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A MATTER OF PURE CONSCIENCE? FRANZ WIEACKER AND HIS "CONCEPTUAL CHANGE"*

1. A HIGH-RISK BIOGRAPHY

Are private letters, particularly letters politically exonerating their author or addressee, reliable? May we consider the so-called *Persilscheine* of the German denazification procedure following WWII a trustworthy historical source? Can a work purporting to be a "history of the ideas of German legal historian Franz Wieacker" (V), which focuses on the personal development of these ideas in Wieacker's own thought, be seriously written whilst omitting the sole publication devoted to his scholarly activity and achievements during the Nazi era?[1] If you would answer all these questions in the affirmative, you will no doubt consider the biography of Wieacker published recently by Dr. Ville Erkkilä a well-made piece of legal historiography.

Wieacker, whom I remember as an urbane elderly gentleman, and whose pupils and pupils' pupils are today still active in the academy, is an extremely unrewarding object of historical study. On occasion, we encounter his name in connection with awkward propositions; for instance, that he made his scholarly career "under the Nazis, but not with the Nazis",[2] that his characterization of the reception of Roman law in Germany as 'scientification' (*Verwissenschaftlichung*)

* V. Erkkilä, *The Conceptual Change of Conscience. Franz Wieacker and German Legal Historiography 1933–1968*, Tübingen 2019, p. XIII & 314. Numbers in brackets refer to pages of the book.

[1] R. Kohlhepp, *Franz Wieacker und die NS-Zeit*, „Zeitschrift der Savigny-Stiftung Romanistische Abteilung" 2005, Vol. 122, pp. 203–223.

[2] J. G. Wolf, *Die Gedenkrede*, (in:) *In memoriam Franz Wieacker. Akademische Gedenkfeier am 19. November 1994*, Göttingen 1995, p. 23.

"was a courageous act, since it could have brought him … dangerous censure from fundamentalist legal scholars backed by the SS" (125–126),[3] and that the path of compromise – pursued by Wieacker in the Nazi era – seems compromising, but only "from today's point of view" (*aus heutiger Sicht*).[4]

It was in the framework of the 1933 Nazi "revolution" that young legal scholars like Wieacker, his mentor Carl Schmitt, and Wieacker's comrades Ernst Rudolf Huber, Ernst Forsthoff, Erik Wolf, Friedrich Schaffstein, Karl Michaelis, Georg Dahm and some others actively adopted "revolutionary" legal language aimed at the "legal renewal" (*Rechtserneuerung*) of German society and the German state (84). Dr. Erkkilä correctly observes that "Wieacker participated in 'legal renewal' with a notable contribution, and published regularly in journals whose ideological stance was unmistaken National Socialist" (86). Phrases recommending something like a "Durchordnung des deutschen Gesamtraums nach einheitlichen raumeigenen Gesichtspunkten"[5] flowed easily from his pen.

However, in retrospect Wieacker presents himself rather as a victim of his own falsely invested belief in the seriousness of the Nazi renewal.[6] So the reader is entitled to assume the existence of two Wieackers. The first being that depicted by his benevolent Jewish teacher Fritz Pringsheim in an exonerating letter drafted in 1947 at Oxford:[7] unpractical, having only scholarly interests, and averse to party politics, and the other: a socially engaged protagonist of a racial ideology, apparently so committed that an orthodox adherent of that ideology, Hans Kreller, singled him out as one of the most energetic (*tatkräftig*) workers at the building site of the German legal community (*Neubau des deutschen Gemeinrechts*).[8]

As a historian of ideas, Dr. Erkkilä attaches much more importance to mere concepts then to brute social facts, which appears, for the reader-jurist, not as a particular shortcoming, but as relatively normal. The central concepts of the book are *Rechtsbewusstsein* or legal consciousness (65–176) and *Rechtsgewissen* or legal conscience (177–279). Both are frequently, though not always (234), treated by Wieacker as synonyms (283). Dr. Erkkilä characterizes Wieacker

[3] The quotation is prefaced by "Liebs asserts", but I do not see anything similar in D. Liebs, *Franz Wieacker 1908 bis 1994 – Leben und Werk*, (in:) O. Behrends, E. Schumann (eds.), *Franz Wieacker. Historiker des modernen Privatrechts*, Göttingen 2010, p. 38.

[4] O. Behrends, *Franz Wieacker 1908–1994*, „Zeitschrift der Savigny-Stiftung Romanistische Abteilung" 1995, Vol. 112, p. XXV.

[5] F. Wieacker, *Vielfalt und Einheit der deutschen Bodenrechtswissenschaft der Gegenwart*, Stuttgart–Berlin 1942, p. 9.

[6] F. Wieckaer, *„Wandlungen der Eigentumsverfassung" revisited*, „Quaderni Fiorentini per la Storia del Pensiero Giuridico Moderno" 1976-77, Vol. V–VI, p. 842.

[7] Cited by O. Behrends, *Franz Wieacker 1908–1994...*, pp. XXVI–XXVII.

[8] H. Kreller, *Weitere Büchereingänge*, „Zeitschrift der Savigny-Stiftung Romanistische Abteilung" 1944, Vol. 64, p. 463.

as a legal scholar whose commitment to the concept of legal consciousness was intense and continuous, and remained so in his post-war writings (73).

2. LEGAL CONSCIOUSNESS

Despite Wieacker's embrace of legal consciousness, the concept was not an invention of his, but of the great Savigny (67–69, 71, 179). However, it was also known to the 19th century Russian legal philosophers Kistiakovskij, Novgorodcev, Il'in and Petrażycki, who all tried to fill the gap between a retrograde legal order of the Tsar's Empire and its modern consciousness.[9] Both legal consciousness and legal conscience, qualified as "revolutionary", were subsequently introduced in the Soviet *Decree on Courts Nr. 1* of 1917. Thus, while the old law had been abolished *en bloc*, the war communism of 1918–1921 at least found some measure of expression in "legal consciousness" (*pravovoje soznanie*), abridged by the Bolsheviks to *pravosoznanie*.

Similarly to pre-revolutionary and revolutionary Russia, both ignored by Dr. Erkkilä, in the Germany of the 1930s legal positivism was harshly criticized and even condemned as immoral (69). Thus, the importance of legal consciousness in Wieacker's oeuvre is explained by the fact that he was always a strong anti-positivist. "The point of departure for 'new legal science,' and accordingly for the new *Studienordnung* (study program) was anti-positivism" (86). Already in a paper on the all-round renewal of German legal science, published in 1937, Wieacker pleaded for judicial anti-positivism based on the Nazi worldview.[10] However, a question must be allowed: is the rule of law without a grain of positivism imaginable?

In the realm of legal history, Wieacker applied the concept of legal consciousness as a tool to describe the reception of Roman law in Germany which "separated the German legal consciousness and the administration of the state" (128) or, to put it – following Dr. Erkkilä – more bluntly, "the people and the state" (125). As a matter of fact, Wieacker embraced initially, together with the Nazis, the old Germanist topos on the reception of Roman law as a "national misfortune" (*Unglück*) of the Germans. As early as 1940 he characterizes it as a "real calam-

[9] R. S. Wortman, *The Development of a Russian Legal Consciousness*, Chicago–London 1976, pp. 225–234; A. Sproede, *„Rechtsbewusstsein"* (*pravosoznanie*) *als Argument und Problem russischer Theorie und Philosophie des Rechts*, „Rechtstheorie" 2004, Vol. 35, Sonderheft Russland/Osteuropa, pp. 442–476; A. Walicki, *Legal Philosophies of Russian Liberalism*, Oxford–New York 1967, pp. 213–290.

[10] F. Wieacker, *Der Stand der Rechtserneuerung auf dem Gebiete des bürgerlichen Rechts*, „Deutsche Rechtswissenschaft" 1937, Vol. 2, p. 25.

ity" (*echtes Verhängnis*)[11] and in 1941 laments: "Who could deny that the reception of alien law in Germany would became a calamity?".[12]

The concept of legal consciousness continued to be central for Wieacker during the post-war years. In the obituary for Andreas Bertalan Schwarz, a renown civilian and Roman lawyer of Jewish origin, Wieacker called in 1954 for a renewed European *ius commune* as a protective means against any positivism, whether of "particularistic-national" or "totalitarian" origin.[13] And in his famous 1976 reevaluation of his early doctrine of property,[14] Wieacker traced the source of his juvenile illusions to an anti-positivist faith that the Nazi regime would really aim at a balanced restructuring of the German societal constitution.[15]

3. LEGAL CONSCIENCE

Within a common legal consciousness of the people (*Rechtsbewusstsein*), bound to time, place, and historically changing cultural principles, Dr. Erkkilä distinguishes (178) the sub-concepts of "social status" (*Stand*) and "learnedness" (*Bildung*). On the other hand, legal conscience (*Rechtsgewissen*) is an atemporal and non-spatial mental tool for use by juristic experts (177). Legal conscience was grounded in ideas of "scholarly togetherness" or "communality" (*Kameradschaft*) and creative legal wisdom (*Schöpfung*, 178). However, legal conscience – as a form of specifically juristic wisdom – was situated within the legal tradition (183–184), even if it comprised equally the phenomenon of creative legal thinking (205).

Dr. Erkkilä considers Wieacker's construction of the legal conscience of late republican Roman lawyers as a "point of reference" or "historical ideal" for subsequent legal cultures (226, 249). We know, however, that the Late Republic has produced very few works of juristic literature, so that Wieacker himself was forced to qualify his construction of the legal conscience of this period with the help of the somewhat paradoxical concept of the "pre-literary classic" (*vorliterarische*

[11] F. Wieacker, *Einflüsse des Humanismus auf die Rezeption*, „Zeitschrift für die gesamte Staatswissenschaft" 1940, Vol. 100, p. 423; cf. M. Avenarius, *Verwissenschaftlichung als „sinnhafter" Kern der Rezeption*, (in:) O. Behrends, E. Schumann (eds.), *Franz Wieacker. Historiker des modernen Privatrechts*, Göttingen 2010, pp. 124–136.

[12] F. Wieacker, review *Max Kaser*, *Römisches Recht als Gemeinschaftsordnung*, „Zeitschrift für die gesamte Staatswissenschaft" 1941, Vol. 101, p. 171.

[13] F. Wieacker, *In memoriam Andreas Bertalan Schwarz*, „Zeitschrift der Savigny-Stiftung Romanistische Abteilung" 1954, Vol. 71, p. 606.

[14] F. Wieacker, *Wandlungen der Eigentumsverfassung...*, Hamburg 1935.

[15] F. Wieacker, *„Wandlungen der Eigentumsverfassung" revisited...*, p. 842.

Klassik).[16] This oxymoron was, on the one hand, rightly refused by Wolfgang Kunkel who, in reference to the notion of 'classic', required "something which I can see",[17] and, on the other hand, finally abandoned by Wieacker himself.[18]

The concept of the 'classic' receives some clarification from the antagonism between vulgarism and classicism, both defined by Wieacker in 1954 as embodying "timeless style phenomena of high juristic civilizations" (*Hochkulturen*).[19] However, in a more substantial sense, vulgarism also represents a "collapsed legal order" (162) or even the "destruction of a legal system" (172). Neither Wieacker nor Dr. Erkkilä ever queried the utility of the concept "classical law", which downgrades all subsequent periods to postclassical or vulgar and all earlier ones to pre-classical. That's just too bad according to a fatalistic Wieacker, as the concept of classical jurisprudence "is simply given to us".[20]

However, as we positively know, the legal classicism of the Late Roman Republic was not only "pre-literary"; it also lacked any relevant mechanism for the oral transmission of legal doctrines of that time: Homers of Roman jurisprudence are unknown. Nevertheless, phantasmal theoretic problems concerning the identification of phenomena usually considered classical, albeit already existing in times preceding the emergence of a classical literature, did not really perturb the German scholarly community in the 1950s when Wieacker's "classic" paper was first published. Of much greater relevance in the German legal discourse from the 1930s onward was the problem of the reception of Roman law.

At that time, Wieacker initially adopted the view that "Germany was possessed by a hostile national mentality towards any influence of European (Roman) legal culture"; this was a mentality based on "an illusion of the foreign and arbitrary essence of the European legal tradition" (146). As we have already noted, Wieacker consequently qualified the reception of Roman law opportunistically as a "national misfortune" and a "real calamity" for the Germans. Only beginning with his writings of 1944, when the brochure "*Das römische Recht und das deutsche Rechtsbewusstsein*" was published, did the issue of the reception of Roman law in Germany come to be more neutrally characterized as a particular case (*Sonderfall*) of the relationship between European nations and the law of late Antiquity.[21]

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[16] F. Wieacker, *Vom römischen Recht. Zehn Versuche*, Stuttgart 1961, pp. 165, 173, 175.

[17] W. Kunkel, *rec. Wieacker*, Über das Klassische in der römischen Jurisprudenz, „Zeitschrift der Savigny-Stiftung Romanistische Abteilung" 1952, Vol. 69, p. 467.

[18] F. Wieacker, *Römische Rechtsgeschichte. Quellenkunde*, *Rechtsbildung*, *Jurisprudenz und Rechtsliteratur*, Vol. I, München 1988, p. 521; on this controversy cf. T. Giaro, *Max Kaser 1906–1997*, „Rechtshistorisches Journal" 1997, Vol. 16, p. 284.

[19] F. Wieacker, *Vom römischen Recht. Zehn Versuche...*, p. 226.

[20] F. Wieacker, *Vom römischen Recht. Zehn Versuche...*, p. 164; cf. T. Giaro, *Max Kaser 1906–1997...*, pp. 282–283.

[21] F. Wieacker, *Das römische Recht und das deutsche Rechtsbewusstsein*, Leipzig 1944, p. 8.

4. RACISM: THE TESTIMONY OF WIEACKER'S WRITINGS

After the take-over of 1933, the empirical evidence for the Nazis' anti-Semitism accumulated at an ever-accelerating rate (79). Nonetheless, Dr. Erkkilä sees no real connection between the anti-Semitic purges at the German universities during the 1930s and the careers of young legal scholars such as Wieacker. Dr. Erkkilä restricts himself to the conclusion that "the dismissal of Jewish professors left many chairs in different universities open, and competition for these vacancies was fierce". In this situation, the poor young legal scholars of the Aryan race – concludes Dr. Erkkilä somewhat hastily – "had no choice but to toe the Third Reich line" (84).

Connoisseurs of Wieacker's scholarly oeuvre would no doubt be surprised by Dr. Erkkilä's assertions that Wieacker did not participate "in the racist rhetoric of the Third Reich", and also that his private letters contain "not a single racist remark, nor any signs of willingness to propagate fascist ideology" (87; sic! albeit that the epithet "fascist" suits better the totalitarianism of Italy).[22] Well, so we know that he abstained from racist remarks, but – it should be added – he also abstained from anti-racist remarks. However, let us leave the letters aside and examine Wieacker's public utterances contained in his scholarly works.

Not later than 1937, in the second issue of the new legal journal "Deutsches Recht" (the principal organ of the National Socialist Association of German Legal Professionals directed by Hans Frank), Wieacker published a paper dedicated to the historical origins of the Nazi marital reform. Here he approved of the infamous Nazi Law for the Protection of German Blood (*Blutschutzgesetz*) of 15 September 1935 and the equally ill-famed Marital Health Law (*Ehegesundheitsgesetz*) of 18 October 1935. In the same context he endorsed "*connubium* [using the Germanized form *Konnubium*] with the old, racially more or less related, settlement- and fate-neighbors of the German people".[23]

Moreover, also in 1937, Wieacker surveyed – in the theoretical law journal of Nazi Germany, "Deutsche Rechtswissenschaft"– the overall condition of legal renewal in the whole sector of civil law. Published as a quarterly of the *Akademie für Deutsches Recht*, and directed by the stalwart Nazi Karl August Eckhardt, the journal was considered the mouthpiece of the *Kieler Schule*. Here Wieacker welcomed wholeheartedly once again the return of the ancient institution of limited marriage capacity (*connubium*).[24] As far as can be discerned from

[22] F. Wieacker, *review of Paul Koschaker*, *Europa und das römische Recht*, „Gnomon" 1949, Vol. 21, p. 191.

[23] F. Wieacker, *Geschichtliche Ausgangspunkte der Ehereform*, „Deutsches Recht" 1937, Vol. 7, pp. 181–182.

[24] F. Wieacker, *Der Stand der Rechtserneuerung...*, p. 18.

Dr. Erkkilä's extensive biography, both citations remain unknown to the author, or perhaps known but – alas! – judged irrelevant.[25]

Probably for one of the above reasons both papers are absent from the scholarly bibliography of Franz Wieacker's writings compiled by Dr. Erkkilä and found at the end of his biographical work (305–306). Interestingly enough, Wieacker probes the legal history of ancient Rome in a search for ennobling historical antecedents (*geschichtliche Ausgangspunkte*) of the Nazi marital reform instead of identifying it directly by its proper name: barbarism; a term which after the war he does not hesitate to use in reference to the Americans (155) or Bolshevists (189). Or he could simply have kept silent, which some German jurists succeeded in doing, including Leo Raape, Franz Böhm, Ludwig Raiser, Helmut Coing, Ernst von Caemmerer, and Werner Flume.

Apart from the enthusiastic welcome given by Wieacker to the resurgence of the *connubium* in its modern anti-Semitic form, he stressed the importance of considerations relating to worldview and race (*weltanschaulich-rasserechtlich*) and expressed his concern about the biologically correct constitution of the German racial body (*Volkskörper*).[26] Moreover, he emphasized that following the *völkische Revolution* and a new *völkische* moral order,[27] the content of German family law was now predetermined by the ideological foundation of blood heritage and race (*Bluterbe und Rasse*).[28] The "biologically inferior" (*Minderwertig*) young individual must be segregated, since he is "not a utilizable member of the whole" (*ein nutzbares Glied des Ganzen*).[29]

Furthermore, racial accents are also present in Wieacker's writings focused on Roman legal history. In this vein, he placed hope in a narrow cooperation reserved for "the new Europe" of the post-war time, cooperation which was expected to take place between nations related in blood and spirit (*nach Blut und Geist verwandt*).[30] Moreover, with a view to his historical subject, Wieacker also mentioned "alien blood" (*fremdes Blut*) and habits that existentially subverted the specifically Roman orientation.[31] Finally, he referred to the so-called great

[25] Cf. by contrast O. Behrends, *Franz Wieacker 1908–1994...*, pp. XXXII–XXXIII; R. Kohlhepp, *Franz Wieacker und die NS-Zeit...*, pp. 214–215, 221–222.

[26] F. Wieacker, *Der Stand der Rechtserneuerung...*, p. 18.

[27] About the concept of *völkisch* cf. J. Schröder, *Rechtswissenschaft in Diktaturen: die juristische Methodenlehre im NS-Staat und in der DDR*, München 2016, pp. 43–45.

[28] F. Wieacker, *Geschichtliche Ausgangspunkte...*, p. 178; other quotations in V. Winkler, *Der Kampf gegen die Rechtswissenschaft. Franz Wieackers „Privatrechtsgeschichte der Neuzeit" und die deutsche Rechtswissenschaft*, Hamburg 2014, p. 462.

[29] F. Wieacker, *Zum gegenwärtigen Stand des Jugendhilferechts*, „Zeitschrift für die gesamte Strafrechtswissenschaft" 1939, Vol. 58, pp. 66–67.

[30] F. Wieacker, *Der Standort der römischen Rechtsgeschichte in der deutschen Gegenwart*, „Deutsches Recht" 1942, Vol. 12, pp. 54–55; cf. R. Kohlhepp, *Franz Wieacker und die NS-Zeit...*, p. 206.

[31] F. Wieacker, *Vom römischen Recht. Wirklichkeit und Überlieferung*, Leipzig 1944, pp. 162–163.

ancient catastrophe affecting the Roman Empire in the 3rd century, which deprived Roman law of its proper national (*eigenvölkisch*) reality.[32]

5. NAZISM: THE TESTIMONY OF WIEACKER'S CONDUCT

These anti-Semitic Nazi clichés are perhaps consummated by a statement given by Wieacker during a public conference at the University of Leipzig on 20 November 1943. At that time, Wieacker tentatively aggregated the (West) Slavic people within the European population – which can be contrasted with the approach of his antagonist Koschaker who relegated them to "the periphery or even outside Europe"[33] – but situated them at a decidedly "simpler stage of development" (*schlichtere Entwicklungsstufe*). Not unexpectedly, this served to condemn them to receive condescending "instruction" (*Unterweisung*) from a mature people which in fact happened during the German colonization of Eastern Europe (*Ostkolonisation*).[34]

During WWII Wieacker had a personal encounter with the aforementioned people. "His scholarly work was interrupted when Germany invaded Poland …" and – Dr. Erkkilä recounts – "Wieacker was drafted" (99). He served from 1 September 1939 to the end of the month.[35] Oddly, Wieacker characterizes himself as a victim when referring in a letter to the German attack against Poland: "the progression of the war can put an end to my scientific work for an indefinite period... In practice the result would be that the editors cannot expect the delivery of my manuscript for two and a half years…" (100).

What a horrific prospect for the scholarly reading public of Germany! And what about Poland? In Poland some 100,000 civilians were killed by German armed forces during the 1939 September campaign, characterized by the indiscriminate and often deliberate targeting of civilian populations and by shocking barbarity, foretelling the German genocidal ambitions in Eastern Europe.[36] But let us return to inner-German problems during the years 1933–1945 and assume

[32] F. Wieacker, *Das römische Recht und das deutsche Rechtsbewußtsein*, Leipzig 1944, pp. 8–9.

[33] P. Koschaker, *Europa und das römische Recht*, 4th ed., München–Berlin 1966, pp. 146, 325.

[34] F. Wieacker, *Das römische Recht...*, p. 37; the post-war editions do not contain this fragment (F. Wieacker, *Gründer und Bewahrer. Rechtslehrer der neueren deutschen Privatrechtsgeschichte*, Göttingen 1959, pp. 9–43).

[35] D. Liebs, *Franz Wieacker 1908 bis 1994...*, p. 28.

[36] J. Böhler, *Auftakt zum Vernichtungskrieg: Die Wehrmacht in Polen 1939*, 2nd ed., Frankfurt a.M. 2006, pp. 241–247; T. Snyder, *Bloodlands: Europe between Hitler and Stalin*, New York 2010, pp. 119–123; R. Moorhouse, *First to Fight. The Polish War 1939*, Vintage 2019, p. 263.

for the time being that despite living in a notoriously racial state,[37] Wieacker – as eagerly attested by Dr. Erkkilä – avoided taking an active part in its "racist rhetoric" (87).

However, even if merely as a man living through these times, Wieacker assumed at least the passive part of a witness to this spectacle of racist rhetoric organized by the Nazis. So we are entitled to enquire into his attitude towards the racist policy and practice so pervasive in his personal and professional surroundings.[38] Did he not notice the Aryanising of the law faculties at German universities, of editorial boards in legal journals, of courts, offices and corporations? Did he not complete the form for his personal Aryan certificate (*Ariernachweis*)? And during the *Reichskristallnacht*, did he not hear the glass breaking?

Dr. Erkkilä, whose indifference towards the real life problems of the period seems at times almost impressive, insists that according to Wieacker "the 'racial element' was irrelevant to science" (98) or, what's more, even "incomprehensible" in the scientific context (284). In fact, Wieacker is depicted by Dr. Erkkilä as concerned exclusively with *Bildung* and *Stand* (54–59, 99), which means respectively "legal education" and "the legal estate" in the sense of the "guild of jurists" (130, 257). This may explain why an individual permanently occupied with such abstract topics was defined by the German security organs as politically 'reliable' (99).

And what about the German legal community of the Nazi-era? Did its members consider Wieacker as one of them? Hans Kreller, himself a Nazi 'no ifs, no buts,' still defines Wieacker as late as 1944 as one of the most energetic (*tatkräftig*) builders of the new German community law (*Neubau des deutschen Gemeinrechts*).[39] Another committed Nazi, Heinrich Lange, counted Wieacker already in 1941 among the leading figures of the *Kieler Schule*.[40] During the denazification procedure, Wolfgang Kunkel stressed that Wieacker "at least externally joined the row of authors which were labelled as national socialist."[41]

It is a fact, corroborated by Dr. Erkkilä, that Wieacker enjoyed a "firm position in the intellectual context of the *Kieler Schule*" (122, 91–92), albeit that a German paper devoted to the *Kieler Schule* and published in 1992, when Wieacker was still alive, does not mention him at all.[42] Wieacker participated also in the so-called

[37] M. Burleigh, W. Wippermann, *The Racial State: Germany 1933–1945*, Cambridge 1991, *passim*; D. T. Goldberg, *The Racial State*, Wiley-Blackwell 2001, *passim*.

[38] D. Simon, *Franz Wieacker 5. August 1908-17. Februar 1994*, „Rechtshistorisches Journal" 1994, Vol. 13, p. 9.

[39] H. Kreller, *Weitere Büchereingänge...*, p. 463.

[40] H. Lange, *Die Entwicklung der Wissenschaft vom bürgerlichen Recht seit 1933. Eine Privatrechtsgeschichte der neuesten Zeit*, Tübingen 1941, p. 11; cf. V. Winkler, *Der Kampf gegen die Rechtswissenschaft...*, p. 464.

