintaining international peace and security and developing cooperation and understanding between Parties.

5) States Parties to the Agreement undertake not to put into orbit any nuclear or any other type of weapons of mass destruction or place such weapons on celestial bodies.

11 J. Hampson, *The American Space Commerce Free Enterprise Act*, https://niskanencenter.org [access: 11.09.2017].

6) The Moon and other celestial bodies shall be used by all States Parties to the Agreement solely for peaceful purposes.

7) By using space, States Parties shall be guided by the principles of cooperation and mutual assistance.

8) Astronauts are considered to be messengers of humanity. Each State Party undertakes to assist in the event of an accident, danger or forced landing on its territory.

9) Each State Party bears international responsibility for its activities in outer space, whether it is carried out by governmental or non-governmental institutions, legal entities, and ensures that such activities are compatible with the provisions of the Agreement.

10) Each State Party shall have jurisdiction and control over their facilities and personnel launched into space.

11) States undertake to conduct consultations before unsafe operations in space and to inform the Secretary-General of the United Nations of their activities.

12) Space stations and other installations located on the Moon and other celestial bodies shall be available to all States Parties to the Agreement.[12]

Analysing these fundamental principles of the Treaty, we may notice that space has been recognized by international law as *res communis*, used for peaceful purposes and in the interest of the humanity. It should be considered whether the status of outer space (*communis omnium*) is regulated by the aforementioned Treaty or by customary law. To give an answer, a few examples shall be analysed. At the Hamburg Conference in 1960, the International Law Association adopted a resolution on the space regime in which Art. 3 states that: "outer space may not be subject to the sovereignty or other exclusive rights of any State."[13] The commonly cited project of the Code of the David Davies Memorial Institute from 1962 decides: "outer space, including the Moon and other celestial bodies is a *res communis omnium,* i.e. an area open for free exploration and use by all States which is not subject to national appropriation".[14] Similar regulations can be found in the provisions of the Interamerican Bar Association or the Space Law Committee in Hungary. The status of outer space has also been repeatedly discussed in the preambles of the United Nations Resolution. Resolution A Res. Well. 1721 / XVI - Dec. 20th, 1961 states that according to international law, space and celestial bodies are free from exploration and use by states and are not subject to appropriation.[15] What is more, Resolution

12 Dz.U. no. 14, item 82.

13 *Report of the Forty-Ninth Conference* – Held at Hamburg, August 8th to August 12th, 1960, p. 267.

14 David Davies Mameorial Institute, *Draft Code of Rules on the Exploration and Uses of Outer Space*, 1963, 29 J. Air L. And Comm. p. 141.

15 Resolution Adopted By The General Assembly1721 (Xvi). *International Co-Operation In The Peaceful Uses Of Outer Space*.

A Res. Well. 1962 / XVIII mentions that space and celestial bodies are not subject to appropriation, occupation or other similar activities.[16] All of these examples indicate that space law is not just a postulate or a theory, but beyond the Space Treaty it develops directly from customary law.

The international arena considered the views of scientists that developed concepts variety of concepts, i.e. introducing the notions of *res communis humanitatis* saying that space belongs to all humanity, *res communis civium* that space is the property of all people residing in the earth, *res communis omnium universi*, which treats space as the common property of all intelligent beings in the universe or *res extra commercium*, which entails that space cannot be treated as a subject of state supremacy.[17] [18]

Space, morally speaking, is the property of all humanity, as the Treaty establishes laws for all states without any discrimination, based on considerations of equity.[19] Furthermore, it shall be noticed that in the light of the Treaty, humanity (*communis*) are the states. However, the entire space law system also relates to private entities. International law, in addition to major bodies such as states or international organizations, refers in some assumptions directly to individuals / citizens. As Gyula Gal observed in his book "Space Law", "Since *res communis humanitatis* (space law as the law of humanity)[20] and *res communis civium* (space law regarded as co-ownership law also addressed to individuals)[21] refers to citizens on the basis of international law it should be stated that space is the property of the *res communis civium*."[22]

The draft of the The American Space Commerce Free Enterprise Act and International Law contains many controversial solutions. It is said that it may conflict with in-

16 Resolution adopted by the General Assembly 1962 (XVIII). *Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space*.

17 A. Górbiel, op. cit., p. 56.

18 Cf. A. A. Cocca, *Determination of the Meaning of the Expression Res Communis Humanitatis in Space Law,* Sixth Colloquium on the Law of Outer Space, IISL, Paris 1963, pp. 3–4, E. Scifoni, *The Principle of Res Communis Omnium and Peaceful Use of Space and of Celestial Bodies*, Seventh Colloquium on the Law Outer Space, IISL, Warszawa 1964, p. 50, H. Valladao, *The Law of Interplanetary Space*, Second Colloquium on the Law of Outer Space, IISL, London 1959, p. 163–164, C. Berezowski, *Międzynarodowe prawo lotnicze*, Warszawa 1964, pp. 83–84, M. Niciu, *Umele consideratil cu privire statul juridic al. Corpurilar cersti,* Studia Universitatis Babes-Bolyai, Seres Iurisprudentia 1965, p. 58, C. W. Jenks, *International Law and Activities in Space*, in: "The International and Comparative Law Quarterly", vol. 5, section. 1, p. 104, B.Cheng, *The 1967 Space Treaty*, in: "Journal de Droit International", vol. 95, 1968, p. 564, D. J. L Brownlie, *Public International Law*, London 1970, p. 295.

19 G. Gal, *Space Law*, A.W.Sijthoff-Leyden, New York 1969, p. 123.

20 A. A. Cocca, *Determination of the Meaning of the Expression Res Communis Humanitatis in Space Law*, Sixth Coll, 1963, p.2, cited from: G. Gal, op. cit., p. 125.

21 E. Scifoni: *The Principle Res Communis Omnium and Peaceful Use of Space and Celestial Bodies*, Seventh Coll, 1964, p.50, cited from: G. Gal, op. cit., p. 123.

22 G. Gal, op. cit., p. 123.

ternational law and thus allow the United States and its citizens to excessively interfere in space.

The first notable assumption is the provision which states that "the US citizens and entrepreneurs have the right to explore and use space, including the use of its resources without any conditions or limitations."[23] The Americans explain that the private interest of each citizen is a privilege granted by the executive power. A private interest is often subject to the law with the reservation that it is a subject to the supervision of the authority that grants it. Of course, citizens cannot be deprived of their rights without appropriate procedure and the same applies to private interests in conducting business in outer space. Further articles of the Act provide two possibilities on how to limit this activity. According to the Act, freedom of exploration and use of space by entities, either citizens or entrepreneurs registered in the United States, may be limited by two exceptions: security considerations of the United States and obligations resulting from the already discussed Space Treaty.[24] It should be noticed that Art. 6 of the Treaty provides that "Activities of non-governmental legal entities in outer space, including the Moon and other celestial bodies, requires authorization and continuous supervision by the relevant State Party to the Agreement".[25] The term "requires" creates a legal obligation to grant permits and provide continuous supervision over private activities in space. Therefore, this article does not imply that the United States is forced to authorize private space activities, but allows the establishment of private enterprises operating in outer space in the state, provided that the state constantly supervises private enterprises and be responsible for them on the international scene.

The draft of the US bill introduces a reduction of administration requirements related to supervision and issuing permits to operate in space, with all the regulations of state supervision over private facilities being preserved. The bill introduces a condition that private entities willing to be active in space shall obtain the appropriate certificate, which will be issued by the Secretary of the Office of Space Commerce.

To receive a certificate, the applicant will have to fulfil numerous requirements, including the requirements of size of the space object, the type of actions to be undertaken, its duration, location and the potential deorbitation method. In addition to these conditions, each applicant will be required to submit a space insurance agreement with a declaration that the object is not a nuclear weapon or a weapon of mass destruction, is not designed to bring the above into orbit, will not undertake any tests of nuclear weapons, and all the provided information is truthful, complete and accurate.[26] However, the ques-

23 American Space Commerce Free Enterprise Act of 2017, § 8011, sec 4 (b).

24 K. Muzyka, *Komentarz do Projektu American Space Commerce Free Enterprise Act of 2017*, https://prawoikosmos.wordpress.com, [accsess: 6.09.2017].

25 Dz.U. no. 14, item 82.

26 American Space Commerce Free Enterprise Act of 2017, § 8010.

tion arises of whether a space object that is towing an asteroid can be treated as a weapon of mass destruction. Such considerations were undertaken by Dandrige M. Cole who, during the annual meeting of the American Astronauts Society in 1962, gave the speech: "A Possible Military Application of a Cis-Martian Asteroid".[27]

As part of state supervision, the act introduces the establishment of the Private Space Activity Advisory Committee. The main tasks of the Committee will include: the analysis of the status and development of non-governmental activities in space, the analysis of the efficiency and effectiveness of the certification process, issuing recommendations for the Secretary and Congress on ways to promote the development of the private sector, the evaluation of existing practices and wide support including recommendations and advice for private entities.[28]

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Dz.U. no. 14, item 82.

27 K. Muzyka, op. cit.

28 American Space Commerce Free Enterprise Act of 2017, § 80109.

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**SUMMARY**

**The Development of the American Private Sector in Relation to International Law. From the First Artificial Satellite to The American Space Commerce Free Enterprise Act**

The active development of technology enbled mankind to realize new programs for the exploration of previously inaccessible areas of the universe hundreds of thousands of kilometers away. The emergence of this new field created the need to ensure its special legal regulation, which would correspond to the specific characteristics of this business. But now we have entered into a phase of re-evaluation of existing legislation of space and we must realise that alongside countries operating in space an has arisen entirely new entity - the private sector. Therefore it is necessary to ask ourselves whether the privatization and commercialization of outer space is legally possible and if it is not precluded by existing treaties. The draft of the latest US Commercial Space Act is undoubtedly a great advance for key areas of the private sector activity such as remote sensing and new space missions. It provides a sense of confidence for entrepreneurs by strictly regulating issues related to the supervision of private sector entities. However, on the international scene the question has arisen of whether this act is contrary to international law, especially principles contained in existing space law treaties.

Keywords: public international law, space law, the American Space Commerce Free Enterprise Act

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Ryszard Kamiński

# Non-Financial Reporting in the Light of International Regulations and EU Directives

## Introduction

The contemporary model of company reporting is evolving with changes in the business environment. Increasingly, entrepreneurs get information not only about the economic aspects of companies' operations but also about social and environmental aspects. The disclosure of such information is usually done through annual reports. The guidelines exist for the production of such reporting, and legal requirements can be found in some European countries.

The EU Member States and the European Union have a significant contribution to the development of company reporting standards. On 16 April 2013, the European Commission adopted a proposal for a directive enhancing the transparency of certain large companies on social and environmental matters. The purpose of Directive 2013/34/EU was to increase EU companies' transparency and performance on environmental and social matters, therefore contributing effectively to long-term economic growth and employment.[1] The companies concerned will need to disclose information on policies, risks and results as regards environmental matters, social and employee-related aspects, respect for human rights, anti-corruption and bribery issues, and diversity on the boards of directors. Directive 2013/34/EU was amended by Directive 2014/95/EU of the European Parliament and of the Council as regards disclosure of non-financial and diversity information by certain large undertakings and groups.[2] From 2018, around 6000 large organisations in Europe will

1 Official Journal of the European Union L 182/19 2013. Directive 2013/34/EU of The European Parliament and of The Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC.

2 Official Journal of the European Union, L 330/1 2014. Directive 2014/95/EU of The European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups.

start reporting non-financial information for the financial year 2017 under the EU Non-Financial Reporting Directive. The Directive requires organisations to include in their annual report a non-financial statement describing the impact posed by their operations to matters such as the environment, employees, social issues, corruption, human rights and bribery, and how they manage the principal risks that are involved. These companies also have to disclose the diversity policy for their administrative, management, and supervisory boards. This Directive represents the most significant EU legislative initiative in respect of such environmental, social and governance disclosure in nearly a decade and is likely to have a significant impact on the non-financial information reporting of many of the companies affected. The European Commission also published the Guidelines to the Directive on 26 June 2017 to support companies in the preparation of this non-financial statement.[3]

The observed trends of non-financial reporting concepts has inspired the writing of this article. The aim of the paper is to present and evaluate the non-financial reporting system, focusing in particular on the European Union. The aim of the paper determined the content and sequence of the main issues tackled with in the text. These include:

1) The characteristics of the essence and concepts of non-financial reporting.
2) A short description of international standards on non-financial reporting.
3) A presentation of EU regulations on non-financial reporting.
4) A presentation of EU guidelines to support companies in the preparation of this non-financial statement.

The study included companies obliged to prepare statements in accordance with UE regulations. The provisions quoted in the paper were enforced on 31 December 2017. The basic source material used in the work was literature on non-financial reporting and legal acts. The work methods that were used include a descriptive analysis method and a comparative method.

## The Essence of Reporting Non-Financial Information

The system of reporting should provide different reports for different users in accordance with their expectations. The information provided through these reports should allow the correct interpretation of the business information. To achieve this requirement, the essential parts of the system are both financial information and non-financial information. The term "non-financial information" is often used to refer to data on environmental issues, but in reality it covers a much broader area. Nonfinancial information involves issues related to: sustainability, corporate responsibility, the environment, social and governance issues, ethics, human capital, health. Non-financial information is

3 Guidelines on non-financial reporting(methodology for reporting non-financial information) (2017/C 215/01), Official Journal of the European Union C 215/1, [access: 5.7.2017].

typically indirectly correlated with an organization's financial performance and outlook, especially when assessed over time. Moreover, nonfinancial performance also impacts the tangible asset value and can be tied to intangible assets, including brand reputation, intellectual capital and an organization's market value. Company managers and external stakeholders (including investors) increasingly consider non-financial information in their decision-making as the link between tangible and intangible assets. The organizations need detailed insight into their financial, social and environmental impacts, both externally and internally. These could include human rights impacts within their supply chain, carbon dioxide emissions from the company's operations, or environmental impacts as a consequence of the downstream use of their products. As companies get more detailed insights into these impacts, they also start to manage them, driven by the fact that "*what gets measured gets managed*".[4]

It is assumed that non-financial material information should involve not only historical data (i.e. financial performance data) but also forward-looking information including projections or forecasts. In the literature the view is often encountered that non-financial reports should disclose the information that would enable investors and other stakeholders to run models or make their own predictions about the future value creation potential of the organization. However considering the risk of providing proprietary information to competitors, companies would normally not be required to disclose sensitive information related to, for example, trade and R&D programmes. With the proviso that if material information is not disclosed because of perceived competitive harm, this fact and the reasons for it will be noted in a report.[5]

In this context, it is reasonable to compare the characteristics of financial and non-financial information.

- Financial information relates to cash flows and the results and (balance sheet) positions associated with them. The information has a direct link with the financial registration system and can be historical or prospective. Financial information is expressed in monetary units and can be measured exactly.
- Non-financial information relates to all information other than the financial information that does not have a direct link with a financial registration system. Often there is no comprehensive registration system. Insofar as there are internal procedures for risk management and collecting information, these will as a rule contain fewer safeguards for the reliability of the information.

4 *The road to reliable nonfinancial reporting,* Ernst&Young 2016, http://www.ey.com/Publication/vwLUAssets/EY-ccass-road-to-reliable-nonfinancial-reporting/$FILE/EY-ccass-road-to-reliable-nonfinancial-reporting.pdf [access: 4.11.2016].

5 *Financial vs Non-Financial Information*, Materialitytracker, 2016, http://www.materialitytracker.net/standards/financial-vs-non-financial-information/ [access: 20.01.2016].

It should be emphasized that the nature of non-financial information can be qualitative or quantitative:

- Quantitative means that the information is numerical. The information is capable of being expressed in numbers or figures, for instance in quantities or periods. Quantitative non-financial information is akin to financial information, but is usually of a less uniform nature. Often it is measurable and an indirect link can be made with a (financial) registration system.
- Qualitative information is of a descriptive nature. Pertinent examples are performance, the functioning of systems and processes, physical characteristics or compliance with codes of conduct. Usually there is no comprehensive registration system for this information, nor a generally accepted frame of reference, or standardised units. Qualitative information can often be translated into quantitative information by applying a quantitative framework of standards, in the form of performance data. As a rule this will lead to a certain degree of simplification.[6]

Non-financial information can be presented in different ways. Usually it is combined with reporting of financial information. There are three forms of presentation:

- In combination with a financial statement intended for general purposes, or prepared for a specific purpose. The information forms part of the financial statements or the information is enclosed in a separate report.
- This can be the directors' report accompanying financial statements. It contains a commentary on the relevant information of assets and the company's financial position, including the evaluation of the effects and the identification of risk factors with the described threats. This also contains non-financial data, including information on environmental issues and employment.
- In a stand-alone separate report, not in combination with a financial report. Well-known examples are corporate social responsibility reports and environmental reports. They do contain financial information as well, but the emphasis is on the non-financial information.[7]

In the practice of companies there are different ways to define, prepare, and disseminate non-financial reports. Francesco Perrin examined the reports of 90 companies from the 150 included in the Ethical Index Euro.[8] Based on the results of these studies, he identified five distinctive features which represent the common starting point for distinguishing non-financial reports from other documents:

6 *Non-f inancial information in progress. A guide to the reporting and assurance of non-financial information in the public sector* , Nivra, 008 Royal NIVRA Amsterdam, https://www.nba.nl/Documents/Vaktechnisch-thema/MVO/NFI-wegwijzer-Engelse-versie.pdf. p.10–11 [access: 2.01.2016].

7 *Non-financial information in progress,* op. cit. p. 15.

8 F. Perrin, *The Practitioner's Perspective on Non-Financial Reporting,* California Management Review, vol. 48, no. 2, Winter 2006, pp. 75–78.

- Complementarity with Annual Financial Report.
  Non-financial reports are published to complete the corporate economic portrait by adding a social and environmental dimension. Social, environmental and sustainability reports frequently follow the same time schedule and structure as annual reports, and they are often updated quarterly. F. Perrin noted that many companies progressively integrate different documents. They usually start with an environmental report, shift to producing a social and environmental report, and then publish a sustainability report, which integrates social, economic, and environmental issues into a unique document.
- Qualitative information and quantitative data are contained in non-financial reports. The quantitative data allow readers to do temporal or spatial comparative assessments, and the qualitative information enhances the communicative potential. Usually, reports are structured in two main sections. The first one describes the firm's programs qualitatively and the second one summarizes programs, activities, and investments from a quantitative point of view.
- Outside Orientation. Non-financial reports usually are produced as a direct result of an accountability process, which is the process of becoming an open and responsive organization that is able to balance the interests of various stakeholders. Therefore, these reports are expressly outside-oriented, aimed at sharing information systematically about the exchange relationships between companies and their stakeholders. The results indicate that the reports are expressly stakeholder-oriented.
- Stakeholders are involved in the process dimension of non-financial reports. Companies tend to focus on ongoing interactions with stakeholders and stress the exchange of ideas that has allowed companies to better understand stakeholders and their interests. This means that stakeholders' needs and requests are taken into account in the report.
- Expected outcomes. These are strengthening "the strategic reporting aptitude" and "the internal reporting aptitude". The implementation of the first task increases opportunities to check corporate strategic positioning, redefine their mission and values, evaluate progress, reorient corporate action, and manage relationships with stakeholders. The expectation of strengthening "the internal reporting aptitude" entails that reports are strictly tied to organizational objectives, such as redefining responsibilities and tasks across divisions within the company, enhancing collaborations, identifying synergies among divisions and corporate functions through the systematization of dispersed data and information.

## Standards of Reporting Non-Financial Information

Unfortunately, in practice, non-financial reports are often incomparable and this prevents stakeholders from making decisions regarding this particular area. This problem is exacerbated by the fact that companies are free to decide what information to disclose and how to do it. Therefore, they often avoid presenting information that is not completely positive, and try to present all information in the best possible light. In order to improve the quality and increase the comparability of reports consisting of non-financial information, work commenced on the implementation of standards in this area as early as the 1970s. Today in practice, there are different standards, recommendations and guidelines. Companies can therefore base their reports on a variety of proposals for non-financial reporting systems developed by many organisations. Among them there are proposals of the following organisations:

- United Nations Global Compact (UNGC),
- Organization for Economic Co-operation and Development (OECD),
- International Labour Organization (ILO),
- Global Reporting Initiative (GRI),
- International Integrated Reporting Council (IIRC),
- Sustainability Accounting Standards Board (SASB),
- European Federation of Financial Analysts Societies (EFFAS),
- standards and certifications: AccountAbility's AA1000 Standards and ISO 26000.

Launched in 2000, the United Nations Global Compact is a platform for businesses for the development, implementation and disclosure of responsible, and sustainable corporate policies and practices. The UNGC seeks to align business operations and strategies with ten universally accepted, guiding and overarching principles in the areas of human rights (2 principles), labour (4 principles), the environment (3 principles), and anti-corruption (1 principle). It assists private sector businesses in the management of increasingly complex risks and opportunities, and seeks to embrace, support and enact, within their sphere of influence, a set of core values in these areas.[9]

The Organization for Economic Co-operation and Development guidelines for multinational enterprises are a set of non-binding norms and rules for international enterprises. Their goal is to help these companies contribute positively to a better natural, social and economic environment. By transforming the impact of companies on society, these Guidelines aim to change the choice of investment by adding a completely new perspective – non-financial results.[10]

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9 *TheTenprinciples,* United Nations Global Compact, https://www.unglobalcompact.org/aboutthegc/ [available 20 January 2014]; *EU Directive on disclosure of non-financial and diversity information. Achieving good quality and consistent reporting. Position Paper*, Federation of European Accountants, march 2016, p. 6.

10 *OECD Guidelines for Multinational Enterprises 2011 Edition*, OECD Publishing, 2011. *EU Directive on disclosure*, op. cit. p. 8.

In 1977, the International Labour Organisation adopted the ILO Tripartite Declaration of Principles concerning international companies and social policy (it was revised in 2000).[11] The purpose of this Declaration was to encourage multinational companies to solve problems that may arise as a result of their activities in the host countries. This paper opts for an improvement in the situation on the local labour market, especially in countries with high levels of unemployment. The Declaration contains regulations concerning basic human rights, minimum wage, labour relations, working conditions, and health and safety.

The Global Reporting Initiative started publishing non-financial reporting guidelines in the 1990s to help organisations communicate about their impact on society and environment. Since inception, the GRI has gained major attention from companies and has become a worldwide reference for reporting. The latest (G4) version particularly focuses on issues related to materiality – it encourages companies to focus their communication on the most relevant topics related to their core business.[12]

The International Integrated Reporting Council was launched in 2010 with the objective of developing and promoting integrated reporting by businesses. Integrated reporting is a framework designed to change corporate communication to produce company reports that detail organisational undertaking. The IIRC believes that the implementation of the non-financial reporting directive should follow the underlying approach of the integrated reporting framework as this framework emphasises the connectivity of financial and non-financial information and highlights the key role that materiality has to play. By integrating financial with non-financial information, the aim is to make clear how value-relevant information fits into the operations of the undertaking and thereby help embed long-term decision making into the undertaking's management.[13]

The Sustainability Accounting Standards Board is a US not-for-profit organisation established in 2011 to develop and disseminate accounting standards dealing with social and environmental issues. A significant characteristic of the SASB is that the standards developed are intended to be consistent with the current US system of financial regula-

11 *Tripartite declaration of principles concerning multinational enterprises and social policy*, International Labour Office, Geneva 2006.

12 *G4 Sustainability Reporting Guidelines*, *Reporting Principles and Standard Disclosures,* Global Reporting Initiative, https://www.globalreporting.org/resourcelibrary/GRIG4-Part1-Reporting-Principles-and-Standard-Disclosures.pdf, [access: 2.03.2015]. *G4 Sustainability Reporting Guidelines, Implementation Manual*, Global Reporting Initiative, https://www.globalreporting.org/resourcelibrary/GRIG4-Part2-Implementation-Manual.pdf, [access: 2.03.2015]; *EU Directive on disclosure*, op. cit., p. 6.

13 *The International <IR> Framework,* Integrated Reporting (<IR>), IIRC, http://www.theiirc.org/wp-content/uploads/2013/12/13–12–08-THE-INTERNATIONAL-IR-FRAMEWORK-2–1.pdf. [access: 23.09.2014]. *Towards Integrated Reporting. Communicating Value in the 21st Century,* IIRC, http://theiirc.org/wp-content/uploads/2011/09/IR-Discussion-Paper-2011_spreads.pdf. p. 3 [access: 24.09.2014].

tion – indeed, the aim is to integrate SASB standards into the standard annual report required by the U.S. Securities and Exchange Commission for all publicly traded companies. The SASB has developed its Sustainable Industry Classification System that categorises ten sectors and 88 industries and has so far issued a Conceptual Framework and nine industry-specific reporting standards (with a tenth under development). Apart from non-financial reporting, accounting standards and key performance indicators, the SASB is also developing a more consistent approach to the use of materiality in sustainability reporting.[14]

The European Federation of Financial Analysts Societies has published key performance indicators for CSR since 2010. The objective of these key performance indicators is to provide a basis for the integration of CSR data into corporate performance reporting. The current release (key performance indicators for ESG version 3.0) sets out the overall requirements for CSR reports, guidelines for presentation and structure, and minimum requirements for the content to be disclosed. They apply to profit-oriented entities. While the framework is suitable for all entities regardless of size, scope and legal form, it has been specifically designed for publicly-listed companies and issuers of bonds. EFFAS encourages investors, financial analysts, credit rating agencies, and other functions vital in capital markets to integrate their key performance indicators into their valuation models.[15]

The AccountAbilty principles for sustainable development were initially published in 1999 and have since undergone various modifications. The current standard in place is the AA1000 Accountability Principles Standard 2008 (AA1000APS), which provides undertakings with a set of principles to frame and structure the way in which they understand, govern, administer, implement, evaluate, and communicate their accountability. The value of the principles of AA1000APS (namely, inclusivity, materiality, and responsiveness) lies in their comprehensive coverage and the flexibility of their application. Accompanying AA1000APS is AA1000AS – a high-level principles-based assurance standard that emphasises the importance of materiality, completeness, and responsiveness.[16] ISO 26000 is a voluntary CSR standard designed to help undertakings to behave responsibly and to improve their CSR engagement through time. The standard revolves around Seven Core Subjects: organisational governance, human rights, labour practices, environment, fair operating practices, consumer issues and community involvement and development. One of the ISO 26000's core objectives is to improve the reliability of undertakings' communication and transparency.[17]

14 *EU Directive on disclosure, op cit*. p. 7.

15 *EU Directive on disclosure,* op. cit., p. 8.

16 *Accountability Principles Standard,* AccountAbility, http://www.accountability.org/standards/aa1000aps.html, [access: 14.08.2017].

17 ISO Standards are international in nature, and developed on the basis of principles established by the World Trade Organisation (WTO) Committee on Technical Barriers to Trade (TBT). These principles relate to the way in which an international standard development process is

## Non-Financial Reporting Under EU Directives

The European Union's policy in the field of disclosure of non-financial information has been practically reflected in the European Commission's "*Green Paper: Promoting framework for Corporate Social Responsibility",* published in 2001.[18] The Green Paper, which is subject to regulation by the EC, contains internal and external non-financial issues which primarily concern CSR problems. In 2011 the EU formulated a plan for the development of good practices in the area of reporting of environmental and social issues in the Member States "*European Commission Communication on CSR 2011: Implementation table*" .[19] One of the objectives of the adopted plan was to improve the quality of reporting of environmental and social issues.

A very important step in the subject of non-financial reporting was the adoption in 2013 of Directive 2013/34 / EU, which concerns the disclosure of information on environmental issues, social and employment issues, including the protection of human rights, anti-fraud and corruption, respecting the principles of diversity management. Directive 2013/34 / EU provides for the obligation of reporting information related to large enterprises of public interest, i.e. quoted companies, insurance companies, banks and other organisations of public importance in view of their business profile and their employing more than 500 staff on average in a financial year as at the balance closing date, in the form chosen by the company, i.e. either in the annual financial report or in a separate report. Non-financial reports are to be drawn up with respect for the principle of *comply or explain*, meaning the need to explain the reasons for the non-disclosure of certain information.

Directive 2013/34/EU concerning the disclosure of non-financial and diversity information by certain large undertakings and groups was amended by the Directive 2014/95/EU. According to Art. 1 section 1 item 1 of the EU Directive, the organisations concerned shall include in their reports non-financial information, including information required to understand the development, results and position of the organisation and the impact of its operations in respect of environmental and social issues, respect for human rights, counteracting bribery and corruption, including as a minimum:

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carried out, and include expectations of transparency, openness, impartiality and consensus, effectiveness and relevance, coherence, and addressing the needs of developing countries. These are further complemented by the disciplines of Annex 3 of the WTO TBT agreement— Code of Good Practice for the preparation, adoption and application of standards— a Code which ISO national members are encouraged to comply with. (ISO 26000 – Social responsibility, http://www.iso.org/iso/home/standards/iso26000.htm, access: 10.05.2014).

18 *Green Paper. Promoting a European framework for Corporate Social Responsibility, Commission of the European Communities,* Brussels 2001, COM (2001) 366 final.

19 *European Commission Communication on CSR 2011: Implementation table*, Ec.europa.eu 2011, http://ec.europa.eu/enterprise/policies/sustainable-business/files/doc/csractionstimeline121213webversion_en.pdf [access: 28.05.2014].

- a brief description of the undertaking's business model,
- a description of the policies pursued by the undertaking in relation to those matters, including due diligence processes implemented,
- the outcome of those policies,
- the principal risks related to those matters linked to the undertaking's operations including, where relevant and proportionate, its business relationships, products or services which are likely to cause adverse impacts in those areas, and how the undertaking manages those risks,
- non-financial key performance indicators relevant to the particular business.
- Pursuant to the preamble to Directive 2014/95UE, the report should disclose:
- environmental matters (e.g. health and safety, use of renewable and/or non-renewable energy, greenhouse gas emissions, water use and air pollution),
- social and employee-related matters (e.g. gender equality, implementation of fundamental conventions of the International Labour Organization, working conditions, social dialogue, respect for the right of workers to be informed and consulted, respect for trade union rights, health and safety at work and the dialogue with local communities, and/or the actions taken to ensure the protection and the development of those communities),
- human rights matters (e.g. information on the prevention of human rights abuses), anti-corruption and bribery matters (e.g. information on the instruments in place to fight corruption and bribery).

Such statements should include a description of the policies, outcomes and risks related to those matters and should be included in the management report of the undertaking concerned. The non-financial statement should also include information on the due diligence processes implemented by the undertaking, also regarding, where relevant and proportionate, its supply and subcontracting chains, in order to identify, prevent and mitigate existing and potential adverse impacts. Reporting organisations must, as a minimum, provide explanations if they do not follow any policies in respect of the foregoing issues. By way of exception, they may omit information about expected occurrences or matters subject to negotiations in progress if their disclosure might have a seriously adverse effect on the commercial position of the organisation, while having no impact on the correct and objective understanding of the development, performance and position of the organisation and the impacts of its activities. The company may be free from the duty to report non-financial information if they prepare a separate report which is published together with financial statements, or on the organisation's website, within six months of the balance closing date, and if financial statements contain a reference to such a report. There is significant flexibility for companies to disclose relevant information (including reporting in a separate report), and they may rely on international, Eu-

ropean or national guidelines (e.g. the Eco-Management and Audit Scheme (EMAS)[20], the UN Global Compact, the OECD Guidelines for Multinational Enterprises, ISO 26000, etc.).

## Guidelines on Disclosure of Non-Financial Information

The European Commission published the Guidelines to the Directive 2014/95UE on 26 June 2017 to support companies in the preparation of this non-financial statement.[21] The guidelines do not add any legal requirements to the non-financial reporting directive. They do not prescribe reporting guidelines or standards, but they do recommend a few of them, such as the UN Guiding Principles on Business and Human Rights or ISO 26000. They also take into account the UN COP21 Paris Climate Agreement,[22] with the disclosure of information on the actual and potential impacts of the organisation's activities on the environment, especially regarding the reduction of greenhouse gas emissions.

The Guidelines set out the purpose of this disclosure. The aim of these guidelines is to help companies disclose high quality, relevant, useful, consistent and more comparable non-financial (environmental, social and governance-related) information in a way that fosters resilient and sustainable growth and employment, and provides transparency to stakeholders. These non-binding guidelines are proposed within the remit of the reporting requirements provided for under the Directive. They are intended to help companies draw up relevant, useful concise non-financial statements according to the requirements of the Directive.

These guidelines put the emphasis on relevant, useful and comparable non-financial information in accordance with Article 2 of Directive 2014/95/EU.

The guidance is addressed to the companies required by the Directive to disclose non-financial information in their management report. However, the non-binding guidelines could represent best practice for all companies that disclose non-financial information, including other companies not included in the scope of the Directive. The European Commission has prepared the guidelines to develop a principle-based methodology relevant to companies across all economic sectors, which helps them disclose relevant, useful and comparable non-financial information. These guidelines are framed in the con-

20 EMAS (Eco Management and Audit Scheme) is an EU environmental protection instrument based on: *Regulation (EC) No 1221/2009 of the European Parliament and of the Council of 25 November 2009 on the voluntary participation of organizations in the eco-management and audit system in the Community (EMAS), repealing Regulation (EC) No 761/2001 and Commission Decisions 2001/681 / EC and 2006/193 / EC,* Official Journal of the European Union L 342/1.

21 *Guidelines on non-financial…*, op. cit.

22 *Paris Agreement*, United Nations 2015, https://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf [access: 12.08.2017].

text of the management report. The intent is to provide balanced and flexible guidance on the reporting of non-financial information in a way that helps companies disclose material information consistently and coherently. The guidelines recognise the importance of linkages and inter-relations of information (connectivity), whether it is between different aspects of non-financial information or between financial and non-financial information. As much as possible, these Guidelines should help ensure comparability across companies and sectors. This approach recognises the broad diversity of the businesses and sectors involved, and of the circumstances that companies need to reflect in their reporting. Significant efforts have been made to avoid a 'one-size-fits-all' approach and an overly prescriptive methodology.

The guidelines set out the basic principles of disclosing non-financial information. These principles result from the basic assumption that the management report shall include a non-financial statement containing information to the extent necessary for an understanding of the undertaking's development, performance, position and impact of its activity (3.1 point of the Guidelines). It is assumed that Materiality is a concept already commonly used by preparers, auditors and users of financial information. A company's thorough understanding of the key components of its value chain helps identify key issues, and assess what makes information material. Companies may report on a wide range of potential issues. A company assesses which information is material based on its analysis of how important that information is in understanding its development, performance, position and impact. This materiality assessment should take into account internal and external factors. A number of factors may be taken into account when assessing the materiality of information. These include:

- Business model, strategy and principal risks. (The company's goals, strategies, management approach and systems, values, tangible and intangible assets, value chain and principal risks are relevant considerations).
- Main sectoral issues. (Similar issues are likely to be material to companies operating in the same sector, or sharing supply chains. Topics already identified by competitors, customers or suppliers are likely to be relevant for a company).
- Interests and expectations of relevant stakeholders. (Companies are expected to engage with relevant stakeholders and seek a good understanding of their interests and concerns).
- Impact of the activities. (Companies are expected to consider the actual and potential severity and frequency of impacts. This includes the impacts of their products, services, and their business relationships, including supply chain aspects).
- Public policy and regulatory drivers. (Public policies and regulation may have an effect on the specific circumstances of a company, and may influence materiality).

The Guidelines require that non-financial statements should give fair consideration to favourable and unfavourable aspects, and information should be assessed and pre-

sented in an unbiased way (3.2 point of the Guidelines). Therefore, it should consider all available and reliable inputs, taking into account the information needs of relevant stakeholders. Users of information should not be misled by material misstatements, by omitting material information, or disclosing immaterial information. It is emphasized that Material information on certain categories of issues explicitly reflected in the Directive should be disclosed as a minimum. These include:

- environmental, social and employee matters;
- respect for human rights;
- anti-corruption and bribery matters (3.3 point of the Guidelines).

It is assumed that non-financial information will allow insights into a company's business model, strategy and its implementation to be provided, and explain the short-term, medium-term and long-term implications of the information reported. By disclosing targets, benchmarks and commitments, a company may help investors and other stakeholders to put its performance in context. This may be helpful when assessing future prospects. The external monitoring of commitments and progress towards targets promotes greater transparency towards stakeholders. Targets and benchmarks may be presented in qualitative or quantitative terms. As appropriate, companies may disclose relevant information based on science-based scenarios (3.4 point of the Guidelines).

The Guidelines are expected to be consistent with other elements of the management report. The content of the non-financial report should be consistent over time. This enables users of information to understand and compare past and present changes in a company's development, position, performance and impact, and relate reliably to forward-looking information. Consistency in the choice and methodology of key performance indicators is important to ensure that the non-financial statement is understandable and reliable. However, updates may be necessary, as key performance indicators may become obsolete, or new and better methodologies be developed that improve the quality of information. Companies are expected to explain any changes in reporting policy or methodology, the reasons for changing them and their effects (for example by restating past information, clearly showing the effect of changing reporting policies or methodologies) (3.6 point of the Guidelines).

Important non-financial information that should be disclosed is the diversity policy, which shall be included in their corporate governance statement. The description of the board diversity policy does not form part of the non-financial statement. Therefore, this section of the guidelines is without prejudice to the need to disclose material diversity information as part of the non-financial statement (6 point of the Guidelines). Article 1 of the Directive 2014/95/EU requires large listed companies to disclose in their corporate governance statement: "a description of the diversity policy applied in relation to the undertaking's administrative, management and supervisory bodies with regard to aspects such as, for instance, age, gender, or educational and professional backgrounds,

the objectives of that diversity policy, how it has been implemented and the results in the reporting period. If no such policy is applied, the statement shall contain an explanation as to why this is the case". The description of the diversity policy should specify which diversity criteria are applied and explain the reasons for choosing them. When selecting these criteria, all relevant diversity aspects should be considered to ensure that the board has a sufficient diversity of views and the expertise needed for a good understanding of current affairs and longer-term risks and opportunities related to the company's business. The nature and complexity of the company's business should be taken into account when assessing the profiles needed for optimal board diversity, as should the social and environmental context in which the company operates. The diversity aspects should, in general, cover age, gender, or educational and professional backgrounds. Where relevant due to the company's geographical presence and the business sector in which it operates, it is also appropriate to include geographical provenance, international experience, expertise in relevant sustainability matters, employee representation and other aspects, for example the socioeconomic background.

It seems that the requirements imposed on the non-financial statements by the Guidelines are as justified as possible. It is obvious that the condition for the proper fulfillment of the non-financial reporting of its tasks is that the information is presented in an orderly, fair and useful manner. The information presented in the non-financial statements should be understandable to users with a certain level of knowledge of business. The comprehensibility of information is ensured when it is presented transparently and clearly. However, this does not mean that information that can be difficult to understand for the average user may be omitted in the non-financial statements, if it is relevant in or for the decision making. Reporting information is useful when it has the ability to influence the economic decisions of users. The usefulness of the information depends on its other characteristics, namely – relevance. Information is relevant if it can affect the evaluation of the business processes in the company and improve the quality of the forecasts made by the user of the financial statements. The requirement that information be relevant is achieved by simplifying the registration issues that are irrelevant from the point of view of the decisions to me made.

## Conclusions

The need to standardise non-financial reporting to ensure its transparency and clarity is noted by researchers and reporting organisations. In their opinion, the reports should be clear, transparent and comparable and stakeholders should be able to fully satisfy their information requirements. This is also evidence of the care taken over ensuring good relations with stakeholders, who receive standardised data. The regulations of Di-

rective 2014/95 / U, are a step forward, since they will help to standardise the rules of reporting non-financial information, and will improve its transparency and utility. Lack of detailed regulations would impede their comparability, since organisations could rely on different rules and guidelines. Thus, this Directive fills a regulatory gap and improves the usefulness of the information generated by organisations obliged to prepare non-financial reports. This Directive demonstrates the commitment of the European Union to advance corporate transparency and sustainability – supporting smart, sustainable and inclusive growth, and paving the way for a sustainable global economy. It is a kind of a new "paradigm" in enterprise reporting .[23]

Mandatory reporting laws do not introduce any binding mandates on companies to limit environmental pollution, increase labour standards or introduce quotas for female representation on corporate boards. The emphasis is still clearly on voluntary action such as stakeholder engagement, transparency and learning through the development of best practice and the common norms of responsibility. In most cases, the non-financial reporting has not yet reached the quality used for financial reporting. This weakness is related to, inter alia, the problem of measurement issues covered by non-financial reporting and the scope of the disclosed information.

Because the reporting system should take into account the reporting information the users actually demand, and provide the set of information needed in the modern market economy, it is accepted that a balanced approach to financial and non-financial information provides a more complete picture that enables investors and other stakeholders to better understand how company value is created and managed. This view is also shared by the EU, which says that more transparency will drive the long-term performance of the EU's largest companies and contribute to Europe's competitiveness and the creation of more jobs. The fact that the Directive is limited to large corporations and draws on a variety of existing codes, which tend to emphasise environmental over social issues means that any positive change will be limited, however. Nevertheless, there is agreement that transparency leads to better performance. All companies that disclose information on social and environmental matters reap significant benefits over time. Companies that use these guidelines will be able to better integrate material environmental and social information in their business cycle, innovate and adapt their reporting to the particular circumstances of their business, and further rely as appropriate on other reporting frameworks. The first results of the impact the Directive showed in particular that such benefits included lower funding costs, stronger consumer loyalty, and better relations with stakeholders. There is a consensus that well-informed business and investment decisions have much better chances to succeed. Investors, lenders and other stakeholders will benefit from a more informed and efficient decision process.

23 B. Spießhofer, R. G. Eccles, *Information und Transformation – CSR – Berichterstattung in Europa und den USA*, in: *Forum Wirtschaftsethik,Jahresschrift des DNWE,* 2014.

It also seems that society on the whole will benefit from companies managing environmental and social challenges in a more effective and accountable way. The guidelines will support companies in this process. They are principle-based to help companies across all sectors and are designed to be practical, business-oriented and impact-driven. New UE guidelines reflect current best practices and most recent developments at international level, including lessons from the UN Sustainable Development Goals and the Paris Climate Agreement.

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**SUMMARY**

## Non-Financial Reporting in the Light of International Regulations and EU Directives

The need to standardise non-financial reporting to ensure its transparency and clarity is noted by researchers and reporting organisations. In their opinion, the reports should be clear, transparent and comparable and stakeholders should be able to fully satisfy their information requirements. Bearing in mind this assumptions the aim of the study is to analyse the non-Financial reporting system within the scope of international and European Union law. The author pays attention to the essence of reporting non-financial Information and its standards, EU Directives and Guidelines of Discolure.

Keywords: Reporting Non-Financial Information, international law, EU law

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# The Principle of Mutual Trust in the Area of Freedom, Security and Justice. Analysis of Selected Case Law

## Introduction

Since 1999, the European Union (EU) has been implementing the principle of mutual recognition (MR), which is referred to as the cornerstone of judicial cooperation in criminal matters.[1] The principle of mutual recognition assumes that decisions of the judicial authorities of one Member State should as far as possible take effect automatically in all other Member States of the EU.[2] Mutual recognition is based on a presumption of mutual trust. The logic is that "the extraterritoriality of judicial decisions, created by mutual recognition, will only be accepted if there is a sufficiently high level of mutual trust between Member States".[3]

Mutual trust can therefore be regarded as a prerequisite for the principle of mutual recognition, or its 'twin brother'. Mutual trust, as an idea, was initially perceived as a political postulate. However, along with progress towards judicial cooperation in criminal matters it became a systemic principle, proclaimed not only as a cornerstone in the Area of Freedom, Security and Justice, but also as a catalyst for integration.[4] There is no legal definition of 'mutual trust' and, as was aptly observed by T. Ostropolski, the term lacks an explicit normative basis.[5] The meaning of the principle can be – at least partially – recalled from treaties, texts of different legal instruments and policy documents. Conversely, the mutual recognition principle currently has a strong legal basis in EU law.

1 Presidency Conclusions, Tampere European Council 15 and 16 October 1999, http://www.europarl.europa.eu/summits/tam_en.htm [access: 17.01.2018].

2 For more on mutual recognition vid. for example: L. Klimek, *Mutual recognition of Judicial Decisions in European Criminal Law*, Bratislava 2017.

3 A. Willems, *Mutual Trust as a term of art in EU Criminal Law: Revealing its hybrid character*, in "European Journal of Legal Studies" 2016, vol. 9, p. 213.

4 *Cf*. judgment of the Polish Constitutional Court of 16 November 2011 in case no. SK 45/09.

5 T. Ostropolski, *The CJEU as a Defender of Mutual Trust*, in "New Journal of European Criminal Law" 2015, vol. 6, p.166.

The Treaty of Lisbon gave the principle of mutual recognition a pivotal role in the move towards judicial cooperation in criminal matters.[6]

The Council and the Commission have rather quickly revised their attitudes towards the factual level of trust between member states. The same could be said of the European Parliament, which opted for complex regulation of procedural rights to ensure at least a minimal level of common guarantees in Member States. Unlike the other EU Institutions, the Court of Justice of The European Union (CJEU) has become the most important advocate of mutual trust. The Court has upheld the presumption of trust and has become one of its strongest defenders.[7] Reference to mutual trust was an important part of the Court's reasoning in many decisions. However, it can be noted that even the CJEU's case law in this regard has been far from uniform over the course of time.

In this article we will try to present how mutual trust is perceived by the EU Court and how this view has evolved. In addition, analysis of these judgments will be complemented by the views of the European Court of Human Rights (ECtHR) and the German Constitutional Court (Bundesverfassungsgericht, BVerfG). This will help in forming a certain concept for the interpretation of mutual trust by European courts acting on different jurisdiction levels.

## Mutual Trust as a Prerequisite for the Principle of Mutual Recognition

Mutual recognition is not a new concept. The first attempt to introduce mutual recognition in the area of criminal law in Europe was seen in the Council of Europe's conventions adopted in the 1960s and 1970s.[8] They proved to be unsuccessful, especially due to the lack of trust between states. At the EU level, mutual recognition was recognised as a cornerstone of judicial co-operation in criminal matters during the Tampere European Council in 1999.[9] Just one year later, the European Commission stated that the traditional system of co-operation is not only slow, but also cumbersome, and sometimes it is quite uncertain what results a judge or prosecutor who makes a request will get.[10] It argued

6 In accordance with art. 82(1) Treaty on the Functioning of the European Union: *Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States*.

7 T. Ostropolski, op. cit., p. 166.

8 For example: European Convention on the Punishment of Road Traffic Offences of 30 November 1964, European Treaty Series no. 052 [1964].

9 Presidency Conclusions, Tampere European Council 15 and 16 October 1999.

10 Communication from the Commission to the Council and the European Parliament – Mutual recognition of Final Decisions in criminal matters /* COM/2000/0495 final */, p. 2.

that judicial co-operation might also benefit from the concept of mutual recognition. Then, the Commission introduced a Program of Measures to Implement the Principle of Mutual Recognition of Decisions in Criminal Matters. This document sheds light on the specific relationship between mutual recognition and mutual trust. It stipulates that: "Implementation of the principle of mutual recognition of decisions in criminal matters presupposes that Member States have trust in each other's' criminal justice systems. That trust is grounded, in particular, on their shared commitment to the principles of freedom, democracy and respect for human rights, fundamental freedoms and the rule of law".[11] This begs the question of whether the presumption that Member States would trust each other was justified and rational. At that time, no measures aimed at mitigating the differences in the criminal legal systems of member states or approximate minimal procedural rights were envisaged in the treaties. Leaving this aside, it can be said that at the outset there was a strong belief that the level of trust between states – all of which were already parties to the European Convention on Human Rights (ECHR) – was high, which was reflected in the different instruments stipulated in secondary law.

Over time, the wording used to describe mutual trust in different MR instruments has changed significantly. This can be shown in the examples of different phrases used in MR instruments. The framework decision (FD) on the first, and so far most important, mutual recognition measure – the European Arrest Warrant (EAW)[12] declares that the level of confidence between Member States is high.[13] However, in as early as 2008, in the FD on custodial sentences we read that mutual recognition 'should become the cornerstone' of cooperation and – rather oddly – that relations between Member States 'are characterised by special mutual confidence'.[14] This change in tone might therefore reflect

11 Programme of measures to implement the principle of mutual recognition of decisions in criminal matters (Official Journal L C 12/10 of 15 January 2001).

12 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States as amended by the Council Framework Decision 2009/299/JHA of 26 February 2009 amending by the Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial (Official Journal L 81/14 of 27 March 2009).

13 In accordance with recital 10 of FD EAW *The mechanism of the European arrest warrant is based on a high level of confidence between Member States*.

14 Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (Official Journal L 327/27 of 5 December 2008) as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 amending by the Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial.

the real level of trust between member states. As was rightly observed by A. Willems,[15] examples of the effects of these doubts regarding foreign criminal proceedings are also visible in the most recent MR instruments. The 2014 FD on the European Investigation Order (EIO),[16] explicitly acknowledges that the trust presumption is rebuttable and introduces for the first time the explicit 'human rights' refusal ground.

The growing scepticism towards mutual trust might stem from the first years' experiences of the EAW, the introduction of which has caused a lot of controversy.[17] This has concerned, among other things, the partial abolition of dual criminality, which was challenged on the grounds that it breached the principle of legality and the principles of equality and non-discrimination.[18] The most fundamental issue for the legitimacy of the EAW (and what could also be accurate for other MR instruments) is whether the MR system is compatible with human rights. Therefore, significant changes in the refusal grounds catalogue of the EIO (described above) are not a big surprise.

## The Case Law of the CJEU

At the outset it should be noted that the jurisdiction of the CJEU with regard to cooperation in criminal matters was limited until 1st December 2014.[19] After the Lisbon Treaty came into force there was a 5-year transition period concerning instruments adopted before the coming into force of the Lisbon Treaty. A significant amount of the case law of the CJEU was devoted to the EAW.[20] The CJEU has underlined many times that the

15 Cf. A. Willems, op. cit. p. 219.

16 Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European investigation order in criminal matters (Official Journal L 130/1 of 1 May 2014).

17 See for example: E. Guild, L. Martin (Ed), *Still not resolved? Constitutional Issues of the European Arrest Warrant: a Look at Challenges Ahead after the Lessons Learned from the Pasty*, https://www.utwente.nl/en/bms/pa/staff/marin/Still%20not%20resolved%20Constitutional%20Challenges%20to%20the%20European%20Arrest%20Warrant.pdf [access: 02.01.2018].

18 Case C-303/05 *Advocaten voor de Wereld*, ECLI:EU:C:2007:261.

19 See Article 10 (1) of Protocol 36 annexed to the Treaty of Lisbon (consolidated version Official Journal C 326/2001 of 26 October 2012).

20 Cf. cases: C-303/05 *Advocaten voor de Wereld,* ECLI:EU:C:2007:261*;* C-66/08 *Kozłowski*, ECLI:EU:C:2008:437; C-296/08 PPU *Santesteban Goicoechea*, ECLI:EU:C:2008:457; C-388/08 *PPU Leymann and Pustovarov,* ECLI:EU:C:2008:669; C-123/08 *Wolzenburg*, ECLI:EU:C:2009:616; C-261/09 *Mantello*, ECLI:EU:C:2010:683; C-306/09 *I.B.*, ECLI:EU:C:2010:626; C-192/12 PPU *West*, ECLI:EU:C:2012:404; C-42/11 *Lopes da Silva Jorge*, ECLI:EU:C:2012:517; C-396/11 *Radu*, ECLI:EU:C:2013:39; C-399/11 *Melloni*, ECLI:EU:C:2013:107; C-168/13 PPU *F.*, ECLI:EU:C:2013:358; C-237/15 PPU *Lanigan*, ECLI:EU:C:2015:474; C-463/15 PPU *A*, ECLI:EU:C:2015:634; C-241/15 *Bob-Dogi*, ECLI:EU:C:2016:385.

"EAW must be executed on the basis of the principle of mutual recognition and in accordance with the provisions of the framework decision". As S. Peers rightly observed, the case law of the CJEU "focuses overwhelmingly on the efficient application of the European Arrest Warrant",[21] which, however, can also apply respectively to other mutual recognition instruments. As can be seen, even with regard to human rights objections, the core argument of the Court was that Member State have mutual trust in each other's criminal systems.

In the ground-breaking case *Advocaten voor de Wereld*,[22] answering the allegation that (only) partial abolition of dual criminality with regard to 32 offences[23] breached the principles of equality and non-discrimination, the CJEU held that: "The Council was able to form the view, on the basis of the principle of mutual recognition and in the light of the high degree of trust and solidarity between the Member States, that, whether by reason of their inherent nature or by reason of the punishment (…), the categories of offences in question feature among those the seriousness of which in terms of adversely affecting public order and public safety justifies dispensing with the verification of double criminality".[24]

Already then, the argument that there was a high degree of trust and solidarity was an important part of the Court's reasoning. However, the judgments were criticised by many, who argued that "to a certain extent the impression prevails that the Court chose somewhat easy arguments to dispose of some rather difficult issues".[25]

Subsequently, in *Gözütok and Brügge*,[26] the Court was asked whether the *ne bis in idem* principle covers the situation where criminal proceedings have been definitively discontinued due to a settlement before the prosecuting authority (without any involvement of the judge at that phase). The CJEU answered positively, which was met with the surprise of many Member States, as during the hearing it had argued the opposite. In a famous statement, the CJEU – referring to the principle of mutual trust – held the following: "There is a necessary implication that the Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied".

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21 S. Peers, *EU Justice and Home Affairs Law: Volume II: EU Criminal Law, Policing, and Civil Law*, Oxford 2016, p. 99.

22 Case C-303/05.

23 On partial abolition of double criminality requirement vid. more: *Rethinking international cooperation in criminal matters. Moving beyond actors, bringing logic back, footed in reality*, eds. G. Vermeulen, W. De Bondt ,C. Ryckman, Antwerp 2012.

24 Case C-303/05, § 57–58.

25 F. Geyer, *European Arrest Warrant: Advocaten voor de Wereld VZW v. Leden van de Ministerraad*, in: "European Constitutional Law Review" 2008, no. 4, p. 161.

26 Joined Cases C-187/01 and C-385/01 *Gözütok and Brügge*, ECLI:EU:C:2003:87.

Further, in the ruling *Melloni*[27] of 26 February 2014, the CJEU held that it is not permissible for Member States to have more rigorous rules as regards guarantees for the EAW following *in absentia* trials.

In this case, Mr Melloni – an Italian businessman prosecuted for bankruptcy fraud, was hiding behind the justice system in Spain. The trial took place in Italy (which Melloni was fully aware of) but the accused decided not to attend it personally. Still, during the entire trial, he was represented by defence lawyers. When the conviction became final in 2004, Italy issued an EAW ordering Spain to surrender Mr Melloni. It is worth noting here that under the Spanish Constitution, if a person has been convicted in his or her absence (*in absentia*), surrender to the execution of that conviction must be made conditional on the right to challenge the conviction. Such a right was not foreseen in Italian criminal proceedings when Mr Melloni was convicted. Not surprisingly therefore, Mr Melloni referred to the right to a fair trial envisaged in the Spanish Constitution. He argued that his surrender to Italy would violate Spanish Constitutional standards, since in Italy he could not count on a retrial. From the case law of the Spanish constitution it follows that the described rule also applies to situations where the accused was represented by lawyers. Therefore, personal appearance is an element of this entitlement to retrial. At the same time, EU law does not create an equivalent system of guarantees as in Spanish law. Article 4a(1) FD EAW[28] allows the Executing State to refuse the surrender or to make it conditional on the right to a retrial in a limited number of situations. Mr Melloni's case would not fall into these exceptions since, in accordance with Art. 4a(1)(b) FD EAW, if the person convicted in his or her absence was defended and represented by a lawyer, the Executing State cannot refuse surrender. There was therefore a clear conflict between Spanish and EU law provisions. Given this fact, it should also be borne in mind that Art. 53 of the Charter of Fundamental Rights of the European Union (Charter)[29] states that "nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized (…) by Union law and international law (…), including the ECHR and by the Member States' constitutions'". Does this mean, therefore, that referring to the Charter and its own constitutional provisions, Spain should refuse the surrender of Mr Melloni (at least until his right to challenge the in absentia conviction were to be guaranteed)? According to the CJEU, that interpretation of Article 53 of the Charter would undermine the principle of the primacy of EU law. It would allow a Member State to disapply EU legal rules which

27 Case C-399/11 and case C-237/15 PPU.

28 As amended by Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial.

29 Official Journal C 326/391 of 26 October 2012.

are fully in compliance with the Charter, where they infringe the fundamental rights guaranteed by that State's constitution. The Court referred again to the principle of mutual trust end effectiveness of the EAW, stating that (…) "casting doubt on the uniformity of the standard of protection of fundamental rights (…), would undermine the principles of mutual trust and recognition would, therefore, compromise the efficacy of that framework decision". Therefore, the concept of mutual mutual trust stands behind an explanation of the rule that the Charter is to be used as a maximum standard of fundamental rights protection in EU criminal justice.[30]

Mutual trust arguments were a very important part of the CJEU's judgment on access of the EU to the European Convention on Human Rights,[31] i.e. Opinion *2/13* of 18 December 2014,[32] sometimes ironically called the 'Christmas bombshell'.[33] In short, it might be stated that in the Opinion, the Court criticised (on many different levels) the draft of the accession agreement. It stated that the draft agreement contained many fundamental errors and was incompatible with the treaties.

One of the core arguments of the CJEU related to mutual trust issues. In the Court's opinion, the draft agreement may pose a danger to the autonomy of EU law because it may negatively affect the principle of mutual trust between Member States in the context of the respect for fundamental rights, which is particularly relevant in the Area of Freedom, Security and Justice. This danger stems from the obligation imposed on the Member States to check the observance of fundamental rights by all other party states even if they are EU Members. Such a requirement would impair the principle of mutual trust, as can be deduced from the following statement: "The principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained. That principle requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law".[34]

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30 Which does not preclude higher human rights standards in other EU law areas, cf. case C-617/10 *Åkerberg Fransson*, ECLI:EU:C:2013:105.

31 For more information on the complicated issue of accession, vid.: P. Gragl, *The Accession of the European Union to the European Convention on Human Rights,* Oxford and Portland 2013.

32 Opinion 2/13 of 18 December 2014 on Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, ECLI:EU:C:2014:2454.

33 Cf. S. Douglass-Scott, *Opinion 2/13 on EU accession to the ECHR: a Christmas bombshell from the European Court of Justice*, http://verfassungsblog.de/opinion-213-eu-accession-echr-christmas-bombshell-european-court-justice-2/#.VRGRofmG9uw [access: 11.01.2018].

34 Cf. Paragraph 191 of Opinion 2/13.

The CJEU has repeated the arguments expressed in the *Melloni* case. The Court requires that the ECtHR effectively respects its jurisprudence and thereby gives supremacy to the primacy, unity and effectiveness of EU law over the protection of fundamental rights under the ECHR.[35]

As was presented above, the CJEU has consequently defended the principle of mutual trust. According to its judgments, mutual trust can be seen as a matter of 'fundamental importance' or as 'one of the key specificities of EU law'.[36] Bearing this in mind, it should be emphasised, however, that the principle of mutual trust is not absolute, and even in the opinion of its biggest defender the mutual trust assumption can be rebutted.

In the 'asylum case' N.S.[37] the Court held that EU law precludes a conclusive presumption that the Member State responsible under the Dublin Regulation[38] observes fundamental rights. In this case, the court held that a Member State may not transfer an asylum seeker to another Member State (responsible under the Dublin regime) where there is a risk that asylum seekers would face a real risk of being subjected to inhuman or degrading treatment. Where the MS cannot be unaware of systemic deficiencies in the asylum procedure, both the presumption of mutual trust, and the presumption underlying the relevant legislation that asylum seekers will be treated in a way which complies with fundamental rights, must be regarded as rebuttable.[39] The member state facing major operational problems in this case was Greece, which was severely affected by the migration crisis (the case concerned the period from 2008 to 2009). At that time in Greece there existed a systemic deficiency in the asylum procedure and in the reception conditions for asylum seekers. It is assumed that Member States participating in the Common European Asylum System observe fundamental rights, including the rights based on the Geneva Convention, and on the ECHR, and that the Member States can have confidence in each other in that regard. However, when it is evident (for example on the basis of ECtHR jurisprudence)[40] that a given member state (or a third country) infringes the fundamental rights of the asylum seeker, such confidence is unfounded. Moreover, infringement of fundamental rights by the Member State responsible will not

35 Cf. S. Reitemeyer, B. Pirker, *Opinion 2/13 of the court of justice on access of the EU to the ECHR – one step ahead and two steps back*, http://europeanlawblog.eu/2015/03/31/opinion-213-of-the-court-of-justice-on-access-of-the-eu-to-the-echr-one-step-ahead-and-two-steps-back/ [access: 21.12.2017].

36 T. Ostropolski, op. cit., p.166.

37 Joined Cases C-411/10 and C-493/10 *N.S. and others*, ECLI:EU:C:2011:865.

38 Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national **(**Official Journal L 50/1 of 25 February 2003).

39 Paragraph 104 of Joined Cases C-411/10 and C-493/10 *N.S. and others*.

40 In this regard vid. also the judgment of the ECtHR of 21 January 2011 in the case *MSS v Belgium and Greece*, (no. 30696/09).

affect the obligations stemming from, among others, the Dublin Regulation of the other states. The Court clearly stated that if there are substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment, the transfer would be incompatible with Art. 4 of the Charter (Prohibition of torture and inhuman or degrading treatment or punishment). Thus, if compliance with fundamental rights requires the Member State where the asylum seeker is present to examine the asylum application, that Member State has no choice but to do so.[41]

According to Mitsilegas, the N.S. judgment "constitutes a turning point in the evolution of inter-state cooperation in the Area of Freedom, Security and Justice, and signifies the end of automaticity in inter-state cooperation not only as regards the Dublin Regulation, but also as regards cooperative systems in the fields of criminal law and civil law".[42] In turn, S. Peers asks whether this judgment means 'the death of mutual trust'.[43] Probably not, but after this judgment one surely cannot automatically rely on the 'mutual trust' that other Member States will observe human rights and that, simply because they are a part of the EU, they should always unconditionally be treated as 'safe'.

Another occasion where the CJEU confirmed that the assumption of mutual trust has certain limits was its judgment in the already well-described case *Aranyosi and Căldăraru*.[44] This case concerned detention conditions in a state that issues the EAW. In the cases of Mr Aranyosi and Mr Căldăraru, the German court asked the CJEU whether it should execute an EAW despite the concerns raised by the fugitives about prison conditions in Hungary and Romania which had led to ECtHR rulings finding violations of Article 3 ECHR (freedom from torture or other inhuman or degrading treatment or punishment). It was a general assumption for all instruments existing in judicial cooperation in criminal matters that Mutual recognition should ensure not only that sentences are enforced, but also that they will be served in a way that protects individual

41 Cf. K. Lenaerts, *The principle of mutual recognition in the area of freedom, security and justice,* the fourth annual lecture at All Souls College, University of Oxford, 30 January 2015, https://www.law.ox.ac.uk/sites/files/oxlaw/the_principle_of_mutual_recognition_in_the_area_of_freedom_judge_lenaerts.pdf [access: 22.12.2017].

42 V. Mitsilegas, *The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual*, "Yearbook of European Law" 2012, no. 31 ,p. 358.

43 S. Peers, *Court of Justice: The NS and ME Opinions – The Death of "Mutual Trust"*?, http://oppenheimer.mcgill.ca/IMG/pdf/Court_of_Justice-_The_NS_and_ME_Opinions_-_The_Death_of_Mutual_Trust_.pdf [access: 15.12.2017].

44 Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*, ECLI:EU:C:2016:198; Cf. S. Gáspár-Szilágyi, *Joined Cases Aranyosi and Căldăraru: Converging Human Rights Standards, Mutual Trust and a New Ground for Postponing a European Arrest Warrant*, "European Journal of Crime, Criminal Law and Criminal Justice" 2016, vol. 24, no. 2–3.

rights.[45] At the same time, however, the CJEU has so far highlighted that the list of refusal grounds is exhaustive and that refusal on general a human-rights based exception would undermine the effectiveness of the EAW system. However, these arguments seemed insufficient in this case. After the ECtHR's judgments[46] it was obvious that prisons in Romania and Hungary were dramatically overcrowded and that the executions of the EAW in these circumstances would not be defensible from the perspective of human rights protection. The CJEU had to consider whether in such cases judicial authority may or must refuse execution of the EAW, or whether it may or must make the surrender of that person conditional on obtaining information that detention conditions are compatible with fundamental rights.

At the beginning of the reasoning, the Court repeated that the list of refusal grounds is exhaustive and that an EAW may be made subject to only one of the conditions exhaustively laid down in Article 5 of that Framework Decision. Again – according to the Court – this is justified by the high level of trust between member states. The Court, therefore, did not change its approach and did not accept that in certain circumstances fundamental rights violations should be treated as an additional ground for refusal or non-execution.[47] In its opinion, the mere finding that there is a real risk of inhuman or degrading treatment by virtue of the general conditions of detention in the issuing Member State cannot lead, in itself, to the refusal to execute a European arrest warrant. However, the Court stated that "limitations of the principles of mutual recognition and mutual trust between Member States can be made in exceptional circumstances".[48] As to the merits, the Court held that if there is "a real risk of inhuman or degrading treatment, the execution of the warrant must be postponed but it cannot be abandoned". Before that, however, the executing judicial authority must go through the specific 'two-tier test'.

First, it must check whether there is a systemic failure to ensure decent prison conditions in a given State and second – a 'real risk' that the individual fugitive would be subject to such conditions if the EAW is executed. If these 'conditions' are met, the executing State's authorities have to postpone execution of the EAW until the detention conditions in the issuing State have improved.

This case is another example where mutual trust cannot be achieved by a mere decision or legislation. The CJEU tried to find a compromise between the effectiveness and integrity of the EAW and the need for human rights protection. This judgment,

45 Communication from the Commission to the Council and the European Parliament – Mutual recognition of Final Decisions in criminal matters, p. 2.

46 Cf. e.g. judgment of ECtHR of 10 March 2015 in the case *Varga and Others v. Hungary*, (Nos 14097/12, 45135/12, 73712/12, 34001/13, 44055/13 and 64586/13).

47 Excellent considerations on this issue can be found in: opinion of Advocate General Eleanor Sharpston of 18 October 2012, case C-396/11 *Ministerul Public – Parchetul de pe lângă Curtea de Apel Constanța v Ciprian Vasile Radu*, ECLI:EU:C:2012:648, § 70 *et seq*., 74 *et seq*.

48 *Ibid.* § 82.

however, leaves many questions unanswered. First of all, it is not entirely clear how the test proposed by the CJEU should be proved and who bears the burden of proof. Sometimes it might be very difficult to present sufficient evidence that the entire detention system is inefficient. Another concern regards possible forum shopping to achieve impunity in cases where detention conditions have not been improved in a reasonable time. Problems regarding detention conditions cannot be solved easily and fast. Perhaps in the future this judgment will trigger a legislative initiative for minimum EU detention standards which was suggested by Advocate General Y. Bot in his opinion.[49]

## The Case Law of the ECtHR and the BVerfG

The case-law of the CJEU underlines the importance of mutual trust in cooperation within the EU, especially in the Area of Freedom, Security and Justice. Having analysed the reasoning of the CJEU, it is worth taking a closer look at the judgment of the BVerfG in a case related to the European Arrest Warrant (Order of 15 December 2015 – EAW II).[50] Already, the past rulings of this court, such as the 'Solange' jurisprudence, have become model solutions, discussed and applied across Europe and beyond.[51]

The case concerned the surrender of an American citizen from Germany to Italy under the EAW. It was issued for the purpose of executing a sentence imposed in Italy after trial *in absentia*. The German court had serious doubts about the procedural guarantees in Italy, and therefore asked the relevant Italian authorities for the necessary information regarding national law. The German court tried to determine what kind of remedies the accused was entitled to and what provisions would apply in the case of a trial during which the accused were not present. After the necessary information was provided, referring among other things to the principle of mutual trust and obligations set out in the FD EAW, the Düsseldorf Higher Regional Court stated that extradition in this case was lawful. This decision was appealed in the BVerfG, which found that executing the arrest warrant was contrary to the German legal order. The Court referred primarily to the constitutional aspects of criminal sentences, stating that in this case executing the Framework Decision on the European arrest warrant affects the principle of individual guilt, and thus the principle of the rule of law, and this forms part of the inalienable constitutional identity under the Basic Law (i.e. German Constitution). The Court also referred to the ECHR where the presence of the defence – be it in the initial proceed-

49 Opinion of Advocate Generaln Yves Bot of 3 March 2016, joined cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru*, ECLI:EU:C:2016:140.

50 Order of BVerfG of 15 December 2015 in case no. 2 BvR 2735/14.

51 T. Reinsbracher, M. Wendel, *The Bundesverfassungsgericht's European Arrest Warrant II Decision*, in "Maastricht Journal of European and Comparative Law" 2016, vol. 23, p. 702.

ings or upon retrial – is one of the essential requirements under Art. 6 ECHR (the right to a fair trial). BVerfG stressed that Italian procedural law, in the described case, did not provide the accused with the undeniable guarantee that he would have an opportunity to have a new hearing of evidence at the appeal stage. It found that the requested person who had been sentenced in his or her absence and who had not been informed about the trial and its conclusion should at least have been provided with the real opportunity to defend himself or herself effectively after having learned of the trial, in particular by presenting circumstances to the court that may exonerate himself or herself and by having them reviewed. The Italian criminal proceedings failed to ensure such standards at that time. In the opinion of the BVerfG, the Higher Regional Court failed to sufficiently follow up on that issue. It contented itself with finding that a hearing of evidence in Italy was 'in any case not impossible'. On these grounds, the BVerfG stated that the Italian criminal proceedings were not in compliance with the minimum guarantees laid down in the German Constitution. The key aspect of the judgement is a reference to the so called Identity Review Order (*Identitätskontrolle*), which is a review of the conformity of the standards of legal proceedings in the issuing state with the German national order. Under this principle, even if the procedure in the issuing state meets the EU standards, it still needs to abide by the key German constitutional standards. These standards could not be met in a situation where the accused, after his surrender to Italy, was not provided with a legal remedy with which he could have challenged the sentence rendered in his absence in a manner that safeguarded his rights of defence. Such rights under the German constitution are inalienable and encompassed by the guarantee of human dignity.

Thereby, the BVerfG stated that the order of the Düsseldorf Higher Regional Court violated the fundamental rights of the accused in the main case under the Basic Law (Constitution) insofar as it declared the extradition under the EWA permissible. It recognized that the principle of mutual trust and the effectiveness of EU law must give way to the protection of fundamental rights guaranteed by the Constitution.[52] The justification for such a position was that the Member States were the 'masters of the Treaties', and that the validity and the primacy of Union law depends on their will. National law, therefore, in such cases limits the principle of the supremacy of EU law. In the Court's opinion: "In general, sovereign acts of the European Union and acts of German public authority – to the extent that they are determined by Union law – are, due to the prece-

52 Cf. N. Gazeas, *Die Europäische Beweisanordnung – Ein weiterer Schritt in die falsche Richtung?*, in: "Zeitschrift für Rechtspolitik" 2005, no. 1, p. 19, which indicates that the German parliament, when adopting the Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters (Official Journal L 350/72 of 30 December 2008), proposed that due to the large differences between the criminal law systems in the Member States and the insufficient level of procedural guarantees in the Union, mutual recognition cannot take place automatically and without any limitations.

dence of application of European Union Law, not to be measured against the standard of the fundamental rights enshrined in the Basic Law. However, the precedence of application of European Union Law is limited by the constitutional principles that are beyond the reach of European integration".

The position of the German court underlines the conditionality of the principle of mutual trust. Regardless of considerations concerning, among other things, the principle of loyalty, the ruling of the German Constitutional Court is an example of a restrained approach to the principle of mutual trust.[53]

Another decision which sets the way for the interpretation of the principle of mutual trust is the judgment of the ECtHR in the case of *Avotiņš v. Lithuania.*[54] In this case, the ECtHR examined the compliance of the enforcement of the foreign judgement under the Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (known as '*Brussels I*') with the ECHR. In this case, the ECtHR had, for the first time, to examine observance of the guarantees of a fair hearing in the context of mutual recognition in civil and commercial matters based on European Union law. Considering the scope of EU judicial cooperation it was only a matter of time before the ECtHR had to rule on the issue[55] as it was predictable that the mutual recognition and enforcement of civil judgments can interfere with fundamental rights in many different ways.

The case concerned a judgment of a Cypriot court ordering the applicant to pay a debt he had contracted with a Cypriot company, and an order made by the Latvian courts for the enforcement of the Cypriot judgment in Latvia. It is also worth noting at the outset that this case also concerns a judgment that was rendered *in absentia* (in this case in the absence of the defendant). In the applicant's opinion, the Lithuanian court violated Article 6 of the ECHR (the right to a fair trial), due to the fact that it had authorised the

53 The judgment was called 'Solange III', due to its bold claims against the priority of EU law and the system of protection of fundamental rights created within it. Cf. H. Satzger, *Grund – und menschenrechtliche Grenzen für die Vollstreckung eines Europäischen Haftbefehls? – „Verfassungsgerichtliche Identitätskontrolle" durch das BVerfG vs. Vollstreckungsaufschub bei „außergewöhnlichen Umständen" nach dem EuGH*, „Neue Zeitschrift für Strafrecht" 2016, no. 9, pp. 514–522.

54 Judgment of ECtHR of 23 may 2016 in case *Avotiņš v. Lithuania* (no. 17502/07). Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Official Journal L 12/1 of 16 January 2001). See also S. Ø. Johansen, *EU law and the ECHR: the Bosphorus presumption is still alive and kicking – the case of Avotiņš v. Latvia*, http://eulawanalysis.blogspot.com/2016/05/eu-law-and-echr-bosphorus-presumption.html [access: 14.01.2018].

55 Cf. e. g.: in the case *Pietro Pianese v. Italy and the Netherlands* (no. 14929/08), an Italian citizen complained about detention based on the EAW, alleging violations of Art. 5 of the Convention. However, the ECtHR declared the applicant's allegations inadmissible, because they were brought out of time and were manifestly ill-founded. In turn, in case *Romeo Castaño v. Belgium* (no. 8351/17), the ECtHR will check compliance the refusal to enforce EAW with the Convention.

enforcement of the Cypriot judgment, although the decision had been delivered in breach of his defence rights and had thus been clearly unlawful.

The ECtHR held that there was no violation of Article 6 of the ECHR. The applicant could have used the remedies available under Cypriot law. His inaction and lack of diligence contributed to the situation to a large extent and he could have prevented it. The defendant signed the acknowledgment of debt deed, which contained a clause conferring jurisdiction to the Cypriot courts. He should have been aware of the consequences of his actions and the possibility that the creditor would institute proceedings in this country. Regardless of the above and more than the ruling itself, in this particular case what is more interesting for us are the general observations of the court on the delicate issue of application of EU law on the one hand and respect for fundamental rights envisaged in ECtHR on the other.

Although the ECtHR did not notice any infringement of the ECHR, it pointed out that it is impossible to introduce a mechanical and automatic recognition system within the EU without providing the Member States with the opportunity to check the equivalence of the protection of fundamental rights.[56] The ECtHR reiterated that, when applying European Union law, States are bound by the obligations they entered into on acceding to the ECHR. These obligations must be assessed in the light of the presumption established by the Court in the famous 'Bosphorus' judgment.[57] This judgment introduced the presumption of equivalent protection of ECHR rights by the EU. However, "any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient".[58] The ECtHR stated that member states of an international organization are still liable under the ECHR for all acts and omissions of its organs regardless of whether the act or omission was a consequence of the necessity to comply with international legal obligations. In other words, the mere fact that a given Member State is applying EU law and executing a judgment issued by another EU Member State does not negate its obligation to check whether ECHR standards were met.

In the *Avotins* case, the ECtHR confirmed that the *Bosphorus presumption* also applies to the mutual recognition mechanism. The Court observed, however, that this presumption is applicable only when two conditions are met. First, if there is an 'absence of any margin of manoeuvre' on the part of the domestic courts and *the deployment of the full potential of the supervisory mechanism provided for by European Union law*. In *Avotins* these conditions were fulfilled, as the Brussels I Regulation (as opposed to directives) is directly applicable and contains only limited grounds for refusal (applicable in marginal situa-

56 Cf. S. Ø. Johansen, op. cit.

57 Judgement of ECtHR of 30 June 2005 in case *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* (no. 45036/98).

58 Cf. *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland.*

tions). According to the ECtHR, the Latvian courts did not have, therefore, any margin of manoeuvre in this case (which might be questioned as EU law does not regulate, for example, such matters as burden of proof with regard to fundamental rights observance which could arguably give some leeway to the executing court)[59]. With regard to the second condition, the ECtHR held that it was met in this case since Mr Avotins had not advanced any specific argument concerning the interpretation of the Brussels I Regulation and its compatibility with fundamental rights. Especially so, as there was no request that a preliminary ruling should have been sought from the CJEU. The passive attitude of the defendant with respect to his rights and legal actions supports the statement that the second condition was also met.

However, the mere finding that all the above-mentioned conditions have been met is not yet sufficient. Another important aspect that the executing court must take into account while recognising a foreign judgment is whether the protection of ECtHR rights in the entire procedure is not 'manifestly deficient'. The ECtHR has very clearly explained that obligation: "The Court must satisfy itself […] that the mutual recognition mechanisms do not leave any gap or particular situation which would render the protection of the human rights guaranteed by the Convention manifestly deficient. In doing so it takes into account, in a spirit of complementarity, the manner in which these mechanisms operate and in particular the aim of effectiveness which they pursue. Nevertheless, it must verify that the principle of mutual recognition is not applied automatically and mechanically […] to the detriment of fundamental rights – which, the CJEU has also stressed, must be observed in this context […]. In this spirit, where the courts of a State which is both a Contracting Party to the Convention and a Member State of the European Union are called upon to apply a mutual recognition mechanism established by EU law, they must give full effect to that mechanism where the protection of Convention rights cannot be considered manifestly deficient".

How should this be interpreted in the light of the principle of mutual trust? Convincingly, the aspirations of absolute mutual trust have been negatively assessed.[60] Obviously, the system of simplifying the migration of judgments in the EU has not been denied. The ECtHR did not undermine the basis of the simplified mechanism for the recognition and enforcement of judgments, in particular the introduction of a prohibition on reviewing foreign judgements as to their substance in the Member State in which recognition/enforcement is sought (the prohibition of *révision au fond*). However, according to the ECtHR, Member States must be able to investigate whether the proceedings in

59 Cf. S. Ø. Johansen, op. cit.

60 G. Biagioni, *The Uneasy Balance Between Mutual Recognition of Judgments and Protection of Fundamental Rights*, in "European Papers" 2016, Vol. 1, no. 2, p. 594, http://www.europeanpapers.eu/fr/system/files/pdf_version/EP_EF_2016_I_036_Giacomo_Biagioni_1.pdf [access: 12.01.2018].

the issuing State do not violate the standards of the ECHR, even if this is not provided for in EU law.[61] At the same time, it was emphasized that the level of protection of fundamental rights introduced by EU law cannot interfere with guarantees provided at the international level. The judgement of the ECtHR is clearly a signal for a revision of some of the legal features of EU judicial cooperation, and arguably not only in judicial cooperation in civil matters.

## Conclusions

The principle of mutual trust is often referred to in case-law and probably this trend will not change in the near future given that the presumption of trust is the basis for all mutual recognition instruments. Therefore, there is a need to clarify what the principle of mutual trust means exactly and how it is understood by courts. The decisions referred to in this paper have explained, at least to a certain extent, the content of the principle. Moreover, they have provided an example of the complex relationship between mutual trust, fundamental rights protections, mutual recognition and the enforcement of judgments. Although the judgments relate to different aspects of cooperation and were issued in different circumstances, in our opinion some general conclusions can be drawn. Firstly, courts seem more and more often to refer to the principle of mutual trust in the Area of Freedom, Security and Justice in their reasoning. The intensification of the reference to the mutual trust principle goes hand in hand, however, with the belief that the principle has certain limits. It is clear now that the presumption of mutual trust under certain circumstances is rebuttable. The common feature of all judgments is the negation of the absolute nature of the principle of mutual trust. The conditional nature of the principle of mutual trust stems from, among other things, the need for fundamental rights protection.[62]

Secondly, the basis of the principle's restriction is something which fundamentally differentiates the CJEU, BVerfG and ECthR. Where the ECtHR indicates that the minimum protection level should respond to the standard envisaged in the ECHR, the BVefG recognizes as a priority the standards set by the German Constitution which cannot be reduced due to the abstract principle of trust. The CJEU refers to guarantees referred to directly in EU instruments. In *Melloni*, the CJEU for the first time set a minimum

61 *Ibid*, p. 589.

62 Unfortunately, in the Union there are still serious deficiencies in the protection of fundamental rights. For example, due to bad conditions in prisons in Bulgaria, the German courts refused extradition to that country several times, information available at:http://www.euractiv.com/section/justice-homeaffairs/news/German-courts-refuse-to-extradite-prisoners-to-bulgaria/ [access: 12.01.2018].

of fundamental rights protection in criminal matters by reference to the European *ordre public*. The CJEU tried to create a common standard, a public order category which takes into account European requirements, and not only the characteristics of the national legal order. This means that the interpretation of the conditions for the recognition and enforcement of judgments may also be influenced by factors not directly indicated in the act (i.e. the principle of protection of fundamental rights).

Adoption of mutual trust as the basis for integration, and above all the mechanisms for recognition and enforcement of judgments is an ambitious project. Its content, however, must take into account the context and the conditions in which it operates – the aims of the regulations, but also the attitude of the national courts. Referred judgments make it clear that there are different approaches to the principle of mutual trust. Practice will show which point of view becomes the leading one, especially as the presumption of adequate protection of fundamental rights and the rule of law in all Member States is becoming increasingly questionable since the Commission took the unprecedented step of triggering the formal steps established in Article 7 of Treaty on the European Union[63] against Poland. The former convictions that *in this Union of values it will not be necessary to apply penalties pursuant to Article 7 of the Union Treaty*[64] unfortunately turned out to be too optimistic.

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SUMMARY

**The Principle of Mutual Trust in the Area of Freedom, Security and Justice. analysis of Selected Case Law**

The paper concerns the principle of mutual trust and its interpretation by the Court of Justice of the European Union as well as two other important European courts: the European Court of Human Rights and the German Constitutional Court. The paper presents the important change of direction in interpretation of the principle of mutual trust by the CJEU. Initially, the belief in the existence of mutual trust between member states was firm. Over time, however, it has turned out that even in the EU – which follows from a number of judgments of the ECtHR – violations of human rights sometimes happen. This dramatically undermines trust in foreign judicial systems. This led the CJEU to the conclusion that the principle of mutual trust is rebuttable and that in some circumstances limitations to the principles of mutual recognition and mutual trust can be made. This conclusion can be treated as an answer in the specific 'judicial dialogue' of the CJEU with the ECtHR and the German Constitutional Court – the two latter courts seemed to notice earlier that mutual trust between member states cannot be blind and unconditional.

Keywords: European criminal law, Area of Freedom, Security and Justice, principle of mutual trust, mutual recognition

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Martin Hapla

# Is the Separation of Powers a Useless Concept? The Components and Purpose of the Separation of Powers[1]

## Introduction

The separation of powers is a significant topic. It is an important part of discussions among not only lawyers but also politicians and journalists. Something like this would not be possible if the issue were resolved. The separation of powers keeps raising new questions. But what is the nature of these questions? When Eoin Carolan considered the same in the context of Great Britain, he concluded that there is no political or judicial debate over the important normative assumptions of the separation of powers. This issue rather remains hidden in the background, and only some partial problems of the institutional arrangement are discussed, such as the position of the Lord Chancellor or the House of Lords.[2] We can put this criticism on an even more general plane and say that the theoretical and philosophical contexts of the whole issue remain neglected. In fact, many of the difficult-to-solve disputes over the status of various state bodies might be, in my opinion, rooted in some of the non-articulated general problems. It is, therefore, one of the objectives of this paper to bring these problems to the fore and examine the separation of powers from the point of view of legal theory and philosophy. Nowadays, the importance of general institutional issues is quite extraordinary.[3] We live in a time when we hardly agree on any ethical or political principles. This raises the need for fairly set up institutions that would enable us to resolve the disputes that arise from such disagreements.[4]

1 The paper is a result of the project Axiologické základy právního myšlení Code: MUNI/A/0828/2016.

2 E. Carolan, *The New Separation of Powers: A Theory for the Modern State,* New York 2009, pp. 33–34.

3 To this, cf. J. Waldron, *Political Political Theory. Essays on Institutions,* Cambridge, London 2016, p. 5. The author also reminds us that this is a traditional issue. Examination of political institutions has been a topic of theory since Aristotle. Vid. ibid, p. 20.

4 Cf. ibid. Our disagreement on ethical, religious, and political values has already been addressed by John Rawls, who constructed his concept of overlapping consensus as a reaction. To this, vid.

What if exploring this issue opens Pandora's box? Could it be eventually shown that the separation of powers is such a difficult-to-understand principle that we cannot actually draw any concrete institutional applications from it? We should not close our eyes to such fears but rather the opposite. If they prove justified, the question remains how we should treat the separation of powers. Should we try to innovate it in some way, to formulate its new, more appropriate concept? Or should we rather dismiss it completely and replace it with something else? Is the separation of powers a useless concept? I will try to answer these questions in two articles. In the first one I deal with the issue of components of the separation of powers, their mutual relationships and their purposes.

## The Components of Separation of Powers

What exactly do we mean by the separation of powers? At first glance it seems to be a rather confusing concept[5] because it combines several and very different components. For example, Jeremy Waldron differentiates five separate principles within its framework: the principle of the separation of power; the principle of the dispersal of power; the principle of checks and balances; the principle of bicameralism; and the principle of federalism consisting in the division of power between the federal government and the components that represent its individual states.[6] In contrast, M. J. Vile distinguishes the separation of agencies, the separation of functions, the separation of persons, and also the system of checks and balances.[7] We see that both divisions differ in certain ways, but they also have a lot in common. I am of the opinion that there are two fundamental questions standing in the background of the ideas on the separation of powers: The first one is who should perform what state function, and second, what should the mutual relations between individual state bodies be? Within both, we can think of different models. If, in the context of the first, we advocate the requirement that each function be exercised by a different state body, we can speak of the separation of functions. The opposite of this principle is the situation where one function is exercised by several state bodies, or where one state body exercises multiple functions. A different question is whether individual state bodies should be (as much as possible) independent or mutually interconnected by different (control or other) mechanisms. In such a framework, we consider whether we should apply the require-

e.g., J. Rawls, *The Idea of an Overlapping Consensus*, in: "Oxford Journal of Legal Studies", 1987, no. 1, pp. 1–25.

5 Cf. M. J. C. Vile, *Constitutionalism and the Separation of Powers,* Indianopolis 1998, p. 2.

6 J. Waldron, op. cit., p. 49.

7 M. J. C. Vile, op. cit., p. 17 *et seq*.

ments of institutional independence or the system of checks and balances.[8] In practice, we can combine a variety of these components – for example, we may require that individual state functions are exercised by different systems of state bodies that would be institutionally independent, etc. Or we can also reflect some of these principles onto different levels of the state organization and deal with the question, for instance, of what the interrelations between the state government and local self-governments should be, and of whether they should exercise different functions.

## The Separation of Functions

The separation of functions and the independence of individual state bodies has not been sufficiently distinguished in the scholarly iterature, not even by critics of the separation of powers. In order to make their views easier to understand, we will combine both into the term "the strict separation of powers" in the first paragraphs of this chapter. Later in the text, we will attempt to distinguish between the two concepts again.

Although Montesquieu is sometimes considered to be the founder of the idea of the strict separation of powers, he does not use the term "séparation des pouvoirs" in his work The Spirit of the Laws, but rather mentions the distribution of powers. This does not exclude the fact that his work presented a fundamental impetus for the constitution of this idea. The idea of a strict separation of powers undoubtedly had its argumentative power: It is noteworthy, for example, that one of the objections to the U.S. Constitution was that it blended different kinds of power and that it was not truly consistent in their separation.[9] James Madison responded to this criticism by accepting that the accumulation of legislative, executive, and judiciary powers in same hands means tyranny, however, in his view, the doctrine of the separation of powers should not mean that the different kinds of power should be completely independent of each other. According to Madison, this was also how Montesquieu understood it, as supported by the constitutional order in Britain where these kinds of powers had never been totally separated.[10] In other words, in the construction of the U.S. Constitution, the strict separation of powers had to make way for other tendencies, in particular for those resulting from the need of in-

8 In connection with this consideration, cf. Jan Kysela's distinction between the separation of powers in the functional sense and institutional sense. J. Kysela, *Ústava mezi právem a politikou: úvod do ústavní teorie,* Praha 2014, p. 287.

9 J. A. Fairlie, *The Separation of Powers,* "Michigan Law Review" 1923, no. 4, p. 397.

10 For details, vid. ibid, pp. 398–399. Also cf. various considerations on the separation of powers directly in the Federalist Papers: A. Hamilton, J. Madison, J. Jay, *The Federalist,* Indianapolis 2005, p. 262 *et seq*.

tegration. The approach of the Founding Fathers thus did not stem from some leading theory on the separation of powers but was rather of a pragmatic character.[11]

The fact is that the idea of the strict separation of powers traditionally faced a large number of objections, especially during the 19th century: the Swiss lawyer and politician Johann Kaspar Bluntschli argued that the complete separation of powers would be the end of the unity of the state.[12] Similarly, the French administration law theorist Leon Duguit stated that the idea of the separation of powers was incompatible with the idea of the indivisibility of sovereignty and that the very idea of one sovereign power within three is a metaphysical concept analogous to the Holy Trinity, which is inadmissible in a truly positive construction of public law.[13] The American academic Westel Woodbury Willoughby then warned that the complete application of this principle is prevented by the practical requirement for effective governance.[14] Finally, these objections were well summarized and supplemented by French lawyer Raymond Carré de Malberg in his Contribution à la théorie générale de l'Etat. This author considered the concept of pluralism to be incompatible with the essential unity of the state. The absolute independence of state bodies would, in his view, be impractical,[15] just as their equality would be legally impossible. There would always be one body that would have superiority over others.[16]

Generally, two distinct questions were combined in the criticism of the separation of powers – the separation of functions and the independence of state bodies. While absolute independence between individual organizational units would indeed undermine the unity of the state, the argument of its impracticability and unfeasibility is directed primarily against the separation of functions. Of course, it must be admitted that even the disintegration of the unity of the state would influence the efficiency of the realization of its functions – it ultimately leads to impracticality.

The separation of functions can be considered a kind of division of labour. Its value, among other things, lies in increasing the efficiency of the whole system,[17] which is aided by the specialization of individual state bodies for the realization of certain functions. Illustrative in this context is a reference to the fact that if statutes were enforced by the person who created them, that person would not be motivated to make them free of flaws since it would be possible to later "repair" statutes relatively easily in the process of

11 S. W. Cooper, *Considering "Power" in Separation of Powers*, in: "Stanford Law Review", 1994, no. 2, p. 366.

12 J. Fairlie, op. cit., pp. 412–413.

13 Ibid., p. 420.

14 Ibid., p. 405.

15 The argument of the impracticability of strict separation of powers can also be found in the present literature. Vid., e.g., E. Carolan, op. cit., p. 19.

16 J. Fairlie, op. cit., p. 422.

17 The importance of the relationship between the separation of powers and effective governance is implicitly described in E. Carolan, op. cit., p. 22.

their application. It is important, however, that their truly strict separation is not (and has never been for most of the past) really pursued.[18] For example, according to Victoria Nourse, the fact that individual state bodies exercise their functions as well as the functions of other bodies is an open secret.[19] Similar approaches can be reliably shown throughout history.[20] On the contrary, the question of how independent state bodies should be of each other is one of the constantly recurring problems. Yet, the emphasis on their autonomy still remains alive.[21]

## The System of Checks and Balances and its Relationship to Institutional Independence

Within the intentions of the system of checks and balances, we no longer strive for the strict separation of state functions, nor for the greatest possible independence of state bodies, but rather for a balanced relationship between them. James Madison may be viewed as one of the fathers of this concept, as he outlined it in the famous Federalist Papers.[22] Maxim Tomoszek explicitly states in one of his texts:

– In overall, we can say that although the separation of powers is primarily perceived as a principle guaranteeing democracy, its main importance lies in ensuring the existence of the rule of law by dividing the tasks of creation and application of law among individual powers, thus ensuring a certain balance.[23]

The idea of balance is characteristic of the system of checks and balances.

The problem of the interrelation of this principle with the other components of the separation of powers has already been outlined in part. These are a few separate prin-

18 In the context of Great Britain, this had already been claimed by John A. Fairlie. Vid. J. Fairlie, op. cit., p. 397. Also cf. L. Claus, *Montesquieu's Mistakes and the True Meaning of Separation*, in: "Oxford Journal of Legal Studies", 2005, no. 3, pp. 427–428. P. B. Kurland, *The Rise and Fall of the "Doctrine" of Separation of Powers*, in: "Michigan Law Review", 1986, no. 3, p. 603.

19 V. Nourse, *The Vertical Separation of Powers*, in Duke Law Journal 1999, no. 3, p. 758. To this, cf. some of the considerations in L. Claus, op. cit., p. 445.

20 Cf., e.g., J. A. Fairlie, op. cit., pp. 402–403.

21 Cf., e.g., the statement of President of the Constitutional Court of the Czech Republic Pavel Rychetský that the separation of powers encourages the tendency to maximize autonomy. P. Rychetský, *Několik poznámek ke stavu* české *justice s přihlédnutím k dělbě moci*, in: *Dělba soudní moci v* České *republice*, ed. V. Hloušek, V. Šimíček, Brno 2004, p. 15.

22 Vid. A. Hamilton, J. Madison, J. Jay, op. cit., p. 280 et seq. Madison also rejects the idea of the strict separation of powers and supports his argumentation by an analysis of Montesquieu's views, from which Madison concludes that Montesquie himself did not strive for it. To this, cf. ibid., p. 262 *et seq*.

23 M. Tomoszek, *Dělba moci jako podstatná náležitost demokratického právního státu*, in ed. J. Jirásek, *Dělba moci. Sborník příspěvků sekce ústavního práva, přednesených na mezinárodní vědecké konferenci Olomoucké právnické dny 2013,* Olomouc 2014, p. 249.

ciples that are not necessarily mutually supportive. According to Mary Elizabeth Magill, attempting to articulate how separation can lead to balance among the departments is a fruitless enterprise.[24] This is why the system of checks and balances is sometimes considered as an element correcting the tendency to the excessive autonomy of some state bodies.

The problem is that while the requirement for separation remains relatively easy to articulate in itself, the idea of balance is much more difficult to grasp. If we put different goods on the scales, we can easily tell when the balance has been reached between the two sides. But what to do when we need to find the balance between (usually more than two) state bodies? What does balance mean in this respect? I am afraid it means nothing more than a relatively well-functioning state with which we are subjectively satisfied. It seems that we have no real idea at hand here.

Another of our questions has a noetic character: How we do tell that a system is in balance? Jiří Baroš argues that we lack an analytical tool that would allow us to find out.[25] Even if we had it, it cannot be ruled out that the system could achieve balance in several different states. Which one should we choose then? In certain situations, perhaps it would be helpful to find some state that we could call "optimal." However, this would only move the problem to how to tell which state can be considered the best. In principle, it is much easier for people to agree on what bothers them than on some ideal arrangement. Uncertainty still persists, not only in the question of what should be the result of the system of checks and balances – according to Magill, it is also not even clear through which mechanism we should achieve such a balance.[26]

In this situation, the question arises whether we do not create the system of checks and balance by the method of trial and error in response to random historical events. The very idea of balance itself may be based only on a social convention, a certain calculation with the default situation. In other words, if the current variant of the institutional arrangement suits us and does not cause any major problems, we only respond to its fluctuations (e.g., increase in the independence of the President's position as a result of a direct election), which we try to compensate for by randomly chosen adjustments. However, this does not even indicate the real functionality of such an arrangement or its optimal character, all the more so that this functionality might be influenced by a number of other factors and not only by the arrangement of the system of checks and balances itself.

The very nature of the balance that we strive for is a different set of problems. Are we trying to establish only the institutional balance, i.e., to balance the position of individual state bodies, or the power balance directly, i.e., to balance the position of individual power centres? It would be ideal if both were overlapping. However, we could give

24 M. E. Magill, *The Real Separation in Separation of Powers Law*, in "Virginia Law Review", 2000, no. 6, p. 1130.

25 J. Baroš, *Dělba moci jako nástroj konstitucionalismu,* „Jurisprudence" 2013, no. 7, p. 15.

26 M. E. Magill, op. cit., p. 1166.

many examples when this is not the case. Some could argue that the original separation of powers between individual legislative and executive institutions has been replaced by the division between the parliamentary majority and the opposition.[27] This argument is correct. But has this been sufficiently theoretically considered? And have all the consequences of this shift really been taken into account? The notion that the judicial power is to be protected from the executive power may also be viewed as misleading. This could perhaps have been relevant in the times of the Federalists, when the two powers were made up of only a handful of people. It no longer makes sense in the context of the current bureaucratic administrative state, where those organizational units have grown considerably. That is why we would find it difficult today to assign them some unified goals and intentions. At present, we do not have to protect the judiciary from some pressure from this executive power, but from the pressure of some political elites who have become accustomed to using some state bodies as their instruments of influence. This has resulted in a shift in the power centre.

To summarise, considering the separation of functions – or balancing the position of individual state bodies through the system of checks and balances – does not mean that we are actually managing to control power and balance power centres. The balance does not have to overlap with the division into state bodies. The balance between power centres is especially needed to prevent dominance and the ensuing tyranny by one of them. This corresponds to the purpose that is usually attributed to the separation of powers. The components of the separation of powers (system of checks and balances) are primarily aimed at ensuring institutional balance, through which they contribute to the power balance. It is logical if relations between institutions also reflect potential threats from the actually existing power centres. Such relations are certainly not determined only by them. The requirements for their efficiency and the need for their practical functionality, etc., can also be important. It is understandable that the system of checks and balances was created in response to real power risks. If they change over time, this should also be taken into account.

## The Purpose of the Separation of Powers

Now, it is time to think about the purpose of the separation of powers, or rather about the above-defined principles. If we were to investigate the purpose of the separation of powers from a historical perspective, both of its originators – John Locke and Charles Louis Montesquieu – followed the idea that too much concentration of power eventu-

27 Vid. V. Klokočka, *Poslanecký mandát v systému reprezentativní demokracie*, Politologický *časopis* 1996, no. 1, p. 24.

ally leads to its abuse.[28] As a result, the purpose of their separation is treated in their theoretical works primarily as an attempt to prevent such abuse. It is possible to agree with Jeremy Waldron's claim that there is a consensus on the importance of the separation of powers in order to prevent tyranny.[29] However, as the same author correctly pointed out, this importance is only claimed, without anyone actually explaining it (including Montesquieu himself).[30]

Moreover, such a purpose of the separation of powers significantly narrows its possible application. For example, the attempt of President of the Czech Republic Václav Klaus to dismiss Iva Brožová from the post of President of the Supreme Court would certainly not make him a tyrant, and the Czech Republic a tyrannical state, if his attempt was successful. In such a situation, it would either be inappropriate to argue using the separation of powers or we would have to understand its purpose in a different way – as the optimization of governance. We would no longer only want to prevent the worst, but to achieve the best. The minimalist concept of the separation of powers could be replaced by a much broader and more flexible concept in which the question of whether the President of the Czech Republic can remove the President of the Supreme Court could be meaningfully asked. Whether it could be answered at all – whether we really can tell which result would lead to the optimization – is another matter.

Of course, it can be argued against this that tyranny may be established by the method of gradual erosion and decay rather than through a single radical gesture. It is difficult to determine where the precise boundaries between good governance and tyranny lead. It is more about whether we are coming closer to tyranny or moving away from it, rather than whether it is tyranny or not. Here, too, we have to work with some conception of ideal standards – we must have an idea of perfect good governance and or perfect tyranny, while considering whether a particular step is closer to the former or latter. In addition, we may still encounter the problem that some steps may not be evaluable in this context.

In the example above, it is easy to see how the purpose of the separation of powers can form its application in specific cases. Preventing tyranny was undoubtedly one of its key objectives, however, the question is whether it is enough for us today and whether the separation of powers has not become a frozen concept. Fortunately, there is no doubt that there may be many such purposes which, in most situations, can complement and support each other. The problem arises only when different requirements are imposed on the separation of powers that are not fully compatible.[31] How such a conflict

28 Vid., e.g., Locke's critique of absolutism in J. Locke, *Second Treatise of Governmen,* Indianapolis 1980, p. 48 *et seq*. Also Montesquieu's famous passage on freedom and the separation of powers in Ch. Montesquieu, *The Spirit of Laws,* Kitchener 2001, p. 173.

29 J. Waldron, *Separation of Powers or Division of Power*, in "Public Law & Legal Theory Research Paper Series" 2012, no. 12–20, p. 1.

30 Ibid, p. 1 and 120. Also cf. J. Waldron, 2016, op. cit., p. 60.

31 E. Carolan, op. cit., p. 28.

between different purposes can be solved remains an open topic, not only in this field but also in law in general. Given the current state of knowledge, the application of the principle of proportionality and some forms of methodology linked to it may turn out to be the best option.

Which purposes can we trace in the background of the separation of powers? Besides the above-mentioned protection against tyranny, Eoin Carolan mentions the following as normative reasons that justify the separation of powers:

- Secure a balance between institutions such that they are capable of supervising each other's actions through a system of checks and balances;
- Ensure law is made in the public interest by establishing a balance of power between institutions, or representative groups;
- Enhance efficiency by giving responsibility for individual tasks to the most appropriate institutional actors;
- Prevent partiality and self-interest by separating the personnel involved in decision-making;
- Ensure objectivity and generality in the creation of laws by separating the tasks of law creation and law enforcement;
- Allow elected and representative officials to supervise the actions of executive officials and call them to account if necessary.[32]

Nevertheless, Carolan criticizes the theory of the separation of powers for not being clear in what it protects exactly – whether freedom, efficiency, individuals, or public interest.[33]

At first glance, it is obvious that some of the above-mentioned purposes lead to the separation of functions, while others aim to ensure the independence of individual state bodies, or a balanced relationship between them. A common goal of all the principles on which a government system can be organized is to ensure good governance. This is true both for the separation of functions and for the requirements regarding institutional independence and the system of checks and balances. Good government can also be characterized as effective, ensuring freedom[34] and a good life for individuals, and avoiding arbitrariness. We can also think of it as limited government.

Within this framework, one of the distinctions made by Jeremy Waldron is also interesting. In Anglo-English literature, we can often encounter not only the term limited government, but also restrained or controlled government. Waldon warns us that these terms are not synonymous (though they are mistakenly used as such) – on the contrary, they mean different things.[35] For example, control is not only negative: if

32 Ibid., pp. 27–28.
33 Cf. ibid., p. 254.
34 To this, cf. also F. Weyr, *Československé právo ústavní,* Praha 1937, p. 21.
35 J. Waldron, 2016, op. cit., p. 30.

someone has a car under control then they know both where they can go and where they cannot.[36] However, restriction is never a positive notion – it only should prevent the government from doing certain things.[37] Therefore it might be sometimes difficult to distinguish it from limitation. Waldron sees the key difference between them lying in the fact that while the meaning of the former is to avoid a misuse, the latter is a broader concept related to the fact that some aspirations of government are illegitimate in themselves (such as aspirations to interfere with religious freedom).[38]

If we go back to the above-described purposes, we can say that the components of the separation of powers lead to more of them, but they differ in that to some of them they lead primarily, while to others only secondarily – through the fulfilment of other goals. For example, the separation of functions primarily aims at achieving efficiency (and thus contributing to the well-being of individuals). Specialization is related to better knowledge of problems and greater performance.

Personally, I do not consider it appropriate to combine the purpose of the separation of powers with the prevention of tyranny. Because what else is tyranny other than allowing arbitrariness?[39] Arbitrariness can take place also within a single state body in the performance of one of its functions unless control is ensured. It may seem that the advantage that lies in this principle is that such tyranny will never be as complete as if it is committed by someone who holds all the functions in their hands. However, if, for example, the courts decided arbitrarily for a long time and nobody prevented them from doing so, would not the work of all other state bodies go down the drain with it? The realization of law is a complex process – if one of its components is eliminated, it brings into the lives of people consequences so severe that it makes no sense to compare it with a situation where more of its component are disturbed. It does not matter if a tripod loses one leg or two – it will not stand in either case.

On the contrary, the introduction of the system of checks and balances should prevent the arbitrary procedure of individual state bodies by ensuring their control. It is to be expected that a state body that does not proceed arbitrarily and works under adequate supervision will also act more efficiently.

It is the balanced position of individual state bodies that is supposed to be a barrage against tyranny. In connection therewith, the following comment by František Zoulík is worth mentioning:

36 Cf. ibid., pp. 30–31.

37 Ibid, p. 31.

38 Cf. ibid., pp. 31–32.

39 To define the notion of arbitrariness, cf. J. Volková, *Právní akty svévolného zákonodárce*, in *Časopis* pro právní vědu a praxi 2015, no. 2, p. 119 *et seq*.

> In the conditions of a modern state, the meaning of the separation of powers as a constitutional principle no longer lies in the limitation of absolute power but in the protection against the seizure of control over state institutions and against legislative enforcement of political programmes regardless of legal principles.[40]

This is a good indication of the importance of historical contexts for understanding the separation of powers.[41] It is natural that at a time when the exercise of all functions (at least officially) was unified in the hands of a single person, the major problem was seen in that unification. In fact, however, the problem lay in the fact in that many people tended to abuse their position if they were not under sufficient control.

## Conclusion

The principle of the separation of powers consists of several very different components, between which there is a strong tension. This tension cannot be eliminated by reference to the purpose of the separation of power. It is therefore particularly difficult to determine if we should emphasize the independence of state bodies or the checks and balances between them. The second part of my paper will be dedicated to the different ways of dealing with this issue.

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**SUMMARY**

**Is Separation of Powers Useless Concept? Components and Purpose of Separation of Powers**

In this paper, the author raised the question of whether the separation of powers is a useless concept. It points out to insufficient reflection of its theoretical and philosophical origins. The paper also distinguishes its components, which it then analyses in more detail. Great attention is dedicated to the tension between the system of checks and balances and the institutional independence. It also examines the purpose of the separation of powers, warning that we can no longer seek it exclusively in the prevention of tyranny but rather in the optimization of government. At the end of the paper is emphasized the need to examine the question of how to solve tension between these components.

Keywords: Separation of powers, state functions, checks and balances, independence, political theory

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# Non-Originalism Differently: the Obligation of the Legislator to Respond to Changing Conditions

## Introduction

Non-originalism refers to an approach to the interpretation of the constitution where the text of the constitution adapts to new conditions without any formal change.[1] This means that the text remains the same, although the result of its interpretation may change over time.[2] This approach recognizes that a change in the outside world can fundamentally imply a change in the normative content of the constitution. Such new conditions that may influence the interpretation of legislation are, for instance, technological advancement,[3] the acceptance or introduction of new or different values in society, but also changes in the use of language.[4]

If it is possible for the text of the constitution to be adapted to new conditions, then it is possible that statutes that in the past had complied with the constitution became unconstitutional and, being unconstitutional, were abolished by the Constitutional Court. The abolition of unconstitutional legislation is a constitutional law sanction.[5] If there is

1 The most fundamental non-originalist argument involves living constitutionalism. The term "living constitution", which indicates development of the constitution due to social conditions but without changing the very text of the constitution. Cf., e.g., D. A. Strauss, *Do We Have a Living Constitution?*, in: "Drake Law Review" 2011, no. 4, pp. 976–977; C. L. Langford, *The Living Constitution: Origins and Rhetorical Implications of the Constitution as Agent*, in: "Communication Law Review" 2015, no. 1, p. 3. Cf. Related term is also the "evolutionary interpretation" vid. Z. Nový, *Evolutionary Interpretation of International Treaties*, Den Haag 2017, p. 212.