[41] V. Winkler, *Der Kampf gegen die Rechtswissenschaft...*, p. 463.

[42] J. Eckert, *Was war die Kieler Schule?*, (in:) F. J. Säcker (ed.), *Recht und Rechtslehre im Nationalsozialismus*, Baden-Baden 1992, pp. 37–70.

Aktion Ritterbusch (96–97), officially known as the "War effort of the German humanities". In this context he presented several early papers, written in the years 1934–36, which are considered to this day the most notable testament to the Nazi doctrine of landed property with its public commitments;[43] the apparent assimilability of this doctrine dissimulated in masterly fashion the particular political goals of the totalitarian state.[44]

Dr. Erkkilä acknowledges the property question as "naturally fundamental" to the Nazi party, which clearly aimed "to build a totalitarian nation and demolish subjective, state-provided rights" (115). This danger was noted and the doctrine sharply censured in 1938 by the Austrian Roman lawyer and long-serving professor within the German university system, Paul Koschaker. His "dogmatic understanding of historical development" may have been methodologically outdated (232), but nonetheless he proved to be – apart from early Nazi critics as Heinrich Stoll and Hans Würdinger[45] – the strongest critic of Wieacker's theory of property.[46]

Dr. Erkkilä elsewhere[47] attests that Wieacker's "obligatory references to the *Führer* are few and notably perfunctory". Clearly, Wieacker did not ape the practices of his Austrian colleague the legal historian Ernst Schönbauer, a staunch Nazi, who cited "our beloved leader" (*geliebter Führer*) no less than four times in a short speech of scarcely two pages.[48] However, Dr. Erkkilä omits an exception found in Wieacker's critique of Koschaker. Wieacker trumpets[49] that "[n]one other than our *Führer* ascribed this directly educational and contemporary value to ancient history", after having denounced Koschaker's actualization program as a "veneration of dead (*ausgelebt*) ideals" and "perpetuation of an outdated (*überaltert*) type of scholarship."

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[43] F. R. Hausmann, *„Deutsche Geisteswissenschaft" im Zweiten Weltkrieg. Die Aktion Ritterbusch 1940–1945*, Dresden 1998, pp. 262–264.

[44] E. D. Graue, *Das Zivilrecht im Nationalsozialismus*, (in:) F. J. Säcker (ed.), *Recht und Rechtslehre im Nationalsozialismus*, Baden-Baden 1992, p. 121; T. Keiser, *Eigentumsrecht in Nationalsozialismus und Fascismo*, Tübingen 2005, p. 118; V. Winkler, *Der Kampf gegen die Rechtswissenschaft...*, p. 485; apologetic J. G. Wolf, *Die Gedenkrede...*, pp. 26–28.

[45] Cf. T. Keiser, *Eigentumsrecht...*, pp. 15, 91–96, 128–143.

[46] T. Giaro, *Aktualisierung Europas. Gespräche mit Paul Koschaker*, Genova 2000, pp. 55, 75, 96–97, 115; id., *Der Troubadour des Abendlandes*, (in:) H. Schröder, D. Simon (eds.), *Rechtsgeschichtswissenschaft in Deutschland 1945–1952*, Frankfurt a.M. 2001, p. 49.

[47] V. Erkkilä, *Roman Law as Wisdom*, (in:) K. Tuori, H. Björklund (eds.), *Roman Law and the Idea of Europe*, Bloomsbury 2019, p. 208.

[48] J. W. Hedemann, *Bürgerliches Recht im Dritten Reich. Ein Vortrag mit einem Anhang: Die Akademie für deutsches Recht*, Berlin 1938, pp. 46–47.

[49] F. Wieacker, *Die Stellung der römischen Rechtsgeschichte in der heutigen Rechtsausbildung*, „Zeitschrift der Akademie für deutsches Recht" 1939, Vol. 6, pp. 405–406; R. Kohlhepp *Franz Wieacker und die NS-Zeit...*, p. 205.

6. DEFENCE STRATEGIES. *PERSILSCHEINE* AS HISTORICAL SOURCES?

In 1946, Wieacker rejected as "monstrous" (*monströs*) and "outrageous" (*empörend*) the denunciations of Professor Ludwig Schnorr von Carolsfeld (of the University of Erlangen), with which the latter charged him in the denazification procedure (148). And as, thirty years later, he composed the essay in which he reconsidered his famous property-brochure, he managed only to formulate a naive rhetorical question: "Could the new property doctrine embolden the oppressions and illegalities of the Nazis?" (*Unterdrückungen und Rechtsbrüche des Regimes ... ermutigen*).[50] The negative answer implied was expected to diminish Wieacker's share of responsibility in the process of making Germany a totalitarian state (14–15).

In this context, Wieacker found himself in the good company of several conservative legal scholars around Carl Schmitt whose disappointment in the early 1940s was characterized by Dr. Erkkilä as "genuine" when the whole legal renewal seemingly latent in the ideas promoted by the Nazis in the 1930s turned out to be a lie (134). This credulity of young albeit adult people may be attributable to the fact that in Germany – as Wieacker bitterly stated in his Jhering-brochure of 1942 – thinking is strongly informed by school and academy, resulting in a lawyer being essentially ill-qualified to perform the duties inherent to that status (*zum Geschäft des Denkens an sich nicht berufen*).[51]

We notice a similar childish attitude in Wieacker's closest friend, the constitutional lawyer Ernst Rudolf Huber (258–260), to whom in 1952 – despite the general boycott to which he was subject directly after WWII – Wieacker, as Dean of the Law Faculty in Freiburg i.B., assigned teaching responsibilities in modern constitutional history. During the Nazi-era, Huber had proved very successful in legitimizing Hitler's dictatorship as *Führerstaat*; so much so that he gained – alongside Carl Schmitt – the title of "crown jurist of the Third Reich". Nevertheless, afterwards Huber "could not see himself as having advanced the National Socialist cause" (137).

Such defensive strategies also permitted Wieacker to ignore, even after WWII and probably against his better knowledge, the systemically totalitarian nature of Nazism. Being of this nature, the system had need not only of men in the streets wielding big sticks, but also required jurists, historians, and other intellectuals able to put the highest achievements of the European spirit to the service of Hitler and his clique. Depicting totalitarian transformations as inevitable or at least

[50] F. Wieacker, *„Wandlungen der Eigentumsverfassung" revisited...*, p. 842; cf. V. Winkler, *Der Kampf gegen die Rechtswissenschaft...*, p. 485.

[51] F. Wieacker, *Rudolf von Jhering. Eine Erinnerung zu seinem 50. Todestag*, Leipzig 1942, pp. 7, 9–10.

highly desirable, these jurists and intellectuals paved the way to discrimination, plunder, murder and, ultimately, genocide.[52]

In Wieacker's view, a concerned Dr. Erkkilä surmises, "denazification was a manifestation of the lack of a 'conscientious' legal culture" (286). So the legal conscience which, conversely, assisted the Germans in Hitler's time – if we draw the conclusions which the insight appears to endorse – took its departure as soon as the barbarian armies of the Yanks and Bolshevists arrived (155, 189). Moreover, the denazification was "a drastic disappointment" also to Wieacker's "network of colleagues" (289), such as Huber, Michaelis, and Dahm. In fact, Nazi communities, such as the lecturer academy of Frankfurt a.M., the *Kieler Schule*, and the law faculty at Leipzig, are remembered by Wieacker somewhat nostalgically (205, 261). Indeed, even some of the 'credit' for rebuilding them anew after WWII at the law faculty in Göttingen is attributable personally to Wieacker.[53]

7. ALWAYS A SCHOLAR, ALWAYS THE SAME SCHOLAR?

Throughout the book, the defense of Wieacker, undertaken and accomplished by Dr. Erkkilä with expedition, follows a triple strategy. Dr. Erkkilä states on the basis of Wieacker's publications and letters first that he was never a Nazi and absolutely not a racist (86–87), second that he belonged to the already mentioned circle of conservative legal scholars who already during the early 1940s "understood the hollowness, cynicism and unscientific nature" of the legal renewal deceitfully promised by the Nazis in the 1930s (134, 212), and thirdly that the Nazi content of Wieacker's writings – even if there is any to be found – does not create difficulties for the approach of Dr. Erkkilä who "intended to go beyond such questions" (281).

It was not political ideology, insists Dr. Erkkilä, but rather Wieacker's "strong personal understanding of the essence of social justice" that was "the prior point of departure for his writings" (282). Evidently, Dr. Erkkilä follows here the reasoning developed in Wieacker's own 1976 reconsideration of his National-Socialist property doctrine, in which Wieacker identifies his earlier self as "the young legal historian and social critic of the early 1930s".[54] But it is sufficient to recall the explicitly "racial" categorizations underpinning the writings collected above to see how much in these Nazi-era publications had to be modified by the post-war era Wieacker, often by judicious omissions.

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[52] The most classical investigation is M. Weinreich, *Hitler's Professors. The Part of Scholarship in Germany's Crimes against the Jewish People*, New York 1946; 2nd ed. Princeton 1999.

[53] V. Winkler, *Der Kampf gegen die Rechtswissenschaft...*, pp. 474–476.

[54] F. Wieacker, *„Wandlungen der Eigentumsverfassung" revisited...*, p. 842.

Besides these racially begrimed fragments, this was also the fate of the warm welcome Wieacker had given in 1942 to the violent Nazi rejection of the idea of penal law, characterized by liberal jurists as The Great Charter of Freedoms (*Magna Charta*) of the criminal. The idea had been promoted by Jhering, but most notably Liszt, to whom we may even accredit the concept of punishment as protection, i.e. punishment endowed with the purpose of establishing security.[55] While present in the "first edition" of Wieacker's brochure, commemorating in 1942 the 50th anniversary of Jhering's death,[56] this critique of humane penal law disappeared, for obvious reasons, from subsequent versions and editions.

In spite of all this, Dr. Erkkilä emphasizes that between 1933 and 1968 Wieacker's personality endured unchanged: "the core of his scholarly identity remained the same from Weimar to the Federal Republic of Germany" (V, 289). Impressive, but it is a banal truth that the identity of the subject does not imply the identity of all his opinions. It is renown that Wieacker emphasized in the 1930s the cooperative nature of the old Roman partnership (*societas*), whereas during the 1950s and later he concentrated rather on its individualist-liberal features.[57] So what is to be understood by all this? That under the Nazis Wieacker gladly espoused the Nazi guff, even though he in no way sympathized with what he said?

Wieacker – this is the proud explanation of Dr. Erkkilä – "was first and foremost a scholar" (288). That sounds kind of familiar: "I am a theorist, a pure scholar and nothing but an academic", so claimed his famous mentor Carl Schmitt in a radio interview already in February 1933.[58] And the benevolent Fritz Pringsheim defended his pupil in 1947 as unpractical, "interested only in scholarly things" (*wissenschaftliche Dinge*) and apolitical.[59] Characterizing Wieacker as essentially a scholar may be correct. However, during the 1930s he also dabbled, in the capacity of co-author of the so-called Leipzig project of the People's Code (*Volksgesetzbuch*), in National-Socialist legislation, albeit that in the postwar years he sought to reduce – supported by Dr. Erkkilä (207, 237) – the apparent weight of his own practical contribution.[60]

Wieacker contested with noteworthy vigor the 1941 printed edition of the materials which mention him as a member of the commission established by the Nazi Academy of German Law for the preparation of the particularly hairy Book I of the People's Code. The Book was entitled *Der Volksgenosse*, a concept

[55] T. Vormbaum, *A Modern History of German Criminal Law*, Springer 2014, p. 117.

[56] F. Wieacker, *Rudolf von Jhering...*, p. 54.

[57] F.-S. Meissel, *Societas. Struktur und Typenvielfalt des römischen Gesellschaftsvertrages*, Frankfurt a.M. 2004, pp. 30–31.

[58] M. H. Wiegandt, *„Ich bin Theoretiker, reiner Wissenschaftler und nichts als Gelehrter": Ein Lebensbild Carl Schmitts*, „Juristische Schulung" 1996, Vol. 36, p. 778.

[59] Cited by O. Behrends, *Franz Wieacker 1908–1994...*, p. XXVII.

[60] W. Schubert (ed.), *Akademie für deutsches Recht 1933–1945*, Vol. III.1. *Volksgesetzbuch. Teilentwürfe, Arbeitsberichte und sonstige Materialien*, De Gruyter 1988, pp. 30–31.

which probably should be translated as "fellow German" or "national comrade".[61] Dr. Erkkilä trusts Wieacker also in a more general sense: "despite the radical changes that the *Machtergreifung* and 1945 brought about, the core of his scholarly identity remained untouched" (289). Regardless of the book's title, no place remains for any – not even conceptual – change of conscience.

The illusion of identity is not difficult to attain if we concentrate, in the manner of Dr. Erkkilä, on legal consciousness, legal conscience, or other related meta-concepts. Then the quality of positive law, valid in Germany between 1933 and 1945, becomes uninteresting. However, also Wieacker's appraisal of the Imperial Legal Studies Ordinance of 1935 remained the same after WWII as it was before: In 1967 he still qualified this well-known creation of the sworn Nazi Karl August Eckhardt as "in its content essentially not politically motivated"; an evaluation that flew in the face of reality.[62] This fiction of identity eventually crumbled with the onset of the student revolt of 1968 (160–161, 265), which definitely strained Wieacker's capacity of gradual self-modernization.

8. REINTEGRATION OF THE NAZIS INTO THE EUROPEAN LEGAL TRADITION?

It is perfectly true that the Nazi regime tried to present German law and its development as "essentially European", but I cannot overcome some doubts regarding Dr. Erkkilä's dating of this attitude to "after 1941" (125). This dating would be consistent with Dr. Erkkilä's faith in the Nazis' plan "to unite Europe under German rule against Soviet Russia" (133); nonetheless, this plan was from the beginning totally unrealistic. Furthermore, other scholars indicate an earlier moment of intensification of German intellectual propaganda in Europe, namely the victory over Poland in September 1939.[63]

And if we go back a couple of years into the deeper history, we will observe that Koschaker's idea to employ Roman law as a means of validating the German presence in the center of European culture, and even of reacquiring for Germany global importance (*Weltgeltung*) in legal scholarship, was a notion that enjoyed its heyday in the period 1935–1940, hence during what was essentially the pre-

[61] W. Schubert (ed.), *Akademie für deutsches Recht 1933–1945*, Vol. III.1..., pp. 17–18, 513.

[62] F. Wieacker, *Privatrechtsgeschichte der Neuzeit unter besonderer Berücksichtigung der deutschen Entwicklung*, 2nd ed., Göttingen 1967, p. 555; contra E. Grothe, *Zwischen Geschichte und Recht. Deutsche Verfassungsgeschichtsschreibung 1900–1970*, München 2005, p. 199 and nt. 154.

[63] B. G. Martin, *The Nazi-Fascist New Order for European Culture*, Cambridge–London 2016, pp. 146–148.

war period.[64] After the outbreak of WWII, the obsolescence of Koschaker's program to support the Nazis against the Bolshevists in the name of the Occident became ever more apparent; it could be resuscitated – this time without ideological recourse to the Nazis – but only after the war.[65]

Whether Nazi Germany was part and parcel of the European legal tradition remains controversial to this day. The prevailing opinion is inclined to qualify the Nazi-law as a perversion of legal order and accordingly as a blackout of legal history.[66] In any case, the period of Nazi rule appears – *toutes proportions gardées* – more comparable to another German dictatorship, namely the communist German Democratic Republic, than to the western systems which in Germany preceded and followed Nazism.[67] On the other hand, sober expositions of Nazi-law in the European context declare correctly that "from a formal perspective law was still made – and this law was applicable, even though its constitutional basis no longer existed".[68]

What up until now requires clarification is the extent to which we owe the consciousness of the European character of continental legal history, and not least the scholarly discipline of European legal history as such, not only to the Nazi-era in general, but also to individual Nazi legal scholars themselves. As a matter of fact, some statements of Dr. Erkkilä referenced above link these phenomena to certain Nazi political plans, which became official "after 1941", to unite European nations under German rule for a kind of preventive war against Soviet Russia (125, 133). Were these intuitions of Dr. Erkkilä to prove correct, we would be obliged to acknowledge that the European Union was, in a certain sense, anticipated by the Nazis.

On the other hand, we must take into account another, and to a certain extent contrary, narrative of Dr. Erkkilä. He mentions namely Wieacker's "courageous act", consisting in his defense of the reception of Roman law in Germany as, *inter alia*, catalyzing the 'scientification' of local laws. Wieacker's statement is praised as courageous by Dr. Erkkilä (who claims to follow in this respect Detlef Liebs),[69] "since it could have brought him … dangerous censure from fundamentalist legal scholars backed by the SS" (125–126). Fortunately, no dangerous censure occurred, the SS remained inactive, and we can try to shed some light on the entangled problem.

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[64] T. Giaro, *Memory Disorders*, „Studia Juridica" 2018, Vol. 78, pp. 14–15, 19–20.

[65] T. Giaro, *Der Troubadour des Abendlandes...*, pp. 73–76.

[66] H.-H. Jakobs, *Sehr geehrter Herr Canaris*, „Myops. Berichte aus der Welt des Rechts" 2012, Vol. 14, pp. 9–16; F. von Hippel, *Die Perversion von Rechtsordnungen*, Tübingen 1955, *passim*.

[67] J. Schröder, *Rechtswissenschaft in Diktaturen...*, pp. 118–119.

[68] M. Stolleis, *Nazi Law and Nazi Non-Law*, (in:) H. Pihlajamäki, M. D. Dubber, M. Godfrey (eds.), *The Oxford Handbook of European Legal History*, Oxford 2019, pp. 1192–1213, citation p. 1196.

[69] But the quotation is difficult to find.

9. WERE THE NAZIS PROGENITORS OF CURRENT LEGAL HISTORY?

Contrary to the assumption of Dr. Erkkilä, the conceptualization of the Roman law reception as having a European character can be attributed neither to Wieacker nor to any other Nazi legal historian. Of course, Nazism did not come overnight, but had many precursors.[70] However, for both questions concerning the reception: its nature as scientification and its European character, the dates are decidedly earlier. As early as 1874 the famous Rudolf Sohm elucidated the reception and in doing so denied the usual Germanist charges based on oppression of local laws by a foreign learned law; instead, he trained his attention on its character as *Verwissenschaftlichung*: "We received alien law, because we needed an alien legal science".[71]

Also the pan-European range of the reception was by no means discovered by the Nazis. As early as 1866, in the second edition of the first volume of "The Spirit of Roman Law", Jhering noticed the commonality of one and the same code of law – the *Corpus Iuris Civilis* – in most parts of continental Europe.[72] In 1895, in the second volume of his monograph *Die Lehre vom Einkommen*, Leon Petrażycki placed in the balance against the anti-Romanist bias of the Germanists, the universal values of Roman law.[73] "Its reception across modern Europe – claimed Petrażycki in a Russian paper published in 1898 – served in the realm of private law in great measure as a surrogate for progressive indigenous legislation".[74]

In 1900, the Roman lawyer Rudolf Leonhard, commenting on the codification debate in reference to the BGB, opposed the Germanists for their trenchant emphasis upon the national character of legal development and their associated tendency to overlook the common European movement of post-Roman law at the continental level.[75] In his rector's inaugural address of 1920 in Berlin, the canon lawyer Emil Seckel appraised German legal scholarship of the 15th and 16th centuries as simply a "copy" of that already developed in Italy.[76] As early as 1928, the Amer-

[70] T. Giaro, *Vor-*, *Mit und Nachdenker des Madagaskar-Plans*, „Rechtshistorisches Journal" 2000, Vol. 19, pp. 131–163.

[71] R. Sohm, *Die deutsche Rechtsentwickelung und die Codificationsfrage*, „Grünhuts Zeitschrift" 1874, Vol. 1, pp. 256–258, 268–273 (quotation p. 258).

[72] R. Jhering, *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*, 2nd ed., Leipzig 1866, p. 14.

[73] L. Petrażycki, *Die Lehre vom Einkommen*, Vol. II, Berlin 1895, pp. 575–76, 607.

[74] L. Petrażycki, *Zagadnienia prawa zwyczajowego* (Polish translation), Warszawa 1938, pp. 67–68.

[75] R. Leonhard, *Das neue Gesetzbuch als Wendepunkt der Privatrechts-Wissenschaft*, Breslau 1900, p. 26.

[76] E. Seckel, *Das römische Recht und seine Wissenschaft im Wandel der Jahrhunderte*, Rektoratsrede Berlin 1920, Berlin 1921, p. 22.

ican jurist Edmund Munroe Smith stated that "[t]he whole movement has been European" and affected "nearly all western and central Europe", so that "in all the principal countries of Europe legal conditions were much the same".[77]

Dr. Erkkilä's approach to original research on the ideas of Wieacker unfortunately forecloses – in dogmatic fashion – the question whether his texts of the 1930s "can be seen as an extension of National Socialist ideology" (281). Regrettably, this question cannot be so easily dismissed and, what is worse, it must be answered in the affirmative. Even an inquirer who limits his interest to what was happening in Wieacker's head excluding the world outside, cannot segregate the man's Nazi-inspired ideas from the humanitarian ones that continue to be affirmed as appropriate today. As a result, the reader is left without any plausible information about the content of German legal consciousness and legal conscience during the years 1933–45.

Franz Wieacker was a great legal historian, who counts among the founding fathers of the discipline of European Legal History. Dr. Erkkilä thoroughly examined his conceptual background, but some of the results must be adjudged false or at best mystifying, such as the phrase which adorns the last page of the book: "The end of the war and the consequent denazification process was a drastic disappointment to both Wieacker and his network of colleagues" (289). Does this mean that he and his network were drastically opposed to the war's ending by unconditional surrender of the Third Reich? Probably yes, they were against it; but thank goodness they were unable to drop the atomic bomb.

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[77] E. M. Smith, *A General View of European Legal History*, „Mémoires de l'Académie Internationale de Droit Comparé" 1928, Vol, 1, pp. 198–99, 219, 228.

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A MATTER OF PURE CONSCIENCE? FRANZ WIEACKER AND HIS "CONCEPTUAL CHANGE"

Summary

Based on a recent biography of Franz Wieacker (1908–1994) two central questions are examined. Is it allowed to analyze a young, but already prominent German law professor of the Nazi era as a pure scholar whose identity remained unchanged from the times of Weimar to the Federal Republic of Germany? Is it plausible to treat the Nazis as progenitors of current European legal history, and in particular as founding fathers of European legal tradition?

KEYWORDS

Franz Wieacker, Ernst Rudolf Huber, Nazism, anti-Semitism, totalitarianism, apoliticality, *connubium*, Aryanising, *Kieler Schule*, reception of Roman law, Roman foundations of Europe

SŁOWA KLUCZOWE

Franz Wieacker, Ernst Rudolf Huber, nazizm, antysemityzm, totalitaryzm, apolityczność, *connubium*, aryzacja, Szkoła Kilońska, recepcja prawa rzymskiego, rzymskie podwaliny Europy

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THE RELUCTANT WARRIOR: THE CHALLENGE TO INSTILLING LAW OF WAR IN TODAY'S PROFESSIONAL WARRIOR

Only the Dead have seen the end of war.[1]
George Santayana

Wars happen. It is not necessary that war will continue to be viewed as an instrument of national policy, but it is likely to be the case for a very long time. Those who believe in the progress and perfectibility of human nature may continue to hope that at some future point reason will prevail and all international disputes will be resolved by nonviolent means . . . Unless and until that occurs, our best thinkers must continue to pursue the moral issues related to war. Those who romanticize war do not do mankind a service; those who ignore it abdicate responsibility for the future of mankind, a responsibility we all share even if we do not choose to do so.[2]
Malham M. Wakin

If wars are to "happen" for the foreseeable future as Professor Wakin counsels, then the effective regulation of the conduct of warfare is essential to the preservation of a civilized world. General Douglas A. MacArthur emphasized this point in confirming the death sentence for Japanese General Tomoyuki Yamashita who was tried for war crimes committed by troops under his command during World War II, writing:

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[1] George Santayana, *Soliloquies in England and Later Soliloquies*, number 25 (1922).

[2] Malham M. Wakin, *Introduction in War, Morality, and the Military Profession*, 224 (Malham M. Wakin ed., 2nd rev. ed. 1986).

The soldier, be he friend or foe, is charged with the protection of the weak and unarmed. It is the very essence and reason of his being. When he violates this sacred trust, he not only profanes his entire cult but threatens the fabric of international society.[3]

In order to earn this sacred trust referenced by General MacArthur above, today's soldier[4] must at once conform to notions of honor, decency and common humanity, while at the same time carrying out with ferocious lethality the imperatives of war. Achieving this delicate balance of humanity and military necessity is a herculean task for any seasoned military officer, let alone a young enlisted member who may be experiencing the stress of combat for the first time. This article seeks to demonstrate the importance of, and challenges to, instilling law of war[5] values into today's soldier in the pursuit of developing 'reluctant warriors' that seek to preserve the civilized world.

1. THE PROBLEM… ENTER THE BEAST

In 1902, a Senate committee investigated U.S. military atrocities in the Philippine-American War. The conflict cost the lives of as many as 200,000 civilians,

[3] General Douglas MacArthur, *Action of the Confirming Authority*, Feb. 7, 1946, United States v. Yamashita (U.S. Military Commission, Manila, Dec. 7, 1945), Levie, Documents On Pows 298 ("It is not easy for me to pass penal judgment upon a defeated adversary in a major military campaign. I have reviewed the proceedings in vain search for some mitigating circumstance on his behalf. I can find none. Rarely has so cruel and wanton a record been spread to public gaze. Revolting as this may be in itself, it pales before the sinister and far reaching implication thereby attached to the profession of arms. The soldier, be he friend or foe, is charged with the protection of the weak and unarmed. It is the very essence and reason for his being. When he violates this sacred trust, he not only profanes his entire cult but threatens the very fabric of international society. The traditions of fighting men are long and honorable. They are based upon the noblest of human traits, – sacrifice. This officer, of proven field merit, entrusted with high command involving authority adequate to responsibility, has failed this irrevocable standard; has failed his duty to his troops, to his country, to his enemy, to mankind; has failed utterly his soldier faith. The transgressions resulting therefrom as revealed by the trial are a blot upon the military profession, a stain upon civilization and constitute a memory of shame and dishonor that can never be forgotten. Peculiarly callous and purposeless was the sack of the ancient city of Manila, with its Christian population and its countless historic shrines and monuments of culture and civilization, which with campaign conditions reversed had previously been spared.").

[4] The word soldier is used in a colloquial sense but is intended to include men and women from all branches of the armed forces.

[5] Law of war is that part of international law that regulates the resort to armed force; the conduct of hostilities and the protection of war victims in both international and non-international armed conflict; belligerent occupation; and the relationships between belligerent, neutral, and non-belligerent States. It is often called the 'law of armed conflict' (LOAC) or 'international humanitarian law' (IHL).

and though many of these deaths were from famine and disease,[6] as veterans wrote home or returned from war, stories of rampant brutality by American soldiers began to surface.[7] Years later, the ongoing violence in the Philippines would inspire a young George C. Marshall, famed U.S. World War II general and eventual U.S. Secretary of State and Nobel Peace Prize winner, on his first assignment fresh out of military school, to tell a fellow officer:

Once an army is involved in war, there is a beast in every fighting man which begins tugging at its chains. And a good officer must learn early on how to keep the beast under control, both in his men and himself.[8]

Sadly, the experiences detailed in the Philippines above more than a century ago were not the end of examples of military members abusing their sacred trust. The beast within, which is ever present in every soldier, took control. Even for nations possessing a reputation for stringent compliance with the law of war, the annals of history, to include more contemporary military engagements, are littered with cases of atrocities committed by soldiers. As Stephen Ambrose writes:

When you put young people, eighteen, nineteen, or twenty years old, in a foreign country with weapons in their hands, sometimes terrible things happen that you wish never happened. This is a reality that stretches across time and across continents. It is a universal aspect of war, from the time of the ancient Greeks up to the present.[9]

All too often the beast wins, and because every nation has an obligation to minimize the reality described above, nations must continue to dedicate time, thought and resources to best prepare their forces for future military operations.

2. COST TO THE MISSION

More than 150 years ago, as Francis Lieber completed his *Instructions for the Government of Armies of the United States in the Field*, *General Order No 100*

[6] Department of State, Office of the Historian, The Philippine-American War, 1899–1902. Available at: https://history.state.gov/milestones/1899-1913/war (accessed: 16.09.2018).

[7] Paul Kramer, *The Water Cure*, *Debating torture and counterinsurgency – a century ago*, "The New Yorker", February 25, 2008, ("A letter by A. F. Miller, of the 32nd Volunteer Infantry Regiment, published in the Omaha World-Herald in May, 1900, told of how Miller's unit uncovered hidden weapons by subjecting a prisoner to what he and others called the "water cure." "Now, this is the way we give them the water cure," he explained. "Lay them on their backs, a man standing on each hand and each foot, then put a round stick in the mouth and pour a pail of water in the mouth and nose, and if they don't give up pour in another pail. They swell up like toads. I'll tell you it is a terrible torture.").

[8] Luke Mogelson, *A Beast in the Heart of Every Fighting Man*, "The New York Times Magazine", April 27, 2011.

[9] Stephen E. Ambrose, *Americans at War*, 1997, p. 152.

(discussed more fully later), he recognized that the value of adherence to his "warrior Code" went beyond being the "right" thing to do. In writing to General Henry Halleck, the General-in-Chief of the U.S. Army, Lieber highlights the strategic military benefits of compliance, writing (*emphasis added*):

I know by letters from the West and the South, written by men on our side, that the wanton destruction of property by our men is alarming. It does *incalculable injury.* It *demoralizes our troops*; it *annihilates wealth irrecoverably*, and *makes a return to a state of peace more and more difficult.* Your order, though impressive and even sharp, might be written with reference to the Code, and pointing out the *disastrous consequences of reckless devastation*, in such a manner as *not to furnish our reckless enemy with new arguments for his savagery*...[10]

Francis Lieber recognized early on that unrestrained warfare was not only contrary to his Code, but also had a direct negative military impact on both winning the war and winning the peace. This corollary remains as true today as it has ever been.

As America's wars in Iraq and Afghanistan demonstrate, despite the overwhelming advantage in combat power, and despite winning virtually every battle from a tactical sense, it may still "lose the war." U.S. Army intelligence officer, Major Douglas A. Pryer, writes, "Reports of misconduct inspire enemy fighters, serve as recruitment boons for our enemies, turn local populations against us, degrade support for our foreign conflicts at home, and undermine the relationship between our nation and allies."[11] He goes on to argue that when we get it "wrong" in today's information age, where high-speed communications devices like digital cameras, personal computers and the internet are ubiquitous, the world quickly learns of abuses and the adverse publicity does immeasurable harm. One need look no further than that events Abu Ghraib and others to see the full impact when soldiers violate the sacred trust of protecting those in their care. What is worse, Major Pryer points out, "These defeats did not come at the hands of our enemies. Sadly, we inflicted these defeats upon ourselves, through unethical actions."[12]

3. A TOLL ON THE SOUL… THE INVISIBLE WOUNDS OF WAR

The soldier above all others prays for peace, *for it is the soldier who must suffer and bear the deepest wounds and scars of war.*[13]

General Douglas MacArthur

[10] *Letter from Francis Lieber to General Henry Halleck*, New York, May 20, 1863.

[11] Major Douglas Pryer, *Controlling the Beast Within: The Key to Success on 21st-Century Battlefields*, "Military Review" January–February 2011, Vol. 5.

[12] Pyer at 5.

[13] General Douglas MacArthur's "Duty, Honor, Country" Farewell Speech given to the Corps of Cadets at West Point, May 12, 1962. Available at: https://nationalcenter.org/MacArthurFarewell.html (accessed: 16.09.2018).

While a national image may suffer from how wars are fought, it is the individual soldier who must return home carrying the weight of what happens during war. An often overlooked cost of war is the physical and psychological trauma placed on those whom nations send into harm's way to do its bidding. According to the most recent statistics from the U.S. Department of Veterans Affairs, 15% of U.S. veterans of the wars in Iraq and Afghanistan have been diagnosed with PTSD (post-traumatic stress disorder).[14] While this is not a surprising result given the accounts of psychological symptoms following trauma experienced in war dating back to ancient times,[15] what is worthy of continued study is an emerging focus on an invisible wounds of war referred to as "moral injuries" in the context of war.

"Moral injury is the damage done to one's conscience or moral compass when that person perpetuates, witnesses, or fails to prevent acts that transgress their own moral and ethical values or codes of conduct."[16] "In the context of war, moral injuries may stem from direct participation in acts of combat, such as killing or harming others, or indirect acts, such as witnessing death or dying, failing to prevent immoral acts of others, or giving or receiving orders that are perceived as gross moral violations (2). The act may have been carried out by an individual or a group, through a decision made individually or as a response to orders given by leaders."[17]

The U.S. Department of Veterans Affairs report initial studies showing that while killing in war is an important indicator in the risk of developing frequent and severe PTSD symptoms, "those who endorsed killing a non-combatant or killing in the context of anger or revenge were more likely to belong to the most symptomatic PTSD."[18]

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[14] U.S. Department of Veterans Affairs, *War Related Illness and Injury Study Center*, *(PTSD)*. Available at: https://www.warrelatedillness.va.gov/education/healthconditions/post-traumatic-stress-disorder.asp (accessed: 16.09.2018).

[15] U.S. Department of Veterans Affairs, *War Related Illness and Injury Study Center*, *(PTSD)*, Matthew J. Friedman, *History of PTSD in Veteran's: Civil War to DSM-5* ("Nostalgia" and "Soldier's Heart" were reported in the Civil War described by symptoms such as feeling sad, sleep problems, anxiety, rapid pulse, and trouble breathing. In World War I, "shell shock" was reported with symptoms of panic and sleep problems. In World War II, "shell shock" was replaced with Combat Stress Reaction (CSR), also known as "battle fatigue." Up to ½ of the military discharges were said to be the result of combat exhaustion. PTSD entered the lexicon in 1980 following research involving returning Vietnam War veterans, Holocaust survivors, and sexual trauma victims.) Available at: https://www.ptsd.va.gov/public/ptsd-overview/basics/history-of-ptsd-vets.asp (accessed: 16.09.2018).

[16] The Moral Injury Project, Syracuse University, http://moralinjuryproject.syr.edu/about-moral-injury/.

[17] U.S. Department of Veterans Affairs, *War Related Illness and Injury Study Center*, *(PTSD)*, *Moral Injury in the Context of War*. Available at: https://www.ptsd.va.gov/professional/co-occurring/moral_injury_at_war.asp (accessed: 16.09.2018).

[18] *Id*.

It would be hard to disagree with General Marshall that the unrestrained beast is an unwelcome and dangerous member of the military ranks. Now armed with the knowledge that this soldier will also likely return home with significant moral wounds that will haunt him well beyond the battlefield, it is important to determine what qualities make a soldier both effective and desirable, while considering how a nation can best instill and cultivate those qualities and values.

4. WHAT IS THE RELUCTANT WARRIOR?

Any soldier worth his salt should be antiwar; and still there are things worth fighting for.[19]

General Norman Schwarzkopf, USA

If, in order to kill an enemy, you had to hit somebody innocent, don't take the shot. Wait another day. Don't create more enemies than you take out by some immoral act.[20]

General James N. Mattis, USMC

What is meant by a 'reluctant warrior'? Put simply, a reluctant warrior is one who while ready to employ lethal force when the situation demands, is not eager to do so in "the moment". This moment, as Sir John Keegan describes, is where honor and decency meet on the battlefield, at a point where "there are no judges, more to the point, no policeman at the place where death is done in combat … all turns on the values of the junior leader present at the moment when the opponent's capacity or will to resist fails, he ceases to be a combatant and he must hope for the mercy of the suddenly stronger."[21] This moment can also be one that affords the soldier the luxury of time and perhaps even distance, it is the proverbial moment when no one is looking, and where right action is required. The reluctant warrior is one who when confronted with a complex wartime situation, perhaps under intense pressure to compromise his values, has the necessary knowledge and training, coupled with the ability to ethically reason and apply moral fortitude, makes the right call. He answers the questions: "Can I, If I,

[19] General Herbert "Stormin'" Norman Schwarzkopf Jr. was a U.S. Army general whose career culminated as the Commander of U.S. Central Command (CENTCOM). In that capacity, he led all coalition forces in the First Gulf War. Available at: https://www.forbes.com/sites/kevinkruse/2012/12/27/norman-schwarzkopf-quotes/#2b9af0e14eeb (accessed: 10.09.2018).

[20] *Ethical Challenges in Contemporary Conflict: The Afghanistan and Iraq Cases*, Lecture by (then) Lt Gen James Mattis (U.S. Naval Academy Center for Professional Military Ethics 2004). Available at: https://www.usna.edu/Ethics/_files/documents/MattisPg1-28_Final.pdf (accessed: 10.09.2018).

[21] J. Keegan, *If you won't, we won't: Honour and the decencies of battle*, "The Times Literary Supplement", issue 4834, 11 (Nov. 24, 1995; London, England).

Should I",[22] and then takes decisive action – or employs uncommon restraint – with a goal of accomplishing the mission all the while staying true to the value imbedded in the Marines' Hymn, "to keep our honor clean".[23]

To fully develop the 'reluctant warrior' needed on today's and tomorrow's battlefields, this article will look at the role of legal regulation and the practice of military education and training, as well as some of the other factors that influence behavior and decision-making during instances of armed conflict.

5. A STARTING POINT… THE ROOTS AND ROLE OF REGULATION

In June of 1859, Swiss businessman Henri Dunant looked on in horror while witnessing the Battle of Solferino, a brutal fight between the allied French and Sardinian Armies against the Austrian Emperor Franz Joseph I. Upon his return to Geneva, Dunant wrote, in *A Memory of Solferino*, "Here is a hand-to-hand struggle in all its frightfulness; Austrians and Allies trampling each other underfoot, killing one another on piles of bleeding corpses, felling their enemies with their rifle butts, crushing skulls, ripping bellies open with sabre and bayonet. No quarter is given; it is sheer butchery; a struggle between savage beasts, maddened with blood and fury. Even the wounded fight to the last gasp. When they have no weapon left, they seize their enemies by the throat and tear them with their teeth."[24] The experience of witnessing such carnage completely changed the direction of Dunant's life. His recount of the gruesome details of war spurred a movement ultimately leading to the creation of the International Committee of the Red Cross in 1863 whose mission today is to protect the lives and dignity of victims of armed conflict and other situations of violence and to provide them with assistance.[25] Dunant's work also resulted in the adoption of the First Geneva Convention in 1864.[26]

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[22] The "can I, if I, should I" sequence refers to the authors' framework of thinking that requires a soldier to first ask oneself does the law permit a particular military action; the soldier then considers the consequences of both action and omission; and finally the soldier weighs all factors to determine whether or not he should engage in the proposed military action. Some operational law attorneys frame their legal advice in this fashion.

[23] Marines, The Official Website of the United States Marines Corps, The Marines' Hymn. Available at: https://www.marineband.marines.mil/About/Library-and-Archives/The-Marines-Hymn/ (accessed: 5.09.2018).

[24] Henri Dunant, *A Memory of Solfernio*, American Red Cross 1939–1959, p. 19.

[25] The ICRC's mandate and mission. Available at: https://www.icrc.org/en/mandate-and-mission (accessed: 17.07.2018).

[26] The First Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, 22 August 1864.

During this same period of time, far across the Atlantic Ocean, chaos reigned as fighting raged in the American Civil War. During some of the darkest days of the war, President Abraham Lincoln and his administration turned to Francis Lieber to draft a code of conduct for military forces. An awesome undertaking, this law professor from New York, would toil for months, ultimately producing in 1863 a Code of 157 articles, titled *Instructions for the Government of Armies of the United States in the Field*, *General Order No 100*, but better known today as the Lieber Code.[27] The Lieber Code established the rules for right conduct with accompanying rationale and general principles underlying the rules. Revolutionary for its time as the first comprehensive attempt to codify the customary laws of war, not only would the Lieber Code advance the respect for the rule of law in America, but it was quickly adopted by many European nations and served as the basis for future law of war treaties, namely the Hague Peace Conferences of 1899 and 1907, that would further cement the notion that war is not unlimited.[28]

Five years following President Lincoln's issuance of the Lieber Code to the Union Army, an International Military Commission assembled in St. Petersburg to consider forbidding the use of certain projectiles in time of war. In 1868, the Declaration of St. Petersburg became the first formal agreement prohibiting the use of certain weapons in war. The stated purpose of the treaty was to fix "the technical limits at which the necessities of war ought to yield to the requirements of humanity" with the Parties declaring "[t]hat the progress of civilization should have the effect of alleviating as much as possible the calamities of war."[29] The 1860s initiated a welcome era of positive law to regulate the conduct of hostilities, which flourished during the 20th Century following both of the World Wars, with treaties incorporating traditions and norms that had been developing over centuries,[30] becoming a bedrock for how civilized nations conduct themselves on the fields of unfriendly strife.

Along with the development of positive law, came the duty of States to disseminate the law of war and to teach it to their armed forces. This was first codified

[27] E. D. Townsend, *Assistant Adjutant General*, *General Orders No. 100*, *Instructions for the Government of Armies of the United States in the Field*, Apr. 24, 1863, reprinted in "Instructions for the Government of Armies of the United States in the Field" 1898, Vol. 2, Government Printing Office ("The following 'Instructions for the Government of Armies of the United States in the Field,' prepared by Francis Lieber, L.L.D., and revised by a Board of Officers, of which Major General E. A. Hitchcock is president, having been approved by the President of the United States, he commands that they be published for the information of all concerned").

[28] ICRC, Treaties, States Parties and Commentaries. Available at: https://ihl-databases.icrc.org/ihl/INTRO/110 (accessed: 10.09.2018).

[29] Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight. Saint Petersburg, 29 November/11 December 1868.

[30] See, e.g., Leslie C. Green, *The Contemporary Law of Armed Conflict*, 2000, pp. 20–23 (describing references to warrior codes from ancient Israel, China, India, Greece, Rome, and Islam).

in the 1906 and 1929 Geneva Conventions,[31] and was subsequently restated in the 1949 Geneva Conventions and their Additional Protocols, in the Hague Convention for the Protection of Cultural Property and its Second Protocol, and in the Convention on Certain Conventional Weapons, all of which specify that the obligation to teach these Conventions to armed forces applies in time of peace as in time of armed conflict.[32] The treaties also require States to ensure that members of the armed forces who have duties under those treaties are trained commensurate with those duties.[33]

Instituting a system of regulation is a necessary and important starting point. The more daunting challenge is in properly developing the soldiers who will carry out its mandate. This step begins with educating the soldier on the law of war and attempting to instill its best values.

6. KNOWLEDGE IS POWER… SOLDIERS NEED TO THINK

The nation that will insist on drawing a broad line of demarcation between the fighting man and the thinking man is liable to find its fighting done by fools and its thinking done by cowards.[34]

Sir William Francis Butler

Think like men of action, *and act like men of thought!*[35]

General James N. Mattis

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[31] 1906 Geneva Convention, Article 26; 1929 Geneva Convention, Article 27.

[32] First Geneva Convention, Article 47; Second Geneva Convention, Article 48; Third Geneva Convention, Article 127; Fourth Geneva Convention, Article 144; Additional Protocol I, Article 83 (adopted by consensus); Additional Protocol II, Article 19 (adopted by consensus); Hague Convention for the Protection of Cultural Property, Article 25; Second Protocol to the Hague Convention on the Protection of Cultural Property, Article 30; Convention on Certain Conventional Weapons, Article 6.

[33] For example, see DoD Directive 2311.01E, *DoD Law of War Program*, 5.8 (May 9, 2006, Incorporating Change 1, November 15, 2010, Certified Current as of February 22, 2011) ("The Secretaries of the Military Departments shall develop internal policies and procedures consistent with this Directive in support of the DoD Law of War Program to: … 5.8.1. Provide directives, publications, instructions, and training so the principles and rules of the law of war will be known to members of their respective Departments. Such knowledge will be commensurate with each individual's duties and responsibilities").

[34] Lt General Sir William Francis Butler, *The Life of Charles George Gordon*, Macmillan and Co., Limited, New York 1901.

[35] Transcript of speech delivered by General (ret) James N. Mattis, 2014 Marine Corps University Foundation Semper Fidelis Award Dinner. Available at: https://www.military1.com/army/article/460220-gen-mad-dog-mattis-gives-the-ultimate-award-speech/ (accessed: 29.08.2018).

In order "for men of action" to "act like men of thought" nations must begin to build the foundation of the 'reluctant warrior' through law of war dissemination and training. Following the Vietnam War, law of war training developed with four common threads: (1) mandatory training for all; (2) simplicity of principles, (3) linking law of war obligations to military effectiveness, professionalism, and good leadership; and (4) applying a positive approach (i.e. showing the benefits of compliance versus merely focusing on the "don'ts" which can be perceived as placing unwarranted limits on the soldier's ability to fight and win).[36]

Fortunately, unlike complexities of the U.S. Tax Code which as of 2015 was over 10 million words long,[37] part of the genius of the law of war, despite its myriad sources and technical nuances, is that in many ways the most important concepts can be boiled down to four core principles: distinction, military necessity, proportionality and unnecessary suffering.[38] And while the nuances of the full body of law are critical to the military lawyer advising commanders, "at the tactical level, the average soldier need not be overwhelmed with the details of a highly complex and esoteric subject."[39]

In pursuit of simplicity, nations have sought over time to distill these concepts in ways that could be readily communicated and easily understood by the end user – the average soldier. An example of these efforts occurred in 1977 when the International Committee of the Red Cross (ICRC), in conjunction with the Polish Red Cross, hosted a working group in Warsaw to develop basic law of war rules for the individual soldier. U.S. DoD law of war legend, W. Hays Parks, participating in the meeting and helping to develop the rules said "the rules were consistent with the "military" principle of "KISS" – keep it simple, stupid."[40] These rules were shortly thereafter adopted by the U.S. Marines Corps, and later by the U.S. Army and U.S. Navy. In their present form, the U.S. Army's 'Soldier's Rules' are as follows:

1. Fight only enemy combatants.
2. Do not harm enemies who surrender – disarm them and turn them over to your superior.
3. Do not kill or torture EPW, or other detainees.
4. Collect and care for the wounded, whether friend or foe.
5. Do not attack medical personnel, facilities, or equipment.

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[36] W. Hays Parks, *The United States Military and the Law of War: Inculcating an Ethos*, "Social Research", Vol. 69, No. 4, *International Justice*, *War Crimes*, *and Terrorism: The U.S. Record* (winter 2002), pp. 981–1015 (987 and 1006).

[37] Scott Greenberg, *Tax Foundation*, *Federal Tax Laws and Regulations are Now Over 10 Million Words Long*, 2015. Available at: https://taxfoundation.org/federal-tax-laws-and-regul tions-are-now-over-10-million-words-long/ (accessed: 20.08.2018).

[38] Gary D. Solis, *The Law of Armed Conflict*, *International Humanitarian Law in War*, Cambridge University Press 2016, 2nd ed., p. 268.

[39] W. Hays Parks, *The United States Military and the Law of War...*, p. 986.

[40] *Id*, p. 986.

6. Destroy no more than the mission requires.
7. Treat all civilians humanely.
8. Do not steal – respect private property and possessions.
9. Do your best to prevent violations of the law of armed conflict.
10. Report all violations to your superior.[41]

While providing simple and clear guidance is important, it is but one piece of creating the reluctant soldier. Rule 142 of the ICRC's Customary IHL Study notes that for many states teaching of law of war is primarily or exclusively in the form of written instruction or classroom teaching. The Customary IHL Study notes that this approach may not be sufficient to ensure effective compliance during the stress of combat. Addressing this concern, South Africa's LOAC Manual states, "in the circumstances of combat, soldiers may often not have time to consider the principles of the LOAC before acting. Soldiers must therefore not only know these principles but must be trained so that the proper response to specific situations is second nature."[42]

While it is impossible to know exactly how one will react to the stress and fog of war, the military has become far more sophisticated in simulating that fog. Significant pedagogical strides in military education continue to be made to better reach and influence the soldier. Rather than focusing strictly on a knowledge test, modern education and training often extends beyond classroom instruction or individualized study into, for example, unit training exercises. In many cases, training on law of war requirements may not be classified as "law of war" training, or may be conducted without acknowledgment that the lessons being learned are law of war requirements. Rather, it may be the case that military forces would be trained according to military doctrines or regulations, which have incorporated law of war requirements and have been reviewed for consistency with the law of war.

This type of imbedded training intentionally links compliance with the law of war with successful mission accomplishment while drawing attention to the positive aspects of law of war compliance. After all, it has been said that the laws of war were written by warriors, for warriors,[43] and with the particular interests of their armed forces in mind.[44] Professor Geoffrey Corn writes, "The law of armed

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[41] *Operational Law Handbook*, *17th Edition*, *Chapter 2*, *Appendix A*, *III*, International and Operational Law Department, The Judge Advocate General's Legal Center and School (2017).

[42] The International Committee of the Red Cross (ICRC) Customary IHL Study, Rule 142, citing to the South Africa, LOAC Manual (citing to Chapter 4, section 38 para. 343).

[43] Francis Lieber was himself an infantryman in the Napoleonic Wars. See, e.g., Major Scott R. Morris, *The Laws of War: Rules by Warriors for Warriors*, "The Army Lawyer" Dec. 1997, p. 4.

[44] A. Roberts, R. Guelff, *Documents on the Law of War*, Oxford University Press 2000, 3rd ed., p. 31 ("The law has been created by states with their general interests and the particular interests of their armed forces in mind").

conflict is inseparable from its military context."[45] As a product of this military context, the law is comprised of rules and regulations that not only seek to preserve humanity, they also make good strategic, operational, and tactical sense.[46]

While law of war training is critical, it is clearly just one aspect of helping soldiers internalize the underlying values contained in the law of war. There are still too many examples of professional soldiers who stop at the "Can I" question, never moving forward to appropriately consider "If I" or "Should I." And there are others who know the answer to the "Can I" question is an emphatic "NO!" and still proceed anyway.