2 The Czech Republic ranks among countries where the non-originalistic approach is fundamentally permissible. P. Holländer, Ústavní *změny: mezi neurózou a surrealismem*, in: Ústava *ČR – vznik, vývoj a* perspektiv, ed. P. Mlsna, Prague 2010. The non-originalistic approach was applied by the Constitutional Court, for instance, in its ruling of 26 May 2011, file no. II. ÚS 3241/10.

3 B. Rüthers, *Dotváření práva soudci*, in: "Soudce" 2003, no. 8, p. 5.

4 F. Waismann, *Verifiability*, in: *Logic and Language: First Series*, ed. A. G. N. Flew, 1951.

5 J. Filip, Ústavní *právo* České *republiky*, Brno 2011, p. 47.

a sanction, there is also an obligation that should not have been violated. It is an obligation of the legislator to respect the change in conditions and to reflect this situation in existing statutes – to adopt new statutes or amend or abolish existing ones. It is important to add that by the legislator I do not mean one member of Parliament but rather the component of state power.[6]

The obligation to take account of a change in conditions results from the status negativus of the addressees of the rights,[7] on the basis of which the legislator must refrain from interfering with the fundamental rights of individuals.[8] If the status negativus means the protection of the rights of individuals, then "refraining from interfering" means both the obligation not to adopt legislation that would interfere with the rights of individuals and the obligation to maintain the existing legislation in such a way that it does not interfere with the rights of individuals.[9] Refraining from interfering with fundamental rights may therefore also entail the obligation to adopt legislation or amend or abolish the existing legislation.[10]

It would certainly be appropriate for the legislator to always adapt the legislation to changing conditions. However, the legislator does not have the means to be able to even detect all the influences emerging in society and then take them into account. Therefore, he cannot be obliged to respond to any changes in conditions since such an obligation would be unfulfillable. If the legislator does not have to take into account all changes in society, can we say that he has to do so in case of at least some of them? In which cases should the legislator respond to changing conditions and why?

Finding answers to such questions is not only a matter of academic and theoretic interests but also closely related to legal practice. If the abolition of an unconstitutional legal provision is a sanction, we can ask whether such a sanction should include the liability of the legislator (or the state) to compensate for legislative damage. If that sanction included such liability, we would have to outline the limits of the liability to compensate. Or to identify those cases where legislative damage would be compensated. That is precisely where we can find it beneficial to know when the legislator must act and when he does not have to.

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6 For more vid. chapter „Who Is the Legislator".

7 The state activates the status, however, the status belongs to individuals. J. A. Robinson, *The Relevance of a Contextualisation of the State-individual Relationship for Child Victims of Armed Conflict*, in: "Potchfstroom Electronic Law Journal" 2012, no. 2, p. 151.

8 G. Jellinek, *Allgemeine Staatslehre*, Verlag von Julius Springer, Berlin 1929, p. 419 *et seq*.

9 R. Alexy, *A Theory of Constitutional Rights*, Oxford 2002, pp. 166–7.

10 The individual is entitled to such non-interference by the state. However, the entitlement already falls into the status positivus to which the status negativus is necessarily linked. The status positivus represents the right of an individual to enforce their rights against the state with the help of that state. R. Alexy, op. cit., pp. 166–169.

## Method

To determine the situations in which the legislator may be required to act (to adopt, amend, or abolish a legal regulation), I analysed the judicial decisions of the Constitutional Court of the Czech Republic.[11] The judicial decisions, however, served only as a useful catalyst for ideas and as an organizational principle of this text. The same conclusions that I came to in this paper can be arrived at even without using Czech judicial decisions. I therefore believe that the results of this paper are applicable not only to the environment of the Czech Republic.

The rulings of the Constitutional Court from which I draw my reasoning relate to gaps in statutes – such gaps that were caused by the negligence of the legislator. In some cases the Constitutional Court described the behaviour of the legislator as an "omission", in other cases as "unconstitutional inactivity". Both omissions and unconstitutional inactivity result in an unconstitutional state. However, in the case of unconstitutional i activity, both the resulting product and the very behaviour of the legislator are unconstitutional. That is the difference between an omission and unconstitutional inactivity.

Every time the Constitutional Court identifies the legislator's behaviour as unconstitutional inactivity, it also points to the indicia (information) based on which the legislator knew or ought to have known that he should adopt, amend, or abolish some legislation. Such indicia are (a) formal sources of law by which the legislator has committed to the adoption of legislation and (b) the Constitutional Court's rulings by which the Constitutional Court drew attention to the existence of a gap in a statute and to the need to adopt new legislation.[12] On the other hand, in the case of the legislator's omission, the Constitutional Court does not refer to any such indicia. From this, I infer that in the event of an omission the legislator did not have to know about the possible creation of an unconstitutional gap. Therefore, a mere omission is not an unconstitutional act, as the legislator did not have to know that he should act – adopt, amend, or abolish legislation. The legislator acts unconstitutionally only if he knows he must act but chooses to remain inactive.[13] Such a decision can either be a decision to ignore one particular indicium or to refrain from reflecting on certain types of indicia at all. If the legislator decides to be inactive, then he deliberately[14] creates an unconstitutional gap in a statute.[15]

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11 In this text, I will continue to refer to the Constitutional Court of the Czech Republic.

12 Vid. e.g., the ruling of the Constitutional Court of 28 March 2006, file no. ÚS 42/03.

13 The very decision to ignore indices is an act. Cf. O. Weinbeger, *Alternative Handlungstheorie*, Wien–Köln–Weimar 1996, p. 107. Omission, unlike unconstitutional inactivity, is not a decision – it is not a kind of action. O. Weinberger, *Norm und Institution. Eine Einführung in die Theorie dews Rechts*, Wien, 1988, pp. 146–147.

14 Or consciously. Cf. O. Weinberg, op. cit., p. 83.

15 The legislator is bound by his own statute (G. Jellinek, op. cit., p. 367 *et seq*.). If the legislator deliberately or knowingly leaves an unconstitutional provision or an unconstitutional gap, then his very behaviour is unconstitutional because he violates his own statute. The prohibition of

It cannot be determined with certainty what the legislator actually knows or does not know. Why is this so will be explained in the following sections. If, however, it is possible to set a boundary for the knowledge of legislator, then it is a border that only determines what the legislator must know and what the legislator does not have to know. Let us therefore consider the legislator's knowledge in only two categories. The first are the cases when the legislator must know, the second are those when the legislator does not have to know.[16]

In the following text, I will analyse the specificities of the unconstitutional inactivity of the legislator. In individual sections, I will gradually analyse cases in which the legislator did not respond to indicia in the form of (a) formal sources of law by which he committed to adopt a statute and (b) rulings of the Constitutional Court by which the Court drew attention to the need to adopt certain legislation. By analysing these two groups of cases, I will pursue two purposes. First, I will explain why the legislator should follow and respond to such indicia and, second, examine the characteristics of unconstitutional inactivity of the legislator. Subsequently in the final section, this will allow me to define when and why the legislator must respond to changing conditions in society.

## The Formal Sources of Law

The unconstitutional inactivity is committed by the legislator if he ignores the formal sources of law by which he committed himself to adopt a statute. Why the legislator should respond in such a case is quite obvious. If the state is governed by the rule of law, then the state is bound by its own law. To the legislator, as a component of state power, applies the same as to the state itself,[17] i.e., he is bound by his own statute and must fulfil what he has committed to.

The issue is a little more interesting if we look at specific cases in which the Constitutional Court described the legislator as unconstitutionally inactive. There were basically two types of such situations: either (1) the legislator referred to a non-existing statute which was supposed to be adopted soon, but which had not been adopted yet;

knowingly or deliberately violating own statute results from the rule of law. Cf. D. Patterson, *A Companion to Philosophy of Law and Legal Theory* (2nd edition), Singapore 2010, pp. 666–667.

16 Since we do not know what the legislator actually knows or does not know, it is not useful to think about the categories of cases where the legislator would have to know something but did not or, vice versa, when the legislator knows something though he did not have to.

17 Cf. J. Fairlie, *The Separation of Powers*, in: "Michigan Law Review" 1923, no. 4., p. 413. See also the ruling of the Constitutional Court of 28 April 2009, file no. Pl. ÚS 27/09.

or (2) the adoption of particular legislation was prescribed by a EU directive[18] but the legislation was not adopted.

One could also argue that there is a third situation and argue as follows: under the Constitution, the legislator implicitly committed to maintain the legal order in a form which conformed with the constitution. Therefore, it would always be the case that when the legislator leaves an unconstitutional statue, provision, or gap in statute, he commits unconstitutional inactivity. This argumentation, nevertheless, would be wrong. This is because in these cases it would be a mere omission on the part of the legislator, not unconstitutional inactivity. In order for the legislator to commit unconstitutional inactivity, both the result and the very behaviour of the legislator must be unconstitutional.

The legal order is a complex system and its individual components – statutes – are adopted pro futuro. Therefore, at the time they are adopted, the situation under which they will be applied is unknown, while constant checking of the constitutionality of all the statues and possible gaps in them is not realistically feasible.[19] Thus, it is not possible to ensure that each individual legal provision and its individual parts are always in compliance with the constitution. The legislator cannot be aware of all unconstitutional elements in the legal order, and so we cannot require him to fulfil the unfulfillable task of correcting every such unconstitutionality. We can only require that the legislator rectifies those defects of which he had to know. Only if the legislator had to know about the unconstitutionality in the legal order and yet did not interfere, then he violated his duty and committed unconstitutional inactivity. Such a claim raises questions: What does it mean that the legislator has to know something? And why should the legislator know about unconstitutional gaps in the cases when (1) he himself referred to a non-existent statute in legislation or (2) when the adoption of a specific legal regulation was imposed by a EU directive; yet, in contrast, he did not have to know about unconstitutionality in other cases?

## Who Is the Legislator?

In order to define what the legislator should know or not, first we must define who the legislator is and what his will and actions are.

The will of the legislator is shaped by the wills of the individuals who are members of Parliament, however, neither them nor the Parliament as a whole are the legislator. The

18 The legislator transferred part of his competences to the European Union in accordance with Section 10a of Act no. 1/1993 Coll, the Constitution of the Czech Republic, as amended. If the legislator is bound by a EU directive, such an obligation can then be considered as the legislator's own.

19 Especially, axiological gaps in statutes are very difficult to detect. For axiological gaps, for example: A. Peczenik, *On Law and Reason*, Dordrecht 2009, p. 20.

legislator is one component of state power. The wills of the members of the legislative body and their behaviour are a necessary component of the legislator's will and actions.[20] If the members of the legislative body have no will or take no actions, it would not be possible for the legislator to have any will or take any action. However, the will of the legislator is not a mere aggregate of the wills of the members of the legislative body. Also, the actions of the legislator do not take place at the same time and in the same manner as the actions of those individuals. The will of the legislator is original and distinct from the wills of the members of the legislative body, and so are his actions.

The legislator has the legislative will – to create and issue statutes and to form the purpose of these statutes. The purpose of each statute is, in addition to ensuring the legal certainty of its addressees, the fulfilment of a certain concept of general prosperity and justice.[21] The legislator's will is thus that statutes ensure general prosperity and justice. Can we say the same about the wills of the individuals who are members of the legislative body? How would we explain where the will of the legislator came from if the will of every single member of the legislative body was to adopt a statute with different concepts of general prosperity and justice?[22] The legislator's will cannot be obtained as the sum or average of the wills of the members of the legislative body, and yet the legislator would have to have some will to be directed towards a certain concept of general prosperity and justice.[23] The content of the legislator's will may be different from that of the members of the legislative body.

Even more marked would be an extreme case where the wills of the members of the legislative body would not be directed towards general prosperity and justice at all but rather at their own personal benefits. Then the will of the legislator could not be the same as the wills of such individuals. The will of the legislator cannot coincide with wills of these individuals who pursue personal gain. It must lack something compared to the wills of those individuals – that pursuit of personal gain. On the other hand, it must

20 If it would not matter who sits in the Parliament, we might not be able to explain where proposals for changes in the legal order of a certain direction come from.

21 G. Radbruch, *Der Mensch im Recht: ausgewählte Vorträge und Aufsätze* über *Grundfragen des Rechts* (3rd edition), Göttingen 1957, pp. 88 *et seq*.

22 See also: R. Dworkin, *Law´s Empire* (3rd edition), London 1991, p. 313 *et seq*., especially p. 440; R. Ekins, *The nature of legislative intent*, Oxford, 2012, p. 29; R. D. Doerfler., *Who Cares How Congress Really Works?*, in: "Duke Law Journal" 2017, no. 5, pp. 998 *et seq*.

23 J. McGarry, *Intention, Supremacy and Judicial Review*, in: "The Theory and Practice of Legislation" 2013, no. 2, p. 266. Also, members of the legislative body do not even have to have general prosperity on mind when voting but their own benefits, which however cannot be the content of the will of the legislator. Despite, the legislator's will aims towards some form of general prosperity even though it does not stem from the will of either of the members of the legislative body. Cf. R. Ekins, op. cit., s. 233; R. Dworkin, *A Matter of Principlee*, Cambridge 1985, p. 38.

be broader than the wills of the individuals, i.e., it must contain some concept of general prosperity and justice that wills of the individuals does not.[24]

The wills of the individuals is a constructive element of the will of the legislator, however, the will of the legislator is comprised of more than that. The will of the legislator may be much broader in relation to the wills of the individuals and also contain such content that the wills of the individuals did not contain at all. In another sense, the will of the legislator may be much narrower than the wills of the individuals and lack many of the intentions and purposes that wills of the individuals contain. However, even if all these individuals pursued general prosperity and justice and agreed on a specific conception of these purposes, it would not be possible to say that the will of the legislator was identical with their will or with the sum or average of their wills. If, for example, the legislator adopts a statute with which the individuals who are members of the legislative body later disagree, that statute is not abolished at the moment of such disagreement. It will only happen if the legislator takes formal or official steps that eventually abolish the statute. The will of the legislator does not change at the moment of change in the wills of these individuals, but only later if the formal procedure is completed.[25]

Similarly, neither are the legislator's actions identical with those of the members of the legislative body. Members of the legislative body act if they vote for a specific bill. On the other hand, the legislator acts only after all the steps necessary for the adoption of a statute have been taken, i.e., upon the validity of the given statute. Thus, the legislator´s activity or inactivity cannot be identified on the basis of the activity or inactivity of the members of the legislative body but only on the basis of an empirical finding regarding the existence or non-existence of the legislation.

To determine what is or is not the legislator's action and when it takes place, the legislator creates a standing intention.[26] The standing intention is the way how to determine what statues and with what content will be adopted and how they will be adopted.[27] This includes both the procedure enshrined in constitutional statutes and informal political culture and the institutionalized practices of the creation of statutes,[28] which co-determine the form of the resulting statutes. The standing intention sets out a series of control steps to ensure the rational and coherent decision-making of the legislator.[29] The legislator acts only after the fulfilment of all the steps determined by the standing intention.

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24 Members of the legislative body do not even need to know what they vote for. S. J. Shapiro *Legality*, London 2011, p. 72.

25 Similarly, neither the legislator's actions are identical with those of the members of the legislative body – but also neither with one chamber of the Parliament. Cf. J. McGarry, op. cit., p. 267.

26 Vid. R. Ekins, op. cit., pp. 58 and 223, 224.

27 Ibidem, p. 58.

28 Cf. K. Bayme, *Parliamentary Democracy. Democratization, Destabilization, Reconsolidation*, 1789–1999, Basingstoke 2000, p. 104.

29 R. Ekins, op. cit., p. 219.

## What Does the Legislator Have to Know?

What does it mean that the legislator has to know something? The will of the legislator is perhaps original, yet it is not a transcendental element that arises of its own accord. The will of the legislator is created through a complicated and sophisticated process – the standing intention – which is a human creation. The very will of the legislator is then also a human creation, as well as all the legislator´s possibilities and abilities to know something. The form of the standing intention is therefore decisive for defining what information the legislator has to know.

Although humanity currently has access to computing technology that may be helpful in identifying and analysing information to design better statutes, it has not been used to this end much, since the standing intention does not prescribe the use of computing.[30] Reflections on what particular statutes should be like thus take place mainly in human minds. Therefore, we cannot assume that the legislator possesses all possible knowledge available to mankind but at most only that objectively available to the people who are involved in the legislative process in a particular country. Who are the people whose knowledge can be used to determine the legislator's knowledge?

In a developed democratic state, the legislative process involves different people. They are the members of the legislative body, and also the head of state (if he approves bills). And also officials who write the text of bills, since based on the theory of pacts with the adoption of a bill the ideas and considerations upon which these officials created the text are also adopted.[31] It should also be remembered that the legislative process does not end with the adoption of a bill. It is a continuous activity involving not only the creation of statutes but also the management of the existing legal order. The legislator not only has the information that existed at the time of creating the statute available but also gains new information that appears later on. Therefore, the legislator also has access to information possessed by those involved in the legislative process after the adoption of the statute. Of course, we can never ascertain the true knowledge of all these persons. If we think about the possibilities of their knowledge, then we mean such information that they could objectively know. These possibilities define the maximum limits of knowledge that we can assume that the legislator has.

The question of where the minimum boundary of what the legislator must know lies will be discussed in the following sections. For the time being, let us remain with the claim that the legislator must know as much as can be expected of those involved in the legislative process. In many countries, these individuals make a vow before commencing their mandate, office, or position. In the Czech Republic, such a vow is made by MPs, senators, and the President, who all swear to act "[...] to the best of their knowl-

30 At least not in most countries including, for example, the Czech Republic.

31 See Paktentheorie: F. Bydlinski, *Grundzüge der juristischen Methodenlehre*, Wien 2003, p. 23.

edge and conscience".[32] Officials involved in writing bills then swear to fulfil their duties in a proper, conscientious, and professional manner.[33] Part of the standing intention that defines the process of making a statute is the performance of functions and duties in accordance with such vows. Since the legislator's knowledge depends on the possibilities of the persons involved in the legislative process, it can be expected of the legislator to possess at least basic knowledge of the status of the legal order and its needs.

Information about whether or not an unconstitutional provision or a gap was created or is being created in the legal order may not be sufficiently obvious for individuals. So we could not expect them to know of such a situation. Therefore, we cannot claim that the legislator had to know about it. If the legislator did not have to know about an instance of unconstitutionality in the legal order, then he did not commit an unconstitutional inactivity but just made an omission. On the other hand, when the legislator explicitly committed to the adoption of some legislation, for example by reference in another statute or in directive, then such information about such an obligation was objectively available to the individuals involved in the process of creating statutes. These persons thus had to be familiar with that information, if they conducted their duties professionally and to the best of their conscience and knowledge. The information was thus present in the process of preparing and adopting statutes determined by the standing intent, and the legislator therefore knew the information. If the legislator did not respond and thus did not adopt, amend, or abolish the legislation despite the foregoing, then he committed unconstitutional inactivity.

## The Rulings of the Constitutional Court

According to the judgements of the Constitutional Court of the Czech Republic, the legislator commits unconstitutional inactivity if he does not respond to a ruling in which the Constitutional Court drew attention to a gap in a statute or to the need to adopt or amend legislation. But why should the legislator follow the rulings of the Constitutional Court?[34]

Let us follow the thesis that the legislator creates statutes but also that statutes are not law but only a source of law.[35] The purpose of a statute is to regulate social situations and

32 Section 23, § 3 and Section 59, § 2 of Constitutional Act no. 1/1993 Coll., the Constitution of the Czech Republic.

33 Section 32, paragraph 2 of Act no. 234/2014 Coll., on Civil Service.

34 For more about the possibility of the binding effect of ruling of the Czech Constitutional Court vid. J. A. Gealfow, *Case Law and its Binding Effect in the System of Formal Sources of Law,* in: "The Journal of the University of Latvia. Law", no. 11 (in print).

35 J. C. Gray, *The Nature and Sources of the Law*, New York 1909, pp. 111, 115; N. MacCormick, *Institutions of Law. An Essay in Legal Theory*, Oxford 2007, p. 57.

relationships.[36] The statute thus appeals to its addressees and everything serves to give them clear messages – so that it is understood by such addressees. Without the addressees to receive, interpret and apply the message, law would not exist and a statute would be just a plain text. Statutes only become law through the process of interpretation and application.[37]

Statuses are addressed to different entities and so different entities interpret and apply them, but in principle we can divide them into two categories. On the one hand, it is the executive and judicial authorities (let us call them "public authorities"), and on the other hand, there are the addressees of public power who apply statutes in their own actions. Of these two groups, it is public authorities which, through their activities – through interpretation and application of statutes – participate in the creation of law. It is true that the creator of law is the state, and therefore law may be formed only within public power. Thus, a subject who does not exercise public power cannot participate in the creation of law.[38]

## The Creation of Law

Let us start with the claim that any text, i.e., also the text of a statute, "is interwoven with the unspoken. The unspoken means that which is not manifested on the surface – at the expression level. However, it is the unspoken that must be updated at the level of content. In this respect, the text, much more decisively than any other message, requires of the reader active and conscious cooperative actions".[39] The transfer of information between the legislator and public authorities is communication. It is a communication since it requires an active approach both on the part of the legislator, who creates thestatute, and on the part of public authorities, who receive and interpret the message. Let me remind you that this is not about communication between persons. The legislator is not a physical person, and neither are public authorities. The way in which the legislator expresses his will is given by the standing intent, and his only mean of communication is a statute.

Knowing that the interpreter is active and he himself gives meaning to the text is part of the generative mechanism of the text on the part of the legislator. "Generating the text means implementing a strategy which also contains predictions of the moves of others –

36 T. Hobbes, *Leviathan*, Cambridge 1996, p. 89.
37 J. C. Gray, op. cit., p. 115.
38 The resulting law can then be influenced by the legislator by adopting other statutes.
39 U. Eco, *Lecotor in fabula*, Prague 2010, p. 66.

as is the case in every strategy."[40] Because the meaning of the message is also determined by the context,[41] it is the context the legislator uses in his strategy.

Context is the actual or anticipated knowledge shared by the participants of communication,[42] i.e., the legislator and public authorities, and it is established through their mutual long-term discourse. Context is, for example, language, grammatical rules, but also professional terms or interpretative methods. The legislator assumes the interpreter's knowledge and at the same time creates it[43] by means of constructing legal texts, systematics, references, use of terms, but also the matter and value orientation of statutes.[44] Thus, the legislator creates the reader's competence to understand the message conveyed by statutes. However, communication is not one-way. The context is created and defined by public authorities by using specific interpretative methods and by specifying terms and meanings for particular applications.[45]

In the creation of a legal text, the legislator takes knowledge of the context for granted and assumes that the legal text will be understood. For example, the legislator does not explain the grammatical or interpretative rules and only assumes that the interpreter is already familiar with them and applies them. Public authorities also regard the context as given and use it automatically to interpret statutes even though the text of the statutes itself does not instruct them to do so. They assume that the legislator wrote the statute with the intent to use the context in its interpretation.

Such automated application of the context has certain benefits for the legislator. The legislator's task to communicate a message is thus easier. By knowing the shared context, the legislator can anticipate interpretative procedures and adopt the appropriate strategy to express his will as clearly as possible. However, the existence of shared context is not only an advantage but also an obligation. As public authorities use the context for interpretation automatically, the legislator must take such application of the context into account and adapt his text-writing strategy accordingly, otherwise the message may not be comprehensible.[46]

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40 Ibidem, p. 69.

41 R. C. Stalnaker, *Context and Content*, Oxford 1999, p. 65; Ekins, op. cit., p. 209.

42 Ibidem, p. 67; Cf. also U. Eco, op. cit., p. 72.

43 Cf. U. Eco, op. cit., p. 72. Identical citation idem, *The role of the Reader. Explorations in the Semiotics of Texts*, Bloomington 1984, p. 7.

44 In addition to adopting statutes, the legislator makes value decisions through choosing the content of statutes. The body of statutes, adopted perhaps even across many election terms of the Parliament, then forms the legislative intent. For more about the legislative intent, vid. footnote no. 51.

45 Cf. J. F. Manning, *The Absurdity Doctrine*, in: "Harvard Law Review" 2003, no. 8, p. 2465.

46 Incomprehensibility of legal texts is noted by Lon L. Fuller as one of eight reasons that lead not only to a poor system of law but to something that is not law at all. L. L. Fuller, *Morality of Law* (revised edition), London 1969, pp. 33 *et seq*.

## Statute and Law

One of the main functions of legislation is the legislative function.[47] This does not mean, however, that the legislator simply has to adopt some statutes. Statutes are not the purpose in themselves, they are a means of fulfilling the purpose of organizing and directing society. Statutes, as mere means, must correspond to their purpose and fulfil it.[48] They must form a coherent and functional whole – only in that case can they serve to organize and direct society.[49] If the legislator adopts a new statute, that statute will join a body of already existing statutes that have been interpreted and applied in some way. This means that they had already served to define what law is. New statutes thus enter the legal environment, and if they are to be consistent with it, they must be interpreted with respect to it. Existing law is thus a shared context of communication. In choosing a statute making strategy, the legislator has to take account of the existence of the body of law and to adapt the text of new statute accordingly.[50] Similarly, public authorities must use the existing law as a context when interpreting statute.

Certainly, the legislator cannot be familiar with the decisions, rulings, and resolutions of all the courts, or even the acts of all administrative authorities. The knowledge of the legislator is limited by the possibilities of the individuals who are involved in the creation of statutes. The legislator is thus not obligated to be familiar with all existing law as a context. Therefore, even if the legislator adopts a statute that does not comply with law, his behaviour may not necessarily be an unconstitutional action, but merely an omission. Behaviour is only unconstitutional when the legislator had to have known he was violating law.

The legislator does not need to be familiar with the whole context, i.e., with decisions of all public authorities. I do not intend to draw a line in this respect, separating all of those decisions the legislator must know. I will confine myself to stating that it can at least be said with certainty that the legislator must know the rulings of the Constitutional Court. The Constitutional Court is the guarantor of democracy and human rights. If the Constitutional Court rules that a certain matter needs to be regulated by statute,[51]

47 Vid. Bayme, op. cit., p. 72 *et seq*.

48 Adoption of a statute that does not have a rational link to its purpose or that is unable to achieve its purpose is arbitrariness on the part of the legislator. Viz ruling of the Constitutional Court of 19 January 2005, file no. Pl. ÚS 10/03; Ruling of the Constitutional Court of 12 March 2008, file no. Pl. ÚS Pl. ÚS 83/06.

49 The existence of mutually contradictory rules and the inability to reach compliance between the declared rules and their application in practice leads not only to a poor system of law but also to something that is not law at all. L. L. Fuller, op. cit., pp. 33 *et seq*.

50 Adapt so that (1) the message carried by the statute is comprehensible for the interpreter and (2) the desired outcome of the interpretation is capable of forming, along with the existing body of law, a coherent meaningful and functional whole.

51 In addition to adopting statutes, the legislator makes value decisions through choosing the content of statutes, by which he creates the legislative intent. The legislative intent is a trend of

then the legislator knows that he has to act and adopt the statute. If the legislator remains inactive instead, it is unconstitutional inactivity.

Law is created not only by the legislator. It is created both by the action of the legislator who codes the message into the text of the statute and the action of public authorities which interpret and apply the texts of statutes. It is useful not to concentrate the creation of law into the hands of only one entity, but rather to distribute this activity among multiple entities. If there are two different entities fulfilling two different tasks[52] who have the control over the form of law, better law can be expected.[53] "If statutes were enforced by the subject who issue them, such subject would not have the motivation to create them free of errors because he could relatively easily 'repair' them later during their application process."[54] If the legislator is relying on the interpreter, he must be careful and choose such strategies to ensure that the interpreter understood. Moreover, thanks to this statutes are more accessible to other addressees of statutes who also have to interpret and follow them. The publicly available interpretative conclusions of public authorities thus also serve, among other things, to other addressees of statutes as guidance for their interpretation.

## The Addressees of Public Power

Public authorities are not the sole interpreters. There are also other subjects – let us call them the addressees of public power – who interpret statutes. However, although they

value decisions, and it should be followed by other newly adopted statutes (F. Melzer, *Metodologie nalézání práva.* Úvod *do právní argumentace*, Prague 2009, p. 221). The overall content of the legislative intent cannot be determined with certainty as there is no one with such competence to formulate the entire content of the intent. The legislator does not comment on his decisions – he communicates only through legal texts. However, we cannot give up on determining the content of the legislative intent. That is because the legislative intent serves also to assess the constitutionality of statutes and actions of the legislator. Although the legislative intent cannot be determined in its entirety, there are entities that define at least parts of the legislative intent – public authorities. The outcome of the application of a statute must be in line with the legislative intent. In order to be able to proceed in this manner, public authorities must first of all define the part of the legislative intent that applies to their case and then interpret a specific statute (the one that is to be applied) in accordance with the defined legislative intent. Public authorities thus define the legislative intent, i.e., they define what is lawful.

52 The legislator adopts the general rules pro futuro, and public authorities test them, specifying and eventually completing interpretations and applications in practice. For the distinction in tasks, functions, and limitations of the legislator, on the one hand, and of public authorities, on the other hand, vid. also R. Dworkin, *Taking Rights Seriously* (3rd edition), Cambridge 1977, pp. 112 *et seq*.; R. Ekins, op. cit., p. 81.

53 The sovereignty of the legislator is not threatened by such a division of functions because the suverenity of legislator lies in the monopoly over the creation of statutes. A. V. Dicey, *Introduction To The Study Of The Law Of The Constitution*, Indianapolis 1982, pp. 37 *et seq*.

54 M. Hapla, *Dělba moci a nezávislost justice*, Brno 2017, p. 23.

also interpret statutes, they do not define what law is, as is the case of public authorities.[55] However, it is the addressees of public power who are the reason for the existence of a substantial part of the statutes. Statues are directed towards them in the first place because the main purpose of the existence of law is the regulation of their social relationships.[56] Therefore, the addressees of public power cannot be left out of the process of making law.

The legislator also communicates with the addressees of public power, and does so through the same statutes used for the communication with public authorities. In the communication of the legislator with the addressees of public power, the legislator also turns to the context and relies on its use by the addressees of public power in interpretation. However, the context in this case is a relatively limited piece of information that such persons could know.[57] The fact that the legislator has to take account of the possible knowledge of the addressees of public power is the context in the communication between the legislator and public authorities. In other words, the fact that one communication (between the legislator and the addressees of public power) has a certain context is the context of another communication (communication between the legislator and public authorities).

Furthermore, if law is not a self-serving element but rather exists because of the addressees of public power and in order to manage their social relationships, then the addressees of public power and their social relationships themselves are the context of law-making. They are the context of the communication between the makers of law, i.e., the legislator and public authorities. The existence of the addressees of public power and the existence of their social relationships must be taken into account by the legislator and public authorities in their communication. The law that is created must fulfil the purpose of its existence, i.e., to regulate the social relationships of the addressees of public power.[58]

The legislator therefore has to adopt such strategy of creating statutes that takes the addressees of public power into account. The public authorities must approach the interpretation of statutes in the same sense.[59] However, a strategy for creating statutes, as any other strategy, may be disturbed by randomness,[60] especially in the form of changes in social conditions. Therefore, the legislator, like any other strategist, has to consider randomness. The legislator can either anticipate social developments or, if that is not

55 For the reason, vid. Chapter "Rulings of the Constitutional Court".

56 T. Hobbes, op. cit., p. 89.

57 R. D. Doerfler, op. cit., p. 1032.

58 Purposeless law is arbitrary law. See footnote no. 48.

59 In interpreting statutes, public authorities are not always obliged to decipher the message the legislator intended. In interpreting, it is more important that the result is coherent with the body of existing law and fulfils the purpose of the statute. See subchapter "Statute and Law".

60 U. Eco, op. cit., p. 70.

possible, expect that statutes may be interpreted differently under potentially changed circumstances.

Why is it possible for statutes to be interpreted differently in the light of changing social conditions? Changing conditions means changing the context in which public authorities will interpret statutes. Thus, public authorities will apply teleological interpretation, to which (according to interpretative rules) public authorities should give priority over the method of historical interpretation.[61] Interpretative rules are themselves part of the shared knowledge of the legislator and public authorities, thus also they are the context. The legislator must therefore know that the teleological interpretation will be preferred.

Moreover, not taking the current situation into account when interpreting statutes would mean not taking the addressees of public power into consideration. The legislator and the addressees of public power communicate with each other through statutes. Their communication does not take place at the moment when the statute is adopted, but at any time while the statute is valid, whenever any of the addressees of public power interprets the statute for their own purposes. The context of such communication will be the current social situation, not the historical situation in which the statute was adopted. Knowledge of the historical situation at the time the statute was adopted cannot be expected of the addressees of public power. An incidental restriction and failure to take into account the resources that the addressees of public power have available in the interpretation of the statute would create a certain "democratic gap".[62] In the end, if the change in social conditions were not taken into account when interpreting the statute, it might be that the statute required something impossible from its addressees.[63]

Unlike the legislator, public authorities act on their share law making at the time when they know the concrete context – the current conditions. On the other hand, the legislator adopts statutes pro futuro, and it is his job to deal with potential changes in society. The possibility of relying on the context, i.e., on the interpretation of statutes in the light of changed conditions, is a strategic advantage for the legislator. Thanks to this, some statutes can be adapted to new realities and continue to cover and govern social relationships without having been formally amended. However, a change in conditions is also an obligation for the legislator. The legislator must maintain the legal order in such a way that it still meets its purpose, i.e., to regulate social relationships. However, as a result of such changes, legislation of higher legal force can be interpreted in a different way and the existing statutes then could no longer be interpreted as conforming with

61 Which on the contrary works with the conditions existing at the time of adoption of the statute.

62 R. D. Doerfler, 2017, op. cit., p. 1041.

63 If law requires something impossible, then it is not only bad law but not law at all. L. L. Fuller, op. cit., pp. 33 *et seq*.

the legislation of higher legal force. In other words, the existing statutes could no longer sufficiently regulate social relationships,[64] or they would begin to interfere with the rights of individuals as a result of the change.[65] In such a case, the legislator has an obligation to intervene and adopt, amend, or abolish the legislation.

## Unconstitutional Inactivity

The difference between omission and unconstitutional inactivity lies in the possibilities of the legislator and his obligations to detect an arising unconstitutional situation in the legal order. Unconstitutional inactivity is committed by the legislator when he has to know that the unconstitutional situation is arising in the legal system but fails to adopt, amend, or abolish the respective legislation.

The legislator's knowledge is derived from the possible knowledge of the individuals who are involved in creation of statutes. Therefore, it cannot be argued that the legislator always commits an unconstitutional inactivity if an unconstitutional gap in a statute is created or if a legal provision becomes unconstitutional. The emergence of any such unconstitutional situation might not be sufficiently evident to say that the individuals who are involved in the creation of statutes should have known or even had to have known about it. In other words, the legislator does not have to know about the emergence of all the unconstitutional situations caused by changing conditions. How to define those situations about which the legislator has to know and to which he has to respond?

The legislative process does not end with the adoption of a specific statute. It is a continuous activity involving not only the creation of statutes but also the management of the existing legal order. The legislator has access not only to the information that existed at the time the statute was created but he also gains new information that emerges later. Based on the obligation to nurture the legal order, the legislator has to analyse the legal order and its problems at certain time intervals,[66] and this is exactly the way the legislator should identify its shortcomings. The legislator should reflect on at least those changes in conditions that are serious, pressing, or fundamental and that bring about significant and obvious economic, social, and technological changes.[67] In other words, such changes

64 The provisions of statutes can no longer be interpreted in such a way so as to comply with the Constitution.

65 See the status negativus, according to which the legislator should refrain from interfering with individuals' rights. As a result of changes in society, statutes may also stop complying with the legislative intent which is the trend of value decisions made by the legislator and with which statutes must comply (vid. footnote no. 51).

66 Cf., e.g., O. Weinberger, 1988, op. cit., pp. 212–213.

67 For example, the emergence of completely new communication technologies, such as fax or the Internet. B. Rüthers, 2003, op. cit. p. 5.

that are obvious to the individuals who are involved in creation of statutes, and who have to do so professionally[68] and to the best of their knowledge and conscience.[69] Sufficiently obvious are at least those phenomena, facts, and conditions about which there is a society-wide[70] debate, or at least wide-ranging professional debate.[71]

If the maximum limit of knowledge of what we can expect of the legislator is the boundary of human possibilities, then the minimum limit is the knowledge of the context of lawmaking. At least those elements of the context that are obvious to the individuals who carry out their tasks in the creation of statutes professionally and to the best of their conscience.

## Conclusion

Non-originalism refers to an approach to the interpretation of the constitution where the text of the constitution adapts to new conditions without any formal change. This approach recognizes that a change in the outside world can imply a change in the normative content of the constitution. If the content of the constitution is changed in such a way, it may happen that some statutes become unconstitutional or that an unconstitutional gap in a statute may arise. In such a case, the legislator should, if such changes result in interference in the rights of individuals, adopt, amend, or abolish the legislation. The legislator certainly does not have to respond to all the changes in conditions, however, he has to respond to those about which he knows. If not, the legislator consciously interferes with the rights of individuals and his very behaviour – inactivity – is unconstitutional.

To determine the requirements of the legislative process, the legislator creates the so-called standing intent, which is a way of creating statutes and the selection of their content. This includes both the procedure enshrined in constitutional statutes and informal politi-

68 See the oath of civil servants. Section 32, paragraph 2 of Act no. 234/2014 Coll., on Civil Service.

69 See the oath of MPs, senators, and the President of the Czech Republic. Section 23, paragraph 3 and Section 59, paragraph 2 of Constitutional Act no. 1/1993 Coll., the Constitution of the Czech Republic.

70 B. Friedman, *The Will of the People. How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution*, New York 2009, pp. 367–368. If there is a social consensus on a particular matter, the legislator's inaction is a democratic dysfunction. J. Chafetz, *The Phenomenology of gridlock*, in: "Notre Dame Law Review" 2013, no. 5, p. 2082.

71 The Constitutional Court of the Czech Republic has declared the legislator to be inactive on the grounds of not responding to a professional discussion pointing out to inappropriateness of the existing legislation. See Ruling of the Constitutional Court of 27 June 2012, file no. II. ÚS 1534/10. Needs can be clearly articulated, for example, through the platforms of social movements J. Balkin. M., *Principles, Practices and Social Movements*, in: "University of Pennsylvania Law Review" 2006, no. 4, p. 929.

cal culture and the institutionalized practices of legislation which co-determine the resulting form of statutes. The process of law-making also includes the existence of the context of communication between the legislator, as the author of statutes on the one hand, and public authorities, as interpreters of statutes on the other hand. The context determines the meaning of legal texts and is thus an important element in the interpretation of statutes and as such it must be taken into account by the legislator. The context also includes, among other things, the conditions in society and their transformation. Which of all of the conditions are those to which the legislator must respond in order not to commit unconstitutional inactivity? It is defined by the possibilities and obligations of the individuals who are involved in the creation of statutes. The legislator must respond to those changes in the conditions that these individuals are able and obliged to reflect on.

If an unconstitutional gap in a statute or an unconstitutional statutory provision is found, the legislator is legally liable for such a defect in the legal order. The sanction in this respect is the abolition of that statutory provision or a ruling of the Constitutional Court that proclaims the existence of an unconstitutional gap or the unconstitutionality of the legislator´s conduct. Whether such legal liability should include liability for compensation for legislative damage is subject to discussion. If, however, we decided to accept the legislator´s liability for compensation for legislative damage, the question remains whether and where to draw the boundaries of such liability. Or in other words, in which cases the legislator (or the state) will be liable for damage. One of the ways to grasp the issue could be accepting the liability of the state for legislative damage in those cases where the legislator consciously interferes with the rights of individuals, i.e., when the result of the legislator's conduct is not only unconstitutional, but so is the legislator's conduct itself.

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**SUMMARY**

**Non-Originalism Differently: the Obligation of the Legislator to Respond to Changing Conditions**

The question that the paper seeks to answer is formulated through reflections on the issues of non-originalism. Non-originalism refers to an approach to the interpretation of the Constitution where the text of the Constitution adapts to new conditions without any formal change. This approach is applied by courts which, in the light of new circumstances, interpret the Constitution in a different way. The question is whether the same approach should also be applied by the legislator. Should it be the legislator who monitors whether the Constitution has changed in substance as a result of changes in society and that some existing statutes thus have become unconstitutional? The paper concludes that the legislator has an obligation to monitor and respond to such changes by amending or abolishing certain statutes or by adopting new ones. If the legislator fails to respond, then his behaviour – inaction – is unconstitutional. However, the paper does not claim that the legislator must respond to all the changes in society, but only to those that are significant and obvious. The legislator is understood as an institution, not as a member of the legislative body (based on the theory of the legislative intent). However, the institution of the legislator is a human creation and composed of individuals, and it is their knowledge that makes up the knowledge of the legislator. And it is precisely their possibilities that determine the boundaries of what the legislator should know. In this text, the creation of law is understood as communication between the legislator, who is the author of statutes, and public bodies, who interpret and apply them. As with any communication, context is what determines it. The legislator's obligations are derived from the content of the context, its function, and its essential position in communication.

Keywords: Legislator, Constitutional Court, Czech Republic, Changes, Society, Law, Statutes, Omission, Unconstitutional inactivity, Communication, Context, Content, Sources of Law, Law-making

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# An Argument from Comparative Law in the Jurisprudence of the Polish Constitutional Tribunal[1]

## Introduction

In the scholarship concerning constitutional courts around the world there is more and more interest not only in the judicial dialogue between those courts and international bodies,[2] which is deeply grounded in binding international treaties, but also in a horizontal dialogue – conducted between various jurisdictions which are not part of the same legal system.[3] It is based on the similarity of constitutional norms and questions that have to be answered by the courts in different states. It contributes to the search of the best possible solutions, but also raises a number of controversies concerning both the legitimacy and the methodology of drawing from the experience of other jurisdictions. The aim of this paper is to outline the way in which the Polish Constitutional Tribunal[4] approaches this issue.

1 An article is a result of the research conducted in the project no. 2014/15/N/HS5/00676 financed by the National Science Centre, Poland. It is a slightly revised and translated version of an article published in Polish as: *Argument komparatystyczny w orzecznictwie Trybunału Konstytucyjnego* published in: "Państwo i Prawo" 2017, no. 7, pp. 37–54.

2 L. Garlicki, *Cooperation of courts: The role of supranational jurisdictions in Europe*, "International Journal of Constitutional Law" 2008, no. 3–4, pp. 509–522; W. Sadurski, *Constitutionalism and the Enlargement of* Europe, Oxford, 2012, pp. 27–33.

3 E.g. *The Use of Foreign Precedents by Constitutional Judges*, ed. T, Groppi, M.C. Ponthoreau, Oxford–Portland 2013; M. Bobek, *Comparative Reasoning in European Supreme Courts*, Oxford 2013; G. Halmai, *Perspectives on Global Constitutionalism. The Use of Foreign and International Law*, The Hague 2014.

4 On the basis of the Constitution of 1997, the Constitutional Tribunal is a body entrusted with the competence to review the constitutionality of norms. It has competences typical for a constitutional court modelled after the German Federal Constitutional Court (with some differences concerning mainly the fact that, even in the procedure initiated by the constitutional complaint, it reviews only constitutionality of legal provisions and not of the decisions concerning application of law). However, due to the fact that the Polish Constitution regulates its status as one of the

The paper is based on the assumption that every element of the reasoning presented by the Constitutional Tribunal is aimed at justifying its holding and in consequence constitutes an element of the decision-making process. Only extraordinarily may it have other functions (such as informative or educational). Therefore, I assume that each reference to the foreign materials made in the reasoning of the Tribunal, is aimed at building an argument from comparative law in the case before it, even if the role of this argument in the decision-making process is not clearly indicated in the reasoning.

For the purposes of this paper, I define a comparative reference as any reference to the law or jurisprudence that is foreign to the Polish legal system, meaning that it refers to legal acts that are not binding in this system. It involves the primary domestic law or jurisprudence of other states, but it may also encompass international treaties that Poland is not party to.[5] A comparative reference has to be clearly distinguished from the situations in which the Tribunal refers to the acts of EU or international law, to which Poland is a party (as well as to the jurisprudence of the international courts enforcing those acts).[6] Those norms are a part of Polish legal system and the obligation to comply with them results from both Article 9 of the Polish Constitution[7] and the particular provisions of international treaties.[8] Hence, making reference to them by the Constitutional Tribunal is necessary and it constitutes an element of the systemic interpretation of the domestic law.

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'tribunals' and not one of the 'courts' within the meanings of its provisions, I will consistently use the term "Constitutional Tribunal" and not the Constitutional Court, when referring to this body. However, whenever the "constitutional courts" as a category are referred to, it should be understood as including the Polish Constitutional Tribunal. See further K. Prokop, *Polish Constitutional Law*, Bialystok 2011, p. 157 *et seq*.

5 Such as The African Charter on Human and Peoples' Rights or the American Convention on Human Rights (e.g. judgments of 25 May 2004, case no. SK 44/03 and of 13 October 2009, case no. P 4/08). If not indicated otherwise, all judgments referred to in the footnotes are of the Polish Constitutional Tribunal and are available in the electronic version in the Tribunal's database: <https://ipo.trybunal.gov.pl>.

6 On this subject vid., among others, L. Garlicki, *Ochrona praw jednostki w XXI w. (globalizacja – standardy lokalne – dialog między sądami)*, in *25 lat transformacji ustrojowej w Polsce i Europie Środkowo-Wschodniej*, ed. E. Gdulewicz, W. Orłowski, S. Patyra, Lublin 2015, pp. 177–179; E. Mak, *Judicial Decision-Making in a Globalised World. A Comparative Analysis of the Changing Practices of Western Highest Courts*, Oxford–Portland 2015, p. 140–163.

7 M. Laskowska, M. Taborowski, *Obowiązek wykładni przyjaznej prawu Unii Europejskiej – między otwartością na proces integracji a ochroną tożsamości konstytucyjnej*, in *Prawo Unii Europejskiej a prawo konstytucyjne państw członkowskich*, ed. S. Dudzik, N. Półtorak, Warszawa 2013, pp. 79–108.

8 E. Łętowska, *Zapewnienie skuteczności orzeczeniom sądów międzynarodowych*, "Europejski Przegląd Sądowy" 2010, no. 10, pp. 18 and 20–22; A. Paprocka, *Wpływ orzecznictwa ETPCz na rozumienie konstytucyjnych praw i wolności w Polsce – kilka uwag na marginesie orzecznictwa Trybunału Konstytucyjnego*, in *XV lat obowiązywania Konstytucji z 1997 r. Księga jubileuszowa dedykowana Zdzisławowi Jaroszowi*, ed. M. Zubik, Warszawa 2012, pp. 77–85.

In addition to this, I analyse the judgments and decisions of the Polish Constitutional Tribunal issued from 17 October 1997, when the current Polish Constitution entered into force, till 20 December 2016, as from this date significant doubts concerning the legality and legitimacy of the judgments issued by the Tribunal may be raised.[9]

## The Basis for Comparative Reference in the Polish Legal System

In international legal scholarship, especially American, one may observe heated discussions concerning the admissibility of using arguments from comparative law and jurisprudence in constitutional adjudication.[10] The supporters of comparative references argue that extending the scope of the arguments used by constitutional courts contributes to the quality and persuasiveness of the reasoning. They underline that the awareness of the solutions adopted in other legal systems serves as an inspiration and allows decisions based on more extensive data to be taken.[11] They note that the analysis of foreign legislation and judicial decisions may provide empirical data useful for predicting the consequences

9 It is a result of significant constitutional crisis that resulted in the illegal election of a number of judges to the Tribunal, the way in which the new President of the Tribunal was elected, and a number of further events that allow the legitimacy of a current functioning of the Tribunal to be questioned. For more on this issue *V. inter alia*, A. Śledzińska-Simon, *Poland's Constitutional Tribunal under Siege,* VerfBlog, 04.12.2015, https://verfassungsblog.de/polands-constitutional-tribunal-under-siege/ [access: 01.08.2018]; A. Grzelak, *Choosing between two Evils: the Polish Ombudsman's Dilemma,* VerfBlog, 06.05.2018, https://verfassungsblog.de/choosing-between-two-evils-the-polish-ombudsmans-dilemma/ [access: 01.08.2018]; M. Matczak, *Poland's Constitutional Tribunal under PiS control descends into legal chaos,* VerfBlog, 11.01.2017, https://verfassungsblog.de/polands-constitutional-tribunal-under-pis-control-descends-into-legal-chaos/ [access: 01.08.2018]. The developments of the crisis around the Constitutional Tribunal were also reflected in opinions by the Venice Commission of 11–12 March 2016, CDL-AD(2016)001 and of 14–15 October 2016, CDL-AD(2016)026.

10 The literature concerning this subject is very extensive. Only some examples include: G. Halmai, *The use of foreign law in constitutional interpretation*, in *The Oxford Handbook of Comparative Law*, ed. M. Rosenfeld, A. Sajó, Oxford 2012, pp. 1330–1333; G. Halmai, *Perspectives…*, op.cit., pp. 181–190; M. Rosenfeld, *Comparative Constitutional Analysis in United States Adjudication and Scholarship*, in *Oxford Handbook…*, op.cit., pp. 43–52; S. Choudhry, *Migration as a new metaphor in comparative constitutional law*, in *The Migration of Constitutional Ideas*, ed. S. Choudhry, Cambridge 2006, pp. 1–13 and the literature cited there.

11 S. Breyer, in *A conversation between U.S. Supreme Court justices. The relevance of foreign legal materials in U.S. constitutional cases: A conversation between Justice Antonin Scalia and Justice Stephen Breyer*, "International Journal of Constitutional Law" 2005, no. 4, p. 523; S. Breyer, *The Court and the World. American Law and the Global Realities*, New York 2016, pp. 249–280. In the context of counter-terrorism measures *v.*: E. Benvenisti, *Reclaming Democracy: The Strategic Uses if Foreign and International Law by National Courts*, "The American Journal of International Law" 2008, pp. 253–258.

of certain decisions for the legal system[12]. They also indicate that the reference to foreign sources may help to place the judicial decision not only in the given legal culture, but also to show its universal character, which enforces its legitimacy.[13] In addition to this, some scholars argue that comparing and contrasting the solutions adopted in various systems may facilitate more profound understanding and assessment of one's own system.[14]

The opponents of using comparative references in the constitutional adjudication stress the close relationship between the constitutional text and the principles of national sovereignty and the democratic legitimization of constitutional judges. They argue that the reference to foreign materials disrupts the democratic process of law-making and the principle that decisions concerning a given legal system can be taken only by judges duly appointed within this system.[15] They emphasize that constitutional interpretation ought to be deeply rooted in a constitutional and legal tradition, shaped in a particular social and cultural environment, which renders all the reference to the law and jurisprudence that is foreign (i.e. shaped in other circumstances) irrelevant.[16] Furthermore, they indicate that there is no consensus as to the methods by which the comparative material should be selected. Hence, the choice of certain materials instead of others is always arbitrary.[17]

In the Polish legal system, comparative arguments are present, however there is no wider discussion between the judges or scholars concerning the basis for their usage and its place in constitutional interpretation.[18] It seems that one may indicate at least three reasons for this lack of controversy.

Firstly, the most intense controversies concerning the use of foreign materials in the constitutional adjudication arise in the common law systems based on the binding role of precedent. Traditionally, in those systems making a reference to a particular ruling demands identifying its role for the resolution of the case at hand, as either a precedent

12 V. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, "Harvard Law Review" 2005, p. 116.

13 S. Choudhry, *Migration*…, op.cit., p. 2; V. Jackson, op.cit., p. 116 and 118; E. Benvenisti, op.cit., p. 269. Cf. the opinion of S. Breyer, who notes that citing to the case-law of countries that are only now developing their democracy by more established courts (such as the US Supreme Court) contributed to the legitimacy and position-building of the court cited to (*A conversation between*…, op.cit., p. 523).

14 G. Frankenberg, *Critical Comparison: Re-thinking Comparative Law*, "Harvard International Law Journal" 1985, no. 2, p. 447; P. Zumbansen, *Comparative Law's Coming of Age? Twenty Years after Critical Comparison*, "German Law Journal" 2005, no. 7, pp. 1079–1780.

15 A Scalia, in *A conversation between*…, op.cit., p. 526; C.F. Rosenkrantz, *Against borrowings and other nonauthorative uses of foreign law*, "International Journal of Constitutional Law" 2003, no. 2, pp. 84–85

16 L.J. Blum, *Mixed Signals: The limited Role of Comparative Analysis in Constitutional Adjudication*, "San Diego Law Review" 2002, no. 1, p. 163.

17 D. Canale, *Comparative Reasoning in Legal Adjudication*, "Canadian Journal of Law and Jurisprudence" 2015, no. 1, pp. 13–14.

18 Cf however, L. Garlicki, *Ochrona praw*…, op.cit., pp. 176–179.

that has to be followed, as a case that can be distinguished from the present one, or the ruling that has to be overturned. Introducing a ruling from a foreign (non-binding) legal system to the reasoning constructed according to this pattern is problematic for the coherence and clarity of the judgment.[19] However, in continental law systems, in which the previous case-law of a given constitutional court or other bodies does not bind the courts for future and serves only as an inspiration concerning possible solutions and the way to support argumentation, similar problems do not arise.

Secondly, the use of comparative material in the process of constitutional interpretation in Poland is supported by the preparatory works of the 1997 Constitution. When the new constitution was drafted, the discussions in the Constitutional Commission of the Parliamentary Assembly, as well as the legal scholarship, drew significantly on the legal institutions established in other systems.[20] The facts that the foreign solutions were widely discussed and applied in the constitution-making process proves that the authors of the 1997 Constitution were aware of the correlations between different legal systems and allowed inspiration to be drawn from them.[21]

Thirdly, according to Articles 9 and 91 of the Polish Constitution, Polish courts and tribunals are obliged to take into consideration the binding norms of international law and the case-law of the international courts. Despite the different significance of such reference, the methodology behind it is quite similar to the use of comparative argument and the readiness of the Polish judicial bodies to engage in judicial dialogue may influence the fact that they do not oppose comparative references.