A 2006 Mental Health Survey conducted by the U.S. DoD of soldiers and Marines in Iraq in the fall of 2006 revealed the following findings: Only 47 percent of soldiers and 38 percent of Marines agreed that noncombatants should be treated with dignity and respect. More than one-third of all soldiers and Marines reported that torture should be allowed to save the life of a fellow soldier or Marine, and less than half of the soldiers or Marines said they would report a team member for unethical behavior. Also, 10 percent of the soldiers and Marines reported mistreating noncombatants or damaging property when it was not necessary.[47]

Alarmed by the results, General David Petraeus, the top U.S. commander in Iraq at the time, wrote an open letter to the members of his command. In his letter, General Petraeus wrote, "Our values and the laws governing warfare teach us to respect human dignity, maintain our integrity, and do what is right. Adherence to our values distinguishes us from our enemy. This fight depends on securing the population, which must understand that we – not our enemies – occupy the moral high ground."[48] He stressed that while we are "warriors … what sets us apart from our enemies is how we fight … how we behave …," and he closed the letter with a call to "… renew our commitment to the values and standards that make us who we are."[49]

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[45] G. Corn, *The Law of Armed Conflict An Operational Approach*, Wolters Kluwer 2012, p. xxi.

[46] U.S. DoD Law of War Manual (June 2015 (updated Dec 2016)) Preface ("Nations have developed the law of war to be fundamentally consistent with the military doctrines that are the basis for effective combat operations. For example, the self-control needed to refrain from violations of the law of war under the stresses of combat is the same good order and discipline necessary to operate cohesively and victoriously in battle. Similarly, the law of war's prohibitions on torture and unnecessary destruction are consistent with the practical insight that such actions ultimately frustrate rather than accomplish the mission.).

[47] Mental Health Advisory Team (MHAT) IV Operation Iraqi Freedom 05-07, Final Report. 17 November 2006. Office of the Surgeon Multinational Force-Iraq and Office of the Surgeon General United States Army Medical Command (35).

[48] General David H. Petraeus, *Letter about Values to Soldiers*, *Sailors*, *Airmen*, *Marines*, *Coast Guardsmen Serving in Multi-National Force-Iraq*, 10 May 2007. Available at: https://www.globalsecurity.org/military/library/policy/army/other/petraeus_values-msg_torture070510.htm (accessed: 5.09.2018).

[49] *Id*.

As demonstrated above, the legal failures are typically ethical failures too. So in addition to training soldiers on the law of war, there must be an investment and emphasis on character and ethics development in the military. And then these two must be combined to simulate the environment in which the soldier will need to apply both under the stress of combat.

7. MORALITY MATTERS AND CHARACTER COUNTS

Men who take up arms against one another in public war do not cease on this account to be moral beings, *responsible to one another and to God*.[50]

Article 15, Lieber Code

If one were to simplify the law of war to its central core, then perhaps Jean Pictet articulated it best when he wrote: "Humanitarian law receives its impulse from moral science all of which can be summed up in one sentence, 'do to others what you would have done to yourself.' This crystallizes the wisdom of nations and is the secret of happiness, or at least, of the best order of society."[51] This sentiment was echoed by a U.S. Army soldier who became the hero of one of the worst atrocities during Vietnam, the My Lai massacre. Warrant Officer Hugh Thompson was a helicopter pilot who, along with his crew, repeatedly landed his helicopter between advancing U.S. forces and innocent Vietnamese civilians. He confronted his fellow troops, to include higher-ranking officers at the point of machine guns, in an attempt to save as many of the Vietnamese villagers as he could.[52] Hugh Thompson's heroic intervention ended the massacre in My Lai. Decades later, during a "Moral Courage in Combat" lecture to U.S. Naval Academy midshipmen, he participated in the following dialogue:[53]

Question: Do you attribute your ability to see through the moral fog that day, better than those who made the massacre at My Lai happen, to any prior military training or experience?

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[50] Francis Lieber, *War Department*, *Instructions for the Government of Armies of the United States in the Field art. 15 (1863)*. Available at: http://avalon.law.yale.edu/19th_century/lieber.asp (accessed: 15.08.2018).

[51] See J. Pictet, *The Principles of International Humanitarian Law*, "International Review of the Red Cross" 1996, Vol. 6, pp. 455–462.

[52] History, My Lai Massacre. Available at: https://www.history.com/topics/vietnam-war/my-lai-massacre-1 ("We kept flying back and forth … and it didn't take very long until we started noticing the large number of bodies everywhere. Everywhere we'd look, we'd see bodies. These were infants, two-, three-, four-, five-year-olds, women, very old men, no draft-age people whatsoever.") (accessed: 10.09.2018).

[53] Lecture by Hugh Thompson, *Moral Courage in Combat: The My Lai Story*, "U.S. Naval Academy Center for Professional Military Ethics" 2003, Vol. 26.

Mr. Thompson: No, I don't believe it was any military training, because I had been through the training that everybody else had been. We had a 50-minute class of instruction on the Geneva Convention, a 50-minute class of instruction on the Code of Conduct, and a 50-minute class of instruction on the rules of engagement. … But [my parents] always taught me to help the underdog. Don't be a bully and live by the golden rule. That golden rule says so much, and it's so simple and so basic. You know, I can't say it was a leadership 405 or whatever. I just think it was my parents, and they taught me right from wrong".

Not all soldiers may have upbringings based in sound moral values like Hugh Thompson. Further, those who have a solid moral foundation prior to entering the military may still fail when the moment matters most. In an attempt to explain ethical failures, Dr. Martin Cook highlights four different potential explanations: (1) there are always a few 'bad apples' in every organization; (2) there has been a widespread deterioration of ethics in the military and society at large; (3) behaviors that in earlier times were tolerated are now unacceptable, perhaps due to greater media scrutiny, etc.; and (4) individuals who have been ethically sound for years or even decades lose their way or are put in unfamiliar environments where their moral armor fails.[54]

Cook focuses on the fourth possibility as it seems to better explain how an otherwise honorable soldier when confronted with certain situational factors behaves in almost unbelievable ways, raising the possibility that in addition to having a few 'bad apples', there may also be relatively 'good apples' who become tainted by being subjected to 'bad barrels'.[55] Cook notes that in trying to unravel this conundrum, current research being done in the fields of social science and behavioral economics may provide some answers. Even better, many militaries around the globe have been investing in the study of ethics and its link to these fields and are placing an emphasis on the continued development of its soldiers so that they possess the needed skills to meet the ethical, character, and leadership challenges that define today's military environment.[56] While good work has begun, more work needs to be done in this area of study as it is an essential component of the 'reluctant warrior'.

[54] Martin L. Cook, *Reflections on the Relationship Between Law and Ethics*, based on a talk given at the Adelaide Law School, Australia, 28 March 2018.

[55] For an example of the complete breakdown of ethical and legal standards, see Luke Mogelson, *A Beast in the Heart of Every Fighting Man*, "The New York Times Magazine", April 27, 2011. This article paints in vivid detail the circumstances surrounding murders committed by members of the 5th Stryker Brigade during a tour in Afghanistan.

[56] See J. Stouffer, S. Seiler (eds.), *Military Ethics*, *International Perspectives*, Canadian Defence Academy Press 2010.

8. THE IMPACT OF POPULAR CULTURE ON THE SOLDIERS OF TOMORROW

Brothers . . . what we do in life . . . echoes in eternity.[57]
General Maximus Decimus Meridius (*Gladiator*)

It is an obvious but important point to remember that new officer or enlisted recruits join the military with preconceived notions of what the military is and what it means to be a professional soldier. In the United States, a 17 year old, with parental consent, can join in the armed forces.[58] The average potential soldier brings with them a lifetime of "expectations" of what they think the military is what it expects from a soldier. These expectations often come from popular culture where exemplars[59] are portrayed in a compelling manner. Much like ancient times where young men were enthralled by stories of mythical warriors like Hercules or Achilles, popular culture creates fictional exemplars of what it means to be a soldier in war. Two simple examples may illustrate the point.

First, if one is a fan of the character Maximus in the film *Gladiator*, he may believe that a soldier is expected to exhibit the qualities of excellence, service before self, and integrity.[60] If such is the case, that person may be more receptive to internalizing the core principles of the law of war. Employing the power of exemplars is a character-building tool utilized by the U.S. Air Force Academy where each class since 2000 chooses an exemplar for their class who epitomizes the type of person the class wishes to emulate.[61] The objective is to reflect on and model the admirable aspects of the chosen exemplar to instill similar character and behavior in cadets. While popular culture and the use of examples can help advance law of war values, it can also have the opposite effect.

A more recent example of *Hollywood* having a negative impact on the armed forces involves the issue of interrogation and torture and its portrayal on television during the early years following the attacks on 9/11. Shows like *24*, *Alias*, and *Lost* spent considerable air time portraying the seductive idea that torture works in so called "ticking time bomb scenarios" to elicit information from detainees.[62]

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[57] Available at: https://www.imdb.com/title/tt0172495/quotes (accessed: 13.09.2018).

[58] Available at: https://www.military.com/join-armed-forces/join-the-military-basic-eligibility.html (accessed: 17.07.2018).

[59] Exemplar is defined as one that serves as a model or example: such as an ideal model or a typical or standard specimen. Available at: https://www.merriam-webster.com/dictionary/exemplar (accessed: 27.07.2018).

[60] These also happen to be the Core Values of the U.S. Air Force, see: *Air Force Instruction 1-1*, *"Air Force Culture"* (para. 1.3), dated 7 August 2012, *Incorporating Change 1*, *12 November 2014*.

[61] Association of Graduates United States Air Force Academy, USAFA Class Exemplars. Available at: https://www2.usafa.org/Connect/ClassExemplars (accessed: 27.07.2018).

[62] Human Rights First, Rights Reporter, 3, May 2007.

The message from many of these shows had an influence on some military interrogators heading to Iraq. One such military interrogator, Tony Lagouranis, served in Iraq at Abu Ghraib. In those days, he claims that training sometimes contradicted reality, pressure to gain intelligence from detainees was immense, and the guidance from leadership was often unclear or changing. In this void, Lagouranis said that "people were watching movies and watching TV, and getting their [interrogation] ideas from that."[63] It is worth mentioning that upon returning from Iraq, Lagouranis suffered a mental breakdown, a grim reminder of the moral wounds of war discussed above.

Hollywood's influence on the military was of such a concern that in November of 2006, U.S. Army Brigadier General Patrick Finnegan, then Dean of the U.S. Military Academy at West Point, and a career military attorney, accompanied by three experienced military and F.B.I. interrogators, traveled to Hollywood for a meeting with the producers of *24*.[64] The purpose of the meeting was to "voice their concern that the show's central premise – that the letter of American law must be sacrificed for the country's security – was having a toxic effect … and adversely affected the training and performance of real American soldiers."[65]

These two examples offer striking contrasts of the influences from popular culture that accompany men and women when they join armed forces. They illustrate an obvious but often overlooked point that armed forces around the world must recognize new soldiers aren't blank cyphers and popular culture influences the development and learning of young people.[66] Education and training on the law of war will need to take into account these potential preconceptions to either leverage the positive influences or combat the negative ones.

9. UNDERSTANDING AND CONTROLLING EMOTIONS

In everything we do, we must observe the standards and values that dictate that we treat noncombatants and detainees with dignity and respect. While we are warriors, we are also all human beings. Stress caused by lengthy deployments and combat is not a sign of weakness; it is a sign that we are human.[67]

General David H. Petreus

[63] *Id* at 3.

[64] Jane Mayer, *Whatever it Takes*, *The politics of the man behind "24,"* "The New Yorker", February 19, 2007.

[65] *Id*.

[66] DevelopmentEducation.ie (11 June 2009). Exploring Popular Culture in Education. Available at: https://developmenteducation.ie/feature/exploring-popular-culture-in-education/ (accessed: 12.09.2018).

[67] See FN 49 Petreus Letter.

Even if all the aforementioned influences – regulation, education and training, ethics and moral training, and harnessing popular culture – contribute toward developing the 'reluctant warrior', one of the most difficult impediments to "mission success" is controlling the emotions of the "beast." In recognition of this fact, late in 2005, staff of the Research and Advanced Concepts Office of the U.S. Army Research Institute for the Behavioral and Social Sciences (ARI) asked the National Research Council (NRC) to explore research opportunities in the basic behavioral and social sciences. The NRC identified key areas of research that would yield useful results for the U.S. military.[68] One such area the NRC identified for further research surrounds the study of emotions, writing:

Emotions play a powerful, central role in everyday life and, not surprisingly, they play an equally central role in military planning and training … and the more recent emphasis on "winning the peace" has placed a premium on soldiers who can understand and defuse the emotions of others.[69]

Further, since emotions can affect judgment and impact decision making, understanding how emotions influence moral decision making should be a priority for the military. The following is a list of the ambitious questions the NRC stated that future research should address:[70]

• Can soldiers be trained to use and rely on fast perceptual processing that occurs with threatening stimuli?

• How can they best minimize false alarms – the perception of threat when threat does not exist?

• How can soldiers maintain a high level of alertness, attentiveness, and "situational awareness" during periods [of anger, terror, and horror interspersed with long periods of boredom]?

• How can military leaders prevent troop boredom from transforming into aggression, despair, or hatred?

• How can soldiers be trained to discern the ethical implications of their actions in a wide variety of situations, including the periods between operations?"

• Given the role of emotion in prejudice and stereotyping, what are the behavioral, cultural, and sociological processes that contribute to dehumanizing effects, such as those observed at the Abu Ghraib prison?

• Can people be trained to resist such effects?

• What role does a long period of vigilance or boredom play in making soldiers susceptible to such effects or other negative consequences?"

Additionally, the NRC identified that when troops interact closely with local populations, as they do during counter-insurgency warfare, there will be times when friendly forces suffer casualties due to "betrayal" by a member of that

[68] National Research Council. *Human Behavior in Military Contexts*, Washington, DC: The National Academies Press 2008, p. vii–viii.

[69] *Id* at 55.

[70] *Id* at 55–61.

population. These events can lead to extreme negative attitudes and prejudices regarding the entire local population and lead to unlawful actions against innocent locals, which, in turn, disrupts attempts to build relationships with the population. Further research may be able to determine if any opportunities exist for the effective remediation of negative emotions in such circumstances.

Lastly, the study highlights the concept of emotional intelligence.[71] While still debated in the field, the NRC stated that "if emotional intelligence is a viable concept, it could be relevant to many military problems, including: prevention and detection of PTSD and the timely return to combat duty, the selection of military recruits for specific roles on the basis of their levels of emotional intelligence, the training of soldiers to recognize emotions in themselves and others and to cope with extreme emotions, the training of leaders to manage emotions in themselves and their subordinates, and the design of training environments to simulate realistic scenarios that require emotionally adaptive skills."[72]

The timing of the call for additional research into the military application of human emotions could not have been more appropriate as the 2006 Mental Health Survey referenced earlier disclosed that soldiers and Marines who had high levels of anger were twice as likely to engage in unethical battlefield conduct.[73] Further, it found that having a unit member become a casualty or handling dead bodies and human remains were associated with increases in the mistreatment of Iraq non-combatants.[74] Clearly, there is significant military utility to better understanding the human condition and this is an area of research that will assist nations in more effectively training and treating its military forces and will assist commanders at all levels to better lead.

10. LEADERS (AT ALL LEVELS) MUST LEAD

Guide the people by law, subdue them by punishment; they may shun crime, but will be void of shame. Guide them by example, subdue them by courtesy; they will learn shame, and come to be good.[75]

Confucius

[71] Psychology Today.com defines emotional intelligence as "the ability to identify and manage your own emotions and the emotions of others. It is generally said to include three skills: emotional awareness; the ability to harness emotions and apply them to tasks like thinking and problem solving; and the ability to manage emotions, which includes regulating your own emotions and cheering up or calming other people." Available at: www.psychologytoday.com/us/basics/emotional-intelligence (accessed: 17.09.2018).

[72] *Id* at 60.

[73] See FN 48. MHAT IV FINAL REPORT (38).

[74] *Id* at 40.

[75] Confucius, *The Sayings of Confucius*, Barnes & Noble, 1994, p. 5.

Leadership is a potent combination of strategy and character. But if you must be without one, *be without strategy*.[76]

General Norman Schwarzkopf

A well regarded movie, *Remember the Titans*, provides a quote often used by military leaders: "Attitude reflects leadership…"[77] Considering this simple truth, leaders in the armed forces have an amazing opportunity – and responsibility – to shape a soldier's attitudes and actions.

An exemplar of senior leadership done right and the deliberate messaging of law of war values to U.S. Marines took place in March of 2003. When U.S. Secretary of Defense James N. Mattis was Major General Mattis, he was the senior infantry Marine commander to lead the ground offensive into southern Iraq, and would ultimately lead the effort for the fight for control of Baghdad. Before going into battle, he issued a one-page letter to his Marines, which highlights the way he thought about combat then, and likely today.[78] Below are a few excerpts from this letter (*emphasis added*).

When I give you the word, together we will cross the Line of Departure, close with those forces *that choose to fight*, and destroy them. Our fight is not with the Iraqi people, nor is it with members of the Iraqi army who choose to surrender. While we will move swiftly and aggressively against those who resist, *we will treat all others with decency*, *demonstrating chivalry and soldierly compassion … Use good judgment* and act in best interests of our Nation. *Engage your brain before you engage your weapon*. For the mission's sake, our country's sake, and the sake of the men who carried the Division's colors in past battles – who fought for life and never lost their nerve – carry out your mission and *keep your honor clean*.[79]

In many ways, General Mattis captures the very essence of what it means to be a 'reluctant warrior'. To treat others with soldierly compassion, to think before acting, and to always keep your honor clean. And while there are certainly elements of the law imbedded in the values he was expressing, he did it in such a way as to inspire his Marines without lecturing at them.

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[76] Kevin Kruse (27 December 2012). Forbes, Norman Schwarzkopf: *10 Quotes on Leadership and War*. Available at: https://www.forbes.com/sites/kevinkruse/2012/12/27/norman-schwarzkopf-quotes/#2b9af0e14eeb (accessed: 28.08.2018).

[77] Available at: https://www.imdb.com/title/tt0210945/quotes (accessed: 14.09.2018).

[78] American Military News, Read Epic Gen. "Mad Dog" Mattis' Letter To The 1st Marine Div. Before Assault On Iraq. Available at: https://americanmilitarynews.com/2016/11/read-general-james-mad-dog-mattis-letter-to-the-1st-marine-division-before-assault-on-iraq/ (accessed: 10.08.2018).

[79] Many of Secretary Mattis' public and private remarks mention the importance of keeping your "honor clean." The origin of this reference comes from the first verse of the Marines' Hymn: "First to fight for right and freedom and to keep our honor clean; we are proud to claim the title of United States Marine."

Based on General Mattis' statements over many years, his approach to behavior on the battlefield appears to be as much about honoring the profession of arms as it is about adherence to the law of war. This is important to understand as it hints toward a deeper "buy in" to many of the fundamental and underlying principles of the law of war, more so than complying with the many rules merely because the law of war requires it. On the latter approach, more than a few military personnel from many countries acknowledge, begrudgingly, that their particular unit or command complies with the law of war because they have to and they "don't want to go to jail." Humanity benefits when military units comply with the law of war, regardless of why they comply; however, one might prefer the deeper buy-in and more meaningful rationale for compliance.

Setting the proper culture at the top of a military organization has a significant impact.[80] During testimony at the court-martial of a U.S. solider accused of committing murder, Stjepan Mestrovic, a prominent sociologist specializing in war crimes, was asked to assess whether the shortcomings in leadership might be partly to blame. In response he testified that "In a dysfunctional unit, we cannot predict who will be the deviant – but we can predict deviance."[81]

While the leadership tone may be set at the top, sometimes regardless of the official values championed, individual small units will develop their own versions of acceptable behavior. Major Pryer highlights this point while discussing former Navy SEAL Dick Couch's book, A Tactical Ethic: Moral Conduct in the Insurgent Battlespace.[82] Major Pryer writes, "Couch presents the compelling argument that new recruits today leave their initial military training with a thorough understanding of U.S. military values, but when they are assigned to operational units, they may enter a small-unit culture that is not what higher commands want this culture to be. A potentially dangerous subculture, Couch argues, is usually due to one or two key influencers (moral insurgents) who convert or gain silent acquiescence from other members of the unit.[83] Since young soldiers want to fit in with their small units, they usually conform."[84]

If Couch is correct, and the evidence of Abu Ghraib, the "Kill Team" of the 5th Stryker Brigade, and numerous other incidents seems to support, leaders at all levels must pay careful attention to the small-unit or "barracks" subcultures that

[80] Parks at 985 ("Commanders must be convinced of the efficacy of the law of war. So do the troops, although a commander's express intolerance goes a long way toward minimizing the probability of misconduct.").

[81] Mogelson at 1 (At the trial of Jeremy Morlock, a member of the 5th Striker Brigade).

[82] Pryer at 8.

[83] *Id* at 8, citing Couch, 77. ("Perhaps to avoid confusion in the minds of counterinsurgents, Couch actually calls these immoral individuals "pirates" rather than insurgents, even though their role is much more akin to an insurgent's role.").

[84] *Id* at 8, citing Couch, 54. ("Exacerbating the problem, Couch points out, is that today's generation of recruits (largely consisting of "Millenials") demonstrate a greater "need to belong" than previous generations.").

exist amongst the ranks. More than other types of organizations, military units develop strong bonds with their fellow soldiers, forming a brotherhood based on trust and loyalty. This is important for unit cohesion, building teamwork, and fostering esprit de corps; however, this emotional loyalty to the small-unit can overwhelm the more important allegiance to the mission and to the higher Core Values of the fighting force. While much has been written about the role of officers in taming the 'beast', equal time needs to be devoted to growing the junior ranks as they will be some of the greatest influencers, for good or bad, on the vast majority of our enlisted soldiers.

11. TO BE CONTINUED…

While the law of war has become part of the fabric of our military heritage, and obeying it is absolutely the right thing to do, the law of war admittedly provides the floor of and not the ceiling for permissible behavior and right conduct. Just because something may be legally permissible does not mean it is also operationally and ethically the best course of action. As discussed in this article, the law usually supplies the answer to the question "can we do this" but does not necessarily equip a soldier with the tools necessary to answer the question "should we do this," which is why it is so important to develop soldiers who can think through the complex decision-making process during the stress of combat. While the law of war is the necessary starting point, W. Hays Parks makes this clear, writing, "effective implementation of the law of war requires more than a manual and dissemination. It requires an ethos within the military."[85]

We have sought to highlight the necessity and challenge of creating that warrior ethos and have touched on some of the internal and external factors that influence that process. In a future article the authors hope to look more closely at these factors while offering suggestions on ways to enhance and improve law of war education and training in the armed forces in pursuit of the 'reluctant warrior' who can "honor the precepts of chivalrous and humane warfare in the face of the contrary behavior …" and "… successfully confront evil without becoming evil."[86] Both soldier and the society will be the better for it.

[85] Parks at 982.

[86] Charles J. Dunlap, Jr., *A Virtuous Warrior in a Savage World*. Available at: http://www.au.af.mil/au/awc/awcgate/usafa/virtuous_warrior.pdf (accessed: 5.09.2018).

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THE RELUCTANT WARRIOR: THE CHALLENGE TO INSTILLING LAW OF WAR IN TODAY'S PROFESSIONAL WARRIOR

Summary

George C. Marshall, famed U.S. World War II general and eventual U.S. Secretary of State and Nobel Peace Prize winner, on his first assignment fresh out of military school, told a fellow officer:

Once an army is involved in war, there is a beast in every fighting man which begins tugging at its chains. And a good officer must learn early on how to keep the beast under control, both in his men and himself

Even for nations possessing a reputation for stringent compliance with the law of war, the annals of history, to include more contemporary military engagements, are littered with cases of atrocities committed by soldiers. All too often the beast wins, and because every nation has an obligation to minimize the reality described above, nations must continue to dedicate time, thought and resources to best prepare their forces for future military operations. Unrestrained warfare has a direct negative military impact on both winning the war and winning the peace. This corollary remains as true today as it has ever been.

What is meant by a 'reluctant warrior'? Put simply, a reluctant warrior is one who while ready to employ lethal force when the situation demands, is not eager to do so in "the moment". He answers the questions: "Can I, If I, Should I", and then takes decisive action – or employs uncommon restraint – with a goal of accomplishing the mission all the while staying true to the value imbedded in the U.S. Marines' Hymn, "to keep our honor clean".

To fully develop the 'reluctant warrior' needed on today's and tomorrow's battlefields, this article will look at the role of legal regulation and the practice of military education and training, as well as some of the other factors that influence behavior and decision-making during instances of armed conflict. This article will also comment on the costs to the individual soldier and to the mission when a nation fails to prepare 'reluctant warriors'.

KEYWORDS

US military law, US military history, international law of war, war crimes

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PATIENT RIGHTS WITHIN THE SYSTEM OF LEGAL AID. A STARTING POINT TOWARDS MEDICAL ANTHROPOLOGY

1. INTRODUCTION

1 January 2016 saw the commencement of operations of free legal aid centres in Poland, which function under the Act of 5 August 2015 on Free Legal Aid and Legal Education (currently named: the Act on Free Legal Aid, Civic Counselling and Legal Education,[1] hereinafter as "the 2015 Act"). Anyone who files an application representing that they are not in a position to obtain paid advice can benefit from complimentary legal assistance. By including within the catalogue of potential beneficiaries of the 2015 Act any person interested in obtaining legal aid, an opportunity arises to tender help to all those in need – including those patients who face legal problems.

This paper expounds upon the problem of patient rights, taking particular account of the right to information: on one's state of health, examination, diagnosis, proposed and practicable diagnostic methods, proposed and practicable medical methods, prognosis.[2] The specificity of the relationship between a patient and a doctor shall also be discussed, with due emphasis on the aspect of communication between those two actors. The authors also pinpoint that, in a broader context, free legal aid centres operating under the 2015 Act might face up to issues pertaining to patient rights. An answer is also sought to the question of how

[1] Official Journal of Laws of 2018, item 1467.

[2] This catalogue was featured for the first time in Article 19 of the Act on Healthcare Institutions, see: Act of 30 August 1991 on Healthcare Institutions (Official Journal of Laws of 2007, No. 14, item 89).

the realization of the right to information could be enhanced, and the authors furnish recommendations on the matter.

2. PATIENT RIGHTS AS A PHENOMENON

Development of contemporary societies is underpinned by knowledge. It is a cliché that knowledge is power and that it serves as a guarantee of a relative equilibrium of rights and obligations for an individual in their dealings with a group or a stronger actor. At a time of rapid technical development sociologists, lawyers and political scientists have identified the need to support weaker actors as part of a campaign to counteract exclusion.[3] A myriad of areas of social and everyday life demand narrow specializations. Nowadays, as much as one requires specialist equipment to discover a defect in a car, even more specialized knowledge is necessary to formulate a medical diagnosis or understand a defect of a human organism. Laymen must avail themselves of the services of car repair centres. Not surprisingly, there are many parallels in medicine. However, inasmuch as not everybody is obliged to hold a car, everybody has an organism which must function properly in order to perform other societal functions. Mariola Guzowska has noted that relationships between laymen and professionals are based upon the former's trust towards the latter. This, in her opinion, "gives rise to an absence of balance in a professional-non-professional relationship, with the former dominating. With a view to mitigate this imbalance between the parties, it is necessary to introduce the patient to the intricacies of the doctor's professional actions. This shall enable the individual in question to consciously participate in these actions. As a consequence, the doctor is burdened with a duty to equip the patient with full and accurate information and instructions."[4] Similar concepts are found in the classic works of eminent sociologists of medicine such as Antonina Ostrowska[5] as well as in the entire contemporary notion of patient rights: the right to information is a rudimentary, fundamental right belonging to that catalogue.[6]

Patient rights shall be defined as a set of entitlements whose purpose is protection of human health. In a wider sense, the idea of patient rights pertains to pub-

[3] M. Foucault, *Trzeba bronić społeczeństwa*, Warszawa 1998 (English title: *Society Must Be Defended*).

[4] M. Guzowska, *Prawo pacjenta do informacji o stanie zdrowia jako jedno z praw przysługujących w procesie leczenia*, „Przegląd Sądowy" 2009, Vol. 9, pp. 91–102.

[5] A. Ostrowska, *Socjologiczne i etyczne uwarunkowania relacji lekarzy z pacjentami*, (in:) J. Hartman, M. Waligóra (eds.), *Etyczne aspekty decyzji medycznych*, Warszawa 2011, pp. 11–23.

[6] For instance, the Act on Patient Rights and the Patient Rights Ombudsman prescribes this right in Chapter 3. For more, see: Act of 6 November 2008 on Patient Rights and the Patient Rights Ombudsman (Official Journal of Laws of 2009, No. 52, item 417).

lic policies, healthcare institutions and the catalogue of rights related directly to health that an individual has.[7] Interestingly, patient rights in a narrower sense are similarly difficult to pin down as they are regulated by various branches of law. It shall be noted that protection of human health and life has been, since time immemorial, a matter of both public and private law and as such are governed by the norms of criminal and civil law. Furthermore, as a result of rapidly expanding juridification of everyday life, these rights begin to transgress into the scope of other branches of law.[8]

When analysing patient rights one shall note that they attach not only to patients themselves, but also to doctors and nurses (as a dominant thread of the medical law literature dictates). Moreover, other specialists, such as physiotherapists, psychologists, speech therapists, etc., begin to play an increasingly more significant role. It is more proper to talk about medical professions at large.[9] The group also includes, therefore, other experts who work with patients on a day-to-day basis so, for instance, administrative workers employed by hospitals as well as officials who regularly tender advice and support to persons under diagnosis or treatment.[10]

The fundamental differentiation of patient rights is that into negative rights (as in "freedom from") and positive rights (as in "a right to"). This division is prevalent in the literature although Dorota Karkowska has noted that some of those rights are a right to something and a freedom from something at the same time: "the fundamental right of a patient to psychophysical integrity necessitates not only that the state refrains from any acts that could endanger the life or health of an individual, but also wide-ranging positive measures shall be undertaken to protect those individual goods. Similarly, societal rights, such as the right to health

[7] K. J. Arrow, *Lecznictwo z punktu widzenia niepewności i ekonomii dobrobytu*, (in:) *Eseje z teorii ryzyka*, Warszawa 1979, pp. 181–215; D. Karkowska, *Zawody medyczne*, Warszawa 2012, p. 30; D. R. Kijowski, A. Miruć, P. J. Suwaj, *Kryzys prawa administracyjnego*, Vol. 1, Warszawa 2012, p. 26.

[8] For more on this, see: B. Kmieciak, *Prawa dziecka jako pacjenta*, Warszawa 2016, p. 46, and M. Safjan, *Prawo i medycyna. Ochrona praw jednostki a dylematy współczesnej medycyny*, Warszawa 1998; A. Zoll, *Odpowiedzialność karna lekarza za niepowodzenie w leczeniu*, Warszawa 1988; G. Rejtan, *Odpowiedzialność karna lekarzy*, Warszawa 1991; M. Nesterowicz, *Kontraktowa i deliktowa odpowiedzialność lekarza za zabieg leczniczy*, Warszawa–Poznań 1972; M. Sośniak, *Cywilna odpowiedzialność lekarza*, Warszawa 1989.

[9] By a medical professional we understand a person who is authorized, "pursuant to specific provisions, to provide medical services as well as a person who has professional qualifications to provide medical services within a defined scope or in a defined field of medicine". Cf. Article 2 section 1 point 2 of the Act of 15 April 2011 on Medical Activity (Official Journal of Laws of 2011, No. 112, item 654). Therefore, we shall refer here to experts who undertake professional actions and interventions for the benefit of patients.

[10] B. Kmieciak, *Problem tajemnicy psychiatrycznej w kontekście dostępu pracowników niemedycznych do informacji o prawach pacjenta*, „Psychiatria i psychologia kliniczna" 2014, No. 1, pp. 50–55.

protection, have within their scope negative entitlements – health protection or the prohibition on the conduct of medical experiments without the patient's consent, as well as positive ones – the prohibition on the implementation by the state of a public health policy that would restrict equal access to healthcare services"[11].

Under Polish law, the most significant patient rights include the right to medical care, the right to information, the right to demand that the doctor withhold certain information from third parties within the scope delineated by the patient, the right to present own opinion as regards the information received, the right to obtain information regarding the doctor's intention to cease to provide medical care at a properly early stage, the right to confidentiality of information pertaining to the patient, the right to consent to medical treatment, the right to respect for intimacy and dignity of the patient, the right to die in peace and with dignity, the right to treatment that ensures the alleviation of pain and other suffering in a terminal state[12], the right of access to medical records, the right to raise objections to the doctor's opinion or report, the right to respect for the patient's private and family life, the right to pastoral care, the right to have valuable possessions stored in a deposit, the right to seek help from the Patient Rights Ombudsman. A cursory analysis of these rights reveals clearly that the right to know and to be informed is a patient's rudimentary, fundamental right. In our opinion this is a reflection of the modern concept of the rule of law from which, *inter alia*, the right of access to public information is derived.[13] In this connection, it is pertinent to refer to a judgment of the Constitutional Court where it was held, in no uncertain terms, that the right to provide information, even assuming that it is triggered by a member of the public when they submit a request, obliges relevant authorities to actively make efforts to make such information available to the individual.[14] The right to information being part and parcel of patient rights shall be approached by analogy. For it is a patient that initiates the reaction of healthcare institutions, however doctors and medical entities must actively, as a response, make available information as regards the conduct and outcome of medical examinations, therapies and alternative methods of treatment or available patient rights. This account is predicated upon the existence of a rational legislator and the assumption that no mutually exclusive nor unnecessary norms shall be enacted into law by parliament[15].

[11] D. Karkowska, *Prawa pacjenta*, Warszawa, 2018-06-20. Available at: https://sip.lex.pl/#/monograph/369206719/4 (accessed: 16.07.2018).

[12] Following the latest amendments to the Act on Patient Rights and the Patient Rights Ombudsman, the right to alleviation of pain encompasses all potential medical interventions and not only those which concern terminal situations.

[13] Z. Witkowski, *Prawo konstytucyjne*, Toruń 2006.

[14] Judgment of the Polish Constitutional Court of 20 March 2006 (ref. number K 17/05).

[15] L. Morawski, *Wstęp do prawoznawstwa*, Toruń 2006.

Karkowska (who has been cited previously) notes that the notion of "patient rights" may pertain to the relationship between a patient and a public authority as between a patient and a concrete entity authorized to provide medical care.[16] She argues further that in the former scenario these rights are "abstract and general" whilst in the former "patient rights have the character of concrete norms which, on the one hand, point to the obligations of entities providing medical care (…) while, on the other, to patients' rights related to the protection of their personal rights"[17].

The foregoing view predominantly embraces the vertical aspect of patient rights. In the centre here is a patient subject to some higher authority which may rest at the level of: booking an appointment (registration), a nurses' station, a doctor's office or the office of a director of the healthcare in question, or a decision of a public authority. A horizontal account of patient rights begs the following question: Can a patient violate the rights of another patient? Such a situation is admittedly hardly possible. A beneficiary of medical care would have to be objectively able to have a bearing upon whether, for example, medical care is administered to another person, and this is unlikely. What is likely, however, is that the behaviour and attitude of patients is liable to directly impact the mental welfare of other persons under treatment.[18]

It is in this context that the notion of a patient's "duty" gains relevance. It may be understood, first, as a formal duty related to following administrative orders related to booking a doctor's appointment.[19] Alternatively, the concept of "duty" attaches to a patient's behaviour towards another: another patient, visitors, a medical professional. A reference here is made to a debate, prevalent in the doctrine of human rights law, concerning an individual's duty towards another person, particularly the duty of respect.[20] This aspect has featured prominently in Polish law and shall continue to do so[21] as it is of special importance in the context of con-

[16] D. Karkowska, *Prawa pacjenta*...

[17] *Ibidem*.

[18] It is perhaps for this reason that the Patient Rights Ombudsman in its 2018 proposed amendment to the Act on Patient Rights decided to include a catalogue of "patient duties" which directly refer to the concept of respect for each and every person.

[19] *Obowiązki pacjenta (wynikające z ustawy o świadczeniach opieki zdrowotnej finansowanych ze środków publicznych)* (Duties of ythe patient (under the Act on Publically Financed Medical Care Services, prepared by the Institute for Patient Rights and Health Education)), Warszawa, http://www.prawapacjenta.eu/var/media/File/Filarski_obowiazki%20pacjenta.pdf (accessed: 23.07.2018).

[20] J. Kondziela, *Chrześcijańskie ujęcie praw człowieka na tle dyskusji międzynarodowej*, „Chrześcijanin w Świecie" 1977, nos. 63–64, p. 56, cited after: W. Osiatyński, *Prawa człowieka i ich granice*, Kraków 2011, p. 77.

[21] E.g. paragraph 3 of the Regulation of the Minister of Health and Welfare of 6 May 1983 on the statutes of stationary drug treatment facilities and care homes for people addicted to alcohol (Official Journal of Law, No. 25, item 115) and Article 18a of the Act of 30 August 1991 on Healthcare Institutions (Official Journal of Laws of 2007, No. 14, item 89). In recent months,

flicts between doctors and patients which arise within the healthcare system. It is an increasingly common situation where persons employed in the healthcare system fall victim to aggression. It is emphasized that the language of rights and entitlements, coupled with the overlooking of duties, may conduce to such incidents. This, in turn, may lead to demanding attitudes among patients who have regard only for their rights.[22] Similarly, the authors notice parallels in the case of other total institutions. For relationships between inmates and prison guards, pupils and teachers, students and lecturers have been based on the inequality of the parties, a phenomenon which was particularly observable in Communist Poland. Contemporarily, greater emphasis is put on the need to embolden and bolster the individual in its dealings with authority – which appears by all accounts correct, however this process may occur at the expense of the employees of a total institution (the lack of respect for doctors or medical personnel at large mentioned above is discernible also in other areas, such as higher education).

3. PATIENT RIGHTS AND THE THERAPEUTIC RELATIONSHIP

The medical professional-patient relationship is peculiar. A person who books a doctor's appointment is often seriously concerned about the situation they have found themselves in. Therefore, it is not merely a relationship between a trader (service provider) and a client, as is frequently surmised in the literature.[23] Commentators at times revive the idea that a patient is, first and foremost, a service recipient who accepts, under a contractual arrangement, service from a trained professional. This consumer approach, as noted by, inter alia, Georg Annas, has not gained a dominant position in the social and medical debate.[24] The interaction occurring between a medical expert and a person suffering from a condition is unique, also from a legal perspective. For actions directed towards a patient are most often aimed at bettering their situation. Therefore, a person who has booked a doctor's appointment has done so in the hopes that the given professional is able to provide the support needed.[25] This angle has been noted by Talcott Persons,

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the Patient Rights Ombudsman proposed amendments to the Act on Patient Rights which would restore the statutory language of a patient's duty.

[22] Cf. in this context: M. Dziewiecki, *Pedagogika integralna*, Warszawa 2010, pp. 129–130; D. Mechanic, D. D. McAlpine, *Sociology of Health Care Reform: Building on Research and Analysis to Improve Health Care*, "Journal of Health and Social Behavior" 2010, No. 51, pp. 149–150.

[23] E. Krajewska-Kułak, M. Sierakowska, J. Lewko, C. Łukaszuk, *Wstęp*, (in:) *Pacjent podmiotem troski zespołu terapeutycznego*, Vol. 1, Białystok 2005, pp. 12–13.

[24] J. Bujny, *Prawa pacjenta. Między autonomią, a paternalizmem*, Warszawa 2007, pp. 10–16.

[25] *Ibidem*, p. 68. See also: R. K. Merton, *Paradygmat analizy funkcjonalnej w socjologii*, (in:) A. Jasińska-Kania et al. (eds.), *Współczesne teorie socjologiczne*, Warszawa 2006, pp. 367–375.

among others, who underscores that a patient seeking the assistance of a doctor has the right to expect the undertaking of actions aimed at bettering their state of health.[26] Conversely, doctors in their everyday work are authorized to interfere with patients' intimacy, which is why the latter are obliged to comply with procedures imposed by medical professionals, who, in turn, must at least showcase respect for the patient's dignity.[27]

An analysis of the debate surrounding patient rights reveals that the low degree of public awareness in this respect is not a phenomenon of the recent times. The Polish government is fully conscious of the low level of medical and legal knowledge of its citizens[28].

Polish citizens struggle with differentiating facts from opinion. When extracting information from the Internet by means of search engines, they fail to sift through this sizable volume of data and classify it according to source or time of publication. It is these two variables that possess the most significance in the study of law. The foregoing explains why the authors, who in their everyday life work in legal practice, deal with patient rights or teach at university level, are not taken aback by citations of legislation derived from Wikipedia. Increasingly more often the recipients of our services (educational or legal) confront the information we provide with *dr Google* rather than with the letter of the relevant legislation. Further, the reliability derived from the number of online visits (or hits) often trumps observations based on a careful study of the official database of legislation. Where beneficiaries are referred to the Act on Patient Rights and the Patient Rights Ombudsman, questions often arise whether the patients' rights charter can serve as the basis for legal rights and obligations. This document, although it has no binding force, still remains a popular source of knowledge about patient rights.[29] Both the first and the second version of the charter comprised only several pages of text. Patients could familiarize themselves with relevant rights expeditiously, according to the situation at hand. On the other hand, the Act on Patient Rights is a voluminous piece of legislation, one that features not only an enumeration of patient

[26] For more, see*: Choroba jako dewiacja i „profesjonalna" rola lekarza; relacja pacjent – lekarz w funkcjonalnej teorii Talcotta Parsonsa*, available at: http://www.h-ph.pl/pdf/hyg-2012/hyg-2012-4-398.pdf (accessed: 17.08.2018).

[27] L. Marszałek, *Społeczny kontekst niepełnosprawności*, „Seminare" 2007, No. 24, pp. 344–345, and T. Żółkowska, *Osoba z niepełnosprawnością intelektualną w społeczeństwie. Koncepcje a rzeczywistość*, (in:) I. Ramik-Mażewska, G. Leśniewska (eds.), *Aktywizacja społeczno-zawodowa osób niepełnosprawnych ruchowo*, Szczecin 2008, p. 13.

[28] The low level of awareness as regards patient rights is also evidenced by a statement made by the then Minister of Health in 2011 who, during a conference devoted to patient rights, misguidedly referenced the European Charter of Patients' Rights which is not, strictly speaking, legally binding. See: http://www.rynekzdrowia.pl/Prawo/Unia-Europejska-o-nas-w-przestrzeganiu-praw-pacjenta-zrobiliscie-postep,108296,2.html (accessed: 21.08.2018).

[29] Similar corollaries are reached by A. Łaska-Formejster, *Pacjent w sieci zależności. Społeczny kontekst praw i autonomii pacjenta*, Łódź 2015.

rights, but also spells out the procedures governing the election of the Patient Rights Ombudsman, the Voivodeship Medical Events Commissions and the inner workings of a commission to which patients may submit their objections.[30]

The myth of "*abuse of medical care*"[31] is common in everyday parlance, however our field research tends to suggest that Polish citizens resort to medical help too late.[32] It is surmised that the Polish society refrains from availing itself of professional help – and just like legal advice is sought as late as during enforcement proceedings,[33] the same situation is observable in the field of medicine. Polish citizens use medical services late where illnesses have reached advanced stages, which is borne out, inter alia, by the number of doctor's appointments. The reason for this, it is suggested, is the low level of awareness when it comes to medicine and the availability of medical services.

Generally, the reformed medical system is burdened with overflowing administration. Further, it is difficult to expect a citizen to know how to benefit from medical care where they are often oblivious to what is actually available. The relationship between a patient and a doctor is one of administrative power and authority. A person faced with pain is not in a position to act rationally, their lack of self-dependence resembles that of people deprived of their liberty (this is, admittedly, a simplification). It is from this perspective that Michel Foucault's analyses of individuals and their relations with public authority appear especially momentous[34]; the same applies to Erving Goffman's research on total institutions[35]. Błażej Kmieciak has also referred to the classic sociological account which attempts to analyse relations between authority and an individual by arguing that the knowledge possessed by medical professionals is highly peculiar and,

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[30] Cf. Ł. Hajduk, M. Binkowska-Bury, A. Jacek, *Informowanie o prawach pacjenta przez personel medyczny*, p. 1, http://www.kpg-steczkowska.com/wp-content/uploads/2012/04/Prawa-Pacjenta.pdf (accessed: 27.07.2018).

[31] This kind of fetishization of individuals' actions is observable also in public discourse concerning the right to access to public information. See: A. S. Bartnik, *Organizacje strażnicze – partnerzy czy pieniacze? Kontrola i rekomendacje jako zewnętrzny audyt ekspercko-obywatelski*, (in:) M. Trybull-Piotrowska (ed.), *Społeczeństwo*, *gospodarka*, *siły zbrojne – relacje i wyzwania*, Warszawa 2014.

[32] As part of research for the purposes of this paper, the authors conducted interviews with 10 patients changing their preferred doctors (the patients were selected using the snowball method, therefore the findings of this paper are not representative). We also have lodged a petition to the Patient Rights Ombudsman asking for disclosure of statistics regarding the volume of complaints and proceedings, however we have not received a response.

[33] A hypothesis put forward by A.S. Bartnik and K. J. Kowalska, *Poradnictwo prawne i obywatelskie w kontekście świadomości prawnej i potrzeby edukacji prawnej Polaków. Wybrane problem*, „Studia Iuridica" 2018, Vol. 78, pp. 40–60.

[34] We refer here to both *Discipline and Punishment* and *Society Must Be Defended* where the author proffers a novel account of the subordination of an individual to administrative or state authority.

[35] E. Goffman, *Instytucje totalne. O pacjentach szpitali psychiatrycznych i mieszkańcach innych instytucji totalnych*, Gdańsk 2011.

to an extent, insular. This puts them in a position of "authority" which is hardly comparable with any other profession.[36]

4. RIGHT TO INFORMATION

Building upon the above, the legal concept of patient autonomy and self-determination appears to be a Weberian model, an ideal through which the state, by means of its policies and legal institutions, shall ensure patients agency. Similar concepts are found in the works of economists, as noted by Dorota Karkowska who writes that "Economists have pointed to the limits of the behaviour of patients acting as sovereign service recipient – patients do not know what good (medical service) is able to satisfy their needs. In these situations medical professionals perform the role of not only a creator of services but also they decide on the content of the services to be tendered. The effect of such information imbalance is the medical professionals' traditional domination over patients, and patient rights are aimed at mitigating this state of affairs"[37]. The recent years have seen, however, a new facet which is liable to meaningfully affect this disproportion – the notion of so-called health management. A relatively novel concept, it focuses on perceiving the patient as "an expert when it comes to own medical condition" and applies primarily to patients suffering from chronic conditions as they possess concrete knowledge concerning, inter alia, the effects of drugs. Their opinion may also be invaluable in the process of formulating a diagnosis and proposing methods of treatment on account of the fact that such patients have the option of monitoring the state of their bodies/organisms on an on-going, permanent basis.[38]

It is pertinent to refer in this connection to Article 68(2) of the Polish Constitution whose construction has generated controversy as regards the positive versus the negative package of guaranteed benefits, i.e. equal access to publically financed medical care. The controversy overlaps largely with the right to information prescribed in Article 9 of the Act on Patient Rights and the Patient Rights Ombudsman. For since the concepts of a positive and negative package of benefits are not helpful in determining the services which are publically financed (reimbursed by the state), it is difficult to expect patients/laymen to be in the know as regards availing themselves of their rights. Sylwia Jarosz-Żukowska has noted that Polish regulations and case law with regard to patient rights is convoluted and unambiguous although "the Supreme Court has emphasized that a beneficiary of medical

[36] B. Kmieciak. *Czy szpital psychiatryczny jest (nadal) instytucją totalną?*, „Psychiatria i Psychologia Kliniczna" 2017, Vol. 17, pp. 142–151.

[37] D. Karkowska, *Prawa pacjenta…*

[38] Cf. M. Gałązka-Sobotka (ed.), *Stwardnienie rozsiane: zarządzanie chorobą*, Warszawa 2016.

services has no claim to the National Health Fund to establish whether they have a right to a medical service which is not covered by a contract for the provision of medical services"[39]. Further, she writes that "the Supreme Court in its resolution of 24 January 2007 (III UZP 4/06) – LEX No. 209081 answered the question: 'If a given medical service is not covered by a contract to provide medical services […], can a patient demand that the National Health Fund establish whether they have a right to that medical service'? The Sureme Court's answered was negative. For the insured have the right to all of the medical services which are not excluded by statute, as long as they align with the current requirements of contemporary medical knowledge based on scientific evidence and medical practice, 'however the right to all non-excluded medical services is subject to the provisions of the Act (at the time it was the 1997 Act on Public Health Insurance [authors' comment]), which envisaged that edical services were provided to the insured subject to the availability of funds had by branches of the National health Fund, which perform their functions in accordance with the principles of fairness, purposefulness and efficiency', cited after: D. E. Lach, *Zasada równego dostępu*..., pp. 250–251. Cf also the judgment of the Polish Supreme Court of 7 August 2003, in which it was held that the National health Fund is not obliged to reimburse treatments not covered by a contract with a given medical service provider"[40].

Considering the above, the paper argues that it would reasonable to oblige the Ministry of Health to publish, on an annual basis, a list of basic medical services, i.e. the scope of access to doctors and treatments available – perhaps every doctor's appointment should be evidenced by means of a certificate and/or diagnosis. For today a patient is generally oblivious as to what information to expect, how to obtain it, and, even more so, who is competent to provide it. Although the right to information is a fundamental patient right, there is no unambiguous legal basis for a person suffering from a condition to demand information of such a condition's specifics. Granted, one has an unconstrained right to familiarize oneself with any and all information concerning one's state of health, however this general rule is not aided by means of practical executive provisions of law. For instance, the right to information on an administered medical intervention was first recognized under Polish law in the 1991 Act on Healthcare Institutions. The legislation used the term "information on one's state of health" which is ambiguous. Although no legislative restrictions were prescribed in this respect, practical use of the right faces tremendous obstacles. Although the need to obtain consent and the right to understandable and clear information has been accepted as a patient right for decades – see, for instance, the rather unequivocal judgment of the Polish Supreme Court of 14 November 1972, I CR 463/72 (unpublished), patients face problems

[39] S. Jarosz-Żukowska, *Prawo do ochrony zdrowia i dostępu do świadczeń opieki zdrowotnej*, http://www.repozytorium.uni.wroc.pl/Content/53682/36_Sylwia_Jarosz_Zukowska.pdf (accessed: 21.08.2018).