It also seems that the text of the Polish Constitution itself allows for such references. The Constitution does not contain any provision that would oblige or mandate its interpreters to take foreign sources into consideration.[22] Nonetheless, in its Preamble, it refers to the roots of Polish culture, which includes legal culture, in universal human values and expresses the awareness of "the need for cooperation with all countries for the good of Human Family".[23] Those clauses are too general to serve as a basis for reconstructing

19 L.J. Blum, op.cit., s. 166; A Scalia, in *A conversation between*…, op.cit., p. 522.

20 W. Osiatyński, *Paradoxes of constitutional borrowing*, "International Journal of Constitutional Law" 2003, no. 2, p. 249 *et seq.*; M.F. Brzeziński, L. Garlicki, *Judicial Review in Post-communist Poland: the Emergence of a Rechtsstaat?*, "Stanford Journal of International Law" 1995, no. 1, p. 35 *et seq*. See also with reference to the principle of the democratic state of law: R.R. Ludwikowski, *Constitutional Culture of the New East-Central European Democracies*, in *Constitutional Cultures*, ed. M. Wyrzykowski, Warszawa 2000, s. 74ff and with reference to the model of constitutional jurisdiction: G. Halmai, *Separation of Power – Social Rights – Judicial Review The Polish and the Hungarian Cases*, in *Constitution-making Process*,. M. Wyrzykowski, Warszawa 1998, *passim*.

21 Cf. the opinion of A. Scalia, who clearly distinguished the use of comparative material in the process of constitution-making and in adjudication – supported the former and strongly opposed the latter (*A Conversation between*…, pp. 525, 538–539)

22 Cf. Art. 39 Section 1c of the Constitution of South Africa.

23 Translation by A. Pol and A. Caldwell, in *The Constitution of Poland*, Warszawa 2007.

a constitutional norm that would oblige the Polish judiciary in general and the Constitutional Court in particular to interpret the Constitution in accordance with the standards adopted in other states. However, they indicate that the authors of the Constitution intended it to be open to dialogue with other legal systems and in consequence do not allow the possibility of conducting such a dialogue to be excluded, if – in the circumstances of a particular case – no constitutional principles or rules oppose it.

## The Practice of Using Comparative Argument by the Constitutional Tribunal

The Constitutional Tribunal is quite prone to referring to comparative arguments in its reasoning. However, the practice of this reference is varied with respect to the scope, depth and subject of the analysis. One can encounter judgments in which the reference to a provision of foreign law or a statement of a judicial body seems to be incidental and lacking in more detailed analysis,[24] as well as ones in which a given regulation or decision is carefully scrutinised in order to determine its usefulness for the reasoning of the Tribunal.[25] However, in the reasoning of its judgments the Tribunal does not reflect on the axiology underlining the use of comparative material in adjudicating constitutional questions, or on its aim and function in the decision-making process. It concerns both the lack of abstract comments on the methodology of decision-making in general, and the lack of indication of the role of certain reference in the particular case before the Tribunal.[26] Nonetheless,

24 In extreme cases, the Constitutional Tribunal refers to a very general statement made by another constitutional court without citing its context or significance for a case before the Tribunal (e.g. judgments of: 5 May 2004, case no. P 2/02; and 28 June 2005, case no. SK 56/04). With respect to those judgments it is difficult to say that the Tribunal formulated a comparative argument as a reference to foreign decisions, since it does not have the character of an analysis, but is rather ornamental in nature.

25 For instance the judgment of 30 September 2008, case no. K 44/07. Cf. with regard to other constitutional courts: M. Wendel, *Comparative Reasoning and the Making of a Common Constitutional Law – The Europe-Decisions of National Constitutional Courts in a Transnational Perspective*, NYU Jean Monnet Working Paper 2013, no. 25, pp. 5–12.

26 It formulates only very general statements indicating *inter alia* that presenting an argument form a foreign law is "appropriate" (the judgment of 12 January 2005, case no. K 24/04); that "the Tribunal considers that the standards developed by the foreign judiciary and the underlying values are important" and that the given material "deserves attention" (the judgment of 24 February 2010, case no. K 6/09); that "in the context of the present case it is important to present [the legal issue at hand] […] in its wider context, including comparative approach" (judgment of 28 October 2015, case no. K 21/14); that the reference to the comparative material "is a result if growing convergence of the modern legal systems" (judgment of 3 July 2008, case no. K 38/07); or that "one can note" information concerning comparative law (judgment of 8 March 2000, case no. Pp 1/99). In many cases the Tribunal does not indicate any reason for including comparative analysis in the reasoning of its judgment (e.g. the judgment of 19 July 2011, case no. K 11/10).

partial conclusions concerning this matter can be drawn on the basis of the material used by the Constitutional Tribunal and the conclusions (if any) drawn from them.

With regard to the type of the material used, comparative references may be divided into referring to: the constitutional provisions of other states,[27] other legal provisions of foreign domestic law,[28] and the case-law of foreign courts and tribunals.[29] This division is not strict, as the Tribunal sometimes refers to other kinds of sources. Nevertheless, in most cases it is possible to determine that the analysis is aimed at the reconstruction of constitutional norms, the examination of possible legislative solutions to certain problems, or the inspiration behind the decision on the hierarchical control of norms reached in a different legal system. It is evident that the remaining elements of the analysis are supplementary.[30]

References to the constitutional provisions of other states are used by the Constitutional Tribunal mainly in order to stress the importance of a given constitutional norm by indicating that it is binding not only in the Polish legal system, but that it also constitutes part of the common constitutional heritage of a group of states. The group in question may be defined as the democratic states in general or states that also fulfil other criteria (such as the member states of the EU, parliamentary democracies or even the "majority of the European states rooted in the common Christian culture").[31] Such a declaration, apart from educational purposes, serves as a starting point for the exercise of balancing constitutional values. By emphasizing that a particular principle (especially a fundamental right or freedom) is common to a significant number of states, the Tribunal stresses its universal character and notes that as a result it may be considered as more significant than others and its limitation has to be justified by especially compelling reasons.[32]

More often the Constitutional Tribunal analyses foreign legislation and empirical data concerning its application. In those cases the Tribunal adopts one of two approaches.

27 E.g. the judgment of 26 November 2003, case no. 22/02.

28 E.g. the judgment of 24 February 2010, case no. K 6/09.

29 E.g. the judgments of 9 July 2007, SK 48/05 and of 19 July 2011, case no. K 11/10.

30 For instance in the judgment of 28 October 2015 (case no. K 21/14) the Tribunal examined a number of the judgments of the German Federal Constitutional Court concerning the notion of "social minimum". It also briefly referred to certain provisions of German legislation. However, the Tribunal's analysis clearly aimed at the reconstruction of the nature and scope of the positive obligations of the state, so it concerned the content of the constitutional norm. By contrast, in the judgement of 20 September 2008 (case no. K 44/07) the Tribunal presented in a very broad way the legislation concerning the possibility of shutting down a hijacked passenger airplane in Germany and, in less detailed way, in some other states, but it did so only in order to present the context of the judgment issued by the Federal Constitutional Court of Germany, which declared such a possibility unconstitutional, and to make this judgment a main point of reference in its own analysis.

31 Judgment of 7 October 2015, case no. K 12/14.

32 E.g. the passages concerning freedom of religion in the judgment of 7 October 2015, case no. K 12/14.

The first one focuses on verifying whether the operationalization of constitutional norms is conducted in different states in the same way, i.e. whether there is one "proper" way of regulating certain matter (complying with a constitutional norm present in various legal systems).[33] In the case of a positive answer to this question, the Tribunal compares whether the solution before it complies with the model it has reconstructed. The discrepancies – in the absence of other significant arguments – justifies declaring the solution adopted by the Polish lawmaker unconstitutional. In the case of a negative answer, the Tribunal holds that the lack of a common model grants the lawgiver more latitude as to the way in which it would regulate a given matter and the comparative arguments do not support the conclusion, either with regard to the constitutionality or unconstitutionality of the adopted solution. This approach is in its essence very similar to the analysis of constitutional provisions of other states and, notwithstanding the fact that it focuses on the content of legislation, is aimed at the reconstruction of the constitutional standard.

The second approach is based on the supposition that the legislative measures adopted in different states for achieving the same goals may vary. With this in mind, the Tribunal examines the way in which various regulations function, assessing their usefulness for achieving their goals and their effectiveness in achieving those goals. It takes into consideration the wording of the legislation as well as empirical data concerning its application.[34] Such an examination transfers the role of the comparative analysis from the level of reconstructing a constitutional norm to the level of assessing the proportionality of the limitation of fundamental rights or freedoms. It may serve as a way to verify whether the solution adopted by the Polish lawmaker – if similar to ones already in force in other states – may achieve its aims,[35] or – if the solution in question varies from ones adopted abroad – whether it applies the least invasive means of achieving those aims).[36]

In addition to this, the comparative references in the jurisprudence of the Constitutional Tribunal may focus on the judgments issued by foreign courts and tribunals., It is also possible to identify two types of situation within this category.

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33 E.g. judgment of 10 May 2000, case no. K 21/99.

34 E.g. the judgments of 4 November 2014, case no. SK 55/13 and of 9 July 2009, case no. SK 48/05.

35 Such examination should be supplemented by the verification of whether the conditions that are relevant for the effectiveness of a given regulation in other states are similar to ones occurring in the Polish legal system, or whether there are some differences between the legal systems that may influence the usefulness and effectiveness of adopting a similar solution in Poland (*v.*, *e.g.*, a conclusion of the analysis conducted in the judgment of 4 November 2014, case no. SK 55/13).

36 More on the structure of the proportionality test in the jurisprudence of the Polish Constitutional Tribunal *v.*, *e.g.*, the judgments of 25 July 2013, case no. P 56/11 and of 16 October 2014, case no. SK 20/12.

In the first, more common situation, when analysing comparative material, the Tribunal stresses not only the reconstruction of the content of constitutional norm or legislation, but the outcome of the supervision of the constitutionality of norms conducted by other judicial body entrusted with the power to review the constitutionality of law.[37] The Tribunal does not in fact interpret legal norms as such, but borrows the result of the examination of their relation to each other.[38] It seems that this kind of reasoning serves on the one hand as an inspiration for the Tribunal's decision and, on the other hand, as an additional way to legitimize the Tribunal's ruling, by pointing out that it is compatible with the canons of legal reasoning also adopted in other states.[39]

The second situation is similar to the first one with respect to the aim and the methodology of the analysis, but it should be distinguished due to the fact that the focus of the analysis is not on the foreign court's resolution of the case, but on the way in which the resolution was reached. This includes cases in which the reference made concerns the principles under which the bodies entrusted with constitutional jurisdiction exercise their competence. Such references appeared in the case-law of the Constitutional Tribunal when it was faced with the problems arising from membership in the European Union and the necessity of reconciling the principle of the primary role of the Constitution with the obligations under the European Union law, as well as with the necessity of drawing lines between the scope of its jurisdiction and the jurisdiction of the Court of Justice of the EU.[40]

## The Problems with Methodology

The above analysis indicates that the ways in which the Constitutional Tribunal draws on the comparative law are varied. Nonetheless, all of them can be characterized as the use of particular, often fragmentary, comparative material chosen on a case-by-case basis. Such an approach is pragmatic, as in each case the Tribunal is faced mainly with the task of adjudicating a case at hand. It does, however, adversely impact the methodology of

37 Naturally, the Tribunal should in this situation refer to the content of the constitutional norms and the legislation which were analysed in the cited judgment. However, those elements constitute only background information that allows determination of whether the judgment in question is relevant for the case before the Tribunal (e.g. the judgment of 30 September 2008, case no. K 44/07).

38 E.g. the judgment of 9 July 2009, case no. SK 48/05.

39 V., e.g., the judgment of 30 September 2008, case no. K 44/07 in which the Tribunal explicitly stated that its judgment may be controversial in the eyes of public opinion and seems to defend it by pointing out its similarity to decisions taken previously by the constitutional courts in Germany and Czech Republic.

40 V., e.g., judgments of 24 November 2010, K 32/09 and of 16 November 2011, SK 45/09. See also W. Sadurski, *'Solange, chapter 3': Constitutional Courts in Central Europe – Democracy – European Union*, "European Law Journal" 2007, no. 1, pp. 1–35.

introducing a comparative argument to the Tribunal's reasoning.[41] This concerns in particular the choice of the material to be used, the random nature of the references made, and the lack of clear indication what role such an argument played in the decision-making process.

The Constitutional Tribunal, when selecting the foreign law or case-law to refer to, does not usually explain why it found relevant the materials from particular jurisdictions and omitted those from other countries.[42] In some cases this choice – even though not clearly justified in the judgments – seems to be based on the similar constitutional history common to a number of states[43] or the existence of other relevant features due to the fact that they face the same constitutional challenge.[44] In other cases, the reasons for a particular choice are difficult to identify.[45] Among the few clear statements concerning the methodology of the use of foreign law by the Tribunal, it stated that: "in case of referring to the domestic law of another state, it is necessary to establish whether it is adequate to use the foreign model in order to interpret Polish law. In particular it is necessary to exercise particular caution in the choice of the legal system to which the Tribunal refers." However, even in the case in which this statement was made, it resulted only in the general conclusion that "in the present case it is appropriate to refer to the legal solutions functioning in Germany and in the case-law of the European Court of Human Rights" without the indication of any reasons for this conclusion.[46]

It may be also doubted whether the analysis of the comparative material by the Tribunal is detailed enough to conclude that, especially when referring to the

41 For more on the methodology of comparative constitutional law *v. inter alia*: M. Tushnet, *Some reflections on method in comparative constitutional law*, in *The Migration of Constitutional Ideas*, ed. S. Choudhry, Cambridge 2006, pp. 68–83; S. Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, "Indiana Law Review"1999, no. 3, p. 833 *et seq*.

42 However, there are exceptions. *V.* judgment of 30 September 2008, K 44/07 where the Tribunal reconstrued two approaches to counteracting terrorism in Western democracies and clearly indicated why one of them was more relevant for the Polish legal system and judgment of 19 July 2011, K 11/10 when it clearly referred to the common historic heritage and the similarities between the Polish and Hungarian legal system in order to justify referring to the case law of the Hungarian Constitutional Court.

43 For instance in cases concerning the lustration or benefits of the former employees of the communist secret services.

44 Such as being a Member of the EU.

45 E.g. the reference to the case-law of Germany, United States and Canada in the judgment of 11 October 2016, SK 28/15.

46 The judgment of 3 July 2008, K 38/07. See also the judgment of 28 October 2015, K 21/14 in which the Tribunal stated "The Constitutional Tribunal held that in the circumstances of the present case it is important to present the issue of the minimum of existence in the broader context, including the comparative perspective. For this reason, the Tribunal presented this issue by invoking the German legal system".

foreign legislation, it found all the elements that were relevant to the reconstruction of a functional equivalent[47] of the assessed Polish regulation in a given legal system. This problem can arise especially in situations in which the Tribunal examines the constitutionality of a regulation that is aimed at providing a proper balance between two conflicting constitutional values, but it refers only to those elements of foreign legislation that serve the preservation of one of those principles and omits those that serve the realization of the other principle.[48]

Finally, it is problematic that the Constitutional Tribunal does not formulate any statements concerning the role of comparative argument in constitutional interpretation or making decisions on the supervision of norms. In most cases in which reference to foreign materials is made, it is placed in a separate part of the reasoning (as a separate section or in one section with the analysis of international law). The material described there is not referenced later on, when the *sensu stricto* analysis of the Polish law relevant for the outcome of the case takes place.[49] This practice significantly limits the argumentative value of comparative references in the case-law, and results in the fact that their role, other than informative and educational, is difficult to grasp.

## Conclusion

The above analysis indicates that the Polish Constitutional Tribunal is relatively open to dialogue with other jurisdictions, which – in principle – seems to be both within the spirit of the 1997 Constitution and pragmatic with regard to today's world of multi-level and multi-centred legal systems, in which similar problems arise all over the globe. However, the analysis also shows that in order to fully develop the pragmatic, legitimising and persuasive potential of this horizontal dialogue, more stress should be placed on the way in which comparative references are introduced to the Tribunal's case-law. In particular, the Tribunal should indicate, in a more consistent way, the place of comparative argument in its decision-making process and justify the choices it makes with this respect.

47 J.C. Reitz, *How to Do Comparative Law*, "American Journal of Comparative Law" 1998, no. 4, p. 620 et seq.

48 E.g. the judgment of 7 October 2015, K 12/14 in which the Tribunal analysed the ways in which different legislations provided the right to conscious objection to medical professionals, but failed to take into consideration the solutions that guarantee patients' rights in such situations.

49 Cf. the judgment of 4 November 2014, SK 55/13.

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**SUMMARY**

**An Argument from Comparative Law in the Jurisprudence of the Polish Constitutional Tribunal**

The use of references to foreign law and jurisprudence by the constitutional courts around the world currently gains more and more attention from scholars. The admissibility and usefulness of conducting such a horizontal dialogue between various jurisdictions raises controversies in other countries, but not in Poland, where no significant academic discussion on the legal basis and justification for using comparative arguments in constitutional jurisprudence has been conducted. The reasons for this lack of controversy seem to lie in the roots of the 1997 Constitution, and the way in which the Polish legal system is constructed. The Polish Constitutional Tribunal is quite prone to using comparative references in its reasoning. However, it rarely clearly indicated their role or significance for the resolution of the case before it. The analysis of the case-law of the Tribunal indicates that references to foreign law concern constitutional provisions, legislation, and the judgments of other constitutional courts. The purpose of the references stresses the universality of particular constitutional norms and deciphering their meaning, as well as gathering data significant for the assessment of the proportionality of a national law, as well as at drawing inspiration from the decisions taken by foreign courts. However, the persuasive use of a comparative argument demands that the methodological problems which can be noticed in the case-law should be addressed. They involve in particular: the need to justify the choice of comparative material that is analysed, the fragmented nature of the analysis, and the lack of a clear indication what role these kind of arguments have in constitutional argumentation.

Keywords: constitutional law, the Constitutional Tribunal, constitutional adjudication, comparative law, comparative interpretation

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# Rights of the Posted Workers – Directive 96/71/EC and the Evolution of Legislation Concerning Posted Workers[1]

## Introduction

The freedom to provide services and the freedom of movement for workers are the basic, an essential freedoms set out by the EU Treaties. They form – together with other freedoms – essential base for the Internal Market of the European Union. However, it should be noted that those two aspects of EU law can cause conflicts between employers and their workers. It can also be a cause of unfair competition between employers from different Member States – especially when the Member States have significantly different employment conditions. This can lead to social dumping or so called race to the bottom. In this article I shall describe the issues concerning the conflicts of the rights of the posted workers (a similar but separate category than freedom of movement of workers) with rights and interests of the employers. I shall also point out at the measures that have been taken so far by the European Union to improve effective protection and balance between those two aspects. For the better understanding of this issue, a very brief overview of both definitions will be given in this article.

## The Definition of the Freedom of Movement for Workers and Definition of Posted Workers

The freedom of movement for workers is a particular aspect of freedom of movement of persons. Above all, its purpose is to ensure the protection of citizens of the European Union.[2] This freedom, along with all EU Labour Law in general, is one of the most es-

1 The final version of the article was prepared in June 2017, therefore the newest developments of the topic are not included, as they would have to be addressed in a separate article.

2 L. Florek, *Europejskie Prawo Pracy,* Warszawa 2010, p. 46.

sential measures of social politics of the European Union. The principle of the freedom of movement for workers was established chiefly by Article 45 of Treaty of Functioning of the European Union (formerly Articles 39 and 48) and by the Regulation No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (amended by the Regulation No 312/76 of 9 February 1976 and Regulation No 2434/92 of 27 July 1992). According to this regulation (Article 45 TFEU), freedom of the movement of workers shall be secured within the Union. In principle, it is ensured by the abolition of discrimination based on nationality between workers of the Member States. This applies to employment, remuneration and other conditions of work and employment. It consists of – above all – access to employment and equal treatment. Article 45 of Treaty of Functioning of the European Union states that this freedom is only given to workers. To ensure uniformity of this regulation, definition of a worker is to be understood in a way set out by the European Union Law and cannot be defined by any of the national law of Member States.[3] As this definition is not expressly stated in any of EU acts, it is defined by the Jurisprudence. According to Judgments of the European Court of Justice (ECJ) the definition must be based on objective criteria.[4] Those criteria establish that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration. Remuneration is an essential part of employment relationship – employment needs to have an economic aim. Low remuneration and short working hours, however, do not mean that such service cannot be regarded as employment relationship.[5] It should be noted however, that Court of Justice has used slightly different terminology depending on the context.[6]

The protection provided by the freedom of movement for workers generally does not apply to the full extent to posted workers, who are mostly protected by the Directive 96/71/EC.[7] The protection does not cover all areas – it is ensured only in matters expressly stated in the Directive 96/71/EC. For the purposes of this Directive, 'posted worker' means a worker who, for a limited period, carries out his or her work in the territory of a Member State other than the State in which he normally works. The employer must be an entity established in one Member State that posts workers to another

3 Judgment of the Court of Justice of the European Union of 19 March 1964 Mrs M.K.H Hoekstra (née Unger) v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten (Administration of the Industrail Board for Retail Trades and Businesses, C-75–63.

4 Judgment of the Court of Justice of the European Union of 3 July 1986 Deborah Lawrie-Blum v. Land Baden Würtemberg, C-66/85.

5 Judgment of the Court of Justice of the European Union of 3 June 1986 R.H.Kempf v.Staatssecretaris van Justitie, C- 139/85.

6 Judgment of the Court of Justice of the European Union of 12 May 1998 María Martínez Sala v Freistaat Bayern, C-85/96, *European Court reports 1998 Page I-02691*; A.C.L. Davies, *EU Labour Law*, Oxford 2012, p. 174.

7 Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

Member State, whereas the worker is employed in the country where the employer is established.[8] Whether a worker is a posted worker or a "normal" migrant worker has to be decided on a general basis, as a general assessment of all factual elements. The most important factor is the period of time of employment when the worker is providing work in another Member State[9]. In one of the judgments, the Court has ruled that an open – ended employment contract and fixed term contracts (when the date of finishing the undertaking was not specifically precised) shall be regarded as permanent employment.[10] Although it is not clearly stated by any act, a period exceeding 24 months of employment is often regarded as permanent employment.[11] The Directive 96/71 applies only if the undertakings take one of the following transnational measures mentioned in Article 1 of the Directive (post workers to the territory of a Member State on their account and under their direction; or post workers to an establishment or to an undertaking owned by the group in the territory of a Member State; or being a temporary employment undertaking or placement agency).

The posted workers form a specific category that has similar rights as the workers that migrate to other Member State (the obligations of the posted workers or their employers also vary – for example, the employers that provide services with posted workers are obliged to fulfill some specific obligations, as for instance providing workers with a certificate of posting[12]). It also means that the posted workers do not enjoy the right to equal treatment as the migrant workers that seek employment in another Member State.

The posted workers are only given a certain "core" of labor rights, consisting of a catalogue of working conditions and terms of employment.[13] On the other hand, setting a fixed minimal pay and minimal conditions of work is a form of interference in the contractual relations.[14] However, it seems to be necessary for securing the elemental need of the posted workers (especially on the international level). Such interference is also necessary in order to ensure the protection of the dignity of the worker.[15]

8 A. Świątkowski, *Prawo Pracy Unii Europejskiej*, Warszawa 2015, p. 172.

9 Ibidem, p. 170–171.

10 Judgment of the Court of Justice of the European Union of 30 November 1995 Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, C-55/94.

11 K. Jaśkowski, *Meritum Prawo Pracy 2017*, Warszawa 2017, p. 99.

12 A. Świątkowski, op. cit., p. 174.

13 Directorate - General for Internal Policies, *Posting of workers directive current situation and challenges*, 2016.

14 A. Sobczyk, *Prawo pracy w świetle Konstytucji RP. Wybrane problemy i instytucje prawa pracy a konstytucyjne prawa i wolności człowieka*, Warszawa 2013, p. 35–36.

15 C. Dupré, *La respect de la dignité humaine: principe essentiel du droit du travail,* "Revenue de droit du Travail " 2016, no. 11, p. 674–675.

## Definition of Freedom to Provide Services

Freedom to provide services is another freedom established by the Community. It is also an essential part of the EU Community and it creates uniform social-economic conditions for ensuring the functioning of the EU market.[16] The bases of this freedom are set out in Articles 56–62 TFEU and in the Directive 2006/123/EC of the European Parliament and of The Council of 12 December 2006 on services in the Internal Market.[17] According to the provision of Article 56, restrictions to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a different Member State. The main aim of this freedom is to allow business entities (entities such as natural persons, legal persons, organizational entities not being legal persons, in which a statute vests legal capacity) to move from one Member State to another in order to provide services. Further, this freedom prohibits any unjustified limits to the free circulation of such services. In other words, the Treaties preclude the application of any national legislation which has the effect of making the provision of services between Member States more difficult than the provision of services exclusively within one Member State.[18]

Article 57 provides a very brief and general definition of services – services shall be considered to be 'services' within the meaning of the Treaties where they are normally provided for remuneration and when they are not governed by other freedoms (freedom of movement for goods, capital and persons). They should also have a cross-border and intangible nature. Generally they should be provided on temporary basis.[19]

The protection of workers and the protection of business entities (freedom to provide services) have different subjects of protection. It is hard to achieve the necessary balance between them, as the interests of workers and interests of employers are often in conflict.

It is a task of all Member States to comply with EU legislation, and not to create national legislation that could hinder that freedom in any way. Both legal and natural persons (and organizational entities not being legal persons, in which a statute vests legal capacity) can rely on these rules as they are directly effective.

## Directive 96/71/EC

Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services

16 M. Kożuch, *Swoboda Świadczenia Usług w Unii Europejskiej - System Prawa Unii Europejskiej*, Warszawa 2011 p. XVII-1.

17 Official Journal of the European Union 27.12.2006 L 376/36.

18 Judgment of the Court of Justice of the European Union of of 28 April 1998 Jessica Safir v Skattemyndigheten i Dalarnas Län, formerly Skattemyndigheten i Kopparbergs Län, Case C-118/96.

19 J. Barcz, *Prawo Gospodarcze Unii Europejskiej,* Warszawa 2011, p. IV-25.

(The EU Posted Workers Directive) concerns mostly the rights and treatment of posted workers, as well as the freedom to provide services given to the business entities.

The aim of this Directive is to ensure that posted workers provide work under the terms and conditions (only those terms and conditions expressly stated in the Directive – Article 3) imposed by the country where the work is carried out. The aim is also to promote the transnational provision of services while ensuring fair competition and measures guaranteeing respect for the rights of workers (point 5 of the preamble). In order to reach this aim, this Directive operates with overriding mandatory provisions – the norms that are applicable independently of the law applicable to the employment contract, unless the provisions of that country gives the better protection to those workers (Article 3(7)).

On one hand, the purpose of this regulation is to protect those Member States, where the service is carried out; on the other, Directive ensures the protection of the posted workers' rights.[20] It is only natural that the Member States need to protect their own market from so called social dumping – a situation when a country less developed Member State can provide another Member State with workers having much lower salary expectations. As a consequence, this can lead to exclusion of the workers residing in the host country.

However, it should be noted that Directive 96/71/EC does not include any executive regulations. Several years after coming into force, many abuses committed by entrepreneurs were revealed. Some of the entrepreneurs had used to their advantage the differences in salary level in different Member States.[21] As the division of the competences concerning the supervision of the entrepreneurs (whether they comply with regulations imposed by this Directive or not) could not be precisely determined, the EU institutions were not able to effectively protect the posted workers. The criticism has escalated in 2007/2008, when several cases concerning conflicts of rights of entrepreneurs with the rights of the posted workers had been heard by the European Court of Justice.

## Laval Un Partneri Ltd v Svenska Byggnadsarbetareförbundet C-341/05[22]

In the abovementioned case, the facts were as follows. A Latvian company (Laval Un Partneri Ltd) concluded a contract with Swedish government to renovate schools in Sweden (May – December 2004). The company was using Latvian workers. Their salary was significantly lower compared to Swedish workers. The minimum salary was not

20 P. Wąż, *Delegowanie pracowników do innego Państwa Członkowskiego celem świadczenia usług*, Warszawa 2011, p. 3.

21 A. Świątkowski, op. cit., p. 171.

22 Judgment of the Court of Justice of the European Union of 18 December 2007 Laval Un Partneri Ltd v Svenska Byggnadsarbetareförbundet, C-341/05.

fixed by Sweden by statutory law as it was regulated mostly by collective agreements. The Swedish Building Workers' Union (Svenska Byggnadsarbetareforbundet) negotiated with the Laval Ltd in order to encourage them to sign a collective agreement. That document aimed to ensure a higher level of the minimum salary for the Latvian workers, but also stated that the companies were obliged to pay (1,5 % of total gross wages for the Union, 0,8% to the insurance company and 5,9% for the purposes of insurance premiums). Finally, Laval Ltd refused to sign the agreement, which eventually led to a dispute between two parties. In response, collective actions against Laval (that had started already before negotiations) intensified, eventually leading to boycott of all Laval's sites in Sweden. The company was no longer able to carry out its activities in Sweden. Laval claimed that the blockade infringed its freedom to provide services. Laval also claimed for compensation against trade unions (other trade unions also participated in collective actions) for the damage suffered. The matter was referred to the ECJ by the Swedish court (preliminary ruling).

One of the questions posed to the ECJ concerned the right to force a foreign provider of services to sign a collective agreement (considering that no express provisions concerning the application of terms and conditions of employment in collective agreements were binding under Swedish law) and whether or not it is compatible with freedom to provide services.

According to Article 3 of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, Member States shall guarantee posted workers terms and conditions provided in the Member States where the work is carried out (the terms and conditions set out by statutory law or by collective agreements – collective agreements could only apply to some economy sectors). This applies among other things to minimum rates of pay. Such rights shall not prevent application of terms and conditions of employment which are more favourable to workers.ECJ acknowledged that the right to take collective action for the protection of the workers of the host State against possible social dumping may constitute an overriding reason of public interest within the meaning of the caselaw of the Court which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the Treaty.

Further, the Court of Justice held that undertakings established in other Member States would compete unfairly against undertakings of the host Member State in the framework of the transnational provision of services, if the level of social protection in the host Member State is higher. Despite the fact that a minimum wage had not been imposed by the Swedish Law (and had to be provided by the collective agreements), considering however that collective agreements were not in fact declared "universally applicable" the ECJ held that trade unions; not being bodies governed by public law, "could not avail themselves of that provision by citing grounds of public policy in order

to maintain that collective action such as that at issue in the main proceedings complies with Community law".

It can be argued that this judgment led in fact to limiting rights of posted workers. In some way the judgment acknowledged that under the Directive 96/71/EC these workers were striped of the rights that had been granted to Swedish workers by the "non-universally" applicable collective agreements. Despite the fact that there was no unfair treatment of the posted workers that had been imposed by the statutory law itself, as a matter of fact, posted workers had not been considered as having the same rights as most Swedish workers. This case establishes a change to interpretation of Directive 96/71/EC by saying that the Directive limits the level of protection guaranteed to posted workers. Neither the host Member State nor the social partners can ask for more favourable conditions going beyond the mandatory rules for minimum protection set forth in the Directive.[23]

## Similar Cases "Laval quartet"

Laval case forms together with: Viking[24], Commision v. Luxemburg[25], Rüffert[26] so called "Laval quartet". Those cases have determined the division of the competences of the Member States regarding regulation of the rights of posted workers.[27]

In those judgments the ECJ ruled that it is not in principle prohibited to organize collective agreements in order to induce a company to enter into a collective agreement. However they may be considered as a restriction on the freedom of services and the freedom of establishment. The protection of those rights (the freedom to provide services and the freedom of establishment as well as rights of posted workers) is not uniform and is dependent on the circumstances and the nature of a claim.[28]

The abovementioned cases also clarify that the freedom to provide services may in fact impose restrictions on the right to collective action of the posted workers. This applies

23 A. Bücker, W. Warneck, *Viking, Laval, Rüffert: Consequences and policy perspectives*, Brussels 2010, p. 10.

24 Judgment of the Court of Justice of the European Union of 11 December 2007 International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti Case, C-438/05.

25 Judgment of the Court of Justice of the European Union of 19 June 2008 Commission of the European Communities v Grand Duchy of Luxemburg Case, C-319/06.

26 Judgment of the Court of Justice of the European Union of 3 April 2008 Dirk Rüffert v Land Niedersachsen Case, C-346/06.

27 A. Świątkowski, *Kwartet Laval w prawie pracy*, Warszawa 2010, p. 34.

28 Directorate - General for Internal Policies, *The impact of the ECJ judgments on Viking, Laval Rüffert, Luxembourg on the practice of collective bragaining and the effectiveness of social action*, 2010, p. 6–7.

in particular to situations when the actions are not aimed at regulating the conditions of employment of its own members.

Those judgments influenced mostly the legislation of those Member States (countries like Sweden or Denmark) whose labour law and employment conditions are mostly based on the autonomous collective bargaining model. The collective bargaining model means that it is the responsibility of the trade unions to supervise and protect employers in the country (posted workers included), especially in matters of wages. Such system cannot function properly without the occasional necessity of starting a collective action.[29]

Those cases also clarify, that the Directive 96/71/EC outlines the maximum level of protection for posted workers, stating that no collective agreement may, specify a higher level of protection. On the other hand, review of some cases show, that regulations of the Member States concerning posted workers, led in some cases to restrictions of the freedom to provide services.[30] The problem of the method of calculating the elements that could be regarded as minimum rates of pay is not discussed closer in this article; it has been reviewed by the Court of Justice, also in recent cases.[31]

## Evolution of the Legislation

The fact that some differences of the law systems of Member States can hinder application of equal treatment of the workers is not the sole problem concerning the protection of rights of posted workers. Another issue is the fact that Member States do not cooperate and exchange detailed information concerning the terms and conditions of employment. A level of understanding of such terms by both Member States and parties to the employment relation is essential to prevent disputes between themBearing these facts in mind, after detecting a possible loophole in the protection of the workers under Di-

29 Directorate - General for Internal Policies, *The impact of the ECJ judgments on Viking, Laval Rüffert, Luxembourg on the practice of collective bragaining and the effectiveness of social acton*, 2010, p. 7–8.

30 Judgment of the Court of Justice of the European Union of 14 April 2005, Commission of the European Communities v Federal Republic of Germany Case C-341/02; Judgment of the Court of Justice of the European Union 19 January 2006 Commission of the European Communities v Federal Republic of Germany Case, C-244/04; Judgment of the Court of Justice of the European Union of 24 January 2002 Portugaia Construções Ldª (Preliminary ruling) C-164/99,; R. Stefanicki, *Ograniczenia swobodnego przepływu usług (kapitału) usprawiedliwione względami interesu publicznego w* świetle *orzecznictwa europejskiego trybunału sprawiedliwości*, „Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego", vol. III, A.D. MMV 2005, p. 61.

31 Judgment of the European Court of Justice of 12 February 2015 *Sähköalojen ammattiliitto* ry v Elektrobudowa Spolka Akcyjna, C-396/13, Official Journal of the European Union C 118, 13.4.2015, p. 6–7.

rective 96/71/EC, Commission in its Recommendation of 3rd April 2008 on enhanced administrative cooperation in the context of the posting workers in the framework of the provision services (COM(2006) 159 Final) drew attention of the Member States to the fact that closer cooperation might be necessary. The Commission indicated also that the Member States should actively participate in a systematic and formal process of identification and exchange of good practices in the field of posting of workers through any forum of cooperation established by the Commission.[32] The abovementioned Recommendation, as well as the Commission Decision set out the guidelines in matters concerning compliance with the provisions of the Directive 96/71/EC and supervising the entrepreneurs. As a consequence, a group of experts was set up ("Committee of Experts on Posting of Workers") in order to: promote exchange of information, examine issues regarding implementation and application of the Directive, as well as examine the possibilities to increase effective compliance with rights of migrant workers. Eventually, a strategy concerning single market has been issued.[33] The next step was proposing a new directive – Directive 2014/67/EC on the enforcement of Directive 96/71/EC.[34]

## Directive 2014/67/EU

Directive 2014/67/EU aims to establish a common framework of a set of appropriate provisions, measures and control mechanisms necessary for the better application and enforcement of Directive 96/71/EC (Article 1 of Directive 2014/67/EU). Under the Directive, the Member States are obliged to designate one or more competent authorities, which may include the liaison office. The directive also sets out precise criteria (Article 4) for the assessment of all factual elements concerning posted workers (failure to satisfy one or more of the factual elements set out in paragraphs shall not automatically preclude a situation from being characterized as one of posting – it does not form an exhaustive enumeration) – the elements of the definition of a posted worker aims also to eliminate the problem of fictional posting.[35]

Under the Directive 2014/67/EU, the Member States are obliged to cooperate, share the necessary information concerning terms and conditions of employment (especially

32 2009/17/EC: Commission Decision of 19 December 2008 setting up the Committee of Experts on Posting of Workers.

33 M. Monti, *A new Strategy for The Single Market: At the Service of Europe's Econommy and Society. Report to the President of the European Commission Jose Maunel Barroso*, Milano 2010.

34 Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) no. 1024/2012 on administrative cooperation through the Internal Market Information System.

35 P. Wąż, *Polska ustawa o delegowaniu pracowników* „Monitor Prawa Pracy" 2016, no. 10, p. 511.

those referred in Article 3 of Directive 96/71/EC), provide each other with mutual assistance and take the all appropriate measures to ensure the compliance and application of the terms and conditions of employment referred to in Article 3 of Directive 96/71/EC. Member States shall also provide the posted workers with the possibility of lodging complaints against their employers directly, as well as commence judicial or administrative proceedings (Article 11). Member States are also obliged to impose penalties applicable in the event of infringements of national provisions adopted pursuant to this Directive.

According to Article 23 of Directive 2014/67/EU, Member States were obliged to implement the provisions of this directive by 18 June 2016 (no later than 18 June 2019, a rapport of the Commission on its application and implementation to the European Parliament shall be issued). Some Member States (Poland)[36] decided to place most of the norms concerning the posted workers from the Directive 2014/67/EU and Directive 96/71/EC in a separate statue, others decided to change the existing regulations.

The possible outcome and application of Directive 2014/67/EU is hard to predict as the Member States as it has only been few month since the deadline for implementation expired. It is also questionable whether it will provide and maintain the balance between the rights of posted workers and the freedom to provide services. It can be noted however, that the new Directive consists of rather general provisions that may not be sufficient to ensure reasonable level of protection to the posted workers. That is a reason why the new Directive 2014/67/EU has been criticized by some Member States and the legal doctrine. Some say that will not completely stop problems with implementing the effective protection of posted workers. It may also lead to other problems in the future[37] (such as differences between the understanding posted workers in the Directive 2014/67 and Regulation 883/2004[38]).

On the other hand this Directive has been criticized during the legislative procedure as being too restrictive for employers leading in fact to discrimination against some groups of employers.[39]

## Proposal for Amendment of Directive 96/71/EC

Some Member States (Austria, Belgium, France, Germany, Luxembourg, the Netherlands and Sweden) issued a petition claiming for a modernisation of the Posting of Workers Directive that would establish the principle of 'equal pay for equal work in the same place'. Those Member States argued that remuneration, applicable to posted work-

36 Dz.U. 2016 item 868.

37 F. Pennings, G.Vonk, *Research Handbook on European Social Security Law*, 2015, p. 368–369.

38 Regulation (EC) no. 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

39 Letter of Polish Chamber of Commerce dated of 26 March 2014.

ers should be amended and widened. Bearing in mind those opinions, a proposal for amendment of Directive 96/71 has been issued.[40]

Its aim is to address unfair practices (that are still an issue) and to promote the principle that the same work at the same place should be remunerated in the same manner. The initiative focuses on issues which were not addressed by Directive 96/71/EC and it does not address any issue regulated by Directive 2014/67/EC.

Among the proposed changes is the provision making collective agreements universally applicable within the meaning of Article 3(8) (in all sectors of the economy irrespective of the activities). Another significant change replaces the term "minimum rates of pay" with the "remuneration" (as opposed to the term 'rates of pay', term "remuneration" includes other financial benefits from employment relation, such as complementary benefits). The new proposal also aims to impose on Member States an obligation to publish information on the constituent elements of remuneration. Also a provision concerning applicable labour law is added (when the anticipated or the effective duration of posting exceeds twenty-four months, the Member State to whose territory a worker is posted shall be deemed to be the country in which his or her work is habitually carried out). Other changes concerns the conditions applicable to workers hired out by a temporary agency and provisions which deal with situations of subcontracting chains.

In response to the proposal, number of Member States (Bulgaria, Czech Republic, Estonia, Hungary, Lithuania, Latvia, Poland, Slovakia and Romania) have argued that a review of Directive 96/71/EC is premature and should be postponed after the full implementation of the Directive 2014/67 and its assessment.[41] These Member States also stated that the principle of equal pay for equal work in the same place may be incompatible with the single market, creating in fact a restriction on freedom to provide services for entrepreneurs from some Member States (lower rates of pay were deemed by them as legitimate element of competitive advantage). Some entrepreneurial organization have also stated that such amendments may significantly increase the costs of posting worker, making it unprofitable and thus creating an effective restriction on freedom to provide services.

## Conclusion

European Labour Law concerning matters such as minimal conditions of work and minimal pay is evolving rapidly. Bearing in mind that altogether, in 2014 there were over

40 Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of The European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

41 Ibidem.

1.9 million postings in the EU (which is an upward trend[42]), it should be noted that possible changes to the legislation concerning posted workers will have a significant influence on the Internal Market, as well as on the particular Member States and further on workers and employers. The top sending Member States in 2011 were Poland, Germany and France, while top *receiving* Member States were Germany, France and Belgium. These numbers do not mean however, that future legislation will have the strongest impact only on those countries.

The balance of the freedom to provide services and the rights of posted workers somehow resembles the conflict of interests between particular Member States – Member States with lower rates of pay tend to support the idea of reinforcing the freedom to provide services, while more economically developed Member States (with higher rates of pay and level of remuneration) try to prevent locking out entrepreneurs established in their territory thus supporting idea of further widening the protection of posted workers by imposing higher labor standards for protectionist reasons.[43] The raising influence of the private entities (entities having influence almost as significant as a country) might also pose another threat to the compromise in that matter. It should be noted that the protection of the posted workers seems to become strongly reinforced by the newest EU legislation and its proposed amendments. However, as the economic and social policies of all Member States are at stake, agreement on this matter will not be a simple task, rendering determination of proper balance of those two aspects of European Law a difficult matter.

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**SUMMARY**

**Rights of the Posted Workers – Directive 96/71/EC and the Evolution of Legislation Concerning Posted Workers**

The aim of the study is to analyse the conflict of rights of posted workers with entrepreneurs' freedom to provide services in posting of workers Directive 96/71/EC and the enforcement Directive 2014/67/EC. The author presents the key issues of the conflict, as well as its evolution in EU legislation and in European Court of Justice judgments.

Keywords: posted workers, freedom to provide services, Directive 96/71/EC, Directive 2014/67/EC, Treaty on the Functioning of European Union, European Labour Law, European Union Laws

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# Defining the Pillars of Trade Union Freedoms: the Polish Example

Trade unions play a particularly important role in the modern social market economy. This type of voluntary collective labour organisation forms a fundamental and necessary part of the social and economic system of any civilised country. Trade union organisations should be seen as key social partners, whose basic role is to represent and protect the legitimate rights and interests of workers. It can be concluded that trade unions co-determine the realities of the social and economic life in Poland, even though radical economic and political changes have also affected both the structure and character of the national union movement. Furthermore, even national legislation seems to confirm that collective labour organisations are extremely important for the economic, political and social order.

In their organisational character, pursued policies and activities modern domestic trade unions depart significantly from the experience of the "Solidarity" movement of the 1980s and early 1990s. It is worth noting that the character, structure or problems of the modern labour market differ significantly from the realities of previous decades, when we were able to experience global and radical changes in social and political life. Consequently, both the character and strategy of the domestic union movement have also evolved (or should have?), in trying to adapt to current realities and tackle certain problems and challenges associated with the labour market. Thus, modern Polish trade unions should not be seen anymore only as direct accelerators of political and economic transformation. Nowadays, both the role and functions of trade unions in the social market economy are different, as basic problems of the labour marker have changed. Now society expects that union movements should focus mainly on such issues as equitable remuneration, lower unemployment or stability and the security and comfort of work.[1] Therefore, there is a reason to consider that (simplifying somewhat) the national trade

1 B. Ebbinghaus, *Trade Unions' changing role: membership erosion, organisational reform, and social partnership in Europe*, Industrial Relations Journal 2002, no. 33, p. 465–466.

unions should primarily aim to globally improve the welfare of workers.[2] It seems that national union movements should focus more on dialogue with other social partners, especially in the times of global economic crisis and the increasing popularity of flexicurity[3] policy.[4] This is because the society expects from trade unions to initiate necessary and desired changes in the Polish legal system rather than on waging "class conflicts".

When considering the functions of modern trade unions in Poland we should not forget about particularly important role of the domestic lawmaker. It should be borne in mind that strong and firm position of national union movement can be achieved only through the creation of proper legal frameworks and functional measures. It is also noteworthy that the specific legislative policy related to freedoms and rights of trade union often plays a substantial and decisive role in determining stronger or weaker position of trade unions in a given legal, social and economic system.

In order to characterise and evaluate such aspects as position, importance and size of union movement in a given system it is useful to use two basic and fundamental measures: the extent of trade union freedoms legally recognised in the system and how such freedoms and their guarantees functioning in the reality. The position of a rightful union organisation in a social market economy is based on four basic pillars – freedom of association, self-governance, independence and equality.[5] It seems that only comprehensive analysis of existing legal frameworks from perspective of the above-mentioned pillars makes it possible to identify and determine actual degree of both the autonomy and the liberty enjoyed by trade unions in a given legal order. A general analysis of the Polish legal system makes it possible to present the thesis that the legislator attaches particular importance to the issue of assuring the proper and free functioning of trade unions.[6] At the same time, the legislator tries to shape a relatively broad range of freedoms and guarantees designated to trade unions and their members. Such freedoms, rights and guarantees are directly constituted under the Polish Constitution, biding international agreements and national legislation. It should also be highlighted that the trade union freedoms are recognised as one of the constitutional political freedoms and

2 W. Streeck, *The sociology of labor markets and trade unions,* in: N. Smelser (ed.), R. Swedberg (ed.), The handbook of economic sociology¸ Princeton University Press 2005, p. 264–265.

3 Flexicurity is popular concept of employment model that focuses on two aspects: easiness of employment and dismissals processes (flexibility) and complex social benefits for unemployed (security). Labour market based on flexicurity assures that all – employers, employees and unemployed are beneficiaries. Employers are able to efficiently adjust their employment levels to the market situation. Employees enjoy better chances of improving their qualifications and stronger trade unions. The unemployed experience better social welfare and accessibility of new job positions.

4 R. Hyman, *Emerging agenda for trade unions?*, Labour and Society Programme, Discussion Paper Series 1999, no. 98, p. 6–12.

5 Ibidem.

6 K.W. Baran, *Komentarz do ustawy o związkach zawodowych*. in: Zbiorowe prawo pracy. Komentarz, 2010, LEX/el.; J. Żołyński, *Ustawa o związkach zawodowych. Komentarz*, 2014, LEX/el.

rights,[7] which in turn proves that such freedoms play particularly important role in shaping internal political order. It seems that the constitutional lawmaker expects trade unions to actively participate, not only in social and economic life, but also in political life.[8]

The aim of this article is to present the essence of four fundamental pillars (the freedom of association, the self-governance, the independence and the equality) of trade union freedoms, which can be identified in the Polish legal system. The author tries to briefly systemise and characterise chosen pillars. The article is based on the review of the national legislation (including the Polish Constitution, relevant international agreements and the Act on Trade Unions of 23th May 1991)[9] doctrine and judicature.

## The Classification of Trade Union Freedoms Functioning in the Polish Legal System

Despite the fact that the issue of theoretic classification of trade union freedoms has a minor impact on the practical functioning of trade unions, it is worth noting that the domestic doctrine defines two competing concepts regarding number of trade union freedoms.[10] Some researchers are in favour of the monolithic idea, which is based on the assumption that there is only one meta-freedom.[11] Such standpoint reflects foreign perspective, where 'the freedom of association' is recognised as the only trade union freedom. On the contrary, other researches advocate the competitive pluralistic concept, indicating that we should specify at least three trade union freedoms – freedom of association, self-governance and independence.[12]

It seems that the constitutional legislator is in favour of the pluralistic concept of trade union freedoms as even the Polish Constitution itself indicates in article 59(4) that "the scope of freedom of association and other trade union freedoms may only be subject to such statutory limitations as are permissible in accordance with international agreements to which the Republic of Poland is a party". Furthermore, it should also be

7 Articles 12 and 59 of the Constitution of the Republic of Poland.

8 K.W. Baran, *Komentarz…*

9 The Act on Trade Unions of 23th May 1991 (consolidated text. OJ of 2015, item 1881 as amended).

10 K.W. Baran, *Wolności związkowe i ich gwarancje w systemie ustawodawstwa polskiego*, Oficyna Wydawnicza Branta, Bydgoszcz-Warszawa 2001, p. 19.

11 *Cf.* L. Florek, M. Seweryński, *Międzynarodowe prawo pracy,* Warszawa 1988, p. 122–124; A. Michalska, *Międzynarodowa ochrona wolności związkowej,* „Ruch Prawniczy, Ekonomiczny i Społeczny", no. 1, 1982, p. 85; J. Wratny, *Niektóre problemy wolności związkowej w krajach kapitalistycznych,* in: *Z problematyki związków zawodowych i współuczestnictwa pracowników w zarządzaniu. Ujęcie prawnoporównawcze,* Warszawa 1982, p. 5;

12 *Cf.* K.W. Baran, *Wolności związkowe…*, p. 18–20; J. Jończyk, *Prawo Pracy,* Warszawa 1995, s. 170; Z. Hajn, *Zbiorowe prawo pracy. Zarys systemu.*, 2013, J. Żołyński, *Ustawa…*

noted that article 12 of the Polish Constitution identifies two trade union freedoms – for creation and functioning of trade union organisations. Consequently, for the direct constitutional basis, the pluralistic concept of trade unions freedoms should be considered as the leading and more adequate concept in the Polish legal system.

Adopting the pluralistic concept makes it possible to specify individual freedoms, the total of which determines the factual position and rights of union movement in Poland. For the purpose of the article and adopted methodology, I propose focusing on two fundamental meta-freedoms, which are most important – the freedom of association and the freedom of functioning. This is because all other freedoms and rights (e.g. the freedom to establish union organisation, the freedom to join an organisation or the freedom to dissolve an organisation) originate directly or indirectly from the indicated meta-freedoms and each 'minor' freedom can be easily assigned to the one of them.

While naming the freedom of association and the freedom of functioning as two the most fundamental trade union freedoms, it is also worth highlighting that these two meta-freedoms are directly and mutually related. The freedom of association could not exist independently, while the true image of the functional freedom is widely determined by the extent to which the standards of freedom of association are implemented. My personal view is that each minor freedom designed for union movements should be considered as a logical consequence and derivative of one of the specified meta-freedoms. Moreover, also the fact that both the freedom of association and the freedom of functioning of trade unions are constituted under the Polish Constitution seems to support the thesis about the leading role of described meta freedoms.[13] For example, we can refer to article 12 of the Polish Constitution, where it is clearly recognised that "the Republic of Poland shall ensure freedom for the creation and functioning of trade unions".

Accurate insight into the specified meta-freedoms also makes it possible to particularise four fundamental guarantee pillars of trade union freedoms. These four fundamental pillars are: the freedom of association as an necessary factor initiating the creation of the union movement and the self-governance, the independence and the equality as three basic guarantees and dimensions of both association and functional freedoms.[14] As was highlighted at the beginning, in order to reconstruct both the actual legal position and the social and economic gravity of the union movement in Poland it is necessary to focus on these four pillars, which together determine the actual role of trade union freedoms.

13 K. W. Baran, *Komentarz…*, J. Żołyński, *Ustawa…*
14 Ibidem.

## Trade Unions' Freedom of Association

The freedom of association should be considered as the primary and supreme pillar of trade union freedoms guaranteed under any civilised legal and social system. Any other particularised trade union liberty should be considered as the logical consequence resulting from achieving standards and fulfilled directives of the freedom of association. It should be noted that the national legal system consists of numerous guarantees designed to assure the appropriate degree of freedom of association of trade unions and employers' organisations. We may find mandatory provisions in the Polish Constitution,[15] as well as in other sources of law (in the provisions of biding international agreements[16] and in national legislation, especially in the Act on Trade Unions)[17]. Therefore, both the quantity and importance of legislation concerning the issue of trade unions' freedom of association may prove that both freedom itself and (in general) the union movement in Poland are particularly important for the national legislator.

Turning to the characteristic of the analysed pillar of trade union freedoms, it is worth highlighting that freedom of association consists of three basic dimensions. These are:

- the freedom of coalition,
- the freedom to leave any trade union organisation and
- the freedom to dissolute established union organisation.[18]

The freedom of coalition[19] should be considered as the most important and fundamental element of the meta-freedom of association. It results from the fact that the freedom of coalition is described as the workers' liberty to establish or join any union organisation. Colloquially, the freedom of coalition would mean that decision to join or establish any union organisation shall be based on the founders' or candidates' free will. It is also worth noting that employees are not the sole beneficiaries of the freedom of coalition. We must not forget that such liberty can also be enjoyed by domestic trade union's federations and confederations, as well as international workers' organisations.[20] A simi-

15 Especially in article 12 (the state's legal obligation to ensure the freedom of creation and operation of trade unions), article 20 (the dialogue of social partners as basis of the social market economy) and article 59 of the Polish Constitution (direct guarantees for trade union freedoms).

16 *Cf.* Articles 2, 4 and 5 of the International Labour Organisation (ILO) Convention no. 87 concerning Freedom of Association and Protection of the Right to Organize; article 22 of the International Covenant on Civil and Political Rights and article 8 of the International Covenant on Economic, Social and Political Rights.

17 The Act on Trade Unions of 23th May 1991 (consolidated text. OJ of 2015, item 1881 as amended).

18 *Cf.* K.W. Baran, *Wolności związkowe…*, p. 39; W. Masewicz, *Nowe prawo o związkach zawodowych*, „Praca i Zabezpieczenie Społeczne", no. 10, 1991, p. 3; *W. Sanetra, Prawa (wolności) pracownicze w Konstytucji*, „Praca i Zabezpieczenie Społeczne", no. 11, 1997, p. 2.

19 Term peculiar for polish doctrine of collective labour law.

20 *Cf.* Article 11 of the Trade Unions Act and article 5 of ILO Convention no. 87.

lar concept can be applied to other indicated dimensions (the liberty to leave or dissolve a given organisation), which should also be considered as a logical consequence deriving from the freedom of coalition.

The personal scope of the freedom of coalition is shaped mainly by the provisions laid down in article 2 of the Act on Trade Unions. Under this article, "the right to found and join trade unions shall be given to the employees regardless of the employment relation basis, members of agricultural production cooperatives, and persons who perform work on the basis of an agency contract if they are not employers". The unlimited freedom of coalition is also granted to "persons delegated to such establishments in order to serve their substitutionary military duty" (art. 2(5) of the Act on Trade Unions). It is also worth mentioning that the domestic labour law doctrine considers the adopted personal scope of freedom of coalition as both relatively broad and reflecting the specificity and complexity of employment relationships on the domestic labour market.[21] However, current evolution of the labour market seems to prove that the statutory personal scope of the freedom should be determined in more liberal and appropriate form that would assure that all categories of workers have unrestricted access to the freedom.

When studying the issue of personal scope of freedom of coalition, it is also necessary to mention the newest ruling of the Constitutional Court. As a consequence of the ruling of 2th June 2015, the personal scope of the analysed freedom has been significantly expanded.[22] The Court decided that current personal catalogue shaped under article 2 of the Act on Trade Unions, in so far as it limits the freedom of establishing and joining any trade union only to individuals that are directly named in given article, is incompatible with the provisions of article 59(1) in conjunction with article 12 of the Constitution of the Republic of Poland.[23] In the Court's opinion, the access to the freedom of association in the form of trade unions should be granted to all the categories of working individuals considered as workers in the light of constitutional and economic values.[24] These values obligate the lawmaker to assure that all the categories of working individuals, engaged in personal gainful activities and sharing similar professional interests and rights, should have free access to the freedom of association.[25] The presented judgment should be considered as a basis for significant breakthrough that would allow the freedom of association to be enjoyed by numerous workers (in both the constitutional and economic meaning)[26], who so far have been denied the right to protect their legitimate interests.

21 K.W. Baran, *Wolności związkowe…*, p. 41.

22 The judgement of 2th June 2015 (Ref. K 1/13, OTK-A 2015/6/80, OJ of 2015, item 791).

23 Ibidem.

24 Ibidem.

25 Ibidem.

26 In this sense, employment covers also such working activities like self-employment or mandate and work performance contracts (colloquially called "junk jobs").

In order to fully understand the essence of the freedom of association it is also important to analyse its current legal limitations. It should be at least signalled that within the Polish legal system we may distinguish between the full and limited freedom of coalition, the scopes of which directly affect personal and material shape of the freedom.[27] The full freedom of coalition assures the right to both join and establish any union organisation, while the limited freedom restricts such liberty only to the right to join already established union organisations.[28] At the same time, there is also a specific category of individuals who are fully deprived of freedom of coalition.[29] However, it should be noted that the vast majority of imposed limitations meets international standards in terms of acceptable limitations and enjoys proper *ratio legis*.[30]

Finally, it is also worth to study the issue of the size of the union movement in Poland as relevant statistical data makes it possible to evaluate the strength and potential of national unionism. In 2015, the Polish Central Statistical Office published the first statistical report for 25 years that is related to the topic of trade union activity in Poland.[31] According to the statistical data, in 2014 there were 12.9 thousand registered trade union units that associated a total number of 1.6 million people.[32] The size of union movement was equivalent to 5% of the Polish adult population, 11% of the working population and 17% of workers under employment contracts.[33] It should also be highlighted that the majority of registered trade union organisations (67%) associated no more than 149 members.[34] Furthermore, the vast majority of trade unions functioned on the public sector, where over 66% of all the registered organisations were established and functioned exclusively.[35] It is also worth noting that in countries with the highest rate of unionisation, domestic union movements assemble nearly 70% of the working population.[36]

27 *Cf.* K.W. Baran, *Wolności związkowe…*, p, 41; G. Goździewicz ed., *Zbiorowe prawo pracy w społecznej gospodarce rynkowej,* Toruń 2000, p. 55.

28 Examples of employees with limited freedom of coalition: pensioners, retired people, unemployed.

29 Examples of employees deprived of such freedom: members of the National Broadcasting Council, the President of the Supreme Chamber of Control, the Ombudsman, the President of National Bank, judges.

30 Article 59(5) of the Polish Constitution refers to rules of biding international agreements, especially to provisions of the ILO Convention no. 87. As article 8(2) of the Convention indicates, any domestic legal regulation shall not infringe substance of the guarantees given to trade unions.

31 Polish Central Statistical Office, 2015, *Trade unions in Poland in 2014 – briefing note*, [access: 29.03.2016].

32 Ibidem.

33 Ibidem.

34 Ibidem.

35 Ibidem.

36 The highest score in 2013 were noted in case of Finland (68,6%), Sweden (67,7%) and Denmark (66,8%).

At the same time, the average rate of unionisation for OECD countries in 2013 was estimated to be 16.9% of working population.[37] Poland, with its unionisation levels (11% of the working population) should be considered as one of the OECD's countries with the lowest score.[38]

Notwithstanding the fact that the Polish legal system offers relatively strong guarantees for trade unions in the field of the freedom of association, it should also be noted that union activities are not very popular among workers, especially in case of the private sector. Also other aspects, such as the specific atomisation of trade unions (confirmed by relatively big number of small organisations), seems to have adverse effects on both the developments of trade unions and their impact on the realities of political, economic and social life in Poland.

## The Self-Governance of Trade Unions

The **s**elf-governance in terms of internal organisation and policy is another fundamental pillar of the trade union freedoms. Under article 1(1) of the Act on Trade Unions, a trade union should be defined as "voluntary and self-governing organisation of employees, established represent and defend their rights, occupational and social interests". A self-governed trade union enjoys autonomy and unlimited liberty in defining its goals and can freely shape its internal structure and organisation.[39] We can mark out two dimensions of the self-governance: the task-program dimension related to defining goals, directions and policies of a given trade union and the normative-functional dimension which concerns shaping the internal structure and organisation of the union.[40]

In legal terms, the self-governance of trade unions is assured mainly by constituting specific legal provisions that are designed to guarantee unions' liberty of defining its functions and shaping its internal organisation. The Act on Trade Unions consist of numerous provisions related to the analysed pillar of trade union freedoms. In addition to the general directive of article 1(1), the Act also guarantees almost unlimited self-governance of trade unions in terms of defining or forming such aspects as: bylaws and resolutions (article 9 of the Act), internal organisational structure (article 9 of the Act), rules of membership (article 10 of the Act), execution of specified union functions

37 OECD, Online OECD Employment database, *Trade union membership and density in OECD countries*, 2013.

38 The worst scores in 2013 were noted in case of France (7,7%), Estonia (6,4%) and Turkey (4,5%).

39 *Cf.* A. Świątkowski, *Autonomia organizacji partnerów społecznych (związków zawodowych i organizacji pracodawców)*in: System prawa pracy, t. 5, Zbiorowe prawo pracy, K.W. Baran (ed.), Warszawa 2014, p. 299.

40 *Cf.* K.W. Baran, *Wolności związkowe…*, p. 100, J. Żołyński, *Ustawa…*, 2014.

(article 10 of the Act), rules of representation (article 13 of the Act), organisation's authorities (article 13 of the Act) or its financial principles (article 13 of the Act).[41]

Liberty in terms of managing membership matters and defining programme priorities should be considered as two the most important aspects of self-governance. The freedom to define the rules of membership is subjected to almost no legal limitations. The management or another entitled authority of the union organisation independently defines such aspects as the terms of admission and loss of membership, the rules and procedures of election to governing bodies or members' rights and obligations. At the same time, we should not forget about other significant aspects such as trade unions' autonomy in terms of defining their task and policies. It is the external activity of trade unions based on previous plans and assumption that may affect the realities of economic, political or social life of a given country. In these terms, it is extremely important to constitute the legal guarantees of a trade unions' self-governance that will efficiently protect union movement policies from any external and particular pressure, influences and harmful inspirations.

The self-governance of trade unions is also subjected to certain legal limitations determined by the directive of legalism (legitimacy). The provisions of binding international agreements allow public authorities to limit trade unions' self-governance only in specific situations when legal intervention is fully justified by the principle of legalism.[42] For example, under article 8(1) of the International Labour Organization (ILO) Convention no. 87 concerning Freedom of Association and Protection of the Right to Organize, execution of trade union freedoms and rights "shall respect the law of the land" (principle of legalism). Thus, trade unions can enjoy guarantees of self-governance as long as they comply with mandatory rules of law. It should be also noted that any legal limitations imposed on trade union freedoms shall not impair the essence of guarantees provided under the Convention no. 87 (article 8(2)). To sum up, it seems that self-governance and other guarantees (pillars) of trade union freedoms should not be affected by any legal restriction as long as the execution of rights assured under these pillars meets the principle of legalism.[43]

41 Guarantees of trade unions' self-governance defined in the Act on Trade Unions are directly consistent with standards constituted under article 3(1) of the ILO Convention no. 87. The Convention assures that "workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organize their administration and activities and to formulate their programs".

42 Article 59(4) of the Polish Constitution provides that „the scope of freedom of association in trade unions and in employers' organisations may only be subject to such statutory limitations as are permissible in accordance with international agreements to which the Republic of Poland is a party".

43 International Labour Office, *Freedom of Association. Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, International Labour Organisation, Geneva 2006, p. 45–56.

## The Independence of Trade Unions

The independence should be considered as another fundamental pillar of the trade union freedoms. As article 1(2) of the Act on Trade Unions clearly states, "in pursuing its statutory activities a trade union shall be independent from employers, state administration, territorial self-government, and other organisations". It simply means that each and every trade union should be free from any external influence of any other organisation or public entity. Such assurance of independence creates specific obligation of the State to both refrain from any interference and to guarantee that any other entity will not compromise union's independence. It should also be stressed out that presented provisions of the Act on Trade Unions are in the line with the directives of binding international standards that define the principle of public non-interventionism in rightful statutory union activities. [44] [45] As can be observed, the independence is directly connected with the self-governance of trade unions. The combination of these two pillars defines full picture of trade union's autonomy, where the self-governance is related to the internal dimension and the independence should be linked to the external aspects of autonomy.

As already indicated, trade unions should not be considered as direct recipients of the directive of independence, yet they are its main beneficiary. The principle of unions' independence is addressed mainly to external entities who are legally obliged to refrain from any interference with the statutory activities of trade unions. As was defined in article 1(2) of the Act on Trade Unions, the principle of independence of trade unions is directly imposed on such entities as employers,[46] state and local authorities and other organisations (e.g. foundations, associations, non-governmental organisations, churches and religious communities).[47] It seems that under indicated provisions any external organisation or other entity is required to refrain from defined type of conduct. At the same time, from the perspective of trade unions, independence should be regarded as a simple guarantee that all trade unions in their statutory activities shall be free from any interference, oversight or other type of external influence.[48]

It should also be pointed out that the independence of trade unions, just like the self-governance, is subjected to almost no legal limitations. The only legal restriction may be linked to the principle of legalism (legitimacy) that requires from trade unions

44 *Cf.* Article 3(2) of the ILO Convention no. 87.

45 K. W. Baran, *Komentarz…*

46 The Polish Supreme Court in resolution from 12th September 1990 (Ref. III PZP 1/90, OSNC 1991/5–6/55) stated that an employer has no power of control or inspection over union activities of trade unions operating in a given company. Such issues as statutes, association and creation of new organisation, its internal organisation and structure shall be free from any external influences of employers.

47 K. W. Baran, *Wolności związkowe*…, p. 86.

48 Ibidem.

to respect mandatory rules of law. It is clear that independence should not be perceived in such absolute terms as unlimited discretion or total arbitrariness. Consequently, the principle of legalism allows the lawmaker to adopt and impose the appropriate model of judicial control on union activities. Under article 36 of the Act on Trade Unions, the national legislator has introduced a multistage procedure that enables the registry court to correct any unlawful activity of trade union organisation. Judicial assessment showing that a trade union's activity is in contradiction to mandatory rules of law triggers specific procedure. Firstly, the registry court shall specify a period of at least 14 days, within which given trade union has to adjust its unlawful activities to the rules of law. It is also necessary to stress out that the control procedure can be initiated only with the proper motion of a competent public prosecutor.[49]

In case of the failure to correct a unlawful activity within the specified time-limit, the registry court gains the power to:

- impose a fine on members of trade union's body that failed to comply with the court's decision or
- schedule a deadline for elections to the troublesome body of a given trade union, under a threat of suspending the union's insubordinate body.[50]

Finally, if the abovementioned measures proved to be ineffective and following a proper motion of the Minister of Justice, the registry court shall issue a decision to remove the trade union from the register.[51] Under the court's decision, the removed trade union organisation is also obliged to immediately cease its activity and initiate and carry out the liquidation procedure.[52] However, it is also important to underline that such severe sanctions are rarely applied by the registry courts. The national case-law seems to reflect the concept that the sanction of removal may be applied only in extreme cases where the abuse of trade union freedoms and rights is obvious and serious.[53] Examples of such extreme situations may include: initiating illegal strikes, causing serious damage to property or implementing aggressive, discriminating or violent union policies.[54] Nevertheless, competent registry courts usually present a relatively lenient attitude towards unruly trade unions and apply less radical and less effective sanctions.

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49 *Cf.* Article 31(1) of the Act on Trade Unions.

50 *Cf.* Article 36(2) of the Act on Trade Unions.

51 *Cf.* Article 36(3) of the Act on Trade Unions.

52 *Cf.* Article 36(5) of the Act on Trade Unions.

53 *Cf.* K.W. Baran, *Wolności związkowe…*, p. 92; A. Świątkowski, *Swoboda podejmowania akcji zbiorowych a prawa obywatelskie, ekonomiczne i socjalne regulowane prawem pracy*, Studia z zakresu prawa pracy i polityki społecznej. t. 2, Kraków 1995, p. 160; W. Masewicz, *Rokowania oraz spory zbiorowe pracy*, Warszawa 1993, p. 84.

54 Ibidem.

## The Equality of Trade Unions

Equality is the last, most important pillar of trade union freedoms guaranteed in the Polish legal system. The principle of equal treatment is directly constituted in article 1(3) of the Act on Trade Unions, under which the legislator has obliged the public (state and territorial) authorities to treat all trade unions uniformly. The principle of equality also binds other entities such as employers or non-governmental organisations.[55] Therefore, it can be noted that the principle of equal treatment is not directly addressed to trade unions, but to other public entities that are in specific factual or legal relationship with union organisations. At the same time, trade unions should be regarded as the only direct beneficiaries of the indicated principle, enjoying particular protection from any discriminating activities of other entities.

The substance of equality of trade unions' can be defined as the legal prohibition on favouring or discriminating any union organisation.[56] In theory, any trade union registered and functioning in Poland should be treated uniformly by the public authorities. It seems that the principle of equality is equally important in the case of mutual relations between employers and trade unions. In this case, the legal obligation to treat uniformly all trade unions obligate employers to refrain from any behaviour manifesting specific preferences or aversions.[57] Consequently, all obliged entities should treat trade unions equally, regardless of their size, structure or popularity.[58]

However, there are some exceptions from the principle of equality and among them the representativeness criterion should be considered as the major one. Presented criterion has crucial impact on actual scope of a given trade union's powers. Put simply, under the concept of representativeness, the scope of trade union's powers and rights should be determined by a given union's size estimated by the number of its members.[59] Consequently, a given trade union can be recognised as representative only when it is the biggest organisation in given company or it associates at least minimal statutory number of workers.[60] Representative trade unions enjoy broader catalogue of powers, especially in situation where in a given company at least two union organisations operate and the total union movement is unable to develop a uniform position.[61] Representativeness also

55 K.W. Baran, *Komentarz…*

56 J. Zołyński, *Komentarz…*

57 Ibidem.

58 Ibidem.

59 *Cf.* Articles 24117 and 24125a of the Labour Code.

60 Ibidem.

61 In case when more than one organisation function in s given company, which are not able to work out a common position, only the representative organisation shall efficiently express its position. Such an exclusive procedure is linked to issues such as: shaping collective agreements (article 24116 (5) and 24125 (5) of the Labour Code), exceeding reference periods of working time (article 150(3) of the Labour Code), imposing interrupted working time (article 139(5) of the Labour Code) or defining conditions of teleworking (article 676 (2) of the Labour Code).

influences the position of a given trade union outside the work place, favouring dominating union movements, for instance in the case of unions' participation in the Social Dialogue Council.[62]

To sum up, the principle of equality seems to be contradicted by the criterion of representativeness as the latter introduces some degree of exclusivism favouring stronger organisations.[63] However, it seems that concept of representativeness is pragmatically justified. We should be aware that absolute equalization of trade unions may cause that the union movement will be incapable to properly exercise assigned social functions. Consequently, the unlimited union pluralism may lead to the risk that trade unions will be unable to effectively protect and represent the rights and interests of its members.[64]

## Concluding Remarks

The freedom of association, the self-governance, the independence and the equality of trade unions should be regarded as four fundamental pillars of trade union freedoms in the Polish legal system.[65] The fact that the domestic legal system consists of numerous provisions guaranteeing the proper position of union movement seems to support such thesis. It also seems that the national legislator considers trade unions as the key social partner and tries to implement efficient legal guarantees of trade union freedoms.

Concurrently, trade unions enjoying their powers experience only minor legal limitations. It is reasonable to conclude that trade unions in Poland enjoy strong autonomy. National provisions ensure that trade unions enjoy a large degree of liberty in terms of policy making, tasks-defining or shaping internal structure and organisation. Furthermore, the legislator requires public bodies, employers and other entities to treat all trade unions equally and refrain from any interferences. At the same time, the principle of legalism (legitimacy) seems to be the only distinctive restriction imposed on the trade union freedoms. Trade unions, like any other legal entity, have to comply with the mandatory rules of law.

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62 Only representative organisations are entitled to represent employees in the Council of Social Dialogue (article 23 of the Act of 24 July 2015 on the Council of Social Dialogue and other institutions of social dialogue).

63 *Cf.* J. Zołyński; J. Wratny, Problem reprezentatywności związków zawodowych w zakładzie pracy. Więcej pragmatyzmu czy demokracji?, „Praca i Zabezpieczenie Społeczne", no. 3, 2012, p. 3.; G. Goździewicz (ed.), *Reprezentacja praw i interesów pracowniczych*, Toruń 2001, p. 9–11.; J. Stelina, *Nowa koncepcja reprezentatywności organizacji związkowej,* „Praca i Zabezpieczenie Społeczne", no. 6, 2008.

64 Ibidem.

65 K. W. Baran, *Komentarz…*, J. Żołyński, *Ustawa…*

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**SUMMARY**

**Defining The Pillars of Trade Union Freedoms: The Polish Example**

The aim of the article is to present and characterise the essence of four fundamental pillars (the freedom of association, the self-governance, the independence and the equality) of trade union freedoms in the Polish legal system. The author presents such aspects as the classification of trade union freedoms or the characterisation of chosen specific union pillars. The article is based on the review of the relevant national legislation (including the Polish Constitution, international agreements and the Act on Trade of 23th May 1991), doctrine and judicature.

Keywords: trade unions, freedoms, freedom of association, self-governance, independence, equality, Poland, law, union movement

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# Possibilities and Prospects for the Development of Criminalistics

## Introduction

The aim of this paper is to present the possibilities and prospects for the development of modern criminalistics. Discussion of this matter is of importance due to the observation that criminalistics has, of late, lost its original form. The new techniques, including forensic analysis and biometrics, for example, are applied in traditional criminalistics. Fields of knowledge such as forensic archeology and forensic entomology play a significant role in solving common crimes and are also gradually forming a part of criminalistics. There are still no effective tools, however, to combat economic crime. This paper presents the research capabilities that academic research institutes have conducted in this field and possible ways to equip the authority conducting the proceedings with algorithms for identifying and combating economic crime.

The paper is divided into three parts. The first part demonstrates the shortcomings of criminalistics in terms of the fight against economic crime. The second part presents the author's achievements, such as establishing the types of economic opinions and presenting typical traces of economic crime. The third part presents the possibilities for further development of criminalistics.

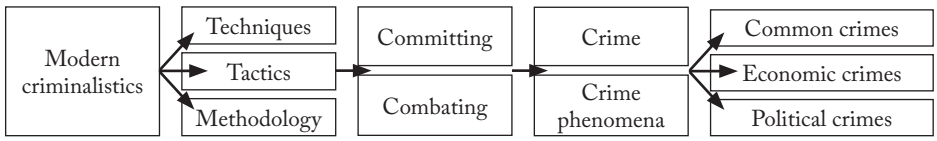
## The Current State of the Solution to the Issue

Currently the field of criminalistics dealing with the prosecution of economic crime is not specified as being a part of Polish or European criminalistics. Nonetheless, both Polish and European criminalistics table the issue of economic crime prosecution.

In Polish criminalistics the most important contribution in this field was made by H. Kołecki. While constructing the modern structure of criminalistics, Kołecki noticed

that prosecution of crimes applies to both common crimes and to economic crimes. The structure of modern criminalistics is presented in the diagram below.[1]

**The structure of modern criminalistics**




Source: H. Kołecki, Struktura współczesnej kryminalistyki, p. 79.

From the above, it can be concluded that criminalistics deals with combating not only common but also economic crimes. What is more, the task of criminalistics is also to determine the methods, tactics and techniques employed in committing economic crimes, which is crucial for their prosecution by the authority conducting the proceedings. Moreover, determining the methods of committing economic crimes allows the types of traces occurring in economic crime cases to be determined. This makes it possible to establish their detailed classification. All these elements are important in combating economic crime. They are also the components for creating the field of criminalistics dealing with the prosecution of economic crime. On the basis of Polish criminalistics, the author proposed a working name for this department of criminalistics, i.e. *kryminalistyka gospodarcza*.[2] However, it is difficult to find an English equivalent. *Kryminalistyka gospodarcza* can be translated as either forensic economics or forensic accounting. Nevertheless, these are two different supportive forensic sciences with goals different than those of criminalistics.[3]

1 Vid. H. Kołecki, *Struktura współczesnej kryminalistyki*, in: „Zeszyty Naukowe ASW", 1981, no. 28, p.79.

2 M. Hrehorowicz, *Kryminalistyka gospodarcza? – opinie biegłych w sprawach karnych gospodarczych*, in: *Dowodzenie w procesach karnych*, ed. R. Sztychmiler, J. Kasprzak, J. Krzywkowska, Olsztyn 2014, pp. 189–197.

3 Forensic economics, as one of the supportive forensic sciences, applies economic theories and methods to the issue of pecuniary damages as specified by case law and legislative codes. It also deals with the analysis of claims and the calculation of damages in personal and commercial litigation. Vid.: Forensic economics, https://www.forensiceconomics.com/, 27.12.2017; National Association of Forensic Economics, http://www.nafe.net/, 27.12.2017.
Forensic accounting in turn, deals with the fraud from an accounting point of view. The definition of forensic accounting is very complex and will be presented later in the article. Vid. S. Hegazy, A. Sangster, A. Kotb, *Mapping forensic accounting in the UK*, in: "Journal of International Accounting, Auditing and Taxation", 2017, no. 28, pp. 43–56.

The need to establish traces of economic crime was reintroduced by H. Kołecki over 20 years later.[4] Another author, B. Sygit, presented the problem of the so-called *white spots* in Polish criminalistics, pointing out that the problem that still remains unresolved is the systematization of the prosecution of economic crime.[5]

The prosecution of economic crime has, therefore, not been systematized either in Polish criminalistics or in other disciplines. Polish criminalistics literature, with minor exceptions, omits the issue of prosecuting economic crime. The existing publications on the prosecution of particular types of economic crime are presented.[6] However, the need to comprehensively develop important solutions concerning the fight against economic crime remains.

Although some attention has been paid to the prosecution of money laundering and combating organized crime,[7] in most cases, European criminalistics has not worked out a system for prosecuting economic crime in general. The issue of the prosecution of particular economic crime is emerging in European criminalistics.

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4 H. Kołecki, *Stan i zadania kryminalistyki – 20 lat później*, in *Czynności procesowo-kryminalistyczne w polskich procedurach. Materiały z konferencji naukowej i IV Zjazdu Katedr Kryminalistyki. Toruń 5–7 maja 2004*, ed. V. Kwiatkowska-Darul, Toruń 2004, pp. 24–26.

5 B. Sygit, *Kilka refleksji o tzw. białych plamach w kryminalistyce*, in: *Problemy współczesnej kryminalistyki*, vol. XVIII, ed. E. Gruza, T. Tomaszewski, M. Goc, Warszawa 2014, pp. 71–89.

6 J. W. Wójcik, *Pranie pieniędzy. Kryminologiczna i kryminalistyczna ocean transakcji podejrzanych*, Warszawa 2002, 486 pp.; J. W. Wójcik, *Oszustwa finansowe. Zagadnienia kryminologiczne i kryminalistyczne*, Warszawa 2008, p. 496; J. Karaźniewicz, *Bankowe oszustwo kredytowe. Aspekty kryminologiczne i politycznokryminalne*, Toruń 2005, p. 310; A. Wujastyk, *Przestępstwa tzw. oszustw kredytowych w ustawie oraz praktyce prokuratorskiej i sądowej*, Warszawa 2011, p. 375; C. Kulesza, *Obrona w sprawach o przestępstwa gospodarcze i skarbowe*, Warszawa 2012, p. 282; W. Mądrzejowski, *Przestępczość zorganizowana. System zwalczania*, Warszawa 2008, p. 141; K. Buczkowski, M. Wojtaszek, *Przestepstwa gospodarcze w praktyce prokuratorskiej i sądowej*, Warszawa 1998, p. 170; *Przestępczość zorganizowana. Fenomen. Współczesne zagrożenia. Zwalczanie. Ujęcie praktyczne*, ed. W. Jaisński, W. Mądrzejowski, K. Wiciak, Szczytno 2013, p.711.

7 Vid. F. Compin, *The role of accounting in money launderings and money dirtying*, Critical Perspectives on Accounting 2008, no 19, pp. 591–602 and references therein; D. S. Demetis, *Fighting money laundering with technology: A case study of Bank X in the UK*, Decision Support Systems 2018, no 105, pp. 96–107; S. Jayantilal, S. F. Jorge, A. Ferreira, *Portuguese Anti-money Laundering Policy: a Game Theory Approach*, *European Journal on Criminal Policy and Research* 2017, no 23, pp. 559–574; G. Ardizzi, C. Petraglia, M. Piacenza, F. Schneider, G. Turati, *Money laundering as a crime in the financial sector: A new approach to quantitative assessment, with an application to Italy*, Journal of Money, Credit and Banking 2014, no 46, pp. 1555–1590; R. Barone, D. Masciandaro, *Organized crime, money laundering and legal economy: Theory and simulations*, in: "European Journal of Law and Economics", 2011, no 32, pp. 115–142; P. Leasure, *Combatting the global crime of bribery: A report on Canadian foreign official anti-bribery policy*, in: "Journal of Financial Crime", 2017, no 24 (4), pp. 496–512 and references therein; R. J. Lowe, *Anti-money laundering – The need for intelligence*, "Journal of Financial Crime" 2017, no 24 (3), pp. 472–479 and references therein.

The issue regarding the structure of modern criminalistics in European countries was introduced by D. Maver.[8] In his publication titled *Criminal Investigation / Criminalistics in Europe: State of the Art and a Look to the Future* he highlights differences in the criminalistics structures of different European countries.[9] He notices that in some countries, criminalistics has the status of an independent science, often connected to law (Germany, Russia, Serbia, Bosnia and Herzegovina, Poland), while in others it is a "half" science usually formally incorporated into criminology (Slovenia, Austria, Croatia), or a sub-discipline of police sciences and criminology, or recognized only as a forensic science (France, Italy, United Kingdom). It was also pointed out that the terminology used is different, especially between English-speaking and non-English speaking countries. Moreover, the connections between criminalistics and other disciplines such as forensic science, police science, investigative psychology, and criminology are not clear. Due to this, it is difficult, according to D. Maver, to develop a common European space for criminalistics.[10]

In his research, D. Maver referred to the different structures of criminalistics in individual European countries. On the basis of these studies, it can be concluded that in Germany the prosecution of economic crime is distinguished as part of criminalistics (Kube, Kriminalistik 1992, 1993). The prosecution of economic crime is also part of criminalistics in Slovenia (Dvoršek, 2003).[11]

It is worth pointing out is that the forensic aspects of the prosecution of economic crime are covered in Russian and Ukrainian criminalistics. The structure of criminalistics in these countries includes the prosecution of individual economic crimes, as well as the determination of traces and types of expert opinions that should be used in investigation.[12]

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8 Professor at the University of Maribor in Slovenia. Specializes, among others in tactics and forensic technique. Vid. ed. D. Maver, Visokošolski učitelj, https://www.fvv.um.si/o-fakulteti/seznam-zaposlenih/darko-maver.aspx, 08.01.2017.

9 D. Maver, *Criminal Investigation/Criminalistics in Europe: State of the Art and a Look to the Future*, Revija za kriminalistiko in kriminologijo 2013, no. 3, pp. 233–244, https://www.policija.si/eng/images/stories/Publications/JCIC/PDF/2013/03/JCIC2013–03_DarkoMaver_CriminalInvestigationInEurope.pdf, 26.12.2017.

10 Op. cit., pp. 233–234.

11 Vid. A. Dvoršek, *Kriminalistična metodika*, Ljubljana 2003; E. Kube, H. U. Störzer, K. J. Timm, *Kriminalistik: Handbuch für Praxis und Wissenschaft* (Bd. 1), München 1992; E. Kube, H. U. Störzer, K. J. Timm, *Kriminalistik: Handbuch für Praxis und Wissenschaft* (Bd. 2), München 1993, for: D. Maver, op. cit., pp. 236–237.

12 A multi-author monograph entitled *Nastilna kniga slidczogo* (*Настільна книга слідчого*) [Ukraine] contains subsections on the methodology of prosecuting particular economic crimes, such as fraud investigation, tax fraud, money laundering, fictitious enterprise, violation of sales rules, etc. But this is a monograph of the so-called series of methodologies and is not a strictly criminalistics handbook. Vid.: M.I. Panov, V.Yu. Shepitko, V.O. Konovalova, *Nastilna kniga slidczogo*, Kiev 2011, p. 736. An example of a handbook for prosecutors is a Rus-

Nevertheless, in most countries, the prosecution of economic crime is not included as part of criminalistics.[13] These shortcomings should be addressed immediately.

Forensic accounting is one of the possible solutions in this field. It is noticed that: "What the use of fingerprints was to the 19th century, and DNA analysis was to the 20th century, so financial information and forensic accounting has come to be one of today's most powerful investigative and intelligence tools available" (Chancellor of the Exchequer Gordon Brown, former Prime Minster of the United Kingdom, The Telegraph, October 11, 2006).[14] Forensic accounting is a type of supportive forensic science. It is growing rapidly, but mainly for the needs of entrepreneurs in detecting fraud and abuse among employees and contractors.[15] Due to the above, forensic accounting can be considered a forerunner of the part of criminalistics involved in the prosecution of economic crimes.

Forensic accounting is an interdisciplinary science. That is why over the years, especially in the area of British criminalistics, various definitions of forensic accounting have been formed. According to S. Hegazy, A. Sangster and A. Kotb, the definitions of forensic accounting found in literature are very specific to the study in which they appear and, virtually without exception, the definitions have an accounting focus. They state the following definitions of forensic accounting: forensic science that includes accounting, auditing, criminology, data mining, economics, finance, law, psychology, as well as sociology and all the relevant skills;[16] a profession in which it is not required to have accounting qualifications nor the computing tools that accountants use to overcome their lack of computing expertise, provided that a person possesses the above-mentioned skills and has the knowledge from the above-mentioned areas;[17] independent, multi-disciplinary forensic units that contain knowledge that lawyers, former police officers, private investigators and computer analysts with the legal, investiga-

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sian-language monograph by I. Kozhevnikov ed. titled *Rasliedowanije prestuplenij w sferie ekonomiki. Rukowodstwo dla sliedowateliej* (*Расследование преступлений в сфере экономики: Руководство для следователей*), Moscow 2001, p. 415; and also: N. P. Dudin, O. N. Korshunova, V. S. Shadrin, *Nastolnaja kniga sledovatelja*, Sankt-Peterburg 2008.

13 Vid. R. Saferstein, *Criminalistics: An Introduction to Forensic Science*, Harlow 2017, A. Buquet, *Manuel de criminalistique moderne et de police scientifique*, Paris 2001, p. 438, V. E. Kurapka, S. Matulienė, E. Bilevičiūtė, R. Burda, R. Davidonis, E. Dereškevičius, J. Juškevičiūtė, R. Krikščiūnas, L. Novikovienė, E. Latauskienė, E. Radzevičius, *Kriminalistika, Taktika ir metodika*, Vilnus 2013, http://wdn.ipublishcentral.net/association_lithuania_serials/viewinside/509701090993033, 17.08.2017.

14 S. Hegazy, A. Sangster, A. Kotb, op. cit., p. 43.

15 Vid. Forensic Accounting and Fraud Examination, https://www.coursera.org/learn/forensic-accounting, 24.08.2017 r. The course treats about "accidental" fraudsters, "preditor" fraudster, data analysis, characterization of money laundering and cyber-crime and whistleblowing.

16 W. D. Huber & J. A. DiGabriele, *Research in forensic accounting – what matters?*, Journal of Theoretical Accounting Research 2014, no. 10(1), pp. 40–70.

17 G. Cook & L. Clements, *Computer-based proactive fraud auditing tools*, Journal of Forensic & Investigative Accounting 2009, no. 1(2), pp. 1–23.

tive and technical know-how have.[18] They also mentioned that 'forensic accounting' is sometimes termed 'forensic services' and it is not surprising that Crumbley[19] drew attention to the fact that forensic accounting is not a natural part of the accounting profession and that the accounting profession does not have monopoly over forensic accounting. The author also mentioned that forensic accounting is a relatively new field of academic inquiry. He also noticed the lack of any particular professional group that has ownership of forensic accounting.[20]

Therefore, a good solution would be to incorporate forensic accounting into criminalistics. It would allow for the development of this field of science in the framework of criminalistics. It would also contribute to the systematization of the traces of particular economic crimes and further development within the framework of criminalistics. The systematized methodology, techniques and tactics of economic crime prosecuting will give measurable results to the prosecution of economic crime. Criminalistics has so far determined no successful methods to prosecute economic crimes. Neither have traces of economic crime, their disclosure, protection and use in the course of court proceedings, including in the form of expert opinion, been specified as yet.

The first hurdle would be to determine the role of criminalistics in Europe. Poland is a part of the European Union and the amalgamation of the laws of EU member states means that it can be expected that the issues in the context of economic crime they deal with are quite similar. Therefore, there is an opportunity to start cooperation in order to create an area of criminalistics specializing in economic crime prosecuting.

## Research Conducted on Expert Opinions in Cases of Economic Crimes

On the basis of the above-mentioned conclusions, the author undertook studies aimed firstly at determining the types of expert opinions that appear in cases of economic crimes and then determining the types of traces in cases of particular economic crimes.[21]

The analysis concluded that the most common opinions in cases concerning economic crimes are: accounting opinions (50.6%), IT opinions (21.9%) and opinions in the field of property valuation (13, 2%). Opinions in the fields of economics, construc-

18 J. Williams, *Private legal orders: Professional markets and the commodification of financial governance. Social & Legal Studies* 2006, no. 15(2), pp. 209–235.

19 D. L. Crumbley, *So what is forensic accounting?*, http://www.bus.lsu.edu/accounting/faculty/lcrumbley/abo.fa2009.html, 03.04.2016.

20 S. Hegazy, A. Sangster, A. Kotb, op. cit., p. 44.

21 The research was carried out in 2007–2009. The research concerned criminal cases, which were recorded in the Courts of the Poznań appeal in 1996–2006.

tion and banking are slightly less frequent (respectively: 5.5%, 4.4%, 2.2%).[22] Each of the above-mentioned opinions is characterized by a different subject and scope.

The subject of the accounting opinion is the financial activity of the given entity, and the scope of this opinion is a specific part of this activity, i.e. the financial situation of the entity which is subject to expert's examination when requested by the authority conducting the proceedings. The source materials for expert testing are usually accounting books. Therefore, the purpose of accounting reviews is essentially to determine the financial position of a given entity at a selected time and, if necessary, to indicate specific business operations on the basis of its financial documents.[23]

The economic opinion should be distinguished from the accounting opinion. The purpose of the economic opinion is different to the purpose of the accounting opinion, although in practice these opinions are often considered equivalent to each other. The aim of the economic opinion is to answer the question concerning the economic justification of specific activities of the economic entity. The task of an expert is therefore to determine whether the examined entity, when starting a specific business venture, acted within justified economic risk. The subject of such an opinion is therefore also the financial activity of the company, however the scope of such an opinion is quite different from the scope of the accounting and accounting opinion. The scope of this opinion is the assessment of the business, enterprise and economic decisions made by the managers of this company.[24] IT opinions in cases related to economic crimes can be divided into:

- information and computer data expertise – the subject of this type of opinion is the data of the computer system being in the area of interest of judicial authorities, collected on electronic data carriers (computer hard drive, memory stick, CD, floppy disk, etc.); the key elements of this opinion are the determination of the type and selected properties of data collected on IT media, e.g. whether they contain illegal computer programs, and determining their properties;[25]
- opinions on the principles of building the operation of a specific computer system – the subject of this opinion are computer programs and operating systems; the scope of the opinion strictly depends on the circumstances which the authority conducting the proceedings intends to establish, most of it may concern the determination of the principles of operation of a specific computer program, possibly setting the characteristics of the original computer program;[26]

22 Vid.: M. Hrehorowicz, *Opinia biegłego w sprawach karnych gospodarczych i jej ocena sądowa*, Poznań 2013, p. 111.
23 Ibidem, pp. 123–125.
24 Ibidem, pp. 136–138.
25 Ibidem, pp. 153–154.
26 Ibidem.

- computer and network opinions – they have an IT network and its objects as their subject, the scope of this type of opinion is to determine the selected properties of both the network itself and the objects placed in it;[27]
- opinions in the field of construction and operation of computer hardware;
- opinions on the use of IT methods in the fields of human activity.[28]

Opinions in the field of property valuation are very common in cases of economic crimes. In principle, they can appear in cases concerning all economic crimes, where the amount of damage caused by the suspect/accused is significant. The purpose of this type of opinion is to determine the value of a given property in a given period. The subject of an opinion in the field of property valuation is a specific real estate, enterprise or movable property, and the scope of this opinion is determining its value – depending on the need – within particular time frames or with regard to particular economic indicators.[29]

The last of these opinions – banking and construction opinions – are connected with the market on which the entrepreneur is conducting the business activity. For this reason, these opinions may also arise in cases regarding any economic crime in which this entrepreneur's activity is involved. In each particular case, the subject matter and scope of the opinion may be different and depends on what the procedural body intends to determine and to what extent.[30]

On this basis, the following types of traces in cases related to economic crimes were established:

- accounting traces,
- IT traces,
- traces in banking,
- traces in property valuation,
- technical, mathematical and other traces (e.g. in construction).[31]

Traces of accounting are used in accounting and economic opinions. They are disclosed by accounting tools. These are mainly entries made in the accounts of a given entity and their changes. Carriers of accounting traces are accounting books and documents constituting the basis for making postings, i.e. invoices and receipts.[32] The financial statements of the entity are carriers of these kind of traces .[33] IT traces can be divided into:

27 Ibidem, p. 158.
28 Ibidem, pp. 155–156.
29 Ibidem, pp. 148–151.
30 Vid. M. Hrehorowicz, op cit., pp. 146–148, 160–162.
31 Idem, *Ślady przestępstw gospodarczych i ich funkcje*, in *Paradygmaty kryminalistyki*, ed. J. Wójcikiewicz, V. Kwiatkowska-Wójcikiewicz, Kraków 2016, p. 155.
32 Vid.: J. T. Wells, *Nadużycia w firmach. Vademecum. Zapobieganie i wykrywanie*, Warsaw 2006, pp. 175–202.
33 J. T. Wells, op. cit., pp. 353–400.

- traces whose carriers are computer programs and operating systems, including signs of damage and changes;
- traces whose carriers are computer hardware (broadly understood), including traces of damage and changes;
- traces whose carriers are electronic documents and carriers of these documents (e.g. CDs, DVDs, memory sticks, pagers);
- traces used by computer and network reviews; these traces are entries of network users and system logs (network connection traces – IP addresses).[34]

Forensic traces in banking are a specific type of trace. These traces constitute both accounting traces related to the conduct of bank accounting as well as IT traces such as data entered into bank IT systems and any changes they underwent.[35] Both types of traces can take the form of a transactional trace depicting the history of transactions made with the use of electronic and tracing banking.[36]

The documents are the carriers of traces used by experts in property valuation opinions. The documents contain information aimed at presenting the real or false value of the property. Often, the relationship between the information content of several documents is the forensic trace of a given economic crime.[37] These are called functional and situational traces.[38]

Similar forensic traces are used by other experts appointed to give an opinion during the economic process (including mathematical and technical fields, as well as construction). In the case of this kind of opinion, the documents are also carriers of forensic traces.[39]

The above classification of forensic economic traces is the most useful from a practical point of view. It allows for a comprehensive coverage of the essence of forensic traces in cases related to economic crimes and constitutes a starting point for the further characterization of these type of traces. Thus far, no Polish or European forensic classification of traces in cases of economic crimes has been made. Due to this, it is necessary to take efforts from representatives of science to fill this gap.

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34 Ibidem, p. 158. Cf. A. Machnacz, *Gromadzenie i zabezpieczanie materiału dowodowego w zakresie przestępstw komputerowych,* in *Przestępczość teleinformatyczna. Materiały seminaryjne. VII Seminar,* ed. J. Kosiński, Szczytno 2004, pp. 170–172.

35 Vid. M. Hrehorowicz, *Ślady przestępstw gospodarczych*…, op. cit., pp. 155–158.

36 J. W. Wójcik, *Oszustwa finansowe. Zagadnienia kryminologiczne i kryminalistyczne*, Warsaw 2008, p. 77.

37 Ibidem.

38 H. Kołecki, *Pojęcie i klasyfikacje śladów kryminalistycznych*, Zeszyty Naukowe ASW 1977, no. 18, pp. 139–161.

39 M. Hrehorowicz, *Ślady przestępstw gospodarczych*…, op. cit., pp. 155–158.

## The Future of Criminalistics

In view of the above, it can be pointed out that forensic science in the European space can develop in two possible directions:

- developing tactics, techniques and methodology for common crimes; which can be achieved by creating new techniques for identifying people and objects or the incorporation of achievements in other fields of knowledge especially in the field of the natural sciences;
- creating tactics, techniques and methodology for dealing with economic crimes, which is, as was mentioned, an urgent problem which needs addressing.

Both directions of the development should take place within the framework of international cooperation, especially on the European ground. Creating an international research group, that would combine achievements in the field of criminalistics from individual countries, would be a good idea. This would be particularly valuable given the varying levels of criminal intelligence development in various European countries. Such a research group would also be able to create solutions responding to the needs of individual countries, and would initiate the amalgamation of forensic systems in individual countries. The publishing of the research results in English would be, of course, an essential condition to allow a multinational scientific community to benefit from the group's findings. The above would contribute to the popularization of the team's achievements, and would strengthen the aspirations to create a common European space for the development of criminalistics.

Building a common European space for criminalistics is challenging. First of all, it should be pointed out that, as D. Maver indicates, the lack of publication in English presenting the findings of European scientists, which results in the inability to reach mutual achievements, is the main obstacle to the development of the common space of criminalistics.[40] Furthermore, creating tactics, techniques and methodology for dealing with economic crimes requires time-consuming court records investigation on a relatively large research group. It also requires a large team of researchers and it will result in high costs. These costs are related, among other things, to the necessity to ensure the accommodation for more than one person at the place where the query is conducted, as well as transport costs. Such research would be particularly costly in Poland, where there are 366 common courts in the whole country.[41] At the same time, approximately 130,000 economic crimes are detected in Poland every year.[42] Therefore, even if the research were

40 D. Maver, op. cit., p. 240.

41 Vid. Lista sądów powszechnych [Subject: Ministry of Justice in Poland], https://bip.ms.gov.pl/pl/rejestry-i-ewidencje/lista-sadow-powszechnych/, 07.01.2018.

42 Vid. Przestępstwa gospodarcze wg jednostek podziału administracyjnego kraju – przestępstwa stwierdzone, przestępstwa wykryte, % wykrycia [Subject: statistical data of the Police in Poland], http://www.statystyka.policja.pl/st/przestepstwa-ogolem/przestepstwa-gospodarcz/122291,Przestepstwa-gospodarcze.html, 07.01.2018.

conducted only in every second court it would be very time-consuming (predictably lasting about 3 years), not to mention the costs. In view of the above, research in the field of economic crime requires cooperation and a prudent plan of action. Such studies are necessary, regardless of their scope (on an international or national scale).

## Conclusions

Summing up, the future of criminalistics, understood as an interdisciplinary science created in the common European space, depends on close international scientific cooperation. The condition for establishing this cooperation is first of all the publishing of the countries' own research results in English. This will allow multinational scientific achievements to be benefited from, and the establishment of cooperation in specific research areas. One of the most important directions for the development of criminalistics should be the creation of a field of criminalistics that deals with the prosecution of economic crimes. To this end, it would be desirable to create an international research team. In Poland, only a small part of this has been developed. In developing this part of criminalistics, it would be helpful to use the achievements of forensic accounting and to further develop it in the framework of criminalistics.

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**SUMMARY**

**Possibilities and Prospects for the Development of Criminalistics**

The aim of this paper is to present the possibilities and prospects for the development of modern criminalistics. Discussion of this matter is of importance due to the observation that criminalistics has, of late, lost its original form. The new techniques, including forensic analysis and biometrics, for example, are applied in traditional criminalistics. Fields of knowledge such as forensic archeology and forensic entomology play a significant role in solving common crimes and are also gradually forming part of criminalistics. There are still no effective tools, however, to combat economic crime. This paper presents the research capabilities that academic research institutes have in this field and possible ways to equip the authority conducting the proceedings with algorithms for identifying and combating economic crime. The paper is divided into three parts. The first part demonstrates the shortcomings of criminalistics in terms of the fight against economic crime. The second part presents the author's achievements, such as establishing the types of economic opinions and presenting typical traces of economic crime. The third part presents the possibilities for further development of criminalistics.

Keywords: economic crime, criminalistics, future development opportunities

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Marta Kowalczyk-Ludzia

# Closing Speech - Between Theory and Practice

*Thus, is one is ashamed to say what they think,*
*they must say things that contradict one another.*
*Plato, Gorgias*

The development of the art of speaking is an integral element of each trial. According to the code, after closing the judicial proceedings the parties take the floor in a predetermined order: the public prosecutor, the subsidiary prosecutor, the private prosecutor, the defence attorney and the defendant. Representatives of parties in the trial speak before the parties (Article 406 of the Polish Code of Criminal Procedure)[1]. Such an arrangement enables the stakeholders to express their position in the case concerned and present to the court their own interpretation of the events. Also, "when it is time for the parties to speak, they may discuss the results of the evidentiary hearing and show any gaps, irregularities or failures in it."[2] The above order is not random, but rather, looking at it from the perspective of the rights of the defendant, it is an important aspect of the execution of the right of defence.

It is worth mentioning here the praxeological nature of the above provision. Article 406 PCC is supposed to give a chance to both active and passive parties to the proceed-

1 The full article 406 of the Polish Code of Criminal Procedure reads as follows: Article 406 § 1. After completion of the taking of evidence, the presiding .e shall call upon the parties, their representatives, and, if necessary, on the social representatives, who shall speak before the defence counsel and the accused, to present their oral arguments. The parties shall speak in the following order: public prosecutor, subsidiary prosecutor, private prosecutor, civil plaintiff, defence counsel, and the accused. The representatives of the parties for the trial shall speak before the parties.. Polish Act of 6 June 1997 – Code of Criminal Procedure – Dz.U. 1997, no. 89, item 555, as amended.

2 J. Bafia, J. Bednarzak, M. Flemming, S. Kalinowski, H. Kempisty, M. Siewierski, Kodeks postępowania karnego. Komentarz, ed. M. Mazur, Wydawnictwo Prawnicze, Warszawa 1971, p. 419.

ings to accentuate both positive and negative aspects of the verification of the defendant's criminal conduct. Also, § 2 of the above provision states that: "If the prosecutor takes the floor again, the defence attorney and the defendant should also be allowed to speak."[3] Thus, the provision supports the principle of the equal rights of parties.[4]

Thus, it could be generalised that "the purpose of speeches is to present to the court the position of parties, helping to shape an objective view of the case. At the same time, they are also contradictory".[5]

The speeches of defence attorneys should be particularly helpful for the defendant, for whom the above provision gives the last chance to emphasise attenuating circumstances that may affect the punishment, or highlight the reasons why the defendant should be acquitted. Moreover, the closing speech should summarise the results of the proceedings. According to the principle of objectivity (Article 4 of the Polish Code of Criminal Procedure), notwithstanding the position presented in a given case, the final speech should contain arguments both in favour and to the prejudice of the accused. Thus, it is rightly emphasised in the literature on the subject that "the first duty of a speaker, in order to achieve internal balance, is to develop an objective opinion about people and problems. The consequence of such a position is tolerance of opinions different from our own."[6]

The court, when determining the punishment, should also make sure to execute the function of the criminal law, in particular the function of rightfulness.[7]

Thus, taking into consideration the arguments of the opposing party, the effectiveness of the final speech is worth analysing. Closing speeches should not be associated with complicated paeans that depart from the core of the case concerned.

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3 Polish Act of 6 June 1997 – Code of Criminal Procedure – Dz.U. 1997, no. 89, item 555, as amended.

4 For more information, vid.: T. Grzegorczyk, J. Tylman, *Polskie postępowanie karne*, Wydawnictwo LexisNexis, Warszawa 2000, pp. 121–122. M. Cieślak, *Polska procedura karna: podstawowe założenia teoretyczna*, Państwowe Wydawnictwo Naukowe, Warszawa 1971, pp. 264 *et seq*.

5 M. Lipczyńska, R. Ponikowski, *Mały komentarz do kodeksu postępowania karnego*, Państwowe Wydawnictwo Naukowe, Warszawa 1988, p. 265. It is also postulated that the provision contained in Article 406 § 1 of the Polish Code of Criminal Procedure "is associated with the party's right to highlight irregularities or gaps in the evidentiary hearing or challenge the assumed facts by claiming that additional evidence is needed or the judicial proceedings need to be repeated, as well as the right to discuss the guilt and punishment, and the purposefulness of coercive measures." – W. Cieślak, K. J. Pawelec, I. Tuleya, *Kodeks postępowania karnego. Praktyczny komentarz do zmian*, Wydawnictwo Difin, Warszawa 2015, p. 310, quotation after the Judgement of the Supreme Court of 18 January 1980, III KR 421/79, Lex no. 17210.

6 T. Gout, *Sztuka wymowy. Technika publicznego przemawiania – część I*, Spółdzielnia Wydawnicza „Nowa Epoka", Warszawa 1946, p. 58.

7 The rightfulness function is associated with "satisfying the sense of justness of the person affected by a crime, as well as the victim's family and social group, by punishing the perpetrator." – L. Gardocki, *Prawo karne*, Wydawnictwo C. H. Beck, Warszawa 2015, p. 7.

Considering the above, the following research question was formulated: when is a closing speech indeed effective, and at the same time meeting its theoretical and practical assumptions?

The following hypothesis is posited: the recapitulation of the positions of the parties to proceedings is not sufficiently used as a defence (or, respectively, prosecution) tool, and in particular is underestimated by law practitioners.

In order to verify the assumptions presented above, 200 court files were examined. The research was conducted in 2015 at the District Court in Olsztyn and the Regional Court in Olsztyn. All the examined cases concluded with a convicting judgment and took place in 2012 and 2013. In terms of the methodology of the research, the author has decided to present a few conclusions from the file examination, because "the examined files very closely reflect the practice and make it possible to formulate a number of scientific conclusions."[8] Only selected results of the examination are presented in this paper, given its limited size, which makes it impossible to present them in more detail. The results of the examination of court files may be summarised in the following way:

## The Purpose of an Effective Closing Speech Should be a Sincere Recapitulation of Proceedings

Meanwhile, in many cases the defendants intentionally tried in closing speeches to shift responsibility for the crime to other persons. Promoting an "elusive defence"[9], which, although it is not legally prohibited, is highly unethical and does not correspond to the idea of diligent conduct. Reducing one's role in a crime by shifting penal responsibility to other persons does not contribute to the proper execution of the right of defence and may even - according to the case law of the Supreme Court - result in more severe punishment[10]. An example of this is a situation where a person accused of a crime under Article 207 § 1 CC claimed that: "my wife was angry at me for being drunk. She attacked me and I defended myself, or maybe it was the other way round. It just happened."[11] This admissible — but not entirely ethical — example of the execution of the right of defence

8 J. Kasprzak, *Wybrane problemy metodologiczne badań w zakresie procesu karnego i kryminalistyki*, in: *Wybrane problemy procesu karnego i kryminalistyki*, eds. J. Kasprzak, B. Młodziejowski, Wydawnictwo Volumina.pl Daniel Krzanowski, Szczecin–Olsztyn 2010, p. 13.

9 Defence becomes elusive when it reveals low moral level or the defendant's ill will, and then it may become an aggravating circumstance. H. Kempisty, *Metodyka pracy sędziego w sprawach karnych*, Wydawnictwo Prawnicze, Warszawa 1955, p. 254.

10 See Resolution of the Supreme Court of 11 January 2006 , I KZP 49/05, OSNKW 2006, no. 2, item. 12. See also: Judgement of the Court of Appeal in Katowice of 29 March 2001, II Aka 98/01.