[40] *Ibidem*.

with obtaining information as regards complications. The case law of the Supreme Court fails to address the gravity of interpretative controversies because the majority of patient rights cases is settled out of court and, on the other hand, it has been held that "doctors are not obliged to provide information on all potential complications of given treatment, especially where such complications were impossible to foresee"[41]. This begs the question: how should complications be documented and what complications should the doctor inform the patient about (if at all)?

In this context, it should be emphasized that following the obtaining of such information the patient has the right to present their own opinion on the matter. At the same time, the information made available to the patient shall be understandable thereto.[42] Karkowska has surmised that "a patient had the right to obtain information expressed in words and terms which are clear and understandable for them. To this end, many an aspect of a patient's situation must be taken into account, such as psychophysical maturity, state of awareness, age, education, etc. Insular, professional medical language, grounded in scientific terms, shall be avoided. One consequence of providing information in an improper manner may be the grant of 'uninformed consent'. This is to say that consent granted in response to information provided in an unclear manner, where no adjustment was made to the intellectual capacity of the patient or their statutory representative, is ineffective and as such legally irrelevant."[43]

Here resides a peculiar paradox related to patient rights. Alicja Łaska-Formejster has inferred from her research that even where patients declare that they are aware of their rights, they are unable to name them nor can they pinpoint where and how they may be found. She goes on to argue that patients are typically only capable of naming up to four rights from the extensive catalogue[44]. The lack of real knowledge or legal awareness as regards patient rights coupled with the low level of legal awareness among Polish citizens makes it so that the volume of court cases and complaints made to relevant institutions is low compared to other European countries. And although the number complaints to the Patient Rights Ombudsman gradually increases year after year, this testifies more to the fact that the level of legal awareness in this respect is rising rather than that the quality of medical services has slumped. Interestingly, statements filed with the Patient Rights Ombudsman often have the form of questions rather than complaints[45]. The foregoing shall serve as a backdrop against which we shall now zero in on legal aid.

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[41] LEX No. 2000500 – judgment of 26 January 2016.

[42] Article 13(2) of the Doctor's Medical Code of 2 January 2004 (uniform text, incorporating the changes enacted on 20 September 2003 by the VII Extraordinary National Congress of Doctors), Warszawa 2004.

[43] D. Karkowska, *Prawa pacjenta...*

[44] For more, see: A. Łaska-Formejster, *Pacjent...*

[45] Own observation based on the information disclosed on the website of the Patient Rights Ombudsman. Professor Jakub Palikowski has analysed the proportion between complaints and questions and concluded that complaints represent only several per cent of all statements lodged

5. THE PATIENT AND LEGAL AID

The Act of 5 August 2015 on Free Legal Aid and Legal Education[46] permitted the provision of free legal aid to persons who represent that they are not able to afford paid legal advisory. More than 1500 centres operate around the country, providing legal advice, civic counselling and mediation services. As the healthcare system becomes increasingly digitalized[47], thus amplifying the risk of patients being disoriented within the intricacies of the medical process of treatment, it is crucial to strengthen and embolden the message conveyed to patients and their families even as early as before treatment actually commences. For it is only information – as noted by Bączyk-Rozwadowska – "conveyed properly as regards its scope, manner and form" may "enable the patient to assess the benefits and risks that may flow from proposed treatment, formulate a 'therapeutic profit and loss account', and ultimately grant or refuse consent to a medical intervention"[48]. It is our estimation that a patient's right to information may be fully realized only with systemic support not only for patients themselves, hence it is necessary to educate the society, devise topical informational brochures[49], whilst supporting representatives of the healthcare system who must comply with patient rights on a daily basis. Sizable difficulty lies in adjusting a message to a given patient and selecting a form of communication that corresponds with the addressee's perceptive abilities. Doctors, nurses and other persons employed in healthcare institutions should be able to impart information in a manner that familiarizes the patient fully with the state of their health and potential available methods of treatment, but also affords patients an opportunity to understand the wider context surrounding their conditions – that is the position of a given patient within the healthcare system, and the intricacies of the system itself. The foregoing is best exemplified by situations faced by people active in the hospice environment in Poland. Doctors, nurses, psychologists and physiotherapists not only proffer assistance, but they also often converse with both patients and their families regarding the complexity of the healthcare system in our country, which generates constrains in their

(see: J. Pawlikowski, *Pytania o urząd Rzecznika Praw Pacjenta*, „Medycyna Praktyczna", source: https://prawo.mp.pl/wiadomosci/156756,pytania-o-urzad-rzecznika-praw-pacjenta.

[46] Official Journal of Laws of 2015, item 1255.

[47] For more, see: http://www.rynekaptek.pl/komunikaty-urzedowe/dziennik-ustaw-opublikowano-ustawe-o-e-recepcie,25461.html (accessed: 25.07.2018), http://www.politykazdrowotna.com/29895,internetowe-konto-pacjenta-mz-wskrzesza-projekt (accessed: 25.07.2018).

[48] K. Bączyk-Rozwadowska, *Prawo pacjenta do informacji według przepisów polskiego prawa medycznego*, „Studia Iuridica Toruniensia" 2011, Vol. 9, p. 60.

[49] A brochure as an educational form is highly regarded in the field of healthcare. For more on this, see, *inter alia*: P. Michalski, A. Kosobucka, M. Nowik, Ł. Pietrzykowski, A. Andruszkiewicz, A. Kubica, *Edukacja zdrowotna pacjentów z chorobami układu sercowo-naczyniowego*, „Folia Cardiologica" 2016, Vol. 11, No. 6.

everyday work (queues to hospices, the necessity of obtaining a referral), and explain to them the duties of attending doctors or doctors discharging their duties for the benefit of patients in hospitals. Therefore, we can talk about two elements constitutive of the right to information, i.e.:

1) access to information regarding own state of health;

2) access to information regarding the operation of the healthcare system.

Inasmuch as the first aspect can only be actualized by medical professionals, the latter one could be entrusted to a centre of free aid and fittingly complement the helplines operated by the Patient Rights Ombudsman and the National Health Fund (this would require the incorporation of strictly patient rights-oriented provisions into the Act). That there is a multitude of entities from which patients and their families could obtain information would only be beneficial, thus bettering the standard of life for citizens. A commendable example of provision of complimentary aid is offered by medical law sections run by Law Clinics at the Jagiellonian University and the University of Warsaw. These centres, which are supervised by legal scholars and representatives of lawyers' professional associations, are operated by students who are also responsible for providing substantive advice. Their potential, engagement and experience could be e.g. for the purposes of preparing educational brochures (workshops on how to formulate the content of brochures, what elements to incorporate could be included in law clinic programmes[50], which founded upon active methods of learning)[51]. All these endeavours shall be undertaken as soon as possible and have a complex character – it is only in such a manner that patients' constitutional rights can be realized at a time of rapid computerization of the healthcare system. It would also beneficially impact the situation of elder patients – persons living alone and infirm persons, inching closer towards the fulfilment of the ideal of equality as regards access to the healthcare system and particular medical services.

6. FINAL REMARKS AND RECOMMENDATIONS

The arrival of a practice of providing legal aid to people in need of medical assistance shall be a catalyst for an analysis of an important question. First, a legal expert deals with a person in a difficult position who requires assistance. Provision

[50] For more, see: B. Namysłowska-Gabrysiak, *Studencka poradnia prawna: kompendium dla Studentów*, Warszawa 2008.

[51] For more on clinical education and the entrusting of preparation of educational brochures to students, see, for example: K. J. Kowalska, *Potencjalna rola klinik prawa w przeciwdziałaniu zjawisku korupcji na Ukrainie – edukacja jako element strategicznych działań antykorupcyjnych*, „Studia Iuridica" 2017, Vol. 69, p. 43.

of information in and of itself may trigger a positive or a negative result. Second, a legal professional who agrees to impart to a given person information they require may have a negative or positive bearing upon the client's state (with the client often being a medical patient). David Wexler and Bruce Winick have put forward the concept of *therapeutic jurisprudence*, the centrepiece of which is the therapeutic or anti-therapeutic attitude that a lawyer may adopt.[52] For, on the one hand, they may only be in a position to convey information pertaining to e.g. patient rights, and this may be conducted in a fully professional manner, that is using expert language, adopting serious posture and referencing concrete pieces of legislation. Such a situation may, however, be considered an example of jurigenesis. Conversely, iatrogenesis ensues where a patient-client sustains harm as a result of non-professional behavior of the "helper".[53] Antoni Kępiński, adopting the same perspective and using his psychiatric background, has noted that an interference in another's difficult situation may make us don the mask of an expert, a professional or a judge. In practice, however, each of those disguises pushes us away from the person we intend to assist.[54] It is imperative that persons involved in providing legal aid adopt a so-called therapeutic attitude – it consists primarily in, Czesław Czabała has written, eliciting hope, showcasing empathy, generating trust as well as (in some cases) imploring the patient to consent to treatment.[55] This resembles Antoni Kępiński's account, under which it is the mere attitude of the intervening person in its relationship with the person being helped that could serve as the "initial medicine".[56] It is worth recalling that it appears especially reasonable to adopt a degree of balance, especially in positive legal aid, between concern eliciting hope and "indifference" which facilitates an analysis of a given person's situation.[57]

The most important recommendations flowing from the foregoing discussion, which suggest potential ways forward for deciding bodies, are as follows:

1) maintenance by the Patient Rights Ombudsman or the Ministry of health of a public list of publicly financed (reimbursed) treatments – as an element of the right to information;

2) introduction of compulsory training sessions on communication skills for lawyers (including trainee lawyers) and advisors proffering aid in the area of health as well as for public officials engaged in similar endeavours within the framework of the National Health Fund, the Ministry of Health and the Patient Rights Ombudsman;

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[52] W. G. Schma, *Therapeutic Jurisprudence*, Williamsburg 2000, p. 2.

[53] W. G. Schma, *Therapeutic Jurisprudence*, "Michigan Bar Journal" 2003, No. 1, p. 25.

[54] A. Kępiński, *Rytm życia*, Kraków 2001, pp. 340–342.

[55] J. Cz. Czabała, *Czynniki lecznące w psychoterapii*, Warszawa 2010, pp. 176–180.

[56] A. Kępiński, *Poznanie chorego*, Warszawa 1989, pp. 8–9.

[57] G. Epstein, *Detachment*, *hope*, *and spirituals understanding: A comment on Bernie S. Siegel's Prescriptions for Living*, "Advances in Mind – Body Medicine" 2000, No. 16, pp. 150–151.

3) introduction of compulsory training sessions for the officials mentioned above and representatives of legal professions as regards the foundations of psychology and psychopathology;

4) introduction of a duty to improve legal qualifications among medical professionals;

5) increase of the number of class hours in the field of interpersonal communication and medical law for medical students.

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PATIENT RIGHTS WITHIN THE SYSTEM OF LEGAL AID. A STARTING POINT TOWARDS MEDICAL ANTHROPOLOGY

Summary

Paper expounds upon the problem of patient rights, taking particular account of the right to information: on one's state of health, examination, diagnosis, proposed and practicable diagnostic methods, proposed and practicable medical methods, prognosis. The authors also pinpoint that, in a broader context, free legal aid centres operating under the 2015 Act might face up to issues pertaining to patient rights. An answer is also sought to the question of how the realization of the right to information could be enhanced, and the authors furnish recommendations on the matter.

KEYWORDS

patient's rights, medical information, therapeutic relationship, the medical professional-patient relationship, Patients' Rights Ombudsman

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prawa pacjenta, informacja medyczna, relacja terapeutyczna, relacja pacjent–lekarz, Rzecznik Prawa Pacjenta

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PROBLEMS OF LEGAL EDUCATION REFORM IN UKRAINE

Quality of legal education is always a relevant issue, because of the new challenges and new requirements which emerge in legal professions with the flow of time. Besides, another crucial challenge is the global changes on the labor market which set new requirements to knowledge, competencies and skills of university graduates. This challenges are caused by raped development of science and technologies and irreversible economic and political processes. This also leads to further broadening of areas in which legal knowledges can be applicable, and correspondingly to further deepening of legal specializations. It is important that law schools follow these developments and swiftly and actively react on them by modernizing approaches to educational processes, updating curricula etc.

Apart from the mentioned global trends and circumstances that make it necessary to modernize legal education as well as access to legal profession, there are problems which are inherent in particular countries. Such problems include corruption in educational institutions and lack of efficient mechanisms to ensure high standards of education. This paper will research on some of this problems and ways of addressing them using the example of legal education in Ukraine.

Problems in legal education system in Ukraine are widely known and actively discussed in Ukrainian society. These discussions received new impetus after reforms to bring Ukraine closer to the EU were launched in 2014. As a result of the respective discussions, in 2016 the Ministry of Education and Science presented the Concept of legal education improvement for professional training of lawyers according to the European standards of higher education and legal profession.[1] Even though the Concept is still a draft, some of its provisions were used for development of draft laws on legal education reform. In September and October 2017 two draft laws on legal education and general access to legal profession were submitted for consideration at the Ukrainian Parliament – Verkhovna Rada of Ukraine. Some provisions of the mentioned draft laws should be further

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[1] Concept is available at: https://mon.gov.ua/ua/osvita/visha-osvita/koncepciya-vdoskonalennya-pravnichoyi-yuridichnoyi-osviti-dlya-fahovoyi-pidgotovki-pravnika.

elaborated and the respective committees of Verkhovna Rada are still reviewing them. Nevertheless, prospects of positive Parliament's opinion on these draft laws are very uncertain since almost a year passed from the moment they had been presented and during this time vision of the relevant government offices on the reforming of legal education has changed.

In 2018 the Ministry of Education and Science presented new model of legal education for Ukraine. According to this model, legal education can be obtained through two different branches, one of which will be providing access to regulated legal professions (judge, attorney, prosecutor, notary) while another will open an access to non-regulated legal professions (for instance, paralegal or law school teacher). The initial stage for those who are willing to get legal education provides for 2-year general education program of junior bachelor training. After the completion of this stage, students will get eligibility to enter cross-cutting master in law program, duration of which is 3-3.5 years. Graduates of this program will get diploma and access to regulated legal professions. The important precondition is that to enter this Master program students will have to pass special admission test. The main task of the test will be to identify whether the applicant possesses such crucial for a future lawyer competencies as logical and analytical thinking. Access of such program's graduates to each regulated legal profession will be defined by the respective laws. The other option will be to enter 2-year bachelor program in law instead of master in law program. After graduation from such a program a person will be able either to work in any of non-regulated legal professions or to continue his/her education on a short 1.5-2 years' master program in law as well as master program under another specialty. However, there is discussion on whether graduates of short master programs in law should be able to have an access to regulated legal professions and under what conditions. Initially, it was suggested that graduates of these programs have an access only to non-regulated legal professions. This approaches was based on a model of legal education, which has for a long time existed in the United States, where future lawyers at first study on a general (not specialized) bachelor program and then enter a law school through admission test – Law School Admission Test (LSAT). While this model demonstrates its efficiency in the U.S., the potential Ukrainian legal education system based on it might not bring the expected outcomes. It's worth mentioning that current legal education system in Ukraine is based on a specialized legal education, which begins with 4-years' bachelor program in law and for many students continues with 1.5-2 years' master program in law. Thus, the mentioned system significantly differs from the system suggested by the Ministry of Education and Science.

Except the fact that these changes introduce educational system that is radically different from the system, which was formed in Ukraine over decades, several other factors exist which will potentially effect the efficiency of the new system. First of all, the presented model and its division of legal education system

into two branches with different admission procedures is quite complicated. Its introduction demands a lot of investments as well as strengthen control on each stage of legal education (general bachelor program, short bachelor in law program, master programs) since corruption remains the main problem of the higher education system in Ukraine. Division into regulated and non-regulated professions is an innovative step. However, while the task to define regulated legal professions is relatively easy, attempts to define unregulated professions will surely cause complications. In this contest the question arises whether it is reasonable to create separate law education programs, graduates of which will only be allowed to work in non-regulated legal professions (even after a master's degree obtained). In reality it is unlikely that there will be a great number of relevant positions, opened for gradates with access only to non-regulated professions and demand on specialists with this educational level. Having this in mind it is reasonable to ask the question: what is more appropriate – to introduce completely new model of legal education or to improve the existing one to address the challenges, that Ukrainian higher education faces today.

Speaking about problems and challenges making the reform of the Ukrainian legal education a necessity, we shall underline few main issues. The first and foremost problem, which affects the legal education quality a lot lies in disproportionally high number of law schools (law departments) in Ukraine. According to a state register data, there are near 300 educational institutions licensed to award bachelor's and master's degree in law. At the same time, researches demonstrate that de facto only graduates of 130 educational institutions are operate on the labor market[2] (in comparison, in Poland and Germany the number of law schools is near 40 and even in U.S. their number is not higher than 200). It is obvious that such an incredibly high number of law schools is unsubstantiated, especially given the fact that labor market of legal professions is oversaturated. Besides, law school graduates frequently choose not to build the career in legal profession. According to research conducted by the OSCE Project Co-ordinator in Ukraine in 2009–2010 the surplus of lawyers on a labor market was 400 percent and only one of twelve law school graduates was able to find a job in legal profession.[3] Furthermore, it is very difficult to control quality of education processes in a such number of law schools. As a result, overwhelming majority of the Ukrainian law schools fails to create conditions enabling students to gain knowledge, skills and competence of a successful lawyer.

Another problem is a quality of legal education. It is caused not only by lack of appropriate control over the quality of education in unreasonably high number of law schools, but also by use of old teaching methods and techniques. Such

[2] *Report on the state of legal education in Ukraine*, 2018. Available at: https://www.osce.org/project-coordinator-in-ukraine/376858.

[3] *Current state of legal education and science in Ukraine (research)*, 2009-2010. Available at: https://www.osce.org/uk/ukraine/108309?download=true.

methods and techniques are aimed at studying regulations and providing students with theoretical knowledge. At the same time, the generally accepted and successful practices of other countries demand the application of approaches that aimed at development of practical skills. Clearly that demands not only learning provisions of some law regulations, but also ability to apply them as well as understanding of basic law principles (such as rule of law). For those purposes, it is important to use case-study method, Socratic method and other methods.[4] These approaches are widely spread in the U.S. law schools since they are a good tool to develop problem-solving skills. However, there are, of course, many other methods and approaches used in legal education in U.S. In American law schools students have opportunities to improve their practical skills in various different ways: through lectures, seminars, individual and team work, simulations (model court hearings, for instance), work in legal clinics.[5] Examinations are also predominantly aimed at verifying practical problem-solution skills. During exams, which are usually conducted in written form, student gets the description of details of a particular case and his/her task is to analyze these details and solve the case.[6] This practical orientation of education is based on preferences of professional associations: American Bar Association since 1990s has been defining skills and qualifications of a modern lawyer. Thus, law schools are able to develop their curricula and identify appropriate teaching methods based on information about current requirements to lawyers. Furthermore, the ABA is also authorized to accredit law schools. Such a cooperation between law schools and professional associations of practicing lawyers positively affects quality of legal education.

Poland also demonstrates good attention to legal education quality. For instance, to improve educational processes at the Department of Law and Administration at the University of Warsaw, considerable changes to curricula were introduced. The important step was to acknowledge that current education approaches became outdated and to develop new curricula that will address modern challenges. It made it possible to concentrate on practical component of education and introduce master-classes for small groups of students, during which they are able to develop procedural documents and deal with cases based on real court disputes. Furthermore, students' academic freedom in choosing what to study was expanded. Thus, now there are even more non-compulsory (or non-core) subjects, which students can choose to study, and this allows them to gain more specialized knowledge.[7]

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[4] T. Mann (ed.), *Europäisierung der ukrainischen Juristenausbildung*, Göttingen 2016, p. 147.

[5] S. Katcher, *Legal Training in the United States*, "Wisconsin International Law Journal" 2006, issue 24/1, p. 371.

[6] R. K. Neumann, *Legal Reasoning and Legal Writing: Structure*, *Strategy and Style*, Austin 2009.

[7] С. Жултек, К. Ю. Ковальська, Впровадження належної практики у сферу вищої юридичної освіти: реформа навчальної програми на факультеті права і адміністрації Варшавського університету, „Право України" 2017, issue 10, p. 110.

Division of subjects in law schools into compulsory and non-compulsory is a common practice in Germany as well. Law schools also pay a great attention to practical component of legal education. That is why, in many law schools students have to provide legal advice in a real cases at legal clinics, participate in mediation, prepare agreements and other legal documents. The main purpose of exams is to verify what practical skills students have gained. That is why during the exam students frequently are tasked to prepare legal advice in a concrete case in writing and then explain orally the circumstances of case and provide legal assessment of them (using provisions of substantive and procedural law). Besides, in Germany law schools moot courts are becoming popular, so students have an opportunity to participate in a court hearings as one of the parties or even judge.[8]

Current situation in Ukraine is a bit different. There are no division into compulsory and non-compulsory subjects since curricula has only compulsory one. Furthermore, many of these compulsory subjects practically do not influence process of formation of knowledge and skills, crucial for a future lawyer. Lectures are one of the most popular form of teaching, but students have no need to prepare for them, because during lectures teacher do not discuss with students controversial or problematic issues of the respective topic, but mostly just shares content of regulations and well-known theories. The other form of training are seminars (conducted in groups). However, this form frequently also appears to be not efficient since students' groups on seminars consist of 20 to 30 persons. Clearly, in such large groups there is always a lack of time during seminars and, thus, many students do not have possibility to express their point of view regarding specific topics. Besides, discussions of problematic and topical issues or dealing with concrete cases frequently are not the main purpose of seminars. It is common practice at Ukrainian law schools, that during seminars students are able to deepen their theoretical knowledge only. On such principles examination of students' knowledge is based, because exams frequently contain theoretical tasks and does not demand solving of cases. As a result, there is no appropriate environment for gaining critical thinking skills, understanding of basic law principles, as well as professional ethics and responsibility. Redress of this situation will demand changes in education approaches together with faculty renewal and specialized training for teachers to share best practices of legal education.

Apart from the exams that are aimed at verifying if students have successfully learned concrete subjects, it is worth mentioning the final exams, passing of which are necessary in order to obtain degree of bachelor or master in law. Till this moment such final exams are the only one form of verification of knowledge and competencies of a future lawyer, since after obtaining a degree graduates are in fact allowed to occupy any kind of law professional positions (though additional examinations, of course, are required for those who are willing to become an attor-

[8] T. Mann (ed.), *Europäisierung der ukrainischen…*, pp. 138–139.

ney, judge, prosecutor or notary). That is why, quality of final exams is such an important issue. However, such exams usually consist of mainly theoretical issues and do not provide students with opportunity to demonstrate problem-solutions skills, ability to critically evaluate case details and analyze provisions of legal regulations. Furthermore, together with a final exam students who are studying on a master's program have to defend a final thesis. In theory, there are serious requirements as to the quality of text, thesis content, relevance of the topic etc. However, in reality control over the quality of such theses both by a supervisor and law school in general is insufficient. As a result, theses submitted by students frequently have the following problems: usage of outdated or unreliable references; lack of originality in analysis of the topic; citation of sources without appropriate references, that is plagiarism which is absolutely unacceptable and strictly prohibited in academic research.

Another serious problem, which has been already mentioned in the paper is corruption.

The problem of corruption in law schools is exacerbated since in Ukrainian society the legal profession is considered to be very prestigious and highly paid. Until recently all stages of legal education suffered from rampant corruption including admissions to bachelor and master programs, education process and graduation. The introduction of Independent External Evaluation (IEE) in 2008 – standardized tests on various subjects which school graduates pass after graduation – this problem was partially mitigated. Since then admission to bachelor programs in law is based on results of testing in three subjects: history, Ukrainian and English. This procedure substituted the entrance exams on law, history and Ukrainian, transparency and integrity of which were fully controlled by admission commissions in universities. However, students willing to continue their education on master's programs still had to pass entrance exams, controlled by universities' admission commissions. In 2015 this problem was actively discussed and thanks to joint efforts of involved stakeholders the Ministry of Education and Science accepted the idea to substitute current master's programs entrance exams with Independent External Evaluation in Law. In 2016 this procedure was tested in the biggest Ukrainian law schools, which have joined the pilot project of the Ministry. Based on outcomes of this project, in 2017 IEE in Law has become a mandatory procedure for admission to master's programs in all law schools. In 2018 this procedure also became mandatory for entrance to master's programs in international law. In general, this minimized corruption risks at the stage of admission to master's programs in law. Yet, eradication of corruption in education is a task which demands a lot of efforts and time.