11 Judgement of the District Court in Olsztyn, file no. II K 469/12.

is defined in judicial psychology as "protective motives".[12] Józef Krzysztof Gierowski explains such behaviour in the following way: "Psychological research into crime motives should take into account not only the possibility that the perpetrator will intentionally conceal or distort the motives of his conduct due to fear of punishment, but also that many, often unconscious, protective mechanisms will be triggered".[13] Such behaviour of defendants, although understandable, as it is supposed to help achieve a favourable verdict, should not be approved, especially by lawyers taking part in the proceedings.

## An Effective Final Speech Should Indicate Whether the Educational Aspects of the Proposed Sentence are Going to be Achieved

Considering Article 53 of the Polish Criminal Code, according to which: "The court passes a sentence at its own discretion, within the limits prescribed by law, ensuring that the severity does not exceed the degree of guilt, being aware of the degree of social consequences of the act, and taking into account the preventive and educational objectives that the penalty is to achieve with regard to the offender, as well as the need to develop legal awareness in society"[14], the parties should in their closing speeches accentuate those aspects, especially that they are not indifferent to the judgement. The statements need not be elaborate - sometimes a simple sentence is sufficient, such as, for example, the following: "I didn't want to do it, but it happened."[15], or: "I would like to apologise to the family and perhaps my imprisonment will at least partly compensate the harm done to them. I would like to apologise to the victim's mother."[16], or: "I would like to say sorry to everyone and ask for a light punishment."[17]

As the court practice shows, such statements should each time be treated very carefully, because, as is rightly observed in the literature on the subject, such "[...] admission of guilt may be the effect of cold calculation associated with the possibility of achieving certain advantages, e.g. extraordinary mitigation of punishment."[18] On the other hand, admission of guilt and repentance may not be a proof worthy of discrediting. It is rightly observed that: "admission of guilt requires overcoming certain psychological barriers.

12 J. K. Gierowski, T. Jaśkiewicz-Obydzińska, M. Najda, *Psychologia w postępowaniu karnym*, Wydawnictwo LexisNexis, Warszawa 2008, p. 342.

13 Ibidem, p. 342.

14 Polish Act of 6 June 1997 – Criminal Code –Dz.U. 1997, no. 88, item 553, as amended.

15 The Judgement of the Regional Court in Olsztyn – II K 181/13.

16 The Judgement of the Regional Court in Olsztyn – II K 149/12.

17 The Judgement of the Regional Court in Olsztyn – II K 156/13.

18 Z. Muras, *Wyjaśnienia oskarżonego w procesie karnym i prawie karnym materialnym*, Wydawnictwo C. H. Beck, Warszawa 2005, p. 91, quotation after: K. J. Pawelec, *Wyjaśnienia oskarżonego*, p. 26, and Z. Rau, *Przestępczość zorganizowana w Polsce i jej zwalczanie*, Kraków 2002, p. 215.

It can play an important educational role. It is also often associated with self-criticism and deep analysis of one's behaviour. Sometimes it is also a milestone in the life of a criminal, who experiences true repentance and willingness to return to society."[19] This issue is also interestingly discussed by Henryk Kempisty, who observes that: "If a defendant really shows repentance in an indisputable way, sometimes admission of guilt may be recognised as a mitigating circumstance."[20] Nonetheless, such statements in the closing speech of the defendant, although they require consideration, can be an important moral element for the defendant, which is not irrelevant to the educational aspect of proceedings.

## An Effective Closing Speech Requires a More Professional Involvement in its Preparation and Delivery

The defence attorney's speech is an integral element of the execution of the right of defence (Article 6 of the Polish Code of Criminal Procedure). Undoubtedly, "not hearing the defence attorney after closing the judicial proceedings is an oversight that may affect the sentence, as it deprives the defendant of the attorney's help immediately prior to the issuing of the judgement."[21]

It is also evident that the defence attorney should also act to the advantage of the defendant.[22] A predictable implication of this assumption is usually a contradiction of the prosecutor's position. Taking into account the dynamics of efforts to achieve the desired results, the arguments used in the closing speech should be well informed. However, it should be noted here that the rhetoric of the defence speech should not go beyond the ethical limits of eristic.[23] Dishonest eristic tricks are contrary to legal ethics and the standards of diligent criminal process.[24] Moreover, considering the objectives of the criminal

19 Ibidem, p. 91.

20 H. Kempisty, *Metodyka pracy sędziego w sprawach karnych*, Wydawnictwo Prawnicze, Warszawa 1955, p. 254.

21 J. Bafia, J. Bednarzak, M. Flemming, S. Kalinowski, H. Kempisty, M. Siewierski, Kodeks postępowania karnego. Komentarz, ed. M. Mazur, Wydawnictwo Prawnicze, Warszawa 1971, p. 421.

22 It is rightly claimed by Stanisław Śliwiński that "first of all, every action of the defence attorney to be to the advantage of the defendant, wilfully taken by the attorney, contains a substitution element that directly affects the defendant's position in proceedings." – S. Śliwiński, *Polski proces karny przed sądem powszechnym. Zasady ogólne*, Państwowe Wydawnictwo Naukowe, Warszawa 1959, p. 203.

23 Cf. Dowody i postępowanie dowodowe w procesie karnym. Komentarz praktyczny z orzecznictwem. Wzory pism procesowych, ed. P. Kruszyński, M. Błoński, M. Zbrojewska, , Wydawnictwo C. H. Beck, Warszawa 2015, p. 27.

24 For example, one of these tricks is to distort the opponent's thesis in such a way that it seems that the same thesis is simply repeated. Obviously, especially in more complicated cases, it is

process (Article 2 § 1 of the Polish Code of Criminal Proceedings) and the principle of material truth (Article 2 § 2 of the Polish Code of Criminal Proceedings), the closing speech should be a diligent execution of the right to defence (Article 6 of the Polish Code of Criminal Proceedings).

Meanwhile, in practice, the position of the defence attorney is many times limited to the following statement: "I petition as is stated in the pleading and for a decision as to the costs of defence."[25]. Such a statement has little to do with the execution of the right of defence in the broad meaning of the term. It should be noted that the defence attorney, being an experienced professional and not engaged emotionally in a case, should not only suggest the desired outcome of the proceedings in his closing speech, but it is also his duty to help the defendant to highlight the alleviating circumstances of his behaviour. A relevant example is the case reviewed in 2012 at the Regional Court in Olsztyn concerning an accusation of serious damage to health (Article 156 § 3 CC) and murder (Article 148 § 1 CC). Upon completion of judicial proceedings, the defence attorney, summarising the proceedings, asked to change the legal qualification of the act and apply extraordinary mitigation of punishment[26]. Compared to the defendant's speech, the defence attorney's suggestion turned out to be quite laconic. In his last words, the defendant claimed: "I would like to say that I am very sorry and I apologise. I want to repeat that I did not intend to kill. I would like to ask for extraordinary mitigation of punishment. I would like to go back to school and have different friends, because in the penal institution I befriended morally depraved people [...] They abused me very much and made me have two tattoos done against my will. I don't want to, I'm afraid to go back there again. I survived half a year there."[27]

The form of the defendant's statement presented above proves how psychologically and emotionally difficult it is to participate in a criminal case. Therefore, it is justified to involve the defence counsel in formulating the final speech, which in particular emphasizes those circumstances that are favourable for the accused. The defence attorney, as a professional, could independently present the defendant's arguments to the court, but in a more orderly and coherent fashion, in terms of content and tone.[28] The need to cooperate in this respect makes the right of defence even more efficient. Similar positions are presented in the

difficult to formulate sentences that are entirely unequivocal, and they only become more or less unequivocal in association with other sentences in the text. Z. Ziembiński, *Logika praktyczna*, Wydawnictwo Naukowe PWN, Warszawa 2002, p. 214. See also: *Rzetelny proces karny w orzecznictwie sądów polskich i międzynarodowych*, ed. P. Wiliński, Wydawnictwo Oficyna a Wolters Kluwer business, Warszawa 2009. See also Article 45.1 of the Constitution of the Republic of Poland of 2 April 1997 adopted by the National Assembly on 2 April 1997 – Dz.U. 1997 no. 78 item 483.

25 See, for example, the Judgement of the District Court in Olsztyn VII K 132/12, VII K 125/12.

26 See Judgement of the Regional Court in Olsztyn – II K 106/13.

27 See Judgement of the Regional Court in Olsztyn – II K 106/13.

28 Cf. S. Jaworski, *Metodyka pracy adwokata i radcy prawnego w sprawach karnych*, Wydawnictwo C. H. Beck, Warszawa 2015, pp. 194–198.

literature on the subject and in the case law, as "[...] the complementarity of the efforts of the defence attorney and his client is noticeable. The speech of a defence attorney who has professional knowledge supports the defence with strictly legal arguments the lack of which is not compensated for by the usually emotional speech of the defendant."[29]

Another thing needs emphasising here, namely in the closing speech the effectiveness of defence is not synonymous with asking for acquittal if the defendant's guilt has been proven beyond any doubt. According to Stanisław Śliwiński, "The defendant does not have to always contradict everything; if he did, he would ridicule himself many times. On the contrary, he should properly evaluate and illuminate facts and use them as best as is possible in the interest of the defendant."[30] A practical example of these deliberations is the reasonable position of the defence attorney who claimed that "he petitions that the defendant be considered guilty of the accusation, but that he should be punished in a just way and in consideration of all the relevant circumstances."[31]

One more thing should be noted here: an informed, succinct and orderly speech promotes legal culture in society. As is interestingly suggested by Mieczysław Szerer: "it is the duty of the defence attorney to highlight all the weaknesses in the prosecutor's reasoning, as it is not only in the interest of the defendant, but also in the interest of society that the indictment is free of any factual and legal gaps. Even if the failures are minor and the court will most likely notice them, it is not indifferent to the public interest if they are left uncorrected."[32] Such just observation needs no comments.

## Effective Closing Speech for the Prosecution Requires More Professional Involvement in its Preparation and Delivery

In the examined cases the speech of the public prosecution is usually expressed in the following statement: "The prosecutor petitions that the defendant be considered guilty and that a punishment be determined for him"[33] - after which, depending on the type and gravity of the act, the prosecutor suggests a punishment that is appropriate in his opinion.[34] This sug-

29 P. K. Sowiński, *Ostatnie słowo oskarżonego (art. 406 k.p.k.)*, in: *Węzłowe problemy procesu karnego*, ed. P. Hofmański, Warszawa 2010, p. 672, quotation ater: Judgement of the Supreme Court of 9 August 2002, V KKN380/00, LEX no. 57167.

30 S. Śliwiński, *Polski proces karny przed sądem powszechnym. Zasady ogólne*, Państwowe Wydawnictwo Naukowe, Warszawa 1959, p. 204.

31 The judgement of the Regional Court in Olsztyn – II K 181/13.

32 M. Szerer, *Kultura i Prawo*, Państwowy Instytut Wydawniczy, Warszawa 1981, p. 177.

33 See, for example, Judgement of the District Court in Olsztyn VII K 109/12, VII K 144/12, VII K 145/12, VII K 125/12, VII K 88/12, VII K 95/12, VII K 96/12, VII K 107/12, VII K 85/12, VII K 82/12, Regional Court in Olsztyn II K 106/13.

34 See, for example, Judgement of the District Court in Olsztyn: VII K 82/12.

gestion is important - it enables the prosecutor to present his or her position after the judicial proceedings are closed. Nonetheless its substantiation within the framework of the "voices of the parties" should be properly supported, even though the same arguments were already expressed in the indictment. All the more so since "the prosecutor's demand for specific penalties has been questioned in literature and supported by the argument that such a practice affects the intensification of judicial punitive repression and the discrepancies between the extent of the sentence given by the court and the prosecutor's demand cause confusion among the public and create a myth that courts are excessively indulgent towards criminals."[35]

In view of the rationale behind the defendant's demands set out in the indictment, the prosecutor should adequately substantiate his or her position. Additionally, proper exercise of the "rights of defence" in accordance with art. 406 § 1 of the Code of Criminal Procedure – the defendant›s right to have his last word (the favor defensionis principle) - requires the claimant and his defence counsel examine the defendant's views on the assessment of the offence committed even after the court proceedings have been concluded. In view of the situations in which the thesis of the indictment becomes obsolete after all the circumstances of the case have been clarified at the trial, the prosecutor should therefore, in his or her final speech, refer to the findings currently reached and not passively cite the arguments contained in the act of indictment (especially when the relevant circumstances of the case have been presented differently from those established in the pre-trial proceedings).[36]

If the speech for the prosecution emphasised both evidence for and mitigating circumstances concerning the crime, it would offer an even more explicit evaluation of the crime, while at the same time being objective (Article 4 of the Polish Code of Criminal Procedure).

## The Final Speech Should be Consistent with the Principle of Favor Defensionis

In many of the examined cases the closing speech boiled down to the same sentence: "it is petitioned as is stated in the initial petition."[37] This laconic statement is often repeated after the prosecutor or defence attorney by defendants themselves. Such a position, al-

35 R. A. Stefański, *Metodyka pracy prokuratora w sprawach karnych*, Wydawnictwo Wolters Kluwer, Warszawa 2017, p. 619, cited from: J. R. Kubiak, *Wnioski prokuratora w przedmiocie wymiaru kary a sędziowski wymiar kary*, Zeszyty Naukowe Instytutu Badania Prawa Sądowego 1979, no. 12; idem, *Wnioski prokuratora co do wymiaru kary (uwagi krytyczne)*, Palestra 1980, no. 1; idem, *W sprawie wniosków prokuratora co do wymiaru kary*, Palestra 1982, no. 1–3.

36 Cf. A. Seremet, *Odpowiedzialność prokuratora za niesłuszne skazanie*, in: *Niesłuszne skazania – przyczyny i skutki*, ed. Ł. Chojniak, , Wydawnictwo C. H. Beck, Warszawa 2017, p. 67.

37 See, for example the Judgement of the District Court in Olsztyn VII K 109/12, VII K 88/12, VII K 95/12, VII K 96/12, VII K 85/12, VII K 82/12, VII K 132/12.

though it is probably meaningful for the representatives of judicial authorities, may at the same time suggest that the defendant is too stressed to exercise his right to defence. The manifestation of this principle is, among others, the actual exercise of the defendant's right to the last word (the favour defensionis principle). Therefore, it is highlighted that "it is unacceptable to limit the defendant's statement only to answering the questions whether he or she upholds the arguments of his or her defence counsel and follows the same motions", "what motions the defendant has", "what sentence he or she expects" or "what extent of punishment he or she expects". The jurisprudence rightly states that failure to grant the defendant the right to speak and thus prevent him or her from presenting his or her own procedural reasons, including reference to the proceedings and the evidence gathered, and to prevent him or her from responding to the opinion of the prosecutor [...] should result in the sentence being revoked."[38] It should therefore be emphasised that, despite the fact that the summary of proceedings "[...] is a difficult activity, resembling a kind of a game from which every participant wants to emerge, in his or her opinion, as a winner."[39], the termination and appropriate justification of one's position contributes to the full understanding of the party's views. Although it is usually a major effort for the defendant to formulate his or her final speech - it is important to remember that he or she should be able to fully exercise his or her entitlement - so that the final speech is concise but not too laconic.

## The Closing Speech Should Answer the Question About the Real Cause of the Prohibited Act Committed

This way revealing the true motivation of the defendant when committing the crime. A good example here is a case reviewed by the District Court concerning a crime under Article 286 § of the Polish Criminal Code. In his final words the defendant "petitioned for a severe punishment so that he would have food provided for him."[40] Only the defendant's true position will enable the court to issue a right and just verdict, so the credibility of the defendant's "last words" is very important.[41]

38 Kodeks postępowania karnego. Komentarz, ed. J. Skorupka, Wydawnictwo C. H. Beck, Warszawa 2016, p. 1028.

39 E. Gruza, *Psychologia sądowa dla prawników*, Wydawnictwo Oficyna a Wolters Kluwer business, Warszawa 2009, p. 112.

40 Judgement of the District Court in Olsztyn VII K 107/12.

41 See the Judgement of the Supreme Court of 23 July 1975, II KR 62/75, OSNKW 1975, no. 9, item 126.

## Conclusions

Ensuring an adequate standard of criminal proceedings meets constitutional[42] and international[43] requirements. Taking into consideration this standard, we should not overlook the necessity of shaping the efficiency of final speeches, especially as it is applied in the implementation of such principles as the favor defensionis principle or the audiatur et altera pars rules mentioned in the study. Moreover, it should be stressed that procedural deficiencies in this respect may constitute an important argument concerning the violation of the rights to defence (Article 6 of the Polish Code of Criminal Procedure). Deficiencies in the implementation of this principle constitute a denial of not only statutory guarantees (Article 6 of the Polish Code of Criminal Procedure) but also constitutional ones (Article 42 (2) of the Constitution of the Republic of Poland). If, therefore, it is accepted that "the rights of defence include any action taken in the interests of the defendant which seeks to repel the accusation [...] or to reduce his liability in an appropriate manner and to reduce any procedural inconvenience"[44], then the scope of such actions include the properly exercised right to effective final speech that will contribute to a fair outcome.

Considering the above, it should be concluded that first of all, the importance of rhetoric in criminal proceedings is hard to dispute. Secondly, unfortunately, the aspects associated with the implementation of the provisions of Article 406 of the Polish Code of Criminal Procedure are not sufficiently acknowledged and used by practitioners and others, as is shown by the above examples. Meanwhile, the recapitulation of the proceedings and the presentation of one's position in the case concerned may effectively contribute to achieving (at least partly) ones' objectives. It is worth "[...] considering what opinion about facts the court can have after closing the evidentiary hearing. The court may have the same convictions as the speaker - then they expect arguments that would confirm their own judgement, but they can also be uncertain or have a completely different opinion - then some kind of surprising arguments that they did not take into consideration would be very persuasive."[45]

It should also be noted that, as Piotr Krzysztof Sowiński rightly claims, "separating 'the voices of the parties' by placing them in a separate (46th) chapter of the Code of Criminal Proceedings would not only serve the purpose of the ease of reference, but would also prove the importance of this procedural activity which constitutes another

42 Article 45.1 of the Constitution of the Republic of Poland of 2 April 1997 adopted by the National Assembly on 2 April 1997 – Dz.U. 1997 no. 78 item 483.

43 See, for example Article 6.3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms made in Rome on 4 November 1950, as amended by Protocols Nos. 11 and 14 and supplemented by Protocol no. 2 – OJ.1993.61.284.

44 Kodeks postępowania karnego. Komentarz, ed. J. Skorupka, Wydawnictwo C. H. Beck, Warszawa 2016, s. 28, cited from: K. Marszał, *Proces karny*, 2013, s. 138.

45 J. Jabłońska-Bonca, *Prawnik a sztuka negocjacji i retoryki*, Wydawnictwo Prawnicze LexisNexis, Warszawa 2003, p. 134.

vital element of the main trial immediately preceding the issuance of the verdict".[46] This author also convincingly claims that "superficial reporting or not reporting at all in the minutes of the trial the speeches of the parties deprives the appellate court of the possibility to comprehensively analyse the position of the court of the first instance", thus significantly hindering the review of the case."[47]

Oratorical competitions organised by legal circles[48] are useful as they highlight the important role of rhetoric in the criminal process. Thus, if the closing speech is an integral element of the trial, then, in the author's opinion, the teaching of this skill should be more thorough, not only during practical legal training but also at university. Considering the cases presented above, rhetoric, especially in the light of its practical application, needs more didactic engagement. An effective closing speech will contribute to the factual application of both the functions and the goals of the criminal procedure, thus highlighting a more comprehensive realisation of the principle of material truth (Article 2 § 2 of the Polish Code of Criminal Procedure) and the right to defence (Article 6 of the Polish Code of Criminal Procedure).

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46 P. K. Sowiński, op. cit., p. 672.

47 Ibidem, p. 672, quotation after: Judgement of the Supreme Court of 11 November 1957, II K 742/57, OSNPG 1958, no. 4, item 19.

48 The following event may serve as an example: http://www.adwokatura.pl/z-zycia-nra/znamy-juz-zwyciezcow-konkursu-krasomowczego-2014/ [access: 10 Jan 2016].

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**SUMMARY**

**Closing Speech - Between Theory and Practice**

The development of rhetoric in criminal procedure is reflected in every court trial. The right of the parties to present their final speech before the court (Article 406 of the Polish Code of Criminal Procedure) is important for achieving the required verdict. This

paper tries to answer the question about the actual extent to which the said regulation is used by the parties to achieve their objectives. The deliberations are based on an analysis of the results of research conducted by the author.

Keywords: closing speech, criminal procedure, court trial, prosecutor, defence attorney

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# Art. 647[1] CC – Important Protection of Subcontractors in the Construction Works Contract or the Legislator's Error?

Art. 647[1] of the Civil Code[1] (henceforth referred to as CC) belongs to a group of codes which regulate construction works contracts and relate to an important issue of concluding contracts with subcontractors. This regulation became part of the CC as a result of modification made on 14 February 2003,[2] which was a response to unfair practices in the construction market. The moment the regulation came into force, it aroused numerous controversies in the legal doctrine and was severely criticized due to editing ambiguities as well as joint and several liability of the investor for the payment of remuneration for the construction works performed by the subcontractor. The literature presented opinions calling for a necessary change and even for the removal of this regulation from the CC.[3] Finally, on 1 June 2017, the amended Art. 647[1] CC came into force.[4]

The purpose of this article is to analyze the process of creating the regulation concerned and to present the doubts it has aroused and finally to assess it. It should be indicated that the literature has so far focused on raising editing doubts which Art. 647[1] CC has aroused without conducting an in-depth analysis of circumstances under which it was introduced into the legal system. While endeavoring to evaluate the regulation, it is also essential to undertake an attempt to consider the proposed changes therein both from the perspective of investors and subcontractors. Finally, the new contents of Art. 647[1] CC, which came into force on 1 June 2017 should be analyzed and compared with the previous one.

1 Civil Code Dz.U. no. 16, item 93.

2 The act of 14 February 2003 amending the act – Civil Code and some other legal acts (Dz.U. no. 49 item 408).

3 M. Gutowski, *Odpowiedzialność inwestora w umowach o roboty budowlane na tle Art. 647[1] §5 k.c.*, „Państwo i Prawo" 2008, no. 2, p. 75.; R. Szostak, *O potrzebie uchylenia Art. 647[1] k.c.*, „Przegląd Prawa Handlowego" 2008, no. 6, pp. 12 - 18.

4 The act of 7 April 2017 amending some legal acts in order to make recovery of claims easier (Dz.U. 2017 item 933).

## Legal Nature of Construction Works Contracts and Contracts with Subcontractors

Art. 647 CC defines what construction works contracts are. As set out in this article, the construction works contract stipulates that the facility be handed over in accordance with the design and technical know-how. Parties to the contract are the investor and the contractor. The investor is the entity which commissions a facility to be completed. The contractor is the person which undertakes to complete the facility.

It should, however, be pointed out that the contractor, as the "general contractor", can make use of services provided by other entities or, in other words, "subcontractors". For this purpose a contract is concluded between the contractor and the subcontractor. This contract is not defined in regulations. This type of contract will be relating to the organization and performance of works by the contractor which will be engaging additional entities with a view to performing the works the contractor is responsible for.[5] What needs to be highlighted is the fact that the contract between the investor and the contractor and the contract between the contractor and subcontractor will be two separate contracts. However, there will be some relationships between these types of contracts.[6] Firstly, the joint purpose of these contracts can defined – they are both aimed at delivering the facility. Secondly, there will be a sequence of activities as the general contract will lead to signing contracts with subcontractors.

Contracts with subcontractors and the protection of the legal situation of subcontractors are set out in Art. $647^1$ CC. And the purpose of this article is to deal with these issues.

## Enforcement of Art. $647^1$ as a Part of CC

The idea to introduce a regulation into the CC with a view to providing a certain degree of protection to subcontractors as a part of construction works contracts came into being in 2002.[7] Unfair practices in the construction services market were the grounds for proposing the bill. These unfair practices mainly included the remuneration for construction works performed by small and medium-sized entrepreneurs whose counterparts (as parties to contracts with subcontractors) were large construction enterprises, most often joint-stock companies, limited companies or developer enterprises which had immense share capital, production and financial capabilities. As was emphasized, potential subcontractors found these circumstances encouraging to commence business relationships with general contractors. This was however disillusioning as general contractors often

5 M. Behnke, B. Czajka-Marchlewicz, D. Dorska, *Umowy w procesie budowlanym*, Warszawa 2011, p. 87.

6 J. Strzępka ed., *Prawo umów budowlanych*, Warszawa 2012, p. 552.

7 Sejm Paper no. 888 of 16 September 2002.

filed for bankruptcy once subcontractors had completed their works. As a result, subcontractors found themselves in very uncomfortable circumstances because they could only turn to an entity for remuneration with whom they had concluded a contract. Legal action they took was a lengthy and time-consuming process. Legal expenses were often greater than the size of remuneration recovered. Even trials which were won often proved ineffective as it was impossible to recover the debt that was adjudged by the court. The bill argued that it was a far-reaching problem (gradually becoming a macro-economic issue even though it was originally a micro-economic issue, vastly commented on by the mass media). In order to emphasize the disciplining nature of this regulation, this regulation was defined as *ius cogens*.[8]

As a result of the circumstances described above, it was necessary to introduce a regulation to prevent a situation when the subcontractor will be unable to receive the remuneration due for performing the construction works in line with the contract with subcontractors. In the bill concerned Art. 647[1] CC encompassed six paragraphs and its reading was almost identical to that we have today.

No controversies were raised when it was first presented before the Sejm. Commissions and sub-commissions started some discussions on the subject concerned. During a meeting of the Special Committee for changes in legal codes dated 21 November 2002, the Chairman, deputy Janusz Wojciechowski, read out the bill and asked who was against the proposal. No one voiced against it. More importantly, deputy Ryszard Kalisz, stated that he agreed to the bill and that it was a long-awaited amendment and should be enforced as quickly as possible.[9] At that point, the discussion on Art. 647[1] CC came to an end.

After the bill was presented for the second time, no modifications were made to Art. 647[1]. Some changes were made when the Senate was dealing with the bill. The Senate proposed that in §4 phrases „in this article and their modifications and supplements" be replaced with „in §2 and §3". As was stated by the Senate, that this was a clarifying alteration and was designed to pinpoint that only contracts with subcontractors and further subcontractors require to be written down –otherwise they will be deemed invalid.[10] At another meeting, the Special Committee for changes in legal codes focused on the alterations made to the regulation by the Senate. It was stated that it was an editing and clarifying alteration and made the regulation more concise.[11] At that point, the discussion on Art. 647[1] CC came to an end. Ultimately, the regulation was enforced on 14 February 2003.[12]

8 Ibidem.

9 Special Comittee for changes in legal codes of 21 November 2002, no. 12, bulletin no. 1224/IV.

10 Sejm Paper no. 1290 of 7 February 2003.

11 Special Comittee for changes in legal codes of 11 February 2003, no. 17, bulletin no. 1477/IV.

12 The act of 14 February 2003 amending the act – Civil Code and some other acts (Dz.U. no. 49, item 408).

The above presentation of the legislative process with reference to Art. 647[1] CC is aimed at proving that it was necessary to enforce this type of regulation. At no stage whatsoever were the reasons for commencing work on this bill questioned. No doubts were raised as to the general reading of Art. 647[1] CC either, including the investor's joint and several responsibility. The purpose of the alterations referred to above was to clarify the regulation and they were approved without any doubt. Ultimately, Art. 647[1] CC was enforced practically unchanged as was originally presented in the bill.

## Some Selected Doubts Relating to the Original Contents of Art. 647[1] CC

Art. 647[1] CC read as follows:

§ 1. In the construction works contract referred to in Article 647 executed between the investor and the contractor (general contractor), the parties set forth the scope of the works which the contractor will perform personally or through subcontractors. § 2. The execution by the contractor of a construction works contract with a subcontractor requires the investor's consent. If, within 14 days of receiving from the contractor a contract with a subcontractor or a draft contract, together with part of the documentation concerning performance of the works set forth in the contract or in the draft, the investor does not submit objections or stipulations in writing, he is deemed to have consented to the execution of the contract. § 3. The execution of a contract by the subcontractor with a further subcontractor requires the consent of both the investor and the contractor. The provision of the second sentence of § 2 applies accordingly. § 4. The contracts referred to in § 2 and 3 should be executed in writing; otherwise they will be invalid. § 5. The person executing the contract with the subcontractor and the investor and the contractor bear joint and several liability for payment of remuneration for the construction works performed by the subcontractor. § 6. Any provisions of the contracts referred to in this article to the contrary are invalid.[13]

As has already been stated in this article, the regulation aroused no doubts whatsoever at the time of its passing, only with some insignificant alterations being made to clarify it, so it was nearly adopted as had been originally proposed. However, at a later time, while Art. 647[1] CC was in use, some discrepancies appeared both in judgments that had been passed and in the doctrine. The discrepancies related to some elements of its content.

Firstly, one should point out to the doubts that have arisen in relation to § 2 of the regulation in question and the necessity to obtain the investor's consent for a contract to

13 Civil Code Dz.U. no. 16, item 93.

be concluded between the contractor and subcontractor. Initially, it was believed that the investor's consent should be regarded as a third party's consent to other entities performing a legal act (defining the legal nature of this consent by applying Art. 63§1 CC).[14] This approach assumed the contract would be deemed valid provided that this type of consent was given. If a contract was concluded between the contractor and the su contractor without the investor's consent, it did not bring about any legal effects until the consent was given by the investor. If the investor refused to give their consent, the contract would be deemed invalid.[15] This approach seems to be very close to the linguistic interpretation of the paragraph concerned. It was also indicated in the proposed Art. 647[1] CC, as discussed above, that the contract with the subcontractor would be concluded provided that the investor expressed their approval.[16] According to the legislator's intention, this would imply that the validity of the contract with the subcontractor would depend on the investor's consent. This understanding was however criticized on teleological grounds. The investor's refusal could have a detrimental impact on the subcontractor if the contract was already concluded and performed by the subcontractor,[17] which could take place in the construction services market. In such circumstances the subcontractor would not be able to demand remuneration payment as it would be resulting from an invalid legal act. This type of situation would be in defiance of the *ratio legis* of Art. 647[1] CC. It should be borne in mind that Art. 647[1] CC was enforced with a view to protecting subcontractors against unfair practices in the construction services market. Adopting an interpretation which would ultimately be unfavorable for persons who need to be protected by the regulation (subcontractors) would be against the *ratio legis* of the regulation discussed.

For this reason, with the passage of time, another interpretation was formed. According to this second concept, the investor's consent as stated in Art. 647[1] CC, should be of special character, and Art. 63 CC should not apply to it. As part of this understanding, the investor's consent is not a condition for the validity of the contract with the subcontractor but is a condition for the arising of the joint and several liability of both the investor and contractor for the remuneration payment to the subcontractor.[18] If the investor does not give their consent, the contract with the subcontractor will be deemed valid, but the joint and several liability of both the investor and contractor will not arise. This stance was approved by the Supreme Court.[19] It should however be mentioned that this interpretation has also some flaws. Without doubt, the subcontractor will

14 P. Drapała, *Umowa o roboty budowlane*, „Przegląd Prawa Handlowego" August 2003, p. 11.

15 J. Strzępka ed., op. cit, pp. 554–555.

16 Sejm Paper no. 888 of 16 September 2002.

17 J. Strzępka ed., op. cit., p. 555

18 K. Koźmińska, J. Jerzykowski, *Zgoda inwestora na zawarcie przez wykonawcę (generalnego) umowy z podwykonawcą*, „Radca Prawny" 2005, no. 5, p. 60.

19 Ruling of the Supreme Court of Poland of 30 May 2006, IV CSK 61/06; Resolution of the Supreme Court of Poland of 28 June 2006, III CZP 36/06.

find themselves in a more favorable position even if the investor has not expressed their consent, the contract between the contractor and subcontractor remains valid. A question can however be posed whether it does not mean that contractors will be less willing to conclude contracts with subcontractors. The investor will have no interest in consenting to assuming additional responsibility and the contractor will not be interested in encouraging the investor to give their consent. Therefore opponents to this interpretation argue that if subcontractors do not have a strong market position (e.g. are ones of very few specialists in the market place), they will not be likely to make the investor and contractor sign a specific contract with them.[20] In view of this, everything appears to depend on the nature of the investment and on the fact whether the contractor will be able to hand over the facility without the assistance of subcontractors or whether some works will be so specialist that both the investor and the contractor will be interested in signing contracts with subcontractors. Despite this practical problem, the understanding of the investor's consent not as a condition for the validity of the contract but as a condition for the arising of the joint and several liability of both the investor and the contractor for the remuneration payment to the subcontractor is the prevailing statement in the legal doctrine.[21] Teleological interpretations unveil weaknesses of linguistic interpretations.[22]

The form of expressing this consent is the problem that has arisen in response to the problem of the legal nature of the investor's consent to the conclusion of a contract with the subcontractor. The attitude to the form of expressing this consent depends on what attitude is adopted in relation to the legal nature of this consent. If it is assumed that the investor's consent is a condition for the validity of this contract (which is not however a prevailing view in the legal doctrine), requirements as to the form of concluding such a contract are also defined in Art. 63 CC. Under such circumstances, if Art. 6471§4 stipulates that a contract between the contractor and subcontractor be concluded in writing (otherwise it shall be deemed invalid), then as per Art. 63§2 CC the investor's statement including the investor's consent should also be made in writing. As per another attitude, if the investor's consent is not a condition for the validity of the contract with the subcontractor but a condition for the arising of the joint and several responsibility of the investor and contractor, applying Art. 63 CC is pointless in relation to the form of expressing the investor's consent. Therefore, according to this attitude, this consent can be expressed in any form whatsoever. It will suffice that the investor's consent to the subcontractor performing their construction works will be resulting from the investor's behavior.[23] In practice it means that the investor's joint and several responsibility can arise even if the subcontractor does not have the investor's consent in writing.

20 J. Strzępka ed., op. cit., p. 556.
21 M. Gutowski ed., *Kodeks cywilny, t. II,* C.H.Beck 2016, pp. 703 - 704.
22 M. Gutowski, *Odpowiedzialność…*, op.cit., p. 77.
23 Ruling of the Supreme Court of Poland of 20 June 2007, II CSK 108/07.

The subcontractor will find themselves in more demanding circumstances in terms of producing relevant evidence in court.

Another practical problem relating to the investor's consent is the problem of receiving from the contractor a contract with the subcontractor or a draft contract with part of the documentation concerning performance of the works set forth in the contract or in the draft. One of the views expressed in the jurisdiction was the assumption that the joint and several responsibility of the investor arises provided that the investor is presented with the contract or the draft contract with relevant documentation beforehand.[24] This was designed to ensure that minimal legal protection was available for the investor. In the meantime, the Supreme Court stated in another verdict of 20th June 2007[25] that the investor's joint and several responsibility will arise irrespective of whether or not the contractor presents the documents mentioned above. According to the Supreme Court the investor's knowledge of the content of the documents may come from other sources if the circumstances surrounding the investment process which is underway pinpoint to this knowledge. In accordance with part of the doctrine, it is hard to accept this attitude because this does not require minimal investor protection standards.[26]

It should be noted that the above doubts as to the consent also related to the conclusion of contracts with further subcontractors (as in line Art. 6471§3 CC the investor's and the contractor's consent is required for the subcontractor to conclude contracts with further subcontractors). One can also see some difference in relation to the remaining part of this regulation. §3 defines the contract with a further subcontractor only as a "contract" without stating explicitly that there is a reference to a construction works contract. §2 defines the contract with the subcontractor as a construction works contract. Therefore, by applying the linguistic interpretation rule, it might appear that the contract with the subcontractor must always be regarded as a construction works contract while the contract with the further subcontractor may not always be a construction works contract. Part of the legal doctrine assume that the contract with the further subcontractor may also be regarded as a specific work contract. It is difficult to make a distinction between the construction works contract and the specific work contract. As distinction criteria might be treated the way the facility is constructed (in accordance with the design and technical know how[27] and specific co-operation of the parties to the contract during the time of construction work)[28]. As a result of different phrases used in §2 and §3 there arise doubts on the legal nature of the contract with the subcontractor. It is

24 Resolution of the Supreme Court of Poland of 28 June 2016, III CZP 36/06.
25 Ruling of the Supreme Court of Poland of 20 June 2007, II CSK 108/07.
26 R. Szostak, op.cit., p. 16.
27 Ruling of the Court of Appeal in Białystok of 19 November 2015, I ACa 607/15.
28 M. Gutowski ed., *Kodeks…*, op.cit., p. 694.

unknown whether the application of different phrases in §2 and §3 was intentional or whether the legislator was not consistent in the wording.

Doubts also arose as the adoption in Art. 6471§5 CC of the investor's and contractor's joint and several responsibility for the payment of remuneration to the subcontractor for the construction works that the subcontractor performed. As has already been indicated in this text, there is no contractual bond between the investor and the subcontractor because the (general) construction works contract concluded between the investor and contractor and the contract concluded between the contractor and the subcontractor are two separate contracts. The introduction of the idea of the joint and several responsibility (which is in this case a guarantee type responsibility) highlighted that the subcontractor might seek to satisfy their claims by reference to the investor's assets.[29] For this reason, the Supreme Court expressed their doubts as to whether there is any point in charging the investor ( who must anyhow deal with the investment risk and bear investment expenses) with responsibility for a third party's debt which might be tantamount to making them liable for their counterparty's mismanagement or ill intention.[30] However, the Supreme Court stated that in specific circumstances this construction is well known in the prevailing legal system, and what is more, minimal protection is guaranteed to the investor because without their express statement of will or the passing of 14 days of the presentation of relevant documents to them, this type of responsibility will not arise.[31] Taking account of this, the Supreme Court recognized the appropriateness of the investor's joint and several responsibility construction and resigned from asking the Constitutional Tribunal to assess whether Art. 6471§5 is compliant with the Constitution.

The above mentioned doubts are not the only doubts that have appeared while analyzing and applying Art. $647^1$ (some issues were omitted by the content of Art. $647^1$ for example the issue of resource claims between the investor and the contractor) but I perceive them to be the most important ones. These doubts are discussed with a view to demonstrating significant interpretation discrepancies that have arisen on the appropriateness of the content of the regulation in the process of creating and applying it. In the legislation process there was general agreement on the justification and appropriateness of the regulation as well as its editing precision (only insignificant modifications were made) while during its application numerous ambiguities were identified and questions were raised as to the compliance of Art. $647^1$ with the Constitution, and the regulation was criticized.

29 R. Szostak, op.cit., p. 13.
30 Resolution of the Supreme Court of Poland of 28 June 2006, III CZP 36/06.
31 Ibidem.

## Proposed Modifications

Despite a myriad of varying views on the justification and appropriateness of Art. 647[1] this regulation has remained unchanged until the present day. This might testify to the fact that despite the doubts that have arisen so far, it fulfills its role in protecting small and medium entrepreneurs (subcontractors) against the insolvency of their counterparties (contractors).

In practice, there has however appeared the problem referred to above, which is connected with the unwillingness of investors to express their consent to the conclusion of contracts with subcontractors and therefore making themselves liable for a third party's debt. This triggered a certain negative phenomenon – "pretending to be unaware". This was raised by the Deputy, Tomasz Kulesza, in his opinion no 20614 to the Minister of Justice on the protection of the rights of small entrepreneurs – construction works subcontractors, dated 28 August 2013.[32] As part of this process, the contractor does not formally register subcontractors and the investor, through their avoidance to create documents confirming this fact, approves the presence of subcontractors on the construction site. As has been indicated in this text, some part of the doctrine tends to be liberal with regard to the formalism of expressing the consent by the investor, and due to the "pretending to be unaware" phenomenon subcontractors may find it difficult to produce relevant evidence in court. Therefore, through an interpellation a modification was proposed. This modification assumed that whenever the investor does not expressly oppose to the conclusion of a contract with a subcontractor, it will be deemed that the investor has expressed their consent to completing such a contract. If despite the objection on the part of the investor, the contractor has completed a contractor with a subcontractor, the investor would acquire the right to dissolve the contract with the contractor.[33] On the one hand this modification was a good response to the „pretending to be unaware" phenomenon by improving the subcontractor's ability to produce evidence because only the investor's express statement of will would prove that the investor has not expressed their consent. On the other hand, this was not a protection against unfair action of the contractor who might attempt to conceal from the subcontractor the fact the investor objected to the contract. In effect, this might lead to the dissolution of the contract by the investor with the contractor and therefore the subcontractor's financial standing might be adversely affected. This proposed modification was not however holistic. For example, it did not address the doubts associated with the legal nature of the contract with the subcontractor.

Another modification was proposed by the Senate of the Republic of Poland. It assumed that the investor must express the consent to the conclusion of a contract with

32 Interpellation to the Minister of Justice of Poland no. 20614 of 28 August 2013.
33 Ibidem.

the subcontractor in writing for the investor to bear the joint and several responsibility.[34] The Senate put forward this proposal in response to the petition P IX-02/15 submitted to the Speaker of the Senate dated 24th September 2015. This modification was aimed at stating univocally that if the investor has not expressed their consent in writing, then the investor will not be charged with joint and several responsibility. According to those who submitted the petition the present text of the regulation implies overly responsibility of the investor as the investor bears joint and several responsibility together with the contractor irrespective of whether the investor was aware of the provisions of the contract with the subcontractor, whether the investor was only aware of the subcontractor's presence on the construction site.[35] Thus, this proposed modification was aimed at protecting the investor by making the investor's consent with the subcontractor and circumstances of arising joint and several responsibility for the investor more formal.

Both modifications didn't come into force. Both of them didn't solve all problems connected with the content of Art. $647^1$.

## The New Contents of Art. $647^1$ CC

The amended Art. $647^1$ came into force on 1 June 2017.[36] Taking into consideration all problems connected with the interpretation of this regulation (some of them presented in this article), the purpose of the legislator was to change the contents of Art. $647^1$ in an essential way.

First of all, it must be indicated, that the new contents of this regulation tries to define, in a unequivocal way, conditions for the arising of the joint and several responsibility of the investor and contractor. According to the amended Art. $647^1$, the contractor or the subcontractor should present to the investor detailed scope of construction works, which the subcontractor is allowed to do. It wouldn't be necessary if the investor and the contractor defined this scope in a separate contract. Both presentation and contract should be executed in writing; otherwise they will be invalid. If the investor expresses the objection for this scope in the 30 days since presentation, the investor's joint and several responsibility won't arise. The investor's objection should be also executed in writing. This change causes that conditions for the arising of the joint and several responsibility of the investor and the contractor are now concretized. Only formal presentation of the scope of subcontractor's construction works would cause legal consequences. It would eliminate the opinion that the arising of the joint and several responsibility of the inves-

34 Senate Paper no. 152 of 14 April 2016.

35 Ibidem.

36 The act of 7 April 2017 amending some legal acts in order to make recovery of claims easier (Dz.U. 2017 item 933).

tor and contractor is possible even when the investor finds out the subcontractor's work from all circumstances of investment process.

The issue of the investor's consent was amended as well. Only the clear objection of the investor after the presentation of the scope of subcontractor's work would exclude the joint and several responsibility of the investor. This solution protects the subcontractor and isn't harmful for the investor. However, the new contents of Art. 647[1] doesn't regulate the situation when the investor would like to agree for the proposed scope of the subcontractor's work before the expiry of the deadline of 30 days. It can be assumed that, according to the literal interpretation of the new contents of Art. 647[1] CC, the investor couldn't agree for the proposed scope of the subcontractor's work in an "active" way and should always wait 30 days without an objection. Only the lack of investor's objection will have legal consequences. This solution unfortunately could slow down the investment process.

The really important change is the indication of limits of the responsibility of the investor. The previous contents of Art. 647[1] CC didn't regulate it. Fortunatelly, according to the new one, the investor is responsible for the subcontractor's remuneration payment (of course when conditions of arising of this resposibility are fulfilled), unless the level of this payment is higher than the payment of the contractor. In this situation, the level of the investor's responsibility is limited by the contractor's payment.

As it can be seen, the new content of Art. 647[1] CC in some aspects is better than the previous one (especially because of the formalism of conditions for the arising of the joint and several responsibility of the investor and contractor and because of the limit of investor's responsibility). However some new solutions are not understandable (like the impossibility of giving by the investor consent for the scope of the subcontractor's work in an "active" way). What's more, unfortunately, the amendment of this regulation is not complex. There is still no answer to the question which types of contracts Art. 647[1] CC concerns. The previous text of this regulation defined a contract with a subcontractor as a "construction works contract" and a contract with a further subcontractor as a "contract", which caused questions about legal nature of contracts with subcontractors and further subcontractors. In the amended text of Art. 647[1] CC one cannot find any legal definition of contracts with subcontractors (new Art. 647[1] doesn't define contracts with subcontractors in any way). It means that there are still debts about legal nature of this type of contracts. New regulation also doesn't regulate the problem of resource claims.

## Conclusion

In endeavoring to answer the question presented in the title of this article, it should be stated that Art. 647[1] CC is essential for the protection of subcontractors was part of construction works contracts as it provides subcontractors with additional sources of satisfying

their claims in circumstances in which they might be unable to achieve this goal in relation to the contractor. The editing ambiguities of the regulation triggered diverse interpretations. In addition to theoretical aspects, one must take account of practical aspects and the avoidance of responsibility by investors despite the enforcement of this regulation. Therefore, one must concede that the previous text of the regulation, in addition to providing protection to subcontractors, was also a certain error that the legislator made because of its textual imperfections and the legislator's inability to anticipate some negative effects in construction practice. It can be assumed that the new text of the regulation which came into force in June 2017 "fixes" some previous legislator's errors but it isn't still a satisfying amendment. In my understanding, the following components of Art. $647^1$ CC need to be univocally clarified: legal nature of the contract with the subcontractor, catalogue of premises resulting in arising the investor's joint and several responsibility, the form of expressing consent by the investor and the problem of resource claims. Currently, these issues were not univocally expressed in the previous regulation and the new regulation doesn't deal with all of them as well. What's more, it must be said that problems connected with the previous content of Art. $647^1$ CC are still current, because the previous text of this regulation will be still used to the contracts which were signed before the new regulation came into force.

To conclude, Art. $647^1$ CC is really needed in polish law system. Unfortunately, both the previous contents of this regulation and the present one aren't sufficient to guarantee the lack of doubts in interpretation.

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**SUMMARY**

## Art. 647[1] CC – important protection of subcontractors in the construction works contract or the legislator's error?

The purpose of this article is to present and assess the impact of the regulation Art. 647[1] CC on subcontractors in the construction market and outline doubts in respect of the contents of the regulations. The first part of the article shows reasons why the regulation concerned was enforced – unfair practices in the construction services market which had a detrimental impact on subcontractors. Furthermore, selected doubts are presented, those associated with the contents of the regulation in question and raised by the doctrine and jurisdiction, for example, the legal nature of the investor's consent or the investor's joint and several responsibility. It is important to indicate the contrast between the unproblematic legislative process and doubts disclosed during its application. The author of this article also depicts two proposed modifications, which appeared in doctrine. The important issue for this article is also a description of the amended text of this regulation and comparison to the previous one. In conclusion, it should be emphasized that art. 647[1] CC is really important for the polish legal system but both the previous content of this regulation and the present one aren't sufficient to guarantee the lack of doubts in interpretation.

Keywords: art. 647[1] CC, protection of subcontractors, investor's consent, joint and several responsibility, legislator's error

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Piotr Szulc

# The Legal Definition of Railway Areas in Poland. The Limitations of Investment and Conducting Business Activity on the Railway Areas

## Foreword

The investment potential of railway areas, as well as the possibilities of their use and the location of the investments of various types should be an important factor in the debate on the problems of development of modern cities[1]. Railway stations are an increasingly important element of revitalization programs. They are given several new functions by linking them with shopping malls, and examples of this are the train stations in Warsaw or in Poznań. Due to the excessive use of the institution of the railway areas in the past years the resource of railway areas in Poland expanded significantly and reached substantial land area and value. Neglect of the problem of railway areas has led to significant communication difficulties and degradation around railway lines. When analyzed at an economic level railway areas, are usually attractive places to locate production or retail activities. Railway lines often run through the central parts of the Polish cities. Thanks to their central location, they can easily become attractive locations for new investments, which may visually and functionally change the areas along the railway lines.

The establishment of special areas may involve conflicts of interest and cause social opposition. Resolving conflicts in the context of restrictions related to special areas requires, in the opinion of the doctrine, the introduction of new negotiation procedures with the interested parties. This may involve the following conflict of interests: the creation of a railway area lies in the public interest, due to the special character of the railway and safety reasons. However, preventing the creation of such a form of administrative protection lies in the local public interest, which is represented by local governments and investors. This may be related to the pressure of interest groups operating in the relevant area, represented by individual residents who have until now conducted business in these areas. Failure to resolve such conflicts would mean depriving the inhabitants of

1 A. Górski, *Planning issues in relation to railway areas on the example of Kielce*, in: „Współczesne problemy i kierunki badawcze w geografii", vol. 3, Kraków 2015, pp. 63–72.

the area of their livelihoods and will limit investment opportunities for the investors. Thus it is in the local public interest of the inhabitants to block the establishment of the railway area. However, the public railway transport provider and infrastructure manager will possibly support the creation of such an area. This example reveals the real existence of a conflict of interest with regard to the creation of special areas.

There is no literal definition of the objects and devices of public transport in the Polish legal system and such items should be interpreted on the basis of a functional interpretation in the framework of land, river, rail and air transport law provisions. Therefore, we can describe the objects and devices of public transport as items dedicated to providing transport which has a public nature, meaning publicly available. Examples of the objects and devices of public transport in the Polish legal system are: trackways and tram stations (the Public Road Act of 1985), train stations, bus stations (the Road Traffic Act of 1997), railway areas (the Railway Transport Act of 2003), harbors, marinas (both sea and river) and airports (the Air Law of 2002)[2]. The objects and devices of public transport do not include objects which are vicariously connected with transport e.g. the catering industry or hospitality industry. This category of objects does not come under the exploitation and maintenance of railway and the transport of passengers and goods as they are rather part of the supply base for passengers.

## Railway Areas as Special Areas

Railway areas may be included in a wide category of special areas which are established to shape and maintain the land. In the doctrine of Polish administrative law, the concept of a special areas occupies a strong position and it is emphasized that the special area is developed on the basis of administrative law and it is a conceptual category which gives rise to specific legal consequences both in the field of administrative law and civil law, and partly even in criminal law. However, the concept of special area cannot be characterized as internally unified. For this reason, the essence of the issue lies, it seems, not only in defining the concept of a special area and its rank as a legal measure, but in the legal consequences of its establishment for its addressees, for example, owners (perpetual usufructuary) of real estate subject to a special legal regime in force within it[3]. However, it should be noted that within special areas there is a significant diversity of them, determined by i.a. the purpose, type and scope of protection and the size of the established area, as well as the mode of their creation and the implementation of priority tasks and regular tasks in the area.

2 J. Jaworski, A. Prusaczyk, A. Tułodziecki, *Ustawa o gospodarce nieruchomościami. Komentarz*, Warszawa 2017.

3 R. Hauser, Z. Niewiadomski, A. Wróbel ed., *Prawo administracyjne materialne, System Prawa Administracyjnego*, Warszawa 2017.

In addition, it should be noted that the administrative and legal consequences may also be the civil law effects of the creation of a special area, which are expressed in a special protection regime subject to the priority objective of creating a given type of a special area. In the field of civil law, these effects are reflected, for example, in limiting the right to property or other property rights, or in limiting legal transactions in this area. This is due to the increasing legal interference of the state, serving the implementation of a state-wide public interest in the form of implementing the priority task of creating a given type of a special area.

This means that the content of the special area regime should be subordinated to the function that such a space is to fulfill, even if it is not applicable in this area. Therefore, the creation of a special area requires a legal act for its creation to be issued each time, and it cannot refer to the character of a given area or to its features. It should be taken into account that special areas are created on a specific separate area, which corresponds to the indicated premises. The problem is, however, that there are special areas which are created directly by a statutory norm in correlation with the features possessed by these special areas, including their widths, and cover the entire area that corresponds to the designated conditions. The most important categories of special areas are: national parks, nature reserves, landscape parks and protected landscape areas. Among them railway areas are special areaa which are created on the basis of a legal norm in correlation with the specific features possessed by the railway area.

Nevertheless, it is not acceptable to adopt a position according to which the creation of a special area can be made by means of a criterion of features or the legal character of the land on which it is to be created, and cover the whole area corresponding to the abovementioned premises. This would cause there to be a lack of a criteria for distinguishing a special area from other legal structures that bind a specific catalog of standards (legal regime) with a designated space, e.g. a forest[4].

It should also be emphasized that the creation of a special area does not mean that the existing legal order in force within it is completely repealed, but that it changes the subject and subject matter in the act creating the special area. This means that the standards that are not changed or have not been excluded – after the establishment of a special area – are still in force in such special area.

## Legal Definition of Railway Areas

The railway areas are defined in the Railway Transport Act of 28 March 2003 as a ground surface specified by geodesic plots on which railways, buildings, constructions and infra-

4 Z. Niewiadomski ed., *Planowanie i zagospodarowanie przestrzenne. Komentarz*, Warszawa 2008.

structure dedicated to the management, exploitation and maintenance of railways and the transport of passengers and goods is located. All railway stations in Poland are situated on railway areas. As things currently stand there is no authorized public administration body to issue a binding decision (certificate) clarifying whether the land is a railway area or not. Consequently, the real estate may be classified as a railway area only based on its function and profile. There is no public register which includes the list of railway areas, as there is no legal obligation to create such registry. Moreover, the indication of what is classified as a railway area can be found in an area plan if such document was implemented in the area. As described above, the regulations regarding the location of railway areas are not precise enough and do not make it possible to clearly stipulate which real estate belongs to the railway area. The practice shows that the situation in which the public authorities are unaware which plots of land constitute railway areas is not an isolated incident. What is more, frequently the boundary of the railway area runs across the middle of a plot of land which may make investment on such plot impossible. The practice shows that the most effective way to identify whether a plot of land is a railway area is to apply directly to the province governor based on the law on access to public information.