At the first sight, foreign languages shall not be priority disciplines in curricula of law schools. However, this is an issue of high relevance for Ukrainian law education system nowadays. First of all, more and more employers set high foreign language proficiency requirements for lawyers because activities of law

firms and organizations gets more internationalized: frequently they have foreign capital and foreign clients. This also demands Ukrainian lawyers to be able to read professional publications in foreign languages. For instance, judgments of the European Court of Human Rights are officially recognized as a source of law in Ukraine. Only a minor share of the ECHR judgements is translated into Ukrainian and hence lawyers shall have sufficient level of foreign languages proficiency in order to use provisions of the judgements in their work. However, the roots of this problems lay in secondary school education system. In law schools English language training shall be aimed at learning special legal terminology, but many students are not capable of this because their foreign language proficiency is inadequate for this task. Moreover, law schools do not pay proper attention to quality of foreign languages training. The results of foreign languages test of the IEE to master's programs in law in 2017 are a vivid example of this situation. In order to pass the foreign language component of the IEE in law a student had to score only 7 points, while the *monkey score* threshold of this test was 9 points. Despite this, most students scored very low points and this fact emphasizes problem of foreign languages training in law schools. To address this problem, it would be appropriate not only to improve training quality, but also to introduce subjects taught in English. One of the good solutions to improve foreign languages skills as well as to understanding of various legal systems by students is students exchange programs such as Erasmus in Europe. Unfortunately, these instruments are not widely used by Ukrainian law schools.

Obviously, it is not possible to solve all these problems by introduction of new model of legal education suggested by the Ministry of Education and Science. Moreover, introduction of such a different model because of its challenges may create additional obstacles on the road of reforming legal education. It is important to keep in mind that to increase efficiency of reform in this field the comprehensive approach shall be used.

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PROBLEMS OF LEGAL EDUCATION REFORM IN UKRAINE

Summary

The paper attempts to study the current situation of legal education reform in Ukraine. The main ideas of the new model of legal education in Ukraine were analyzed. The author made a comparison of Ukrainian legal education system with legal educations practices in United States, Poland and Germany. The main problems negatively influencing the quality of legal education such as corruption, disproportionally high number of law schools and outdated approaches to teaching were described.

KEYWORDS

legal education, Ukraine, teaching approaches, corruption in education, legal education model, Independent External Evaluation, legal profession

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edukacja prawnicza, Ukraina, podejścia do nauczania, korupcja w edukacji, model edukacji prawniczej, Niezależna Zewnętrzna Ewaluacja, zawód prawniczy

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CAN DURESS EXCLUDE CRIMINAL RESPONSIBILITY OF FORMER CHILD SOLDIERS? THE CASE OF DOMINIC ONGWEN BEFORE THE INTERNATIONAL CRIMINAL COURT*

1. INTRODUCTION

Child soldiering is not a new phenomenon since the use of children as troops in domestic and international conflicts was a reality as early as in ancient times.[1] Nowadays, however, it is especially the unprecedented scale as well as a much more diversified character of these practices which constitute a particular challenge and concern to the international community. Available – but also often contested – statistics show that there are approximately 300,000–500,000 child soldiers worldwide at the moment.[2] Even more deplorable than the sheer number, however, is the involuntary way of becoming a child soldier which characterizes the majority[3] of those recruited. They are abducted, coerced to undergo demanding and in many ways humiliating military training, and subsequently

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[1] See also: M. Denov, *Child Soldiers. Sierra Leone's Revolutionary United Front*, Cambridge 2010, pp. 21–23 (enumerating several examples of child soldiers' participation in the hostilities, for instance the Children's Crusade in 1212 when roughly 30,000–50,000 children were recruited).

[2] These estimates are retrieved from: T. Betancourt, I. Borisova, J. Rubin-Smith, T. Gingerich, T. Williams, J. Agnew-Blais, *Psychosocial Adjustment and Social Reintegration of Children Associated with Armed Forces and Armed Groups: The state of the field and future directions. A report prepared for psychology beyond borders*, Austin 2008, p. 6. Source: http://psychologybeyondborders.org/wp-content/uploads/2013/08/RPCGA-CAAFAG-REPORT-FINAL-JULY-2008.pdf (accessed: 20 June 2018).

[3] This contention stems from P. W. Singer's estimate that only 15% of child soldiers join the armed forces voluntarily. P. W. Singer, *Children at War*, Berkeley–Los Angeles 2006, p. 66. Data retrieved from: A. Smeulers, *Eroding the Myth of Pure Evil. When Victims Become Perpetrators and Perpetrators Victims*, (in:) R. Letsschert, R. Haveman, A.-M., de Brouwer, A. Pemberton (eds.), *Victimological Approaches to International Crimes: Africa*, Cambridge–Antwerp–Portland 2011, p. 79.

forced to actively participate in hostilities. Yet, among child soldiers, there are also adolescents who decide to join armed forces of their own free will mainly due to extreme poverty, lack of prospects for the future or other personal reasons such as broken families.[4] As a result, the category of child soldiers is a conceptually complex phenomenon. Interestingly, this becomes even more evident when the semantic and visual sides of the problem are analyzed, as nowadays the child soldiers' label applies not only to an already symbolic image of a black young boy carrying a Soviet-made AK-47[5], but also to victims of sex and gender-based crimes (i.e. sex slaves), porters, cooks, servants, guards etc. hidden, in a sense, behind the scenes of open violence.[6] Child soldiers, therefore, take on a number of different roles and victimize as well as are victimized in a variety of ways. The characteristic which is shared by all child soldiers, however, is without a doubt their 'child status'. Since the 'child status' category is to a great extent a culturally-dependent phenomenon[7], it is also open to divergent interpretations and

[4] See also: M. A. Drumbl, *Reimagining Child Soldiers in International Law and Policy*, Oxford 2012, pp. 12–16 and chapter 3 (underscoring the phenomenon of 'youth volunteerism' which collides with 'the international legal imagination').

[5] M. Happold, *Child Soldiers in International Law*, Manchester 2005, p. 7. The symbolic character of this image is undeniable. Importantly, however, this symbolism is not limited to mere factual relevance, but is deeply rooted in an explicitly contradictory message that this image produces. More precisely, it stems from the fact that childhood is not – at least in the common understanding of this word – defined as a time of military training and fighting, but as a period of emotional development and security. Apart from that, the image of a young warrior carrying a weapon distorts the vision of a child as an innocent human being. Neither does it fit the image of a soldier or a villain who is – as Christine Schwöbel-Patel rightly points out – "the antithesis of the victim of international crime: he is typically male, strong, independent and gruesome". Since child soldiers do not share these characteristics, at a visual level they are viewed more as victims rather than offenders. See: C. Schwöbel-Patel, *Spectacle in International Criminal Law: The Fundraising Image of Victimhood*, "London Review of International Law" 2016, Vol. 4, issue 2, p. 256.

[6] D. M. Rosen, *Child Soldiers in the Western Imagination from Patriots to Victims*, New Brunswick–New Jersey–London 2015, p. 178 (adding that child soldiers are frequently depicted not merely as slaves, but also as commodities or even robots which directly leads to their de-humanization).

[7] This bears particular significance when viewed from the perspective of the complementarity principle (Article 1 and Article 17 of the Rome Statute – ICCSt.). Although this principle solves potential jurisdictional conflicts between State Parties and the Court in favour of the former, it also indirectly calls for the harmonization of criminal laws so that the scope of international criminalization introduced by the Rome Statute is not broader than the scope of criminalization at the domestic level. Nevertheless, it is also worth mentioning here that certain standards in this respect have been introduced in international law. According to Article 1 of the 1989 Convention on the Rights of the Child – in general – 'a child means every human being below the age of eighteen years'. This definition, however, is useful only to a limited extent, as it remains uncertain if it is applicable also outside the Convention (on account of the "For the purposes of the present Convention" limitation). On the other hand, the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, which has already been ratified by 167 states, introduces a corresponding obligation upon the states to ensure that those "who have not attained the age of 18 years do not take a direct part in hostilities" (Article 1).

– as such – by its very nature remains semantically imprecise.[8] Still, even if one accepts that nowadays the age of international criminal responsibility is eighteen years, does this necessarily entail that criminal acts committed by child soldiers should be prosecuted as soon as the offenders cross this age barrier? Or, perhaps, such acts – also when committed by a (former) child soldier who at the time of their commission is already over 18 – should be viewed more as a continuum stemming from child soldiers' previous status and thus remain outside the scope of prosecution?

This paper aims at examining the case of Dominic Ongwen which, at the time of writing, is still in a trial phase of the proceedings before the International Criminal Court (ICC). I will focus primarily on two issues. First, I will describe Dominic Ongwen's life through the prism of the 'victim' and 'perpetrator' labels. In this respect I will try to prove that in many situations these two labels do not fit the social reality which they are supposed to classify or categorize. Second, I will refer to the taxonomy of defences, justifications, excuses and grounds for excluding criminal responsibility in domestic and international criminal law before examining the concepts of duress and necessity as they are codified in the Rome Statute of the International Criminal Court (hereinafter: ICCSt).[9] On these bases, I will venture to address the question whether Dominic Ongwen will be able to effectively invoke one of these defences in order to limit or exclude his criminal responsibility. In my conclusions I will provide a short assessment of 'the law as it is' (de lege lata).

2. DOMINIC ONGWEN – VICTIM OR OFFENDER?

Dominic Ongwen's case before the ICC has already been hailed as symbolic, even though the Court has not rendered a judgment yet. This is so inasmuch as the case touches upon some serious social, political and legal dimensions of child soldiering. In his initial appearance as a suspect before the Court on 26 January 2015 – no less than ten years after the issuance of the arrest warrant – Dominic

[8] As obvious as it may sound, international criminal law does not prescribe age limits for becoming a victim. On the other hand, such a limitation (incapacitating condition) exists with respect to offenders who – as Article 26 ICCSt. stipulates – must be over 18 years old at the time of the alleged commission of a crime. It follows that offenders and victims of crime are not mirror reflections of each other. See also S. C. Groover, *Child Soldier Victims of Genocidal Forcible Transfer. Exonerating Child Soldiers Charged with Grave Conflict-Related International Crimes*, Berlin–Heidelberg 2012, pp. 62–65 (arguing that the age-based exclusionary clause is not merely a jurisdictional matter but that it reflects a general principle of criminal law).

[9] Rome Statute of the International Criminal Court. Source: https://www.icc-cpi.int/nr/rdonlyres/.../rome_statute_english.pdf (accessed: 25.06.2018).

Ongwen testified that he was born in Uganda in 1975, and that at the age of thirteen he was abducted and taken to the bush.[10] Since an abduction may amount to a war crime of conscripting or enlisting children under the age of fifteen years (Article 8 b) xxvi or Article 8 e) vii ICCSt.), Ongwen may be – informally – classified as a victim of war crimes, and most probably also of other international crimes such as humiliating and degrading treatment.[11] In its first judgment in the case of Prosecutor v. Thomas Lubanga (Lubanga), the ICC ruled that "the offences of conscripting and enlisting are committed at the moment a child under the age of 15 is enrolled into or joins an armed force or group, with or without compulsion".[12] It follows that the Court has accepted a broad definition of child soldiers which is not limited merely to involuntary members, but also embraces those who have joined armies or armed groups of their own free will.[13] Importantly, the serious nature of acts amounting to conscripting or enlisting stems, among other things, from the fact that they are directed at a particularly vulnerable group of children. The damaging impact which this particular crime has had upon the lives of many adolescents was already underscored in Lubanga where in his opening statement Luis Moreno Ocampo, the ICC Prosecutor, submitted that:

Hundreds of children still suffer the consequences of Lubanga's crimes. They were 9, 11, 13 years old. They cannot forget what they suffered, what they did, what they saw. They cannot forget the beatings they suffered, they cannot forget the terror they felt and the terror they inflicted. They cannot forget the sounds of the machine guns, they cannot forget that they killed. They cannot forget that they raped, that they were raped. Some of them are now using drugs to survive, some of them became prostitutes and some of them are orphaned and jobless.[14]

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[10] *The Prosecutor vs. Dominic Ongwen*, Initial Appearance. Transcript, 26 January 2005, p. 4. Source: https://www.legal-tools.org/doc/5c45fa/pdf/ (accessed: 25.06.2018).

[11] According to rule 85 of the Rules of Procedure and Evidence of the International Criminal Court (RPE ICC), victims are natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court. Importantly, the ICC has adopted a broad understanding of the notion of harm. See, for instance: *In the case of the Prosecutor v. Ahmad Al Faqi Al Mahdi*, *Decision on Victim Participation at Trial and on Common Legal Representation of Victims* (ICC-01/12-01/15), 8 June 2016, para. 20.

[12] *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo*, *Judgment pursuant to Article 74 of the Statute*, ICC-01/04-01/06, 14 March 2012, para. 618.

[13] This conclusion, however, may be challenged by those who claim that children cannot exercise free will, *ergo* all child soldiers are recruited against their will and – as such – are involuntary members of armed groups. Having familiarized myself with many different stories of child soldiers, as well as considering the criminal acts committed by them, I am only partly sympathetic towards this view.

[14] ICC, Lubanga Dyilo, *Opening Statement Luis Moreno-Ocampo and Fatou Bensouda*, 26 January 2009. The quote is retrieved from: L. Stehl, *Child Soldiers as Agents of War and Peace: A Restorative Transitional Justice Approach to Accountability for Crimes Under International Law*, Berlin 2017, p. 13.

It is most probable that Dominic Ongwen's abduction had an equally harmful effect on him as a child.[15] All the same, from a broader perspective this seems to be too narrow a statement. Nowadays, after all, it is commonly accepted (i.e. in psychology) that traumatic experiences from childhood may have a direct impact upon human personality later in adulthood.[16] To what extent, however, this reflects or justifies Ongwen's personality traits and his behaviour as a grown-up remains an open question.[17]

And yet, Dominic Ongwen's life story is even more complicated than previous paragraphs might suggest, for it goes in the very opposite direction than a simple affirmation of his victimhood. Since 1988 (when Ongwen was abducted) until 2015 (when the transfer to the Detention Centre in the Hague finally took place) Ongwen was an active soldier in the Lord's Resistance Army (LRA). What seems to be of particular importance, however, is the fact that only 5 out of Ongwen's 17 years in service could be classified as underage military activity. And even this five-year period (until 18 years) cannot be altogether qualified as illegal from the perspective of the Rome Statute, inasmuch as the Statute sets the age limit of unlawful conscription and use of child soldiers at 15, not 18 years.[18] Thus, only 2 out of 17 years of Ongwen's activity in the LRA can be considered as a period of his victimization on the basis of this prohibition (Ongwen as a victim).

Further, it is undisputed that Ongwen did not stop fighting for the LRA even when he could no longer be classified either as a child soldier (15 years) or as a child in general (18 years). This is especially relevant from the perspective of attribution, for once Ongwen became an adult, no longer could he shield himself from potential prosecution on the basis of Article 26 ICCSt., which excludes the Court's jurisdiction over persons under the age of 18 (Ongwen as a potential offender).[19] It seems, therefore, that the normative continuum mentioned in

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[15] It should be stressed here that Dominic Ongwen is not a victim of crimes committed by Thomas Lubanga. These are two completely separate situations and cases. See: https://www.icc-cpi.int/pages/situation.aspx (accessed: 1.07.2018).

[16] See F. D'Alessandra, *The Psychological Consequences of Becoming a Child Soldiers: Post-Traumatic Stress Disorder*, *Major Depression*, *and Other Forms of Impairment*, pp. 1–22. Source: https://carrcenter.hks.harvard.edu/files/cchr/files/dalessandra_pshychol_cons_of_child-soldiers.pdf (accessed: 2.07.2018).

[17] Three expert-witnesses – mental health experts – have already testified before the Court to assess Ongwen's mental health in the course of the proceedings. See, for instance: *The Prosecutor v. Dominic Ongwen*, Transcript, 28 March 2018, ICC-02/04-01/15-T-168-ENG (C. Abbo claiming that Ongwen did not suffer from a mental disorder between 2002 and 2005).

[18] This gap constitutes a grey area between being considered a victim and an offender. See f. 20.

[19] This attempt to attribute different roles to Ongwen can be summarized in a following way: below 15 years – Ongwen as a victim; 15–18 years – Ongwen neither a victim, nor a perpetrator (following the wording of Article 8b) xxvi or Article 8e) vii ICCSt – child soldiering); above 18 years – Ongwen as a perpetrator. Some scholars, however, adopt – wrongly in my view – a narrower binary vision (victim-villain) where the moment of transformation from a victim to an offender

the introduction is, in fact, irrelevant from the formal point of view, because it does not automatically preclude Ongwen's categorization as an offender. It may still, however, affect – for instance – the scope and type of punishment imposed upon him if the Court finds him guilty of committing the crimes enumerated below.[20]

Another relevant fact resulting from Ongwen's military activity is his constant rise through the ranks of the LRA which eventually led to him becoming one of its brigade commanders. According to the ICC, "Dominic Ongwen was a commander in position to direct the conduct of the significant operational force subordinate to him. In August 2002, he is reported to have been the commander of Oka battalion. In September 2003, he progressed to the position of second in command of the Sinia brigade, and in March 2004 he became the brigade's commander. It is also notable that the evidence indicates that Dominic Ongwen's performance as commander was valued highly by Joseph Kony, and it is indeed telling that his appointments to more powerful command positions and his rise in rank followed and were associated with his operational performance, which included the direction of attacks against civilian (…)".[21] Thus, in contrast to many other child soldiers who were also abducted at a very early age and who also remained in the LRA after turning 18, but who played only minor roles in the LRA's structure, Ongwen stood out from the crowd, got promoted and, to some extent, took control over the LRA's military activity.[22] Certainly, he was not merely a passive member of this organization but, in fact, the very opposite. This explicit power shift constitutes another example of Ongwen's symbolic transformation from a victim to an offender.

To a certain extent, this transformation has already been recognized by the International Criminal Court itself when it ruled upon the confirmation of charges against Dominic Ongwen.[23] On the basis of this Decision, Ongwen is

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is tied to the age of 18 years. For instance: W. Nortje, *Victim or Villain*: *Exploring the Possible Bases of a Defence in the Ongwen Case at the International Criminal Court*, "International Criminal Law Review" 2017, Vol. 17, p. 197.

[20] S. Gates, *Why Do Children Fight? Motivations and the Mode of Recruitment*, (in:) A. Özerdem, S. Podder (eds.), *Child Soldiers: From Recruitment to Reintegration*, New York 2011, p. 30 (aptly concluding that in Uganda, where the LRA abducted thousands of adolescents, a large number of these children have grown up and remained loyal to the organization well into adulthood).

[21] *In the case of the Prosecutor v. Dominic Ongwen*, *Decision on the confirmation of charges against Dominic Ongwen*, 23 March 2016, ICC-02/04-01/15, para. 58.

[22] "To some extent" because the LRA's activities have been shaped predominantly by its leader Joseph Kony who still remains at large by effectively evading capture. See also: W. Nortje, *Victim or Villain…*, p. 195 (pointing out that Ongwen was part of the core leadership of the LRA, known as 'Control Altar', who reported directly to Kony).

[23] In its ruling the Court had to determine whether there was sufficient evidence to establish substantial grounds to believe that crimes have been committed. See *In the case of the Prosecutor v. Dominic Ongwen*, *Decision on the confirmation of charges against Dominic Ongwen*, 23 March 2016, ICC-02/04-01/15, paras. 13–14. Nevertheless, the holding should not lead to a presumption

accused of committing several types of war crimes[24] and crimes against humanity[25]. Among the seventy counts of these crimes, two are particularly striking, that is the conscription and use of child soldiers as well as the crime of enslavement. Paradoxically, Ongwen is accused of committing crimes of which he was and perhaps[26] still remains a victim himself as a young LRA's abductee.[27] But if the Prosecutor is successful in proving beyond a reasonable doubt that 'between at least 1 July 2002[28] and 31 December 2005 Dominic Ongwen (…) pursued a common plan to abduct children in the territory of northern Uganda and conscript them into the Sinia Brigade in order to ensure a constant supply of fighters"[29], the accumulation of victimhood and criminality in one person will become a legal reality also for D. Ongwen.[30]

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of Ongwen's guilt and – by that – to a violation of the rights of the accused (presumption of innocence). See also Article 61(7) and Article 66 ICCSt.

[24] War crimes: murder and attempted murder; torture; sexual slavery; rape; enslavement; forced marriage as an inhumane act; persecution; and other inhumane acts.

[25] Crimes again humanity: Attack against the civilian population; murder and attempted murder; rape; sexual slavery; torture; cruel treatment; outrages upon personal dignity; destruction of property; pillaging; the conscription and use of children under the age of 15 to participate actively in hostilities.

[26] For it is open to discussion if there are any temporal limits for viewing oneself as a victim of crime (subjective perspective), as well as for determining the victim status by way of applying criminal law mechanisms (objective perspective).

[27] After two years of trial, the Prosecution has completed the presentation of evidence. Importantly, the Legal Representatives of Victims have called additional witnesses to appear before the Court, among whom are also former child soldiers. The trial will resume in September 2018 with the opening statements and presentation of evidence by the Defence. More details: https://www.icc-cpi.int/uganda/ongwen (accessed: 3.07.2018).

[28] This limitation stems from the fact that the Court's jurisdiction is limited to crimes committed after the entry into force of the Statute (Article 11 ICCSt.).

[29] *In the case of the Prosecutor v. Dominic Ongwen*, Document containing the Charges, 22 December 2015, ICC- 02/04-01/15, para. 136.

[30] Obviously, the mere notion of being a victim of the same crime which one had committed before is nothing unusual, also in the case of ordinary crimes. For example, this would apply to a thief who one day is robbed and becomes a victim him/herself. The difference between the Ongwen case and the one described above, however, hinges upon the element of continuation which epitomizes the process of transformation from a victim to a villain. Another aspect of this dilemma is reflected in divergent social responses to crimes committed by child soldiers. In Uganda, for instance, 2000 saw the enactment of the Amnesty Act which – at least on paper – provided blanket amnesty for any Ugandan 'involved in acts of a war-like nature'. See K. J. Fisher, *Transitional Justice for Child Soldiers. Accountability and Social Reconstruction in Post-Conflict Contexts*, Hampshire 2013, pp. 163–165. In practice, however, it turned out that amnesty will not be granted to every member of the LRA. By December 2008, it had already been granted to 17.000 LRA fighters. However, this did not include Dominic Ongwen. *See* J. van Wijk, *Should We Ever Say Never. Arguments against Granting Amnesty Tested*, (in:) R. Letsschert, R. Haveman, A.-M., de Brouwer, A. Pemberton (eds.), *Victimological Approaches to International Crimes: Africa*, Cambridge–Antwerp–Portland 2011, pp. 305–306.

Before turning to the issue of grounds for excluding criminal responsibility, it is worth analyzing here briefly the conceptual dichotomy of victims and offenders through a more theoretical lens. This dichotomy, as many others commonly accepted in law, symbolizes the semantic and epistemological limits of legal terminology, which oftentimes is incapable of properly capturing the complex social reality without distorting its genuine nature at the same time. Certainly, being a victim or an offender is relevant not only from a procedural point of view, but also from the viewpoint of substantive criminal law. These labels are particularly discernible if the concept of crime is perceived as a conflict between two or more actors.[31] Nowadays, however, due to the remarkably state-centric conceptualization of crime, this human-oriented approach is still very rare. Before somebody can be labelled as either a victim or an offender certain conditions or requirements must be fulfilled first. In relation to an offender, obviously, it is guilt which must be proved and attributed to a person before a conviction is reached[32], while in case of victims attribution takes a distinct form of harm-identification. Thus, if a person is not harmed, they cannot be a victim.[33] This dichotomy, however, might also be misleading as it creates 'ideal' actors.[34] Child soldiers, for instance, from a legal perspective seem to be one-dimensional because the only label which the Court may apply in classifying them and their actions is the 'victim-label' which in many situations is simply counterfactual. Nevertheless, modern international criminal law does not allow prosecuting and convicting underage child soldiers for criminal acts which they commit – often with great brutality – during hostilities.[35] It follows

[31] This method of conceptualizing crime as a solvable conflict is characteristic especially for the restorative justice paradigm. See esp. N. Christie, *Conflicts as property*, "The British Journal of Criminology" 1977, No 17/1, pp. 1–15 (introducing the notion of a conflict stolen by lawyers from victims of crime); L. Gröning, J. Jacobsen, *Introduction: Restorative Justice and the Criminal Justice System*, (in:) L. Gröning, J. Jacobsen (eds.), *Restorative Justice and Criminal Justice*, Stockholm 2012, p. 13 (noticing that in the restorative justice paradigm the conflict should be solved by those who own it, that is by those who are personally involved in it). *See* also f. 6.

[32] *See* K. Szczucki, *Ethical Legitimacy of Criminal Law*, "International Journal of Law, Crime and Justice" 2018, p. 7 (underlining that a person's capacity for self-determination is a demonstration of the concept of human dignity).

[33] See also f. 12 and the definition provided therein.

[34] By ideal actors of criminal law I understand both victims and perpetrators who possess certain features usually attributable to a pure construction of them (i.e. innocent and weak victim; strong and formidable perpetrator). *See* also: N. Christie, *The Ideal Victim*, (in:) E. A. Fattah (ed.), *From Crime Policy to Victim Policy. Reorienting the Justice System*, London 1986, pp. 17–30 (defining an ideal victim as a category of individuals who – when hit by crime – most readily are given the complete and legitimate status of being a victim). Although I do not entirely espouse all the arguments relating to 'ideal victims' developed by Christie, I share his view that "[i]deal victims need – and create – ideal offenders. The two are interdependent" (p. 25).