The court ruling of the Voivodeship Administrative Court in Warsaw dated 28 March 2007, IV SA/Wa 256/07 indicated that if there are no buildings or structures related to railway infrastructure, then we can assume that this plot of land shall not be classified as a railway area. We can treat this argumentation as only an auxiliary claim, as the adjudicating panel did not elaborate in detail on whether it is the only condition for determining the legal status of the area, and whether the railway area is created directly by the statutory norm in correlation with the features possessed by these areas. The adoption of such a position would result in chaos in determining what is and what is not a railway area. In addition, the adoption of this solution would result in the recognition of vague and uncertain criteria to determine when – in a temporal sense – the given area becomes a railway area; that is, when it comes to existence in the legal meaning.

A different institution to a railway area is railway land which is defined in the Regulation of the Minister of Regional Development and Construction regarding Land and Property Register of 29 March 2001. Railway land may be helpful in classifying what a railway area is, but it does not have the defining meaning, as the Land and Property Register is not binding with respect to the legal status of the real estate.

## Limitations of Investment on the Railway Areas

An investor who wants to develop real estate covering a railway area has to comply with the obligations imposed on it on the basis of regulatory statutes, mainly the Railway Trans-

port Act. The investor must not erect any type of building on the railway area if it is not exclusively designated for railway transport requirements. In other words, there is a statutory forbiddance on the construction of any commercial buildings on such areas. The definition of railway area stipulated in the Railway Transport Act specifies an exhaustive list of buildings, constructions and infrastructure which may be located on the railway area which results in the prohibition of construction of any buildings and constructions not intended for the management, exploitation and maintenance of railways and the transport of passengers and goods. The prohibition is strengthened by the following forbiddance on locating the buildings and constructions not exclusively designated for railway transport requirements in the proximity not less than 10 meters from the border of the railway area (Article 53 of the Railway Transport Act). Based on the general rule *a minori ad maius* – since the law forbids doing what is lesser, it forbids doing what is greater all the more – if it is forbidden to locate buildings and constructions within 10 meters from the border of the railway area, it is even more forbidden to locate buildings and constructions within the railway areas. This issue was widely analyzed in the court ruling of the Supreme Administrative Court of 16 January 2013, II OSK 1691/11. The adjudicating panel in this case came to the conclusion that the lawmaker did not provide any possibility to erect buildings and constructions not exclusively designated for railway transport requirements on the railway area. During the dispute, the complainant claimed that there is no provision of law which directly forbids land development with buildings and constructions not exclusively designated for railway transport requirements on railway areas. The Supreme Administrative Court decided that in duly substantiated, exceptional cases it is acceptable to dissent from the general rule expressed in Article 53 that locating buildings and constructions within 10 meters from the border of the railway area is prohibited. Therefore, the dissent may lead to the location of buildings and constructions within 10 meters from the border or even directly on the border of the railway area. Nonetheless such dissent may not lead to the situating of buildings and constructions within the railway areas, because dissent from the rules of situating the buildings and constructions shall not be interpreted extensively. To conclude, in this case the Supreme Administrative Court legitimized the rule based on which it is forbidden to erect on the railway area buildings and constructions not exclusively designated for railway transport requirements.

This argumentation was recalled in a comparable case analyzed in the court ruling of the Supreme Administrative Court of 7 November 2013, II OSK 1276/12. Additionally, the adjudicating panel pointed that the lack of possibility of locating on the railway area buildings and constructions not exclusively designated for railway transport requirements is strengthened by the systemic interpretation of Article 23 of the Railway Transport Act, which stipulates that the property manager, railway operator and rail link user may operate and use only buildings and constructions designated for railway

transport requirements, and only on the basis of the approval certificate issued by the President of the Office of Rail Transport.

Moreover, it is not allowed to locate buildings and constructions not exclusively designated for railway transport requirements even if there are already other objects not exclusively designated for railway transport requirements in the railway area, and the presence of such objects in the railway area does not mean that the land is no longer a railway area. The above conclusion would be arbitrary, with no justification for the interpretation of the law or for ordinary reasoning. In this sense, the public administration body would be deprived of even the possibility of ordering the demolition of objects unlawfully erected on the railway area. The definition of a railway area presented in the general part of the Railway Transport Act does not allow any deviation from the specific character of this area. This provision contains a clear message of its unique nature and any attempts to extend this concept, in particular the „not forbidden" manner, are without foundation, which has been confirmed in the court ruling of the Supreme Administrative Court of 18 December 2008, II OSK 1657/07.

The general prohibition of location of buildings and constructions not exclusively designated for railway transport requirements includes any type of building or construction, including advertising mediums of different types. Such a conclusion is also based on the fact that the legal definition of a railway area defines in a positive way any objects that may be located on it, which means that the location of objects not listed there is prohibited. This justifies the conclusion that no advertising media (of any type) can be located in this area which is intended for other purposes, which has been confirmed in the court ruling of the Supreme Administrative Court of 3 February 2010, II OSK 249/09.

## Other Limitations on the Railway Areas

The establishment of a special area consists in introducing, in specific areas, obligations, orders and prohibitions binding legal entities carrying out their activities – mainly business activities. The effect of establishing a special area is the introduction of a special legal regime in the area to ensure the implementation of the objective for which the area was established. A characteristic feature common to all special areas is the priority of the norms of special regulations before the norms of universally applicable law[5]. One of the legal consequences which is generally binding for the establishment of a special area is the prohibition on the construction on this area of any building objects serving business purposes, and also those intended for housing purposes. In special areas, it may also be forbidden to locate any projects that may significantly affect the environment or

5 Zakrzewska M. B., *Ochrona środowiska w procesie inwestycyjno-budowlanym*, Warszawa 2010.

facilities that may pose the threat of a serious industrial accident. To conclude, it should be noted that the most characteristic legal effects of the establishment of a special area are those resulting from a special legal regime: 1) restrictions on the right to property and other property rights, 2) public (administrative) burdens, and 3) various types of police and administrative provisions[6].

The Railway Transport Act imposes several obligations on the entity which is the railway infrastructure manager on the railway area. The infrastructure manager is the entity responsible for managing the railway infrastructure, or in the case of constructing a new infrastructure an entity that has started to build the infrastructure as an investor. The tasks of the infrastructure manager can be carried out by various entities.

The main obligation of a railway infrastructure manager is the management of the properties which constitute the railway infrastructure (bearing in mind that the railway infrastructure is *inter alia* buildings located on the railway area). The railway infrastructure manager has to obtain a security authorization which is issued by the President of the Office of Rail Transport. The security authorization is issued for a limited period of 5 years. According to the jurisprudence, it is a complicated and demanding procedure.

Secondly, the railway infrastructure manager is obliged to maintain order and safety on the railway area. The railway infrastructure manager is obliged to maintain Railroad Guard on the property. The costs of the Railroad Guard are covered by the railway infrastructure manager. Access to railway areas is allowed only in places specified by the manager and is subject to Railroad Guard supervision. The precise list of obligations is presented in the Regulation of the Minister of Infrastructure on the order regulations applicable in the railway area, in trains and other railway vehicles of 23 November 2004.

Additionally, there are several obligations of the railway infrastructure manager the non-performance of which is punishable under law by a fine and a monetary penalty up to 2% of the annual income of the railway infrastructure manager. Moreover, it is prohibited by law to conduct any business activity on the railway area without prior consent of the railway infrastructure manager or railway company. Finally, it is prohibited by law to sell, serve or consume any alcohol in the railway area.

As described above, the Railway Transport Act imposes numerous duties connected with the existence of a railway area on a given plot of land. However, the question arises whether the lawmaker's intention was to charge the owner or perpetual usufructuary of a property located within the railway area with so many detailed duties which are rather addressed to professional entities conducting railway activities.

6 Ibidem

## Conclusions and de Lege Ferenda Postulates

The increasing role of railway areas for investors in Polish cities may be observed in recent years. The growing importance of railway areas should be accompanied by more comprehensive and precise legal regulation which does not raise any interpretation doubts. The lawmaker should finally decide what kind of character railway areas should have. It has to be noted that it is not acceptable to maintain the current position according to which there is a lack of a precise criteria for distinguishing a railway area from other legal structures. Moreover, it would be desirable to establish a public register of railway areas or to make it possible for an authorized public administration body to issue a binding decision (certificate) clarifying whether the land is a railway area or not. Finally, the author of this paper is of the opinion that it should be made possible in future to operate, invest and erect in railway areas buildings and constructions designated not only for railway transport requirements (or at least objects which are vicariously connected with transport e.g. the catering industry or hospitality industry).

In the light of the increasing investment potential of railway areas, train stations and areas along the railway lines, it seems reasonable to make it possible to invest in retail, services, offices and hotels in railway areas, which can significantly contribute to the revitalization of areas that are currently being gradually degraded despite their attractive location. Reasonable legal regulation – which we are currently lacking – would make it possible to balance the interests of the public rail carrier, potential investors and the local society, considering both safety and transport requirements on the one hand, and the economic, functional and aesthetic values of the area on the other hand.

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**SUMMARY**

**The Legal Definition of Railway Areas in Poland. The Limitations of Investment and Conducting Business Activity on the Railway Areas**

The paper analyses the legal definition of railway areas in Poland based on the Railway Transport Act. The author tries to find an answer to the question of what the legal status of railway areas in the Polish legal system is, with emphasis on the classification of railway areas to the wider group of special areas. Moreover, the paper describes the restrictions on investments on railway areas which are presented based on the previous judicature of the Polish administrative courts. Then other detailed obligations resulting from the special legal regime in this area are explained.

Keywords: railway areas, Railway Transport Act, investment on railway areas, limitations on railway areas, special areas

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# The Legal Concepts of Online Commerce

## Preface

In the contemporary social sciences, many concepts are distinguished by trying to formulate, as much as possible, a characterization of modern societies: post-industrial society, mass society, consumer society, global society and the information society. I would like to draw attention to the latter two sociological models. Global society, otherwise known as the global village - is the concept of today's society in which increasingly more advanced, more common and faster methods of communication eliminate geographical, political, national, language barriers etc. The information society - a society where information is treated as a commodity - is created („produced") and distributed („sold") on a massive scale and is a source of profit for its „producers" and „distributors" (i.e. simply the media). The common denominator of both these visions is the mass media, among which the Internet curently reigns. Its name alone is an abbreviation of the term International Network. Currently, it is the strongest bond of global society, as well as a peculiar expression of the technologized and computerized nature of our civilization. The worldwide network of computers allows us to reduce the effort and time needed to achieve the assumed result, which can happen everywhere - even on the opposite side of the Earth. The power of the Internet lies largely in its dynamics and detachment from reality. These features pose serious challenges to legal regimes governing the issue of electronic trading/commerce (e-commerce). The swift pace of development in this relatively young branch of legal and economic turnover is illustrated by the following data. In 2012, the estimated value of the global market in this industry exceeded $ 1 trillion, an increase of 21.1% compared to 2011. In 2013, the estimated value of the global e-commerce market reached 1.3 trillion. The United States, China and the EEA have the largest share in the creation of global e-commerce (and within the latter, the majority of the turnover is generated by: Germany, Great Britain, France, Italy, Spain, Scandinavian countries and the Netherlands). The Chinese market is characterized by the highest average dynamics

of annual growth and the largest absolute number of real and potential consumers (in 2012, more than 220 million Chinese people made online purchases).[1] These statistics clearly show the global trend of the electronic market boom. In the doctrine of civil law - both substantive and procedural - this leaves many vague and contentious issues to be explained, such as: general ideas about the concept of regulation, the identification of contractor of contracts concluded on the Internet, issues related to defects of declarations of will, especially in the face of new technological ways to submit them, etc. Due to the extremely dynamic but also quite stable trend of e-commerce growth and broad prospects for its development, it is rightly predicted that it will continue to grow in importance for the economy - both domestically and internationally. Therefore, there is a huge challenge facing the legal sciences all over the world - the regulation of the International Network, which is a virtual entity, but still has a huge impact on the real world.

## Practical Legal Problems of the Internet

Although it is easy to identify the differences between reality and cyberspace, it is harder to find contact points between the two fields of activity of modern humans. One of the tendencies uniting both these „worlds" is the increasingly frequent use of the Internet to perform conventional legal acts.[2] The aforementioned qualities of the global network - its dynamics, virtuality, speed, universality, affordability, relative ease of use - undoubtedly encourage people to undertake such procedures, but at the same time create various material and formal legal hazards. First of all, they provoke factual states in which the party to the legal relationship aims to annul the declarations of will that they made. The ease of submitting declarations of will by means of user interfaces contributes to the creation of so-called errors in entering data. The anonymous nature of Internet relations is a strong temptation for unreliable, dishonest and disloyal Internet users. The practices they use, such as manipulating data in order to make the product or service is attractive to potential contractors, may lead to an erroneous idea as to the subject of the legal action.[3] It is not an uncommon practice to provide so-called blind links, or interface connections, in order to lead the other party to misinterpret the idea of a relationship between the site administrator and a well-known and trustworthy entrepreneur with an established position in the market. The source of the mistake may also be an error,[4] i.e. a misperception of a declarer of will about the content of their declaration of will.

1 Sources of statistics: The 2015 Global Retail E-Commerce IndexTM; www.e-commerce-europe.eu; www.idealo.pl.

2 As indicated by the statistics quoted above.

3 Latin: *error in corpore*.

4 Mistake of the *sensu largo.*

These are just some examples of various dangers to the durability of legal relationships concluded over the internet. Of course, the current reality even requires cataloging and describing such situations. I suggest here that reflection on the error should be divided into the following categories, based on the type of situation and the potential source of a normative momentary error relating to this situation:

- actual states caused by unreliable, dishonest or disloyal behavior of the participants in online trading;
- actual states caused by the lack of due diligence by trading participants;
- actual states caused by unnecessary or undesirable interference by third parties;
- actual states resulting from irregularities in data transmission in the network.

The problematic issues cited should be considered mainly from the perspective of one of the most common weaknesses of the declaration of will, namely the institution of error, regulated in Art. 84 of the CC.[5] Areas of interest should also include: a qualified error form, i.e. a deception,[6] distortion of a statement caused by a messenger,[7] the issue of netiquette and technical standardization in relation to legal and non-legal norms, the role of general clauses in the interpretation of Internet users' behavior in terms of error and the burden of proof in proving an error in submitting online statements. Corresponding to the error, the institutions operate outside of Germany in the German Bürgerliches Gesetzbuch,[8] the Swiss Code of Obligations,[9] the French Code Civil,[10] the Italian Civil Code,[11] and the Austrian Civil Code - Allgemeine Bürgerliches Gesetzbuch,[12] Principles of European Contract Law,[13] and UNIDROIT.[14]

## The Main Concepts of the Legal, Political and Administrative Regulation of the Internet: Presentation, Comparison, Advantages, Disadvantages

The first problem faced by the legislator in attempting to regulate e-commerce is choosing the right level of legislation. The global reach of the Internet and the inability to localize the submission of a declaration of will, which often happens in practice, obviously speaks

5 The Polish Act of 23 April 1964 - Civil Code (Dz.U. 1964 no. 16 item 93).
6 Art. 86 of the CC.
7 Art. 85 of the CC.
8 Art. of the 119 BGB.
9 Art. 25 of the CoO.
10 Art. 1110.
11 Art. 1428 and § 871.
12 § 871 of the ABGB.
13 Art. 4: 103 [2].
14 Art. 3.5–1a.

for international and even transatlantic law-making solutions in these matters. The problem is that the Internet and online reality is usually very dynamic, spontaneous and unpredictable, while law and international relations are inherently rather static and conservative, more likely to lead to slow evolution or even stabilization (not to mention stagnation) rather than to rapid revolution or reforms. That's why traditional inter-state customs and consents are not enough here. The discussion on the legal regulation of the Internet has a global reach and so far three main positions have crystallized within it. Proponents of the first one treat the Internet as a „new quality" - a unique, independent scientific-technological, cultural and civilizational phenomenon, whose most important features are: pluralism, liberalism, democratism and universalism. They believe that the global network should not be subject to any regulation. This concept is known as the no-law Internet.[15] I think that entities using the benefits of cyberspace are a kind of society that, like any other, needs legal norms to satisfy one of the basic needs of its members - security, stability and certainty regarding tomorrow. Leaving the Internet unchecked would only be acceptable by making the (*notabene* naive) assumption that every participant in e-commerce is honest and reliable, and that the informal and unwritten ethical rules and customs of virtual communities (e.g. netiquette) are sufficient to protect the interests of Internet users. It seems obvious that the consequence of basing the Internet on the idea of no-law Internet would lead to anarchy, its criminalization and, as a result, the distortion or disappearance of its socio-economical functions, which, of course, cannot be allowed. Therefore, a second concept seems to be more realistic, the representatives of which consider it impossible to apply the law regulating traditional relations to relations established by electronic means of remote communication. Therefore, they postulate the creation of a separate law of cyberspace, on the basis of a supranational consensus.[16] The postulate to create a separate global cyberspace law seems to be much more rational than the first concept. A uniform legal system would solve a significant problem, which is establishing an appropriate law and the court for legal relations arising in cyberspace. But even with the assumption of the best will, knowledge and competence on the part of entities of international law, there is a real threat that the process of amending (or rather „updating") the law of cyberspace would be too slow and extended in time.[17] History teaches, however, that the development of multilateral consent

15 Such striving for extreme liberalization of the Internet law, especially in the field of copyright and related rights, led in Sweden to the creation of a political party called Piratpartiet - Pirate Party. The ideology, program and political discourse of this grouping were based on the liberalization and deregulation of the online environment. The party has already gained significant influence - in the EP elections of June 7, 2009 it gained over 7% support.

16 "Internet as a separate legal system".

17 Problems related to the ratification of international agreements on the cross-border regulation of e-commerce are illustrated by the example of the UNCITRAL model e-commerce act. Convention websites: http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention_status.html.

and compromise in the international arena is not an easy task, and this would additionally hinder the legislative process. It seems that in order to effectively implement the postulates of representatives of this idea of regulation, it would be necessary to create a specialized, supranational institution dealing with the normative regulation of electronic trading law. In my opinion, the real functioning of this concept would require establishing an institution of competence to regulate electronic trading, because the dynamic nature of technologies and phenomena related to electronic trading requires quick reactions to changes. Against the concept of Internet as a separate jurisdiction, A. Stosio rightly puts forward the argument: „Creating a cyberspace law would also mean granting cyberspace the status of a new reality for which traditional legal orders are not enough." It is emphasized that cyberspace should not be artificially detached from reality, because despite its separateness, the traditional law is flexible enough that it can, after necessary modifications, satisfy the legal questions arising from various problems associated with the network functioning in a satisfactory manner. It cannot be ruled out that this concept will be applicable in the future, in connection with which it is expected that in the coming decades, the institution referred to above will be created. As of today, this concept seems unrealistic, as well as unnecessary, because the effective regulation of cyberspace can be accomplished by implementing the postulates of advocates of the third concept. This one - the most conservative one - is based on the application of existing legislative methods to regulate cyberspace. It emphasizes the need to take into account the specificity of electronic trading.[18] The electronic marketing law should be a kind of superstructure in relation to traditional legal regulations, established only in situations where the interpretation of existing provisions does not provide sufficient protection for its participants. This concept also ensures the quickest response of legislation to changes. This concept is currently dominant in doctrine and therefore I intend the further course of this work to be based on it. Only the cross-border nature of the network remains a problem.

## Other Concepts of Internet Regulation

There is also an alternative division of the concept of internet regulation and legal trading within it, which is, however, less prominent in the discourse The idea of self-regulation was to entrust the regulation of turnover in whole to private law entities. It was particularly popular among pioneers of the Internet as a medium, who saw it as a compromise in disputes about the need and scope of comprehensive regulation of e-commerce. Its essence was taken by D. D. Clark:

18 This process is called "translation".

We Reject Kings, Presidents and Voting.
We Believe in the Rough Consent and Running Code

Although currently the concept is not presented in its radical form (due to its dissonance with the current dynamic development of the commercial network), it has become the starting point for many other models in the law of new technologies. Its milder form is the idea of self-regulation, which promotes the bottom-up and voluntary creation of standards by entities involved in a specific activity. The legal rules created in this way are in fact the standards of soft law proceedings, and the scope of their normalization and application applies only to a specific group of entities, e.g. entities providing services from the same or related industries, etc. Of course, the latter feature of the type of regulations excludes the universal scope of their validity. The doctrine indicates three functions of self-regulation: regulatory, supervisory and pertaining to sanction. These functions are carried out mainly through the development of codes of conduct, usually reflecting the deontological norms of a given regulatory group. An example of top-down support of this type of action is Directive 2000/31/EC on electronic commerce, Art 8 sec. 2, which imposes on the Member States and the European Commission (EC) the obligation to urge professional associations and organizations to develop such codes at the Community level, while respecting the autonomy of these associations. An auxiliary regulation in this respect is contained in Art. 16 of the above directive. According to this, the Member States and the EC support:

- the development by trade, professional and consumer associations and organizations - codes of conduct at the Community level, aimed at the proper implementation of the directive's provisions;
- the voluntary submission of draft codes of conduct to the Commission at the national or Community level;
- the availability of codes of conduct in the official Community languages, by electronic means;
- providing the Member States and the Commission with the aforementioned associations and organizations - evaluations regarding the use of such codes and their impact on the practice and customs of e-commerce;
- (as a last resort) the development of codes of conduct on the protection of minors and human dignity.

The literature argues that autoregulation is fraught with significant disadvantages related to the nature of the creation of the law and the scope of its application. Indeed, consumers may be left out of the scope of protection, and the balance between trading participants may not necessarily be maintained. However, hybrid solutions are proposed, i.e. combining bottom-up governance and top-down governance, especially in so-called sensitive fields, such as the protection of personal data, protection of consumer rights and interests, and intellectual

property. Finally, it should be pointed out that the specificity of self-regulation prompts the conclusion that this form of regulatory approach to relations more closely meets the conditions, goals and needs of B2B relations than others, in particular B2C. However, the actions taken by the EU in practice correspond rather to the third concept - coregulation. This involves the cooperation of private entities that formulate rules of conduct, and public authorities that sanction such regulations. This is expressed in the form of the eEurope initiative,[19] and more recently in the form of the Digital Agenda for Europe 2010–2020, which provides for the creation of a European code of online rights.

## Concepts and Definitions of the Internet, High-Tech Law and Electronic Trading

When analyzing the changes and tendencies taking place in recent years in the field of the Internet and e-commerce, important processes, especially those caused by technological innovations, have become visible, which - affecting the economy - led to economic changes in the commercial use of this global medium. The Internet, mobile communication and other on-line technologies initiating economic changes contributed to the emergence of the New Economy concept to define economic processes related to e-commerce. But for the comprehensive characterization of the New Economy it is not enough to say that it is a transfer of commercial relations to online exchange. The doctrine mentions the following basic features:

- detachment from time, place and cost of production - *on-line* information is global, available at any time and place, and often free of charge, which ensures an unprecedented level of transparency of the market;
- demonopolizing - this term means that thanks to the Internet new opportunities for competition have been created, and the barriers to entry are much lower than in the case of the Old Economy,[20] thanks to which companies of different sizes can compete with each other; the removal of some levels of intermediaries between market participants[21] and the creation of others[22] - the first of these processes, as a feature of the digital economy, results from the characteristic structure and forms

19 Under which eEurope - an Information Society for All documents from 1999 were developed, eEurope + Action Plan from 2000, eEurope 2002 Action Plan, eEurope 2005 and finally the i2010 initiative - A European Information Society for growth and employment, which is also the implementation of the Lisbon Strategy).

20 The traditional economy.

21 Disintermediation.

22 Reintermediation.

of relations, e.g. B2B,[23] B2C,[24] C2C,[25] C2A,[26] which allow direct contact between the parties to the transaction; the second one of these processes consists in the parallel emergence of other levels of the location of exchange agents and the new nature of their activities, such as electronic markets, portals and brokers;
- reverse economy[27] and reverse marketing - phenomena resulting from the fact that the Internet has created new business models that reverse the individual elements of the traditional economy (Old Economy), and in particular the burden of negotiating and submitting bids;
- the individualization of legal relations - enables the individualization, precision and uniqueness of the offer to be provided, in a way previously unheard, of thanks to the possibilities of in-depth analysis of the behavior of individual network users.

## Concepts and Definitions of Electronic Commerce and Online Commerce

The aforementioned features became the basis for the development of the concept of electronic commerce.[28] But this term does not have a general normative definition and is not uniformly taught in doctrine. For some authors, e-commerce is the sum of all transactions that participants make electronically, which is why it goes beyond the traditional scope of the term „trade". Others show that the concept of e-commerce covers advertising activities, the sales and distribution of products via ICT networks, including primarily via the Internet. As part of the OECD's[29] activity, two definitions of e-commerce have been distinguished: a narrow one - covering only transactions carried out via the Internet and a wide one - treating all exchanges of goods and services electronically (hence the distinction between the terms „online commerce" and „electronic commerce"). In the Anglo-Saxon doctrine, R. Clark points out that e-commerce is a commercial or service activity using telecommunications tools sensu stricto, or at least based on telecommunications. A. R. Lodder suggests, however, that e-commerce should be defined as any commercial transaction regarding goods or services, including commercial activities relating to them, in which the participants are not in the same place at the same time and communicate with each other electronically. In the Polish doctrine,

23 Business-to-business relationships.
24 Business-to-consumer relationships.
25 Consumer-to-consumer relationships.
26 Consumer-to-administration relationships.
27 Inverted economy.
28 In brief: e-commerce.
29 OECD - *Organisation for Economic Co-operation and Development*; French: *Organisation de coopération et de développement economiques*, OCDE.

K. Kowalik-Bańczyk represents the position according to which e-commerce is defined as a wide range of activities - such as the sales of goods, delivery of products and services on-line, electronic fees and bills of lading, conducting tenders and after-sales service - made using electronic communication and a communication tool. It is worth noting that a broad understanding of the concept of electronic commerce also appears in documents prepared under the UNCITRAL system. It was emphasized that transactions in international trade made via electronic data exchange and other means of communication are referred to as the e-commerce, which involves the use of methods of communication and the storage of information that are an alternative to paper. It is also worth pointing out that the doctrine distinguishes two different forms of the e-commerce. The first one includes commercial relations, which are carried out partly via electronic means, and partly conventionally/traditionally - through indirect electronic commerce.[30] An example of this is the combination of ordering goods online with their delivery via traditional mail. Currently, the second form of the e-commerce is becoming more and more common, allowing for the execution of the entire obligation electronically, i.e. consisting not only of concluding the contract electronically, but also for the performance of this contract through direct e-commerce.[31] This applies in particular to the exchange of music files, e-books, subscriptions to magazines and newspapers, ticket reservations, video on demand,[32] etc. In terms of the subject configuration of legal relationships, the following types of e-commerce can be distinguished:

- B2B (business-to-business, entrepreneur-entrepreneur relations) - bilateral professional relations, currently dominant on the Internet, implemented, for example, based on auction or distribution auction systems (reverse auction), brokerage systems and transaction platforms;
- B2C (business-to-consumer, entrepreneur-consumer relations) - unilaterally professional or semi-professional relations, i.e. those in which the consumer is understood as a natural person working for purposes that do not fall within his professional, business or commercial activities; sometimes also include so-called mixed contracts (removed contracts), which are concluded by the consumer for semi-private and consumer purposes, and partly professional, economic or commercial - with a clear superiority or superiority of the former in relation to the latter; primarily such relations concern the operation of on-line stores and auction portals - in the case of a virtual shopper;
- B2A (business-to-administration, entrepreneur-administration relations, also referred to as B2G - business-to-government, entrepreneur-government relations) -

30 Indirect e-commerce, German: unechter E-commerce.
31 Direct e-commerce, German: echter E-commerce.
32 In brief: VoD.

a shortcut used to determine the entirety of an entrepreneur's contacts with representatives of public authorities;
- B2E (business-to-employee relations, entrepreneur-employee relations) - relations between the employer and the employee, performed on the basis of electronic platforms;
- C2C (consumer-to-consumer, consumer-consumer relation) - bilateral consumer relations - platforms specializing in their implementation include auction systems, e.g. e-Bay.com, allegro.pl or gumtree.pl;
- C2A (consumer-to-administration, consumer-administration relations) - an abbreviation used to determine the entirety of contacts between citizens (and at the same time potential entrepreneurs and consumers) and representatives of public authorities;
- A2B/C/A (administration-to-business/-consumer/-administration, relations administration-entrepreneur/-consumer/-administration) - relations referred to as e-Government or e-administration, consisting in the transformation of the „paper" administration into „virtual", at the base of which lies the idea of modifying government or self-government administration, on the assumption that this is more friendly or accessible to citizens or entrepreneurs (with different criteria for this friendliness or affordability, e.g. the European Code of Good Administration - ECGA).

In the literature on the subject since the technical development of the Internet, three features of fundamental importance in the legal sphere - intangibility, interactivity and globality - are pointed out. This „catalog" is sometimes extended to include the extraterritoriality, multifunctionality, universality, multi-jurisdictionality and anonymity of users. However, this requires emphasizing that the above-mentioned properties of the world network are primarily associated with technical assumptions at the core of its functioning, which not only conditioned its creation, but most of all enabled the development of electronic commerce on a global scale.

## A General Outline of Doctrinal Views

The first specific issue that deserves attention and discussion in this paper is the attempt to define the term „electronic trading". Considerations on this topic in Poland entered an advanced stage with the spread of electronic communication in the 1990s. Despite the passage of time, the wording and understanding of the key concepts of electronic trading law have not been clearly defined. The literature presents different ideas regarding the naming of the legal area of interest to us. The names presented in the literature are: „electronic marketing law", „electronic law", „electronic communication law", „in-

ternet/online law", „cyberspace law", „digital law", „network law information", or, finally, „electronic/online commerce law". The scope of the aforementioned terms is currently inaccurate and therefore extremely fluid. In the doctrine, researchers assign them diverse meanings and functions, often subordinating them to the immediate goals, tasks and the needs of their scientific work. The studies I dealt with are dominated by the term „electronic trading law", hence I will use it in this paper. Personally, I think it's the most accurate term. The *ratio legis* of the distinction of electronic trading among other areas of legal regulations results from discrepancies between traditional legal activities and those concluded in electronic form. J. Janowski lists the problems arising from this background, which include:

- the principles of expressing and interpreting declarations of will, submitting offers and concluding contracts by electronic means;
- the information obligations of entrepreneurs who make an offer to conclude contracts by electronic means;
- the protection of consumer interests against unfair commercial and marketing practices on the Internet;
- respect for the privacy of the individual on the Internet, including the protection of his or her personal data;

The distinguishing feature of legal transactions carried out by electronic means of remote communication is the lack of direct contact between one party to the contract with its contractor or product at the time the contract is concluded. This in turn may lead to temptations and opportunities to abuse among unreliable, dishonest or disloyal contractors. Further arguments that justify the separation of the category of electronic trading - as a *sui generis* turnover - are:

- the ease of concluding a contract using the user interface (this primarily concerns innovative technical ways of entering into contracts, e.g. by clicking a mouse); ·
- a threat in the form of potential interference by third parties in submitting a declaration of will (after all, virtually all users of the network without exception are exposed to cyber attacks, viral infections, etc.);
- the participation of automated electronic systems on the market (these are computer systems used especially by entrepreneurs to enter into contracts on the Internet, which submit statements in an automated manner, without direct human participation);
- a lack of total and uninterrupted control over the declaration of will for technical reasons (every message sent via e-mail is automatically transformed into bit form and divided into several parts - usually files).

When I take the above considerations into account, I consider the distinction of electronic trade by creating a uniform definition to be useful - from social, economic and scientific points of view .

## The Views of the Polish Doctrine

Generally speaking, the factor differentiating both types of trading, i.e. traditional and electronic ones, is the manner of submitting declarations of will and - as a result - the manner of conducting legal transactions. The logical approach is undoubtedly the focus on the concept of electronic legal transactions, including electronic contracts. This is also the case with J. Gołaczyński, W. Kilian, P. Podrecki, A. Stosio and W. Kocot, although it must be emphasized that the areas of their investigations are not identical.

The first of these authors formulates the following definition of electronic contracts: „an electronic contract is an agreement concluded by electronic means".[33] This definition is correct, but unfortunately - from the point of view of the legislative policy and the practice of law, it is simply a truism of little use for legal transactions and the development of civil law. In a sense, J. Gołaczyński transfers the burden of limiting the area of law that interests us to the concept of electronic means. Specifying its content, he adds that it concerns a means of electronic communication at a distance, but at the same time it omits electronic information carriers. The rest of his argument, however, is - in my opinion - erroneous and inconsistent. The author notices the existence of electronic contracts concluded on-line and offline. The problem is that in the doctrine there are huge discrepancies in the understanding of contracts concluded and performed on-line and off-line. These English-language phrases are commonly misused, which leads to numerous misunderstandings with these concepts. By submitting statements of intent on-line, Gołaczyński means a situation when both contractors simultaneously participate in sending these statements over the ICT network. In turn, with regard to concluding an off-line electronic agreement, he understands this to be the exchange of IT media with a saved text file that contains the statements of the will of the parties. I would like to point out that at an earlier stage of his deliberations, Gołaczyński identified the means of electronic telecommunications as an element of an electronic agreement that distinguishes it from traditional ones, but at the same time omitted electronic information carriers. These carriers cannot be treated as telecommunications devices in any way. Finally, , Gołaczyński mentiones agreements concluded using electronic data carriers despite the fact that by defining the concepts in question, the author explicitly omitted them. In addition, the distinction between ‚on-line contract' and ‚off-line contract' made by the author is incorrect. The scope of meaning of both these concepts, is well known in the doctrine. An on-line electronic contract is understood as an agreement concluded via electronic means of communication, regardless of whether the parties participated in concluding the contract simultaneously or not. A contract concluded on-line is contrasted with an off-line agreement understood as an agreement where parties agree to communicate using electronic means of communication, but not directly, which means

33 *Prawo umów elektronicznych*, ed. J. Gołaczyński, Wrocław 2006, p. 16.

that the sender is not sure whether the recipient actually received the sent data immediately after they entered the network. The confusion of these two divisions is in itself a serious mistake. The far-reaching consequence of this error is the author's ambiguous attitude towards contracts concluded by electronic means of communication without the simultaneous participation of the parties to the contract. Finally, it should be noted that concluding contracts through the exchange of electronic data carriers is currently very limited in practice. When contractors are directly indicated, it is preferable to exchange traditional statements of will, in writing, for example to improve communication and to avoid difficulties with evidence. Both the Polish and the German doctrines emphasize that there are still problems with this - despite the introduction of the principle of non-discrimination of contracts concluded by way of electronic exchange of information, expressed in Art. 9 of the e-Commerce Directive. In connection with the exchange of statements at a distance, it will be rational to send declarations of will via electronic means of communication. They are faster and do not require additional financial costs. In the further part of his work, Gołaczyński concludes that „it seems that to assess whether the contract is of an electronic nature, the manner of its implementation is also important".[34] According to J. Gołaczyński, this criterion should be applied as an alternative, when the basic criterion fails, i.e. the traditional way of concluding the contract. In his opinion, in a situation where the conclusion of a contract takes place in the traditional way, but its implementation is in electronic form (dematerialized), then we are also dealing with an electronic contract. First of all, when concluding contracts, the traditional method does not have any aspects that support the application of the provisions on electronic trading. The form of the benefit should not have a decisive impact on what legal provisions to apply or what interpretation to make. It is only a derivative of the contract the nature of which is at the center of civil law interests. Recognition of such agreements as electronic in my opinion would be an inappropriate, groundless and even senseless and harmful solution. In these matters, Janowski also takes issue with Gołaczyński. Janowski sees the possibility of favoring a contract concluded in a traditional way, when the electronic method of its execution is the only one possible. However, he himself does not express his approval of such a view.[35]

In turn, W. Kilian refers to the scope of the semantic concept of electronic contracts as „agreements between natural or legal persons communicating with each other by technical means (through digital communication networks) in order to conduct transactions involving intangible assets (so-called on-line execution or direct trade electronic) or creating an electronic basis for the release of tangible goods (so-called off-line or indirect

34 Ibidem, p. 16.

35 J. Janowski, *Kontrakty elektroniczne w obrocie prawnym*, Warszawa 2008, p. 57.

e-commerce)".[36] Its definition clearly differs from the one discussed above. I would like to draw attention to the particular element introduced by this author. In my opinion, it is unnecessary, because it has no impact on the merits of the definition, but only unnecessarily extends it, and what is worse - it is incorrectly formulated. It lacks a mention of organizational units without legal personality, to which the law grants the ability to perform legal acts. They are also called defective legal entities, quasi-legal persons or statutory persons. I consider the term „legal entities" to be more accurate, if it is useful in formulating definitions of electronic contracts. Instead of using the phrase „means of electronic communication at a distance", the author talks about „technical means" and „digital communication networks". They are undoubtedly synonyms.

Meanwhile, P. Podrecki refers only to the Internet in his arguments. According to this author, contracts concluded on the Internet are „all legal relationships, the essential element of which is the use of web pages as a means of communicating and submitting declarations of will to conclude an agreement".[37] Note the syntax of this sentence, because this may raise some substantive doubts. The author in the same uses the concept of „all legal relations" and „contract". The second of these terms is contained in the first, and at the same time they both refer to the meanings used in the middle of the definition of target factors, which causes a glaring lack of precision. I argue that P. Podrecki used the wording „in order to conclude the contract" completely unnecessarily. However, the extension of the subject scope of the definition to legal relations not included in the contracts should be assessed positively. This is because although in most contexts our considerations are related to contracts, the inclusion of unilateral actions in the scope of the electronic marketing law cannot be ruled out, because in certain factual states it is justified - both legally, substantively and logically. The law should take into account the possibility of such situations and, of course, be prepared for them. I approve the inclusion of a general clause called „an essential element" in the definition. In practice, there are such factual states, when the parties, seeking to conclude a single legal action, use both traditional forms of communication and means of electronic communication. As a result, agreements of a hybrid nature are created. Bearing in mind the above observation, I think that the definition of electronic legal transactions should contain the clause „essential element". It would grant discretion to the judicature, with the simultaneous subsumption of the facts. As I mentioned above, P. Podrecki chose the definition of electronic legal trading as the starting point for his deliberations. They start with the definition of the concept of „turnover". In his opinion, this means: „exchange, circulation, transfer, transfer, transfer or transfer between various entities, parties, participants or contractors. The subject of trading are real entities (things), legal states, and so-called

36 W. Kilian, *Umowy elektroniczne*, in: *Prawne i ekonomiczne aspekty komunikacji elektronicznej*, ed. J. Gołaczyński, Warszawa 2003, p. 221.

37 P. Podrecki, *Prawo Internetu*, Warszawa 2004, p. 40.

information goods (digital products)." It is worth paying attention to the distinction of a new category of goods, namely digital (digital) products. In a subsequent part of the book the author uses mainly the noun „exchange" in order to shorten the definitions being constructed. This noun, however it is understood on the basis of the general Polish language or the Polish legal language, defines the action performed with the participation of at least two parties. P. Podrecki does not state directly how he understands this noun. Against this background, the question arises of whether the participation of both parties is necessary for completing a given transaction.

When analyzing J. Janowski's views on this subject, I think that he also includes unilateral actions by his participants. When writing about the exchange in circulation, J. Janowski means not only individual interactions, but the entirety of relations taking place in it - between all the participants. Such a conclusion stems from a systematic analysis of his theses. J. Janowski distinguishes between definitions of the terms „legal transactions in the electronic environment" and „electronic legal transactions". The definitions given here focus on different aspects of e-commerce. He understands the first term as a real exchange (e.g. economic - as a shift in property values) and a formal one (e.g. process - as a circulation of documents), which creates legal effects in the form of creating, changing or terminating an electronic legal relationship, i.e. a legal relationship with an electronic element.[38] The actual exchange refers to real and virtual entities, whereas formal exchange refers to the change in the legal status of these entities or subjective rights constituting an independent subject of the obligation. Thus, the above definition does not include actual exchange, non-formal legal effects. For obvious reasons, such an exchange remains outside of the area of civil law interest, which rightly found reflection in the definition. I consider it unnecessary to enumerate the possible legal consequences of contractual activities, because they are so widely known that they are indeed obvious. In addition, they are identical in traditional and electronic circulation, which eliminates the need to mention them in the definition of electronic trading. The definiens regarding the computerization of the legal relationship is described in more detail in the second definition, which is why I am going to analyze it while discussing it. Electronic legal transactions are legal exchanges and electronic communications as the entirety of legal and official transactions made in electronic form, i.e. with the use of electronic communication means and electronic data carriers. In this definition, Janowski clearly suggests that he also includes official activities (and, of course, public law). It should be added that legal acts are a logically and semantically broader concept than official activities. The set of official activities is included in the set of legal acts. Janowski, wishing to point out that he also qualifies official/public-law activities as electronic legal transactions, should distinguish private-law activities (or at least civil-law transactions) from them. An ex-

38 J. Janowski, op. cit., p. 43.

tremely useful element of the definition is the clear distinction between the electronic form and means of electronic communication and electronic information carriers which are its subgroups. Taking as a differentiating element the recipient's electronic message, we can distinguish between real electronic transmission[39] and digital electronic transmission.[40] Under the first of these terms should be understood the direct handing over of the information carrier to the addressee of the statement written on it, or transferring such media to the addressee via the messenger. Meanwhile, d.e.t. is a message which was delivered to the addressee through the means of electronic communication. The distinction and consolidation of such a division in the doctrine has practical justification. During the analysis of facts that may potentially exist as part of electronic trading, I came to the conclusion that one should consider the possibility of regulating legal provisions as either separate for real and digital transmission, or aggregate, i.e. all legal transactions in electronic form. For example, a matter relating only to the actual transmission is the moment of submitting the *inter absentes* statement. The following question should be asked: which provision is appropriate for determining the moment of submission of a declaration of intent in electronic form by real transmission - Art. 61 § 1 of the Civil Code or Art. 61 § 2 of the Civil Code? And how should the correct formula be interpreted? If we choose the formula of Art. 61 § 1 of the Civil Code, we would have to ignore some of the instructions to read the addressee's wording. The moment of reaching a declaration of will in a traditional written form to the addressee is - incidentally - identifiable when it is immediately available for its content to be read. From now on, reading the content of the declaration of will depends only on the will of the addressee. Analyzing the moment of coming to a declaration of will in electronic form using the real message in relation to Art. 61 § 1 of the Polish Civil Code, a new factor should be taken into account. In practice, we are unable to determine if we have created such circumstances in which the addressee may become familiar with the content of the statement, as a result of which we cannot determine the moment of its submission. Familiarization with the declaration of intent in electronic form, recorded on an IT medium, depends not only on the internal will of the addressee, but also on external factors - namely whether they have the right hardware and software at any given time (or not at all). Of course, it is - respectively - electronic tools and software to decode signals, bit strings and data into a form that is perceived by the human senses. In the face of external factors that determine the recipient's readiness to make a declaration of will, the need to change the method of determining the moment of submission of a declaration of intent recorded on the electronic information medium should be considered. The provision of Art. 61 § 2 of the CC in a literal and explicit way it refers to declarations of will in electronic form, transmitted digitally, via electronic means of communication. This provision was

39 Called later: r.e.t.

40 Called later: d.e.t.

included in the CC by the Act of 14th February, 2003,[41] as part of the Polish legislative offensive concerning the regulation of electronic issues. J. Gołaczyński writes incorrectly on this matter.[42] Namely, he believes that Art. 61 § 2 of the CC includes the use of declarations of will transmitted by means of electronic information carriers. Such a thesis does not really solve the problems that arise. The content of this provision cannot be applied to r.e.t. Here I refrain from deciding which recipe to use, because it is not for the purpose of this work. The point is to demonstrate the legitimacy of consolidating the division of activities concluded in electronic form, using IT media (r.e.t.) or using electronic means of communication (d.e.t.).

Finally, we need to consider A. Stosio's reflections which focus strictly on the Internet itself. They state that „the conclusion of a contract via the Internet consists in exchanging relevant declarations of will by the parties to the agreement with this medium".[43] It is not difficult to see that the area of issues addressed here concerns only the Internet, which makes it narrower than most other learned lawyers dealing with these issues. In fact, electronic legal transactions consist mainly of contracts concluded using this medium, but they are not the only ones that are classified under this category.

The last author whose views I am going to analyze in this subsection is W. Kocot., He points out that the concept of e-commerce usually means the sales, distribution, advertising and promotion of products via ICT networks, including primarily via the Internet. The scholar added that such understanding is commonplace. It can be logically concluded that he is aware of the existence of different views on the essence and nature of e-commerce. In practice and in the doctrine the notions of electronic trade, e-commerce and English-language e-commerce and e-business are understood synonymously. The creation of the last of these (e-business) is attributed to the IBM marketing department. The prevailing opinion is that it primarily refers to the business model, so you should avoid using it to define electronic trading in legal hearings. The definition of e-commerce itself is based on two pillars. The first of these includes activities that make up the very concept of trade. The second is the use of a tele-informatic network as a means of communication as an element constituting the electronic nature of trading. By definition, the author only mentions products. Trade, not only electronic, is understood as other activities, for example the provision of services. And even more - in direct electronic commerce, a special validity is given to a license agreement not mentioned by W. Kocot. Contracts concluded with suppliers of software products (software) are almost always contracts of this type. An exemplary antivirus program manufacturer concludes a license agreement with its clients. Cell phone contracts should also be mentioned, as their complex nature may cause consternation. The creation of such contracts

41 Dz. U. no. 49, item 408.

42 J. Gołaczyński, op. cit., p. 22.

43 A. Stosio, *Umowy zawierane przez Internet*, Warszawa 2002, p. 132.

has been forced by the marketing of computer software. Although an in-depth analysis of cell phone contracts is not within the scope of this paper, the multitude of contracts of this type justifies its mentioning. The complex nature of these agreements consists in the fact that during one consensual activity, two contracts are concluded with two different legal entities. The sales contract is concluded with the entity from which we purchase the software. In turn, the license agreement is concluded with the entity owning copyrights to the acquired software, provided that at the latest at the time of purchase we had the opportunity to familiarize ourselves with the terms of the license As the practice shows, the scope of e-commerce is much broader and much more diverse.

Electronic commerce is still a relatively young, and thus only emerging, field of legal and economic marketing. Nevertheless, it exerts a serious and enormous influence on the entirety of social, economic and legal relations on a global scale. Therefore, lawyers of all professions and specialties - in particular civil lawyers, criminal lawyers and specialists in commercial law - should pay close attention to the sphere of legal and economic life discussed here. My diagnosis is only a certain reflection and a subtle suggestion on what aspects of the issues we are interested in should be focused on today. Another conclusion from my arguments is the otherwise optimistic statement that the existing legal and jurisprudential traditions are able to adapt to new, specific challenges posed by the development of technological civilization. Hence the validity of the conservative concept of the internet regulation presented in this paper, which suggests relying on the traditional legal and jurisprudential acquis - with the law of electronic trading as merely an overhead in relation to the existing legislative and doctrinal solutions.

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**SUMMARY**

**The Legal Concepts of Online Commerce**

The aim of the study is to present the selected legal concepts of online commerce. Electronic commerce is still a relatively young, and thus only emerging, field of legal and economic marketing. Nevertheless, it exerts a serious and enormous influence on the entirety of social, economic and legal relations on a global scale. Bearing in mind this assumption the author pays attention to the selected topics of online commerce that leads to a conclusion that the existing legal and jurisprudential traditions are able to adapt to new, specific challenges posed by the development of technological civilization.

Keywords: Online Commerce, Civil law, High Tech Law

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# The Views of the Court of Arbitration for Sport and the Austrian Football Association on legal liability for the conduct of supporters

## Introduction

Nowadays football matches are enormous events which are closely watched by millions of people worldwide. Since supporters enthusiastically cheer for their favorite teams, sports offenses have become common in the football world. The misbehavior of supporters interferes with matches and creates areas of conflict between rival football fans of different teams. To prevent this, frameworks of proper conduct are being established through national statutes in multiple jurisdictions, the violation of which can result in sanctions. The regulation of supporters' behavior is under the jurisdiction of both the legislator and sports organizations. The principle of "strict liability" is being used to combat hooliganism in front of both the national organizations and the Union of European Football Associations (henceforth – UEFA). According to Art. 8 of the UEFA Disciplinary Regulations (henceforth – Disciplinary Regulations), a football club is responsible for its players, members, officials or supporters if a rule of conduct is violated as a result of their actions, even if it can prove the absence of any fault or negligence. Any uncertainty regarding the affiliation of a supporter who has committed an offense before, during or after a match, is increasingly becoming a frequent focus of the jurisdiction of UEFA and may subsequently turn into an appeal in the Court of Arbitration for Sport (henceforth – CAS). Furthermore, the application of the principle of the appropriate sanction constantly remains under the discussion of the bodies of UEFA and CAS. Due to the fact that there is no definition of the term "supporter" in the Disciplinary Regulations, national associations and football clubs try to prove that the violators are not their supporters and, therefore, insist on the exemption and lifting of the sanctions applied.

In the current context of globalization, not only institutes of the national legal systems but also the regulatory institutions for the supranational sports organizations have started to become the objects of borrowing and repetition. These institutions follow the model of strict liability of clubs for the supporter's behavior, used by the national football or-

ganizations on the basis of the legal concept, applied consistently within the decision of UEFA. The duty of clubs to interact with their supporters serves as a preventive function to avoid a supporter's unacceptable behavior. According to the position of the CAS, formed in a certain number of its decisions, through holding sports clubs accountable, strict liability is aimed at supporters whose conduct during sports events might be banned by the provisions of sports regulations. And as a result, the establishment of the presence or absence of any form of guilt of the club is not legally significant for such a model of responsibility. UEFA's approach to regulating the subjects of responsibility assumes that supporters remain outside the validity of the legal regulations of the sports organizations both because of the difficulty in identifying them and because of the lack of a developed mechanism for the realization of such jurisdictional activity in sports organizations. However, some national football associations demonstrate regulation and that they hold supporters responsible for actions committed during the football competition. For example, the position of the Austrian Football Association set out in the provisions of the Regulations of prohibited activities at the stadium (henceforth – the Regulations of prohibited activities).[1] According to these Regulations, the Bundesliga, which is operates under the auspices of association, has the right to develop and to use its own regulations for the procedure of imposing bans on supporters visiting the places where a sporting event takes place.

The Russian Football Union and football clubs only have the right to hold spectators liable for their unacceptable behavior during a football match through the court. It is worth mentioning that now the judicial prospects for holding spectators liable appear to be vague and there is no established practice on this issue.[2] With regard to the Austrian Football Association, its approach is based on its right to hold the supporters accountable and to apply the proper sanctions to them, such as the ban for a certain period on visiting football matches under the jurisdiction of the association. In particular, the provisions of paragraph 112 of the Rules of the Austrian Football Association for the Administration of Justice[3] determine that at least a two-year ban is applicable for supporters who have demonstrated racist behavior during the match.[4]

1 ÖFB-Stadionverbotsordnung [access: 1. Juli 2016], http://www.oefb.at/_uploads/_elements/70385_OEFB-Stadionverbotsordnung%20gueltig%20ab%201.7.2016%20EF.pdf [access: 10.12.2017].

2 Moscow oblast Court's Appeal Decision no. 33–10571/2014, http://www.consultant.ru/cons/cgi/online.cgi?req=home&utm_csource=online&utm_cmedium=button [access: 10.12.2017].

3 ÖFB-Rechtspflegeordnung [access: 01.07.2017], http://www.oefb.at/show_a.php?t=elements&e=26943[access: 10.12.2017].

4 § 112 (5) ÖFB-Rechtspflegeordnung [access: 01.07.2017], http://www.oefb.at/show_a.php?t=elements&e=26943 [access: 10.12.2017].

## The Austrian Football Association Regulation of the Legal Liability of Supporters

According to the preamble of the Regulation of prohibited activities, the rules of this act are aimed at supporters whose behavior violates the order of sports competitions. The jurisdiction policy of the Austrian Football Association in relation to the supporters is based on the discretionary choice by the Committee for Stadiums, Security, and Supporters[5] between giving the supporters a warning or a prohibition on attending sports events at any stadiums located on the territory of the association's functioning. The imposition of a ban as a sanction is motivated by the need to ensure the safety of supporters, and also for the protection of the stadium's infrastructure. According to the Austrian Football Bundesliga's Safety Regulations[6] it is the club-organizer's[7] responsibility to prevent persons supporters who have been banned from entering stadiums. However, the application of the ban is due to the justification of such a sanction from the point of view of general legal principles of objectivity and proportionality. For example, the application of the warning will be a proportionate sanction only if it is the first occurrence of such behavior on the part of the supporter which threatens public order or security.[8] A warning can only be issued once to the same person for unacceptable behavior at the stadium. At the same time, the fiction of an unrepentant subject after a certain period of time is not used. The ban on a supporter attending stadiums is conditional on his actions being included in the prohibited behavior described on a closed list[9]. Some of the *corpus delicti* make the supporter liable as a result of the first accusation, and some of them only on the basis of a repeated violation. In particular, the first group includes: the presence or the use of pyrotechnics, laser pointers; racist or discriminatory behavior; and behavior that is would lead to unfavorable, high financial consequences for the club or the stadium. The second group includes aggressive behavior towards players, functionaries, officials, judges, government officials and other supporters (paragraph "a"), and repetition of behavior that previously led to the application of the ban. It should be noted that the responsibility of supporters for behavior at a sports competition is traditionally associated with public administrative regulation, and, in particular, with

5 Komitee für Stadien, Sicherheit und Supporterwesen» in ÖFB-Rechtspflegeordnung.

6 Sicherheitsrichtlinien für die bewerbe der Österreichischen Fussball-Bundesliga, http://www.bundesliga.at/de/tipico-bundesliga/uebersicht [access: 10.12.2017].

7 §12 Zuschauerkontrolle, Sicherheitsrichtlinien für die bewerbe der Österreichischen Fussball-Bundesliga, http://www.bundesliga.at/de/tipico-bundesliga/uebersicht [access: 10.12.2017].

8 §6 Verwarnung, ÖFB-Stadionverbotsordnung, http://www.oefb.at/_uploads/_elements/70385_OEFB-Stadionverbotsordnung%20gueltig%20ab%201.7.2016%20EF.pdf [access: 10.12.2017].

9 §5 Anlass, Art und Dauer des Stadionverbots, ÖFB-Stadionverbotsordnung, http://www.oefb.at/_uploads/_elements/70385_OEFB-Stadionverbotsordnung%20gueltig%20ab%201.7.2016%20EF.pdf [access: 10.12.2017].

administrative legislation. For example, the sanction of a ban on visiting places where official sports competitions are held is presented in part 1, 2 art. 20.31 of the Code of the Russian Federation on Administrative Offenses and its implementation is carried out by the organizers of competitions. Consequently, if the club-organizer recognizes a person in relation to whom there is court decision on administrative prohibition, the club has the right to refuse admittance to the supporter at the entrance or to remove him or her from the venue of the competition[10]. In this case, the supporter is not refunded the cost of the canceled ticket. A similar obligation to control persons wishing to participate in a sports competition as a supporter is placed on the club-organizer of matches in the Austrian Football Bundesliga.[11] The organizing club, when using the right to provide screening procedures granted to it, must not admit supporters who are prohibited from visiting stadiums under the jurisdiction of the Austrian Football Association on the territory of the stadium. The prohibition in the Russian regulation model extends only to official competitions, while the sanction applied on the basis of the Regulation on prohibited actions prevents a person from visiting any stadiums on the territory of the association, regardless of the status of the competition. Currently, in the Russian Football Championship (RFPL) interesting club statements can be noticed, namely concerning the use of opportunities provided by Russian civil legislation to prevent certain persons, established by the club as participants in unacceptable behavior, from attending football matches when the club acts as an organizer. For example, the football club "Krasnodar"[12] used the fact that several supporters had been brought to administrative responsibility for violating behavior[13] and deprived the supporters of the right to visit home matches for a certain period.[14] The club intends to consider the next instance of these persons being brought to administrative responsibility for similar actions as the basis for a lifetime deprivation of their right to attend matches of which the club is the organizer. However, in the present example, the legitimization of the club's position is conditioned by Russian civil law, specifically – a public service contract, the point of which is not to bring a certain individual – a supporter – to responsibility in extrajudicial procedure and apply

10 § 6 Act of the Russian Government on 16.12.2013 no. 1156 "Rules of conduct for supporters at official sports competitions", http://www.consultant.ru/cons/cgi/online.cgi?req=home&utm_csource=online&utm_cmedium=button [access: 10.12.2017].

11 § 12 (4) Zuschauerkontrolle, Sicherheitsrichtlinien für die bewerbe der Österreichischen Fussball-Bundesliga, http://www.bundesliga.at/de/tipico-bundesliga/uebersicht [access: 10.12.2017].

12 Krasnodar FC supporters were banned for a year to attend home games after a fight with the supporters Anzhi FC, https://www.sports.ru/football/1050866272.html [access: 10.12.2017].

13 Art. 20.31 Code of the Russian Federation on Administrative Offenses, http://www.consultant.ru/cons/cgi/online.cgi?req=home&utm_csource=online&utm_cmedium=button [access: 10.12.2017].

14 Apparently, the club used as a basis for its own ban the decision against the supporters in the case of an administrative violation, which did not imply a ban for visiting official sports competitions for a certain period.

a sanction consisting in limiting his or her individual rights and freedoms. At the same time, the application – not by the public authority but by the sports organization – of the ban on visiting sporting events at any stadiums of the association does not mean a reduction in the level of protection provided for the person being brought to justice. As follows from the provisions of paragraph 7 of the Regulations of prohibited actions[15], the supporter has the right to appeal against the decision of the Austrian Football Association to the appellate instance[16] of this sports organization while retaining the sanction for the review period. With regard to safeguarding the interests of a prosecuted supporter, one should also consider the right of the Stadium, Safety and Supporters Committee to curtail or abolish the prohibition applied to a person in the presence of exceptional circumstances. These can include, in particular, the nature and exceptional circumstances of the deed, the confession of guilt by a person brought to justice, and also his or her young age. In this case, the list of exceptional circumstances in the provisions of the Regulation of banned actions is left open and allows the jurisdictional body of the association to establish other circumstances indicating that there is no risk of the supporter's unacceptable sporting behavior being repeated. The presence in the criminal law of Austria of the institution of the responsibility of the supporter for conduct during a football match significantly affects the application of the prohibition by the jurisdiction of the football association, because it uses the prejudice criterion in the following sense. As follows from the provisions of paragraph 9 of the Regulations of prohibited actions, the ban on the supporter appointed by the Committee for Stadiums, Security and the Supporters is subject to immediate cancellation if the fact of the termination of criminal prosecution of this person, or the existence of the verdict of not guilty which has taken legal effect, are established. The burden of proof of both facts, as is apparent from the regulatory act under consideration, is assigned to the supporter. However, if the termination of criminal prosecution on non-rehabilitating grounds is established (for example, the insignificance of the act committed), the Committee on Stadiums, Security and the Supporters does not have a normative obligation to repeal the ban previously applied to the supporter. Jurisdictional authority if the criminal prosecution is terminated for the reasons mentioned, at the request of the supporter, only checks the proportionality of the term of the ban applied.[17]

15 § 7 Rechtsmittel, ÖFB-Rechtspflegeordnung [access: 01.07.2017], http://www.oefb.at/show_a.php?t=elements&e=26943 [access: 10.12.2017].

16 Rechtsmittelsenat.

17 § 9 Aufhebung eines bestehenden Stadionverbotes, ÖFB-Rechtspflegeordnung [access: 01.07.2017], http://www.oefb.at/show_a.php?t=elements&e=26943 [access: 10.12.2017].

## Using a Model of Strict Liability for the Behavior of Supporters

The classical strict responsibility of clubs for the supporters' behavior is established in the provisions of the Regulations of the Austrian Football Association on bringing offenders to justice. The range of offenses committed by clubs related to the behavior of supporters is determined in accordance with the regulations of FIFA and UEFA, and is presented in a closed list. In particular, paragraph 116[18] establishes both the responsibility of the club-organizer and the guest club for the use of pyrotechnics used by the supporters (the ban on the use of pyrotechnics is established by the Safety Rules of the Austrian Football Bundesliga[19]). Comparing the level of sanctions for such an offense, one can notice a broader discretion of the UEFA jurisdictional bodies when it comes to choosing from the extensive list of sanctions stipulated in part 1 art. 6 of the Disciplinary Regulations. The range of sanctions used by the association is limited to a fine of a certain range, either by partial closure of the stadium sectors, or the disqualification of the stadium. The association's rules do not use the concept of conditional sanctions[20], which is used in the UEFA Disciplinary Regulations to individualize the cases of bringing the club to justice. Most of the sanctions, listed in the provisions of art. 6 of the regulations, may be conditional on the discretion of the jurisdictional body. However, the application of conditional sanctions cannot be used consistently in law enforcement practice, since it creates the danger of misleading both clubs and supporters. Any case of using a conditional sanction by the jurisdictional authority means doubts about the significance of the charge brought against the club. Each precedent of this kind gives a completely unambiguous signal for clubs and supporters about the existence of a hypothetical opportunity to avoid both a serious sanction and the high level of such a sanction, which is unacceptable from the point of view of the goals of football[21]. At the same time, we should note that insufficient evidence cannot justify the use of conditional sanctions, since in this case it is not a question of the proportionality of the charge and the sanction, but in general of the assessment by the jurisdic-

18 § 116 Verletzung der Veranstaltungsbestimmungen, ÖFB-Rechtspflegeordnung [access: 01.07.2017], http://www.oefb.at/show_a.php?t=elements&e=26943 [access: 10.12.2017].

19 § 15 Ausnahmeregelung Pyrotechnik, Sicherheitsrichtlinien für die bewerbe der Österreichischen Fussball-Bundesliga, http://www.bundesliga.at/de/tipico-bundesliga/uebersicht [access: 10.12.2017].

20 Sometimes in legal practice it is called a "conditional" sanction, vid., for example, the club's argument in the practices of UEFA legal bodies: Decision of 3 February 2015, *Legia Warszawa S.A.*, Case Law Control, Ethics and Disciplinary Body & Appeals Body. Season 2015/2016. January 2015 - June 2015, https://www.uefa.com/insideuefa/disciplinary/disciplinary-cases/index.html [access: 10.12.2017].

21 This conclusion follows from the law enforcement practices of UEFA legal bodies: Decision of 3 February 2015, *Legia Warszawa S.A.*, Case Law Control, Ethics and Disciplinary Body & Appeals Body. Season 2015/2016. January 2015 - June 2015, https://www.uefa.com/insideuefa/disciplinary/disciplinary-cases/index.html [access: 10.12.2017].

tional body of the grounds for making the club responsible for the behavior of supporters. In the law enforcement practice of UEFA, there are precedents of the use of conditional sanctions in relation to clubs for the behavior of supporters and that is why the argumentation used is of particular interest. For example, in one of the cases[22], the jurisdictional body noted as a basis for conditional sanction the measures taken by the club to control its supporters, including special actions in connection with the match between the clubs - historical opponents. However, even the possible provocation of the supporters and the absence of previous cases of prosecution for the behavior of supporters was not considered by the body in justifying the proportionality of the chosen conditional sanction - half of the imposed fine with a probation period of two years.

The responsibility of the club-organizer of the match in connection with improper preparation and holding the sports competition should be distinguished from the responsibility of the club-organizer for the behavior of the supporters. If in the first situation the responsibility of the club is of a classic character, determined by the presence of guilt, then in the second case strict liability is applied. This attitude is demonstrated in the UEFA Disciplinary Regulations[23] and is also used in the regulatory acts of the Austrian Football Association. It should be noted that appropriate performance of the duties assigned to the club-organizer by standards of regulations in many respects has a preventive character in relation to the unacceptable behavior of supporters. One of the fundamental foundations for the prevention of conflict situations at the stadium is the division of the supporters into the sectors of the guest club and the organizing club. For this purpose at the level of UEFA and national association there is a ticket order, including a detailed algorithm of the request by club-guest from club-organizer for a certain number of tickets within a quota. The distribution by the club-guest of the received tickets guarantees the distinction of the affiliation of these supporters with the club and the possibility of identifying everyone who received such a ticket[24]. Nevertheless, the policy of dividing the supporters into sectors can be abused by the individual reselling, which, of course, is not aimed at dividing the supporters of the two teams. The Austrian Football Association obliges the club-organizer to counter uncontrolled ticket sales by third parties. The club, which has such status, as it follows from the provisions

22 Decision of 19 May 2016, *Manchester United FC*, Case Law Control, Ethics and Disciplinary Body & Appeals Body. Season 2015/2016. January 2016 - June 2016, https://www.uefa.com/insideuefa/disciplinary/disciplinary-cases/index.html [access: 10.12.2017].

23 Art. 16 (1), 16 (2) UEFA Disciplinary Regulations, https://www.uefa.com/MultimediaFiles/Download/Regulations/uefaorg/UEFACompDisCases/02/48/23/06/2482306_DOWNLOAD.pdf [access: 10.12.2017].

24 The payable or non-payable nature of the receipt of a ticket from the club-guest ticket does not affect the ability of the club to identify the supporters who accompany the club during the guest match.

of the Austrian Football Bundesliga Security Regulations[25], is obliged to develop and to use legal measures against the sale of tickets on the territory adjacent to the stadium. In the context of preventive measures regarding the unacceptable behavior of supporters, the responsibilities of the organizing club of the Bundesliga match for the inspection of supporters should be considered. The club has the responsibility not only to check all the supporters for active support sectors at the entrance to the stadium, including the sector of the club-guest[26], and randomly check spectators in other sectors[27], but also the responsibility to identify real or potentially dangerous supporters and not allow them into the stadium.[28] The potential danger of supporters is caused by the state of alcoholic and narcotic intoxication. The identification of such a danger allows the club-organizer to refuse the supporter entrance to this match without compensation for the cost of the purchased ticket. Similar consequences can be expected if a supporter refuses to leave items which are banned from the stadium during the match at the entrance.[29]

## The Position of the CAS

We will consider the practice of CAS, in particular CAS 2015/A/3874 Football Association of Albania v. the UEFA and the Football Association of Serbia[30], as well as the practice of the UEFA Control, Ethics and Disciplinary Body, and the UEFA Appeals

25 §10 (1) Maßnahmen in Verbindung mit Eintrittskarten, Sicherheitsrichtlinien für die bewerbe der Österreichischen Fussball-Bundesliga, http://www.bundesliga.at/de/tipico-bundesliga/uebersicht [access: 10.12.2017].

26 §12 (1), §12 (2) Zuschauerkontrolle, Sicherheitsrichtlinien für die bewerbe der Österreichischen Fussball-Bundesliga, http://www.bundesliga.at/de/tipico-bundesliga/uebersicht [access: 10.12.2017].

27 For example, the duty to carry out a personal inspection is entrusted to the organizing club and law enforcement bodies in the Russian jurisdiction. Compare: pp. "v" par. 4 of Act of the Russian Government on 16.12.2013 no. 1156 "Rules of conduct for supporters at official sports competitions": "Supporters in the conduct of official sports competitions are obliged ... when passing or passing to place the official sports competition and [or] around the stadium to undergo a personal inspection and provide personal items for inspection", http://www.consultant.ru/cons/cgi/online.cgi?req=home&utm_csource=online&utm_cmedium=button [access: 10.12.2017].

28 §12 (4) Zuschauerkontrolle, Sicherheitsrichtlinien für die bewerbe der Österreichischen Fussball-Bundesliga, http://www.bundesliga.at/de/tipico-bundesliga/uebersicht [access: 10.12.2017].

29 The list of prohibited items is presented in § 13 Verbotene Gegenstände, Sicherheitsrichtlinien für die bewerbe der Österreichischen Fussball-Bundesliga, http://www.bundesliga.at/de/tipico-bundesliga/uebersicht [access: 10.12.2017].

30 Database of CAS awards, *CAS 2015/A/3874 Football Association of Albania v. the UEFA and the Football Association of Serbia*, http://jurisprudence.tas-cas.org/Shared%20Documents/3874.pdf [access: 10.12.2017].

Body, which consistently and convincingly demonstrates the assessment of supporter's belonging to a club, including the situations involving the use of pyrotechnics from outside the stadium. These cases help both to qualify the responsibility of national associations and football clubs for the improper actions of supporters carried out remotely, with the help of various controlled technical means, and to order proportional sanctions.

In CAS 2015/A/3874 Football Association of Albania v. UEFA & Football Association of Serbia (hereinafter – CAS 2015/A/3874), the Football Association of Albania (hereinafter – the FAA) stated that the decision of the UEFA Appeals Body that the drone with an illicit banner was controlled by an Albanian supporter was erroneous: no evidence was presented to confirm the affiliation of individuals to the FAA, besides, UEFA regulations do not contain any presumptions to identify the offender simply on the basis of the nature of the committed offense. It is possible that the drone could have been controlled by a person who was not a supporter of the FAA (for example, a Serbian supporter). These arguments are in fact aimed at excluding the responsibility of the club for the conduct of a perpetrator because it was impossible to prove his affiliation. As we know, the provisions of the Disciplinary Regulations do not provide the definition of "supporter", it is an open concept.[31] For this reason, in the jurisdiction of the UEFA and CAS, neither citizenship, nor residence, nor the presence of a ticket, nor race, nor nationality is taken into account when proving that a supporter belongs to a national association or a football club. After analyzing the provisions of Disciplinary Regulations, one can indeed assert that there is no normatively defined algorithm for determining the supporter's affiliation to an association or a club. Such an algorithm has been developed in the enforcement practice of UEFA jurisdictions and is presented as "a reasonable and objective observer" proof model for the correct assessment of the situation and determining whether a person is a supporter of a club or not. The FAA took the position that the conclusions from the cases on which the decision of the UEFA Appeals Body was based (CAS 2007/A/1217 Feyenoord Rotterdam v. UEFA[32]; CAS 2013/A/3139 Fenerbahçe SK v. UEFA[33]; CAS 2013/A/3324 GNK Dinamo v. UEFA and CAS 2013/A/3369 GNK Dinamo v. UEFA[34]) do not correspond to the principle of relevance to the case, because

31 About the various concepts of "supporter" vid. also: I.A. Vasilyev, A.A. Kashaeva, The sporting responsibility of football clubs for offensive behavior of supporters on the basis of pp."e" p. 2 Art. 16 UEFA Disciplinary Regulations and Art. 112, Art. 116 Russian Football Union (RFU) Disciplinary Regulations, "Petersburg Lawyer" 2017, no. 2, pp. 60–73.

32 Database of CAS awards, *CAS 2007/A/1217 Feyenoord Rotterdam v. UEFA*, http://jurisprudence.tas-cas.org/Shared%20Documents/1217.pdf [access: 10.12.2017].

33 Database of CAS awards, *CAS 2013/A/3139 Fenerbahçe SK v. UEFA*, http://jurisprudence.tas-cas.org/Shared%20Documents/3139.pdf [access: 10.12.2017].

34 Decisions issued by the Court of Arbitration for Sport in cases involving UEFA, *CAS 2013/A/3324 GNK Dinamo v. UEFA and CAS 2013/A/3369 GNK Dinamo v. UEFA*, http://www.uefa.com/MultimediaFiles/Download/uefaorg/CASdecisions/02/47/25/32/2472532_DOWNLOAD.pdf [access: 10.12.2017].

in these cases the location of supporters was identified. There is no such certainty in the case CAS 2015/A/3874. For example, in the case CAS 2007/A/1217 the UEFA jurisdictional body concluded that "the behavior of individuals and their location in the stadium and its vicinity are important criteria for determining which team or club they support". In CAS 2015/A/3874 there were no Albanian supporters at the stadium or anywhere near the stadium, and therefore the precedence nature of the decision is in question. In another case, CAS 2013/A/3139, there was no doubt that the fireworks during the match behind closed doors were launched by the supporters of the host team. However, in the case in question, CAS 2015/A/3874, it is not clear and it is not established who launched the drone. Finally, CAS 2013/A/3324&3369 emphasizes the principle of strict liability in a situation where supporters are physically present at the stadium and can be clearly identified as supporters of the host team.

According to the FAA, in CAS 2015/A/3874 the principle of strict liability cannot be applied since in this situation even the offender's location could not have been analyzed.[35] Even if there was such a presumption in the Disciplinary Regulations, it could not have been applied, because there was no evidence of the presence of Albanian supporters around the stadium, as required by Art. 16 of the Disciplinary Regulations. In the view of the FAA, attributing the operation of the drone to Albanian supporters under those circumstances "would be at odds with Swiss law as there is no minimum connection between the FAA and the unknown individuals who operated the drone". In addition, the appellant submitted an expert opinion based on three conclusions. Firstly, the concept of "supporter" has a weak connection between the association and the person who committed the offense. Secondly, some of the presumptions used in UEFA jurisdictions' practice are acceptable, but still they should be based on reasonable and objective criteria (for example, individuals seated in a designated area of the stadium can be deemed to be a supporter of a particular team), and are rebuttable. Finally, failing such a minimum connection means that the individual cannot be characterized as a "supporter" for the purposes of disciplinary sanctions against the association. Thus, according to the FAA, the use of a drone and banner cannot be the result of the actions of association supporters, since the image of the sign supporting the team is not sufficient for determining the identity of the offender. Holding otherwise would lead to an arbitrary decision and dangerous precedent, because, as the FAA notes, "…it would become

35 Interesting arguments about influence of supporter's location on the responsibility of a national association or a club are used in the research of de M.A. Vlieger. See: de M.A. Vlieger, *Racism in European football: going bananas? An analysis of how to establish racist behaviour by football supporters under the UEFA disciplinary regulations in light of the inflatable banana-case against Feyenoord*, "International Sports Law Journal" 2016, vol. 15, issue 3–4, pp. 226–232.

an easy game to harm any team by operating a drone from a distance with symbols or signs supporting that same team".

UEFA, in turn, in CAS 2015/A/3874, proved that the drone had been managed by Albanian supporters from the perspective of "a reasonable and objective observer", on the basis of a comprehensive review. First, it is necessary to pay attention to the content of the banner, in particular, the map of "Great Albania" and Albanian nationalist symbols. Secondly, the reaction of Albanian players and FAA officials, who tried to reclaim and keep the banner from the Serbian players, is indicative. Thirdly, the subsequent appearance of the same banner in other matches and events should be taken into consideration.

In its practice, namely in CAS 2007/A/1217, arbitration noted that the behavior of supporters, their location in and around the stadium, are essential criteria for determining which team or club they support. In addition, CAS confirmed that supporters do not need to be at the stadium or to be kept in sight. An association or a club becomes responsible for its supporters' misbehavior as long as the incident takes place at a match, even if the supporters are not present within the stadium. The use in the provisions of Disciplinary Regulations, in particular in the provisions of Art. 16, of the expression "at a match" implies the misconduct of supporters that can influence the smooth running of the game. In the case under consideration, it is obvious that the fireworks launched by supporters had a negative impact on the smooth running of the match because the referee felt obliged to interrupt the game for a short time. The link between the negative influence of supporters on the match, and the need for a temporary suspension or final termination because of this, was established by the arbitration in CAS 2013/A/3139.

Another issue assessed by CAS was the control of the drone by a supporter of one of the teams. Considering the version about the participation of the FAA's supporter in this situation, the arbitration drew attention to four points. First, approximately 100 people associated with the appellant attended the stadium. Secondly, a remote control used to manage such a drone is a small device that can be easily hidden during the inspection at the entrance to the stadium. Thirdly, after the abandonment of the match, the Serbian police searched the FAA's delegation and the dressing rooms but it did not frisk the whole group of Albanians present in the stands. Finally, the drone could have been managed by an Albanian supporter outside the stadium. In the end, CAS, having considered the situation from the perspective of "a reasonable and objective observer", concluded that Albanian supporters controlled the drone. The arbitration considered the nature of the symbols and words depicted on the banner, the positive reaction of Albanian players and the negative reaction of Serbian players, staff, and supporters to the content of the banner. CAS noted that, as follows from the practice associated with the misconduct of supporters (see TAS 2002/A/423 PSV Eindhoven / UEFA[36], CAS 2007/A/1217

36 Database of CAS awards, *TAS 2002/A/423 PSV Eindhoven / UEFA*, http://jurisprudence.tas-cas.org/Shared%20Documents/423.pdf [access: 10.12.2017].

Feyenoord Rotterdam v. UEFA, CAS 2013/A/3094 Hungarian Football Federation v. FIFA[37], CAS 2013/A/3139), in the majority of cases undisciplined supporters were not personally identified. Therefore, a presumptive approach is used to determine whether or not an individual is considered to be a supporter of a given team, based on the perception of "a reasonable and objective observer".

In fact, there is rarely absolute certainty regarding whether the offender is an actual club's supporter or simply someone disguised as such. In accordance with this approach, it is for the association or club being charged by UEFA to rebut such a presumptive attribution by providing evidence to the contrary. In CAS 2015/A/3874, the appellant did not provide any evidence that would have indicated the possible participation of Serbian supporters in the incident with the drone and did not explain why Serbian supporters would have been interested in its control. The argument presented by the appellant, that the Albanian supporters could not control the drone since they were not found, was considered to be insufficient for two reasons. Firstly, CAS had already dealt with a similar situation in CAS 2013/A/3139, where flares were launched outside the stadium and parachuted onto the field, and the fact that the perpetrators could not be seen was irrelevant. Secondly, and decisively, often misbehaving supporters may not be individually identified even if they are inside the stadium. For example, they can hide behind others or cover their faces with scarves, bandanas, masks, etc. In view of the foregoing, CAS decided that the FAA was liable for the incident with the drone with an illicit banner.

## Concluding Remarks

In the case CAS 2015/A/ 3874 the FAA did not provide any evidence that would have indicated the possible participation of Serbian supporters in the incident with the drone and did not explain why Serbian supporters would have been interested in controlling it. The jurisdiction bodies of UEFA and CAS do not consider convincing the argument of the national association or the club that *some* supporters could not have controlled the drone since they were not found at the stadium. Strict liability for the misbehavior of supporters is applied when supporters are present outside the stadium, or if it is impossible to identify them for other reasons (for example, when they hide their faces from cameras). Therefore, the consistent CAS practice (CAS 2002/A/423, CAS 2007/A/1217, CAS 2013/A/3094, CAS 2013/A/3139), which confirms that a presumptive approach which involves assessing the situation from the perspective of "a reasonable and objective observer", is justified. A national association or a club has the right to provide evidence refuting the affiliation of a supporter, and hence the charge. But such

37 CAS bulletin, *CAS 2013/A/3094 Hungarian Football Federation v. FIFA*, http://www.tas-cas.org/fileadmin/user_upload/Bulletin_2014_2.pdf [access: 10.12.2017].

a burden of proof is put on the team in respect of which there is a presumption of a supporter's affiliation based on the collected evidence. Otherwise, if there are no responsible individuals, no confession or other compelling evidence of the supporter's affiliation, it is practically impossible for UEFA to impose strict liability sanctions against national associations and clubs for the misbehavior of supporters.

Regulation of the strict liability of clubs by the Austrian Football Association is characterized by the "criminalization" of a smaller number of offenses. In particular, the offensive behavior of supporters before, during and after the match is not a basis for disciplinary proceedings against the club but allows the administrator to apply such an administrative measure as a ban on visiting stadiums under the jurisdiction of the association. However, any unacceptable behavior of supporters which violates the order at the match entail the use of the strict liability model of the organizing club or guest club in accordance with the rebuttable presumption that supporters belong to one of the two clubs participating in the match.

The use of the conception "a reasonable and objective observer" allows the legal bodies to answer a wide range of questions about the adequacy of the evidence presented by both parties. The legal bodies assess the presented evidence from the standpoint of the following conception: whether the event (the supporter's behavior) occurred, and whether such an event was lawful or not. However, the issue of the use of individual evidence (for example, FARE[38] reports) as grounds for opening disciplinary proceedings, and the status of evidence, is assessed in different ways in the practices of the UEFA legal bodies. On the one hand, the FARE reports are equivalent to any report of a violation of the provisions of the UEFA regulations and therefore should be evaluated as the basis for prosecution, as CAS mentioned, "in all seriousness"[39]. On the other hand, the FARE reports, which do not have the presumption of accuracy and relevance in accordance with the provisions of the UEFA Disciplinary Regulations, can both be accepted and rejected as evidence. A conditional criterion for their approbation by a legal body is the accuracy of the proof provided (which makes it possible to determine whether the event that has taken place), the club affiliation of the persons involved, as well as the character of the behavior of the supporters that is unacceptable at a football match.

The problem of the sufficiency and accuracy of the evidence stimulates the formation of new models. Thus, the use of the model "a reasonable and objective observer" allows the UEFA jurisdictional body to answer three questions. Firstly, whether or not there

38 FARE – "Football Against Racism in Europe" organization.

39 In CAS 2013/A/3324&3369 GNK Dinamo v UEFA it is noted that the FARE examination, although it does not have the presumption described in Art. 38 UEFA Disciplinary Regulations, but should be carefully analyzed by the UEFA legal bodies. See: Decisions issued by the Court of Arbitration for Sport in cases involving UEFA, *CAS 2013/A/3324 GNK Dinamo v. UEFA and CAS 2013/A/3369 GNK Dinamo v. UEFA*, http://www.uefa.com/MultimediaFiles/Download/uefaorg/CASdecisions/02/47/25/32/2472532_DOWNLOAD.pdf [access: 10.12.2017].

has been a violation of the provisions of the Disciplinary Regulations. Secondly, what is the nature of the supporter's behavior? Thirdly, are the supporters affiliated with the specific club that participated in the match? This model has been tested in the practice of CAS and has been repeatedly confirmed by arbitration decisions as consistent with the nature of the disciplinary liability of clubs. As we noted earlier, the use of the proof model "a reasonable and objective observer" allows legal bodies to abstract from the subjective orientation of the unacceptable behavior of the supporter and to assess this behavior from the point of view of an observer who is not familiar either with the motives of the supporters or with their intent with regard to a specific person or group of persons. Unlike UEFA, the Austrian Football Association refers to the rebuttable presumption of the supporters in the guest sector and other sectors of the stadium[40]. This presumption, spread at the level of regulation of national associations, is quite acceptable for determining the affiliation of the supporters with the club, but does not allow questions about establishing the fact of violation of regulations and qualifying unacceptable behavior of supporters to be answered. We assume that the national associations –members of UEFA – use their models of proof close to the "a reasonable and objective observer", but it is difficult to provide empirical evidence of such a model because of the lack of open-access full-text solutions of the jurisdictions of such associations in disputes related to the strict liability of the clubs for the unacceptable behavior of supporters.

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**SUMMARY**

**The Views of the Court of Arbitration for Sport and the Austrian Football Association on Legal Liability for the Conduct of Supporters**

The clubs legal responsibility for the behavior of supporters is used by UEFA to influence the content of sports competitions, ideally abstracted from demonstrating by spectators any non-football ideas. Nevertheless, the regulation of the national associations-members of UEFA also assumes the responsibility of the clubs and, sometimes, the supporters themselves for the unacceptable behavior of the latter. The experience of regulation this issue by the Austrian Football Association demonstrates mentioned approach. Therefore, it is interesting to make a comparison: how much the regulated responsibility of supporters affects to the regulation by the association a strict liability of clubs for the behavior of fans. Using the practice of CAS, we may see a presumptive approach on the basis of an assessment of the situation by "a reasonable and objective observer" for the objective resolution of a dispute.

Keywords: strict liability, illegal behavior of supporters, legal liability of football clubs

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# Digital Currencies Trading under Polish and EU Public Law

## Introduction

Digital currencies (also called virtual currencies or crypto currencies) are a worldwide phenomenon gaining increasing interest in the media and among investors, economists and legal scholars. They are based on an electronic transactions system which uses cryptographic algorithms. The transactions on digital currencies are transparent and publicly available, and can be concluded directly between owners of such currencies or through multilateral platforms which resemble traditional trading facilities. Digital currencies are based on block chain technology – a decentralized peer-to-peer network, which allows each and every transaction to be checked and verified by every other user.[1] Furthermore, publicly available information includes details of every digital currency transaction, but the exact identities of the parties concluding a particular transaction are not disclosed. Although in practice the complete anonymity of the parties concluding a transaction is not guaranteed, digital currency trading may be classified as at least partly anonymous.[2]

In practice digital currencies are used mainly as a new means of exchange which allows certain goods to be acquired, usually by the Internet, without the necessity of using traditional money. Furthermore, digital currencies are gaining increasing interest as a new way of investing funds, since the value of digital currency can drastically increase (or decrease) in a very short period of time. However, mainly due to the anonymity that they provide, digital currencies are also used for criminal activities, such as money laundering, financing terrorism or drug trafficking.[3]

1 P. Dudek, *Waluta Bitcoin, glosa do wyroku Tybunału Sprawiedliwości z 22.10.2015 r. w sprawie C-264/14 Skatteverket przeciwko Davidowi Hedqvistowi,* in: „Glosa" 2016 no. 6, p. 39.

2 S. Shcherback, *How Should Bitcoin Be Regulated?*, in: "European Journal of Legal Studies" 2014, vol. 7, no. 1, p. 50.

3 Idem, p. 46.

Up to this point the legal status of digital currencies has not been clearly established under either Polish or EU law. This is especially evident from the regulatory perspective, since on the basis of private law digital currencies may be at least compared, and up to a certain point treated as alternative, already established institutions of private law.[4] Such an ongoing state of legal uncertainty should be clarified as soon as possible, since the lack of a legal definition of digital currencies may have severe consequences for penal law, tax law and administrative law. Those consequences mainly include a lack of a common practice for applying the law by both public authorities and the courts regarding digital currencies[5] and a lack of a necessary protection for both natural and legal persons investing in digital currencies. It may be even observed that since a constantly growing number of people are considering investing in digital currencies, in many jurisdictions financial authorities are warning about the potential risks associated with this activity, as a sort of answer to a legislative procrastination regarding this matter[6]. Although currently thereare no proposals for complex regulations concerning digital currencies under either EU or Polish law, we can observe the first attempts to create their legal definitions.[7]

The main goal of this paper is to analyze the legal status of digital currencies under both Polish and EU public law, provide an attempt to apply already existing public law regulations to digital currency trading, and finally to propose a direction for future regulations that with deal with this matter.

The main areas of the analysis include a comparison of digital currencies with traditional currencies and electronic money, a comparison of digital currencies with financial instruments, and an assessment of the idea of applying regulations on financial instrument trading to digital currency trading, with an emphasis on the potential difficulties associated with creating administrative supervision over such trading. The paper also

4 K. Zacharzewski, *Obrót walutami cyfrowymi w reżimie obrotu instrumentami finansowymi*, in: „Przegląd Sądowy" 2017, no. 11–12, p. 144.

5 Idem, p.141.

6 National Bank of Poland and the Polish Financial Supervisory Authority has issued an alert on digital currencies trading risks on 7 July 2017, https://www.knf.gov.pl/knf/pl/komponenty/img/Komunikat_NBP_KNF_w_sprawie_walut_wirtualnych_7_07_2017_57361.pdf [access: 31.01.2018]; the German Federal Financial Supervisory Authority consumer warning dated 9 November 2017, https://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Meldung/2017/meldung_171109_ICOs_en.html;jsessionid=8E3D0CFC0D890E08CC77FF542BDBBE5D.2_cid298 [access: 31.01.2018].

7 The Draft of the Act on counter measuring money laundering and terrorism financing dated 15 January 2017, http://legislacja.rcl.gov.pl/docs//2/12298001/12431428/12431429/dokument326696.pdf [access: 31.01.2018], (hereinafter: the Draft); Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and amending Directive 2009/101/EC, 2016/0208 (COD), http://ec.europa.eu/justice/criminal/document/files/aml-directive_en.pdf [access: 31.01.2018], (hereinafter: the Proposal).

contains an analysis of the first attempt to create a legal definition of digital currencies under Polish and EU pubic law, as well as an analysis of the possibility of applying existing public law regulations to digital currency trading.

## Digital Currencies v. Regular Currencies and Electronic Money

Currently there are numerous discussions in the Polish legal doctrine regarding the status of digital currencies, and especially over whether they may be treated as regular money. In economic studies, money is characterized by its main functions, which include *inter alia* being: a means of exchange, a measure, a value, or a means of payment.[8] According to some scholars, digital currencies have similar functions to regular money and therefore may be used in order to release a party from a pecuniary obligation[9]. Therefore digital currencies would be treated as a measure of value other than money on the grounds of Article 3581 § 2 of the Polish Civil Code[10].

According to other scholars, digital currencies may not be treated as a measure of value and therefore they may not be used to release a party from either public or private obligation. Following this assumption, a party may be released from an obligation by using digital currencies only if the other party consents to it. Therefore in this view an agreement in which one party trades a particular good for an agreed amount of a digital currency would resemble an exchange contract rather than a sales contract. The difference between a regular exchange contract and a contract in which one party trades digital currencies would be that a digital currency should not be treated as a good but rather as a property right.[11]

It should be noted that there are several differences between digital currencies and traditional currencies. First of all digital currencies are fully dematerialized and therefore they do not have a physical form which distinguishes them from a regular currency which also occurs in a form of coins and banknotes. Secondly, digital currencies have no interest rate, which makes it more difficult to valuate them. The value of a digital currency is mostly dependent on the demand, therefore the bigger the demand is for a particular digital currency, the bigger its value is. Furthermore, unlike regular currencies, digital currencies are not regulated and they are not issued or supervised by any public institution[12]. Finally, they

8 P. Dudek, op. cit., p. 38–39.
9 K. Zacharzewski, op. cit., p. 140.
10 Dz. U. 2017 of 459 as amended.
11 A. Roszyk, Świat przyjmuje walutę *bitcoin,* in: „Prawo i Podatki" 2015, no. 11, p. 3.
12 Individual tax interpretation no. IPPB5/423–397/14–4/MW dated 10 July 2014 issued by the Director of the Tax Chamber in Warsaw.

do not constitute an official means of payment in any country, and therefore for example under Polish law they may not be treated as a foreign currency.[13]

In my opinion, digital currencies should not be treated as a regular currency or as a common means of exchange. Given their nature and how they may be obtained, they resemble financial instrument more than a currency. However, from the perspective of a private law, digital currencies undoubtedly may be used as a way of fulfilling an obligation if the other party consents to it. Unfortunately, a detailed analysis of a role of digital currencies as a part of contract law falls outside a scope of this article.

Furthermore, under Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the Taking Up, Pursuit and Prudential Supervision of the Business of Electronic Money Institutions,[14] digital currencies do not fall under the definition of electronic money. Article 2 sec. 2 of the Electronic Money Directive defines electronic money as electronically (including magnetically) stored monetary value, as represented by a claim on the issuer which is issued on receipt of funds for the purpose of making payment transactions, and which is accepted by a natural or legal person other than the electronic money issuer.

Although digital currencies meet the criteria of electronic storage and the purpose of making transactions accepted by a natural or a legal person, they do not meet the criteria of issuance on receipt of funds[15]. According to the European Central Bank report, while the link between the electronic money and traditional money is preserved because the stored funds are expressed in the same unit of account such as, for example, USD, EUR or PLN, in digital currencies the unit of account is expressed in a virtual one such as, for example, Bitcoins or Linden dollars.[16] This approach was further confirmed by the Court of Justice of the European Union in the case concerning applying VAT to services for exchanging Bitcoins to regular currencies.[17] Therefore, from this perspective digital currencies may be considered as unregulated digital money, which cannot be classified either as a regular currency, electronic money or a legal means of payment.[18]

13 The only current exception is Japan, which recognized Bitcoin, the most popular digital currency, as a legal mean of payment.

14 Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the Taking Up, Pursuit and Prudential Supervision of the Business of Electronic Money Institutions, Amending Directives 2005/60/EC and 2006/48/EC and Repealing Directive 2000/46/EC, OJ 2009 L 267/7 (hereinafter: The Electronic Money Directive).

15 The Law Library of Congress, *Regulation of Bitcoin in Selected Jurisdictions,* 2014 no. 1, p. 9 https://www.loc.gov/law/help/bitcoin-survey/regulation-of-bitcoin.pdf [access: 31 January 2018].

16 European Central Bank, *Virtual Currency Schemes,* October 2012, p. 16 http://www.ecb.europa.eu/pub/pdf/other/virtualcurrencyschemes201210en.pdf [access: 31 January 2018].

17 C-264/14 *Skatteverket vs. David Hedqvist;* R. Bernet, *Zwolnienie z VAT waluty wirtualnej Bitcoin,* in: „Glosa" 2017 no. 1, p. 110.

18 R. Bernet, op. cit., p. 113.

## Digital Currencies as a Financial Instrument

Legal norms that regulate the trading of financial instrument are a matter regulated by the norms of public law, although a regulation and defining of particular financial instruments like for instance securities is usually a subject to private law regulations.[19] The difference can be illustrated well through the example of the relation of EU law on the trading of financial instruments to the Member States' regulations. Generally instruments classified as financial instruments under EU law, such as for instance securities or derivatives, are also classified as such under each of the Member States' law. However, EU law does not define particular instruments that fall within the category of financial instruments, so, as a result, although a derivative contract relating to securities will be classified as a financial instrument in two different Member States, they may each have a different legal definition of it in. This can be clearly illustrated by using the example of securities which in different Member States have different nomenclature, legal construction and status, although the laws applicable to their trading are similar.[20]

On the EU level, Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU[21] is a basic regulation that regulates the trading of financial instruments. MIFiD II does not contain an open catalogue of financial instruments but instead it lists specific instruments that fall within its scope, in Annex 1 Section C. The list includes *inter alia* transferable securities, money-market instruments, emission allowances or derivative contracts relating to securities, currencies or other derivative instruments. Therefore since the list does not contain digital currencies, they fall outside the scope of MIFiD II. Similarly, the Polish Act on financial instruments trading, dated 29 July 2005[22], lists financial instruments in Article 2, but it does not include digital currencies.

It may be observed that although the particular instruments qualified as financial instruments under MIFiD II and the Trading Act are very different, they do have some mutual features. First of all they are dematerialized, so as a general rule the right that is incorporated in them is not related to any material device such as a document. Secondly, their trade is a subject to administrative supervision.[23] Introducing the state's supervision over financial instruments trading is the main reason for regulating them by public law. Through administrative supervision the legislator aims to increase the effectiveness of

19 K. Zacharzewski, op. cit., p. 142.

20 Ibidem, p. 142.

21 Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, OJ 2014 L 173/346 (hereinafter: MIFiD II).

22 Dz. U. 2017 item 1768 as amended (hereinafter: the Trading Act).

23 K. Zacharzewski, op. cit., p. 144.

resource allocation, increase the level of investor protection, protect fair trading mechanisms and protect the market infrastructure[24].

It seems that since digital currencies are dematerialized, tradable instruments which are gaining in popularity as a form of investment, they can potentially be included in a scope of financial instruments under MIFiD II and the Trading Act. Similarly, carbon dioxide emission allowances have been included within the scope of financial instruments under MIFiD II, although there are several material differences between them and other financial instruments such as securities.[25]

Furthermore, it should be noted that some of the authorities among the Member States explicitly stated that digital currencies may be considered as financial instruments. For example the German national financial authority – Federal Financial Supervisory Authority and German Federal Ministry of Finance argued that under German banking law Bitcoin may be classified as a financial instrument, and in particular as a security.[26]

## Practical Difficulties with Classifying Digital Currencies as Financial Instruments

Although in my opinion digital currencies may and will be classified as financial instruments under EU law in the future, there are several difficulties that may be associated with such a classification.

When it comes to digital currencies, it is impossible to specify a digital currency issuer and therefore there is no legal relation between the issuer of the financial instruments and its owner, which is a typical feature common to the majority of financial instruments.[27] A digital currency is created through a special algorithm using the Internet, and therefore as such it does not have, and does not operate through, an issuer.[28] Therefore although every digital currency has some sort of creator, such a creator may not be confused with the institution of an issuer on the grounds of the regulations of financial instruments.

It should be noted that there is no legal norm that would unconditionally bind a financial instrument with the institution of an issuer. Therefore, on purely legal grounds it is possible to classify a particular instrument as a financial instrument even if it does not

24 M. Spyra, Cele *prawa instrumentów finansowych oraz system narzędzi ich realizacji,* in: *Prawo Instrumentów Finansowych*, ed. M. Stec, Warszawa 2016, pp. 38–43.

25 K. Gorzelak, *Zbywalne instrumenty związane z redukcją emisji zanieczyszczeń,* in: *Prawo Instrumentów Finansowych*, ed. M. Stec, Warszawa 2016, p. 721.

26 S. Shcherback, op. cit., p. 74.

27 K. Zacharzewski, *Praktyczne znaczenie bitcoina na wybranych obszarach prawa prywatnego*, in: „Monitor Prawniczy" 2015, no. 4, p. 193.

28 R. Biernat, op. cit., p. 109.

have an issuer. Furthermore, according to some scholars, the significance of the institution of an issuer on the financial market is decreasing and it is beginning to be of secondary importance.[29] This is due to the gradual shift from the classical issuer based theory of securities to a more modern contract-based theory.[30] As a result of these reasons, scholars claim that a financial instrument without an issuer is just the next, natural step in the evolution of the concept of an issuer and, as a result, of financial instruments as such.[31] In my view, including instruments such as digital currencies that do not have an issuer within the scope of financial instruments will be the next step in the process of modernizing financial markets.

However, it should be borne in mind that the existing regulations on the trading of financial instruments are based on the current centralized market structure which relies on the concept of an issuer. As a result, the public law norms which relied heavily on existence of an issuer may not be adequate for the efficient regulation of digital currency trading. Therefore, creating of an effective and adequate legal framework for the regulation of digital currency trading that does not rely on the concept of an issuer will be a significant challenge for both international and national legislators.

In my opinion, due to the lack of there being a central entity of the issuer for trading in digital currencies, the supervisory powers of administrative authorities may be limited in the initial process of creating a new digital currency[32]. In the first stage the law should regulate information obligations regarding the risks associated with investing in digital currencies and the technical standards ensuring a high degree of trading security. The scope of supervision should therefore be therefore wider in the secondary market where administrative authorities could exercise their power through supervising digital currency trading between investors, and supervising the multilateral facilities that enable their trade.[33] It should be noted that usually the creation of a digital currency is conducted through a process of a so-called Initial Coin Offering – which in a way resembles a well-known institution of an Initial Public Offering[34]. In my opinion, the biggest emphasis of the future regulation should be put on regulating the conduct of those multilateral facilities by classifying them as either Organized Trading Facilities[35] or Multilateral Trading Facilities[36] under MIFiD II. Furthermore, more specific regulations creating

29 M. Mariański, *Pozycja emitenta na rynku finansowym – ewolucja oraz kierunki przemian*, in: „Przegląd Prawa Handlowego" 2017 no. 8, p. 37.

30 Ibidem, p. 37–38.

31 Ibidem, p. 40.

32 G. Sobiecki, *Regulowanie krypto walut w Polsce i na świecie na przykładzie Bitcoina – status prawny i interpretacja ekonomiczna*, i: „Problemy Zarządzania" 2015 vol. 13 no. 3, p. 156.

33 K. Zacharzewski, op. cit., p. 195.

34 I. Barsan, *Legal Challenges of Initial Coin Offerings (ICO)*, in: "Colloque" 2017 no. 3, p. 55.

35 Hereinafter: OTF.

36 Hereinafter: MTF.

a minimum level of cyber safety should be introduced since digital currency traders are often the victims of cyber attacks.[37]

## Defining Digital Currencies Under Public Law

As stated in the previous section, MIFiD II does not define particular instruments included in the scope of financial instruments and, similarly, defining particular instruments under the Polish legal regime is generally reserved for private law regulations.

However, on 19 January 2018 the Polish Minister of Development and Finances presented a Draft on a new act on the counter measuring of money laundering and terrorism financing, which contains the first attempt at creating a legal definition for digital currency in Poland. Furthermore, the European Commission introduced a Proposal for a new directive amending the Directive on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing.[38]

According to Article 1 sec. 2 of the Proposal, virtual currencies are a digital representation of value that is neither issued by a central bank nor a public authority, nor necessarily attached to a fiat currency, but is accepted by natural or legal persons as a means of payment and can be transferred, stored or traded electronically. Save for the remarks concerning acceptability as a means of payment raised for the Polish attempt at defining digital currencies below, the definition proposed by the European Commission seems to be broad and clear enough to accurately cover all digital currencies. Since the Polish attempt at defining digital currencies raises many more questions, this section will focus on the analysis of the Polish definition.

According to Article 2 sec. 2 item 26 of the Draft, the digital currency is a digital representation of value which is not a legal means of payment, international unit of account, electronic money, financial instrument, bill of exchange (Polish: *weksel*), nor a pay check. Furthermore, it specifies that a digital currency should be transferable in a business course for a legal means of payment, acceptable as a means of exchange, can be electronically stored or transferred, or can be subject to electronic trade.

At first, it should be noted that the definition clarifies that a digital currency is not *inter alia* a legal means of payment or a financial instrument. However, in my opinion it does not preclude that in the future, especially under the influence of EU law, digital

37 P. Opiatek, *Kryptowaluty jako przedmiot zabezpieczenia I poręczenia majątkowego*, in: „Prokuratura i Prawo" 2017 no. 6, p. 29.

38 Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, OJ 2015 L 141/73.

currency will be classified as either a legal means of payment or a financial instrument. Secondly, the definition contains the prerequisites for classifying a "digital representation of value" as a digital currency. Although the basic prerequisites of transferability and the possibility of digital storage are clear and undoubtedly they are met by any digital currency, the remaining prerequisites seem to be at least questionable.

In my opinion, the prerequisite of transferability to a legal means of payment and acceptability as a means of exchange can potentially rule out the majority of digital currencies from the scope of the definition. Firstly, it should be noted that not all of digital currencies may be directly transferred to a legal means of payment. Although in theory it is possible, in practice only the most popular digital currencies such as BitCoin or Ethereum may be directly sold for a regular currency. In order to be transferred to a legal means of payment, other digital currencies should first be transferred to one of another abovementioned digital currency that is directly transferable to money. In my view the fact that the definition directly states that digital currencies are not a legal means of payment, results in excluding those digital currencies that may be traded only for other digital currencies from the scope of the definition. This flaw may, however, be easily repaired by amending the prerequisite by clarifying that digital currencies should be directly or indirectly transferable to legal means of payment.

The second prerequisite of acceptability as a means of exchange may also potentially exclude the majority of digital currencies from the scope of the definition. The Draft does not specify what the scope of acceptability is. It is therefore unclear whether the particular digital currency should be a commonly acceptable means of exchange in order to fall within the scope of the definition. If that was a case then, again, only the most popular digital currencies would fulfil this criteria, since in practice services that offer the purchase of goods only accept very few digital currencies in exchange for them.

In my opinion, although the definition of digital currencies proposed in the Draft is potentially too narrow, as it would include only the most popular digital currencies, it is a good first step towards the regulation of digital currencies. Although some authors postulate that digital currencies can be well described by using existing civil law institutions,[39] there are material differences in the legal doctrine concerning their application. Therefore given the practical importance of digital currency trading for other areas of law such as penal or tax law, it seems that the creation of a legal definition of digital currencies would unify the jurisprudence and practice of authorities. In my view, it will also decrease the level of legal uncertainty and at the same time will form a strong basis for further regulations.

39 K. Zacharzewski, *Obrót…*, p. 145; Idem, *Bitcoin jako przedmiot stosunków prawa prywatnego*, in: „Monitor Prawniczy" 2014 no. 21, p. 1132, Idem, *Praktyczne…*, pp. 187–192.

## Examples of Applying Existing Public Law Regulations to Digital Currencies

Although the status of digital currencies is still not clearly established by the public law regime, there are certain examples of existing regulations that may be applicable to digital currency trading. The following examples do not form an exhaustive list of regulations that may potentially concern digital currencies. The chosen examples demonstrate mainly how existing regulations on capital and financial markets can to some extent cover digital currencies trading.

Digital currency trading may be subject to the disclosure obligations of public companies under Regulation No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse.[40] Under article 17 of MAR, a public company (or other entity falling within the scope of MAR) is obliged to immediately disclose inside information that directly concerns it. Article 7 of MAR defines inside information as information of a precise nature, which has not been made public, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments. The acquisition or disposal of a large volume of a digital currency by such an entity clearly meets the definition of inside information and therefore should be immediately disclosed.[41]

Furthermore, legal entities raising capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors may be considered as alternative investment funds under Directive no. 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers[42], and the Polish Act on investment funds and alternative investment funds managers of 27 May 2004[43], or as an alternative investing company under the Investment Funds Act. As neither the Alternative Investment Funds Directive nor the Investment Funds Act limit or list the scope of the term "investments" conducted by such companies or funds, it should be assumed that if such entities invest their clients' capital in digital currencies, this may fall within the scope of those regulations.

40 Regulation no. 596/2014 of the European Parliament and o the Council of 16 April 2014 on market abuse market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC, OJ 2014 L 173/1 (hereinafter: MAR).

41 K. Zacharzewski, *Praktyczne*…, p. 193.

42 Directive no. 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010, OJ 2011 L 174/1 (hereinafter: the Alternative Investment Funds Directive).

43 Dz. U. 2018 item 58 (hereinafter: the Investment Funds Act).

According to some scholars, some of the trading facilities used to trade digital currencies may be regulated under MIFiD II and therefore be classified as an OTF.[44] An OTF is a multilateral system which is not a regulated market or an MTF, in which multiple third-party buying and selling interests in bonds, structured finance products, emission allowances or derivatives are able to interact in the system in a way that results in a contract in accordance with Title II of MIFiD II. According to this definition, a multilateral system has to offer *inter alia* the possibility to trade financial instruments in order to be classified as an OTF. As was previously established, digital currencies cannot be considered as financial instruments. However some authors claim that although a digital currency is not a itself a financial instrument, a derivative contract of which the basic instrument is a digital currency may be considered as such financial instrument. According to Annex I section C item 10 of MIFiD II, derivative contracts relating to assets, rights, obligations, indices and measures (…), which have the characteristics of other derivative financial instruments, having regard to whether, inter alia, they are traded on a regulated market, OTF, or an MTF, are considered as financial instruments. The scope of this definition is broad enough to include derivative contracts relating to digital currencies, as digital currencies may be treated as a right. Therefore, with multilateral platforms that offer trading in digital currencies and digital currency derivatives, such trading may be considered as an ‚OTF under MIFiD II and therefore be a subject to its regulations.

## Conclusions

The technological progress of the modern world raises numerous challenges which must be faced by legislators across the globe. The growing popularity of digital currencies provides new possibilities of investing and concluding transactions, but at the same time is associated with significant risks for investors, public safety and financial markets as a whole. Although currently there are no proposals for complex regulations regarding the status of digital currencies and their trading in either the EU or Poland, some first attempts to regulate this issue are being created. Nevertheless, some of the already existing regulations concerning financial markets may be indirectly applied to digital currencies. Undoubtedly, creating complex regulation for digital currencies, most probably at the EU level, is necessary. Such regulation would allow the creation of effective supervision over the digital currencies market. However, creation of such a regulation will be a challenge for legislators due to the nature of digital currencies and the differences between them and other financial instruments, it could increase the level of public trust towards digital currencies, and as a result increase their popularity.[45]

44 K. Zacharzewski, *Obrót…*, pp. 149–151.

45 E. Chojna-Duch, *Rynek kryptowalut – regulacje i ryzyko*, in: „Puls Biznesu" 2018 no. 11, p. 20.

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**SUMMARY**

**Digital Currencies Trading under Polish and EU Public Law**

Digital currencies are a worldwide phenomenon gaining an increasing interest among investors, economists and legal scholars. They are used mainly as a new mean of exchange and as a new way of investing funds, since the rapid changes in their value allow to gain extraordinary profits. Up to this point the legal status of digital currencies has not been clearly established under neither Polish nor EU public law, although some of the existing regulations may be indirectly applied to them. Under current regulations digital currencies cannot be treated as a legal mean of payment, as an electronic money nor a financial instrument. Creation of a complex regulation regarding digital currencies and granting administrative authorities supervisory powers over their trade seems to be necessary. Because of the evolution of financial markets, classifying digital currencies as financial instruments is a possible way of regulating their trade.

Keywords: Digital currency, trading, financial instruments, money, regulation

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