[35] One relevant exception can be found in the Statute of the Special Court for Sierra Leone which allows for the prosecution of defendants who were fifteen years of age or older at the commission of the alleged crime (Article 7 of the SCSL Statute). Importantly, the SPSL also stipulates that "Should any person who was at the time of the alleged commission of the crime between

that by their very "normative nature" child soldiers are victims and not perpetrators of international crimes. All the same, they are not merely ordinary victims, but 'ideal victims'[36]. This is mainly due to the vision commonly diffused in social imagination where the child soldier is portrayed as a young, weak and dependent person who – on top of that – is coerced to fight. Paradoxically, this element of often mistakenly presumed coercion makes child soldiers even 'more ideal' in the eyes of public opinion. In reality, however, many child soldiers are recruited from voluntary adolescents who wish to improve their living conditions, begin a completely new life etc. And yet, the law in its current form does not differentiate between those children who join armed groups voluntarily, and those who are forced to do it. Perhaps it would be wise, therefore, to adopt a more sophisticated method of assessing the accused party's guilt, and instead of simply affirming the impoverished image stemming from a 'guilty offender' – 'innocent victim' dichotomy, to implement a more complex concept of 'comparative criminal liability', whereby a crime is viewed not merely as an offender's act, but rather as an interaction between him and a person victimized by his act.[37] It still remains controversial, however, if this is indeed a proper method to determine the scope of criminal responsibility. In some circles, for instance, the idea of shared responsibility is strongly rejected.[38] Notwithstanding, I believe it could help judges in passing judgments which better reflect the complex social reality accompanying an act of victimization.

3. INTERNATONAL CRIMES, DEFENCES AND GROUNDS FOR EXCLUDING CRIMINAL RESPONSIBILITY

It could be argued that – on the basis of a plethora of evidence that have already been presented before the Court both by the prosecution and by the victims[39] –

15 and 18 years of age come before the Court, he or she shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with international human rights standards, in particular the rights of the child". Source: http://www.rscsl.org/Documents/scsl-statute.pdf (accessed: 4.07.2018).

[36] N. Christie, *The Ideal Victim*…, pp. 17–30.

[37] See esp. V. Bergelson, *Victims' Rights and Victims' Wrongs. Comparative Liability in Criminal Law*, Stanford 2009.

[38] See a fascinating exchange of views on this issue between V. Bergelson, A. Harel, H. Hurd, D. Husak and K. Simmons in "Buffalo Criminal Law Review" 2005, Vol. 8/2. Also many feminist scholars argue against the idea of shared responsibility, especially in relation to the crime of rape where the argument of victims' fault (consent) is usually invoked as a defensive strategy of the accused party, oftentimes leading even to secondary victimization of rape victims.

[39] Altogether 4.107 victims participate in the Ongwen case. See: *The Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15, Case Information Sheet, June 2018, https://www.icc-cpi.int/uganda/ongwen/Documents/OngwenEng.pdf (accessed: 5.07.2018).

Ongwen's participation in acts amounting to the actus reus element of many crimes that he is accused of is virtually indisputable. The same could be said about specific contextual elements (i.e. the nexus to an armed conflict for war crimes; widespread or systematic behaviour in case of crimes against humanity) which must also be proved before the Court.[40] As evident as it may sound, this should not imply, however, that Ongwen's eventual criminal responsibility is already somewhat 'predetermined'.[41] After all, before such a final conclusion can be reached, the Court must ascertain the existence of the mens rea element of a crime which necessitates probing into the mental sphere (knowledge)[42] of an offender and his attitude towards (intent)[43] a criminal act (actus reus).[44] And only then, according to G. Werle, that is after establishing both actus reus and mens rea elements, "it must be asked whether circumstances are present that exclude individual criminal responsibility on the part of the perpetrator".[45] Virtually the same conclusion with reference to English criminal law is reached by A. Simester who introduces a distinction between 'a prima facie crime' and 'a crime'.[46] A prima facie offence is in a sense 'committed' if a person satisfies specified actus reus and mens rea elements of an offence. This, however, would not be enough to sen-

[40] It should be stressed that these contextual elements are relevant not only from the evidentiary (procedural) point of view, but also with respect to the nature of international crimes themselves. It is this specific context which distinguishes many types of international crimes from domestic ones (i.e. rape as a conventional crime; rape committed during an armed conflict may amount to a war crime). See also: *In the case of the Prosecutor v. Dominic Ongwen*, *Decision on the confirmation of charges against Dominic Ongwen*, 23 March 2016, ICC-02/04-01/15, para. 107.

[41] See also f. 24.

[42] According to Article 30(1) ICCSt., criminal responsibility requires that the material elements of international crimes falling within the jurisdiction of the Court must be committed with intent and knowledge.

[43] *Ibidem*.

[44] George P. Fletcher identifies four different systems for thinking about offenses but only three of them (excluding the so-called holistic response) can be found in specific countries or legal systems: bipartite (as a union of *actus reus* and *mens rea*), tripartite (consisting of the elements: definition, wrongdoing, culpability) and quadripartite (referring to the subject of the offense, the subjective side of liability, the object of the offense, the objective side of liability). As for international criminal law, the bipartite model has been incorporated into the Rome Statute of the ICC. See: G. P. Fletcher, *The Grammar of Criminal Law. American*, *Comparative and International. Volume One: Foundations*, Oxford 2007, pp. 43–58. The classic bipartite concept of crime, however, in case of international crimes in enriched by the specific context (i.e. international armed conflict) in which the crime is committed. In this respect I. Marchuk underscores that "[t]he link between the existence of the requisite contextual elements and underlying offences is reflected in the perpetrator's *mens rea*". See: I. Marchuk, *The Fundamental Concept of Crime in International Criminal Law. A Comparative Analysis*, Berlin–Heidelberg 2014, p. 92.

[45] G. Werle, F. Jessberger, *Principles of International Criminal Law*, Oxford 2014, p. 171.

[46] A. Simester, *On Justifications and Excuses*, (in:) L. Zedner, J. V. Roberts (eds.), *Principles and Values in Criminal Law and Criminal Justice: Essays in honour of Andrew Ashworth*, Oxford 2012, p. 95.

tence the accused party if it can invoke a supervening defence which – according to Simester – "denies neither actus reus nor mens rea but, rather, seeks to avoid liability by reference to accompanying considerations not contemplated in those elements of the offence definition".[47] In that sense, therefore, the supervening defence lies outside the bipartite concept of crime. This contention is aptly illustrated by G. P. Fletcher who notices that in spite of "the convenience of theoretical simplicity, it [the bipartite system of crime – P.G.] has one major drawback: it fails to account for the entire range of defences that are grouped under the categories of justification and excuse" which "(…) do not lend themselves to analysis as part of either the actus reus or mens rea".[48]

By contrast, the distinction between justifications and excuses is characteristic especially for civil law systems of criminal law.[49] Without going into details, generally it is accepted that while justifications exclude criminal responsibility by relating to the properties of an act (act-oriented), excuses refer to the actor and his blameworthiness (actor-oriented).[50] Thus, a successful invocation of a justification renders the act lawful. As for an excuse, although the act violating the norm is regarded as unlawful, the wrongdoer is not punished because the act – all things considered – is not viewed as reprehensible.[51]

In the civil law system justifications and excuses are also more clearly reflected in the crime structure than in its bipartite counterpart. In Germany, for instance, the three-partite concept of crime hinges upon the definition of a crime (Tatbestand), wrongdoing and culpability.[52] Importantly, each of these three positive elements of liability has a corresponding negative formulation. It follows that justifications and excuses are situated at the second and third level of analysis which means that while justifications can negate the dimension of wrongdoing (act-oriented), excuses play the same role with regard to culpability (actor-oriented).[53] In the tripartite concept of crime, therefore, both types of defences (justifications and excuses) are situated within the crime structure. At the same time, however, not only the crime structure itself, but also the order of ascertaining each of these three elements is crucial to its proper understanding and

[47] *Ibidem*.

[48] G. P. Fletcher, *The Grammar of Criminal Law...*, p. 45.

[49] Nowadays, however, these two categories are also commonly applied in common law countries, a practice one can easily identify by reference to the tables of content in various criminal law textbooks.

[50] K. Ambos, *Treatise on International Criminal Law. Volume I: Foundations and General Part*, Oxford 2013, pp. 304–305.

[51] See also: A. Cassese, *Justifications and Excuses in International Criminal Law*, (in:) A. Cassese, P. Gaeta, J. R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court. A Commentary*, Oxford 2002, pp. 952–953 (providing practical consequences of invoking justifications and excuses, i.e. modes of participation, compensation for victims etc.).

[52] For comparison, check f. 45.

[53] G. P. Fletcher, *The Grammar of Criminal Law...*, pp. 50–53.

functioning. This is so because in the tripartite system one has to follow a specific way of reasoning which is demarcated by three levels of analysis where the evaluation of definition comes first, the element of wrongdoing second, and the element of culpability third. It also goes without saying that this method is applicable not only to so-called positive elements, but also to negative formulations of these elements (defences). Thus, if given conduct satisfies the definition of a crime but is at the same time justified, there is no need to continue the analysis at the third level where both culpability and excuses are situated. Accordingly, since positive and negative formulations of crime are closely interrelated both structurally and procedurally, the distinction between a 'prima facie' crime and a 'crime' – applied by Simester in his examination of the bipartite system of crime – possesses no explanatory value in its tripartite counterpart.

This concise comparative analysis of the concept of crime explicitly illustrates not only fundamental differences between various penal systems in general, but also divergent ways of understanding and locating criminal law defences within the crime structure in particular. As for the concept of an international crime, it is undisputed that it was patterned predominantly on the English bipartite model of crime and only subsequently supplemented by several different contextual elements which transformed 'ordinary crimes' into 'international crimes'. On the other hand, however, the same cannot be said about defences, for – upon a reading of the Rome Statute – it becomes clear that no direct semantic reference to them can be identified within the text of the Statute.

From a historical point of view, defences have not played an important role in international criminal law.[54] In fact, until 1998 'no serious efforts for any form of codification' or structural reflection upon the position of defences in ICL 'were administered by the international community'[55]. And not without a reason, for it still remains debatable whether they should be available in cases involving international crimes as justifications or even as excuses. It is worth noting here that in some countries (i.e. USA, UK) duress cannot be raised as a defence to murder.[56] Perhaps – if one were to accept that international crimes are situated at the top of the ladder of offences in terms of their seriousness – the same limiting standard should also apply to them, since they would be – as a category – 'above' homicide on that ladder of gravity (a minori ad maius)?

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[54] K. Ambos, *Treatise on International Criminal Law...*, p. 301; R. Cryer, *Defences/Grounds for Excluding Criminal Responsibility*, (in:) R. Cryer, H. Friman, D. Robinson, E. Wilmshurst (eds.), *An Introduction to International Criminal Law and Procedure*, Cambridge 2010, p. 404.

[55] G. J. A. Knoops, *Defenses in Contemporary International Criminal Law*, Leiden 2008, p. 127.

[56] *R v Howe* [1987] AC 417; see also: J. Dressler, *Duress*, (in:) J. Deigh, D. Dolinko (eds.), *The Oxford Handbook of Philosophy of Criminal Law*, Oxford 2016, pp. 271–272; J. Herring, *Great Debates in Criminal Law*, Hampshire 2012, p. 210.

Nevertheless, these conceptual doubts have not precluded the drafters of the Rome Statute of the International Criminal Court from putting through the first complex treatment of defences to international criminal liability. The most relevant provision in this regard – Article 31 ICCst. – contains a non-exhaustive list of "grounds for excluding criminal responsibility".[57] One immediately notices that – despite the fact that international criminal law has absorbed the bipartite model of crime – the Statute makes no direct reference to the category of defences characteristic of the common law systems. The decision to introduce a different wording, however, was not mere semantics but a deliberate legislative choice of the drafters of the Rome Statute who 'wanted to avoid certain 'catch words' too closely associated with either the common law or civil law system'[58] in order to lay the foundations for an independent system of universal criminal law.[59] Most probably due to similar reasons the Rome Statute is also silent about the traditional distinction between justifications and excuses. Nevertheless, since they are often discussed in scholarship, these two categories and the concept of defence will be utilized in this article as well.

The Rome Statute in Articles 31–33 ICCSt. provides for several justifications and excuses such as mental disease, intoxication, self-defence, duress, mistake of fact, superior orders, as well as for other grounds for excluding criminal responsibility enshrined in other rules of the applicable law (Article 31(3) and Article 21 ICCSt.). The last open-ended category – which could very well serve as another 'escape route' for an accused – has been correctly characterized as a reference aimed at covering customary international law. In this vein, A. Cassese identifies both grounds for excluding criminal responsibility, that is justifications (lawful use of force, lawful reprisals, consent) as well as excuses (physical compulsion, necessity, force majeure) which form part of international customary law.[60] But since it seems to be impossible to examine at length all these defences with respect to the case of Ongwen in one article, the following analysis will be limited to just two of them, that is to duress and necessity.

[57] Article 31 ICCSt. serves the function of 'negative formulations' – to refer to the previously discussed tripartite model and the position of defences within this model.

[58] K. Ambos, *Treatise on International Criminal Law...*, p. 302.

[59] This, as it seems, directly affects also the way this provision will be applied in practice. According to A. Eser: 'Whereas the interpretation of other parts of the Rome Statute may easily take resort to legal precedents both in international and national criminal law, with regard to this section particular heed must be paid to the wording of these provisions, thus avoiding both an uncritical adoption of the ambiguous and controversial drafting at the Rome Conference and an unreflected implantation from national criminal justice systems'. A. Eser, *Article 31. Grounds for excluding criminal responsibility*, (in:) O. Triffterer, K. Ambos (eds.), *The Rome Statute of the International Criminal Court. A Commentary*, Nomos 2016, p. 1131.

[60] A. Cassese, *Justifications and Excuses in International Criminal Law…*, p. 955.

4. DURESS AND NECESSITY

According to Article 31(1) ICCSt. '[i]n addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:

(…)

d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

(i) Made by other persons; or

(ii) Constituted by other circumstances beyond that person's control.'

After a careful reading of this provision, it becomes clear that Article 31(1)(d) produces certain terminological confusion. This confusion is caused, first and foremost, by the lack of any explicit reference to necessity, for the provision – at least at the semantic level – revolves solely around the concept of duress. It seems, therefore, that – prima facie – an interpretation of this provision can lead to two contradictory results: either duress is the sole defence regulated therein – in which case it would have a broader meaning that is traditionally attributed to it; or that this provision espouses both duress and necessity – in which case an interpretative dilemma arises as to the precise meaning of each of these defences in the Rome Statute.

In spite of this indeterminacy, the prevailing position seems to support the former option. A. Eser, for example, claims that 'paragraph 1 (d) blends the justifying choice of a lesser evil (necessity) with excusing situations where the defendant's freedom of will and decision is so severely limited that there is eventually no moral choice available (duress).[61] An analogous contention is articulated by K. Ambos who notices that necessity has been subsumed under the concept of duress, and – because of that – Article 31(1)(d) contains objective elements of both necessity and duress.[62] G. J. A. Knoops, in turn, considers as remarkable the fact that the drafters of the Rome Statute adopted such a flexible approach by combining 'two different concepts: (justifying) necessity and (merely excusing) duress'.[63] On the other hand, W. Schabas shortly concludes that 'Article 31 also codifies the defences of duress and necessity'.[64] In this article, however, it is assumed that

[61] A. Eser, *Article 31. Grounds for excluding criminal responsibility.*…, p. 1150.

[62] K. Ambos, *Treatise on International Criminal Law*..., p. 356.

[63] G. J. A. Knoops, *Defenses in Contemporary*..., p. 59.

[64] W. A. Schabas, *An Introduction to the International Criminal Court*, Cambridge 2011, p. 242.

Article 31(1)(d) contains only one of these defences,[65] that is the defence of duress which departs from the traditional meaning attributed to this concept by combining two distinct and – unfortunately – to some extent mutually exclusive defences of duress and necessity.

The formulation of duress in the Rome Statute allows for an identification of several separate components, which will be briefly interpreted below. First, the defence of duress included in Article 31(1)(d) is applicable only to those crimes which fall within the jurisdiction of the Court (Article 5–8 ICCSt.). In relation to Dominic Ongwen, this requirement is clearly met, for – as already discussed above – he is accused of committing many different types of war crimes and crimes against humanity.

Furthermore, the Statute provides for two core requirements which – it could be argued – justify the very existence of this defence, namely 'a threat of imminent death' as well as 'a threat of continuing or imminent serious bodily harm'. The requirement of a threat leads to a conclusion that it must be objectively genuine, it must 'exist in reality'.[66] Therefore, this provision 'is not applicable in case a defendant falsely believes he is threatened'.[67] As for the normative content, both conditions are limited solely to a threat to 'life' or 'bodily integrity' which inevitably excludes, for instance, mere psychological pressure. In this regard R. Cryer argues that 'blackmail or other threats not involving imminent serious violence will not suffice' and that 'those threats must be very serious'.[68] On the other hand, one has to agree with G. Werle and F. Jeßberger when they claim that also states of psychological coercion may fall under these two conditions but 'only if they threaten imminent serious physical consequences to life or limb'.[69]

Importantly, both types of threats must be of such magnitude as to 'result in duress' leading to conduct which may amount to international crimes codified in the Statute. It follows that duress here 'functions as a mediator' between a threat and the criminal conduct.[70] This causation requirement, however, is subject to various interpretations. A. Eser, for example, holds that this is an objective standard, which means that it would be met only if a reasonable person could have endured the threat.[71] But the application of the standard of a reasonable person seems to have some limitations. K. Ambos refers in this respect to the 'actor's status' and indicates that 'soldiers have a special duty to take on dangers inherent in

[65] The same conclusion is reached by I. Marchuk. See: I. Marchuk, *The Fundamental Concept*..., p. 265.

[66] K. Ambos, *Treatise on International Criminal Law*..., p. 357.

[67] M. Krabbe, *Excusable Evil. An Analysis of Complete Defenses in International Criminal Law*, Cambridge–Antwerp–Portland 2014, p. 225.

[68] R. Cryer, *Defences/Grounds for Excluding Criminal Responsibility*…, p. 412.

[69] See G. Werle, F. Jessberger, *Principles*..., p. 241.

[70] I draw this comparison from A. Eser. See A. Eser, *Article 31. Grounds for excluding criminal responsibility*…, p. 1152.

[71] *Ibidem*.

their profession'.[72] Although this does not automatically preclude the application of the 'reasonable person standard' also to them, in effect the unified standard of this test loses its original character by becoming a multifaceted category whose exact meaning and scope will have to be determined by the Court on a case-by-case basis.

Another important condition – a temporal one – for duress is that the threat has to be either imminent in case of death or imminent or continuing in case of serious bodily harm. The requirement of imminence must be 'objectively given and not merely exist in the perpetrator's mind'[73]. As for the element of continuing threat, this condition will most probably be applied in long-lasting conflicts where 'the violation of protected interests may occur at any time'[74]. It should not follow, however, that the threat will become a catch-all condition. Therefore, one has to agree with G. Werle and F. Jeßberger when they claim that "a mere higher general probability of harm, such as the 'omnipresence of the Gestapo' in the Third Reich, is not enough".[75]

An assessment of the already examined conditions of duress from the perspective of Dominic Ongwen' personal story – apart from the first formal criterion (crime within the jurisdiction of the Court) which has clearly been met – is a difficult task. In fact, it seems that several questions can and should be asked and dealt with before giving a final answer, such as: Was Ongwen under one of the threats provided for in Article 31(1)(d) ICCSt.? Did Ongwen actually commit the crimes he is accused of? If he did, was it because he had found himself in an extreme situation or – perhaps – he would have committed these offences anyway even if no presumed threat could have been identified by a reasonable person?

Indubitably, on various occasions Ongwen found himself under a threat of being harmed. After all, there was even a time when these threats materialized, that is when Ongwen was imprisoned and tortured in Sudan.[76] It has also been confirmed that for some time Ongwen was hiding from J. Kony because he was scared of him. Nevertheless, given the temporal scope of the prosecution (3 years), it seems that at that time – at least on account of available information – Ongwen was neither under a threat of 'imminent death', nor under a threat of 'continuing or imminent serious bodily harm'. Actually, the same conclusion was reached by the Pre-Trial Chamber which proclaimed that 'there exists no evidence indicating a threat of imminent death or continuing or imminent seri-

[72] K. Ambos, *Treatise on International Criminal Law...*, p. 358.

[73] A. Eser, *Article 31. Grounds for excluding criminal responsibility.*..., p. 1151.

[74] G. Werle, F. Jessberger, *Principles...*, p. 241.

[75] *Ibidem*.

[76] M. A. Drumbl, *A former child soldier prosecuted at the International Criminal Court*, Oxford University Press Blog, 26 September 2016: https://blog.oup.com/2016/09/child-soldier-prosecuted-icc-law/ (accessed: 1.07.2018).

ous bodily harm against Dominic Ongwen (or another person) at the time of his conduct with respect to the particular crimes charged.'[77] This does not signify, however, that analogous conclusions will be reached by the Trial Chamber in its future judgment.

Nevertheless, considering the fact that Ongwen is charged with no less than 70 counts of war crimes and crimes against humanity, acceptance of the grounds for excluding criminal responsibility by the Court seems very unlikely. After all, in addition to crimes which are strictly linked to certain military activity undertook by the LRA between 2002 and 2005 (even if illegal; i.e. attacks on camps or the conscription of child soldiers), within the charges there are also other acts which clearly cannot be treated as the LRA's military objectives. This concerns, for instance, Ongwen's direct commission of a number of sexual and gender based crimes against eight women (counts 50–60).[78] One of Ongwen's wives (Witness P-101), for example, testified that she had been held captive by the LRA for eight years since her abduction in August 1996 by Dominic Ongwen and other LRA fighters until her escape in July 2004. On the day of her abduction, Dominic Ongwen forced her to become his so-called "wife" and continued to have sex with her by force until her escape. Ongwen also made her perform various domestic duties for him, including cooking and fetching and chopping wood.[79] In this regard, the ICC also noted that the Defence, neither during the taking of the testimony of the seven witnesses, nor at the confirmation of charges hearing, 'raised any significant disagreement with the narrative provided by the witnesses'.[80] This statement and the passive attitude of the defence counsel may serve, in my view, as a strong indication of Ongwen's guilt. As for the defence of duress, it would rather be too far-fetched an argument to claim that Ongwen committed these crimes because of 'a threat of imminent death' or of 'continuing or imminent serious bodily harm'.

Assuming, however, that such threats were made, there are still additional criteria which must be fulfilled first before the defence of duress can be successfully invoked. This involves the requirements that 'the person acts necessarily and reasonably to avoid this threat' and that it 'does not intend to cause a greater harm than the one sought to be avoided'. According to A. Eser this 'means that the act directed at avoiding the threat must be necessary in terms of no other means being available and reasonable for reaching the desired effect'.[81] In other words, the objective balancing test to be applied must be based upon the principle of proportionality, and the reaction should not be intended to cause greater harm

[77] *In the case of the Prosecutor v. Dominic Ongwen*, *Decision on the confirmation of charges against Dominic Ongwen*, 23 March 2016, ICC-02/04-01/15, para. 153.

[78] *In the case of the Prosecutor v. Dominic Ongwen*, *Decision on the confirmation of charges against Dominic Ongwen*, 23 March 2016, ICC-02/04-01/15, para. 102.

[79] *Ibidem*, para. 111

[80] *Ibidem*.

[81] A. Eser, *Article 31. Grounds for excluding criminal responsibility…*, p. 1153.

than the one sought to be avoided.[82] From Ongwen's perspective, this additional requirement stemming from necessity as traditionally defined ('lesser-evil principle') seems to be particularly problematic, especially in light of the nature of crimes that Ongwen is charged with. Apart from that, it would be difficult to argue that D. Ongwen acted in order to avoid a threat. After all, instead of escaping and hiding in the bush, Ongwen remained in the LRA and rose through its ranks.

The same conclusion will most probably be reached with regard to the two subsequent conditions (made by other persons – duress; or constituted by other circumstances beyond the person's control – necessity) included in Article 31(1)(d) ICCSt. This is mainly due to their secondary character with respect to 'threats' discussed above. Nevertheless, although no information is available as to whether such threats have actually been made against persons other than Ongwen himself, for instance against his family, it is undisputed that – in view of the LRA's practice – this is indeed very possible and should not be entirely excluded. Also, one should not forget that in case of child soldiers' escapes retaliatory attacks against these persons' next of kin were often an automatic response of the LRA.[83] These attacks, however, were not mere punishments but – first and foremost – served as a forward-looking mechanism of deterrence against child soldiers' fleeing.

5. CONCLUSIONS

This article addressed two separate issues. Firstly, how social or historical complexity is viewed through the 'legal lens', especially with regard to the victim-offender dichotomy. And secondly, where the defence of duress is situated in the modern criminal justice system as well as whether Dominic Ongwen will be able to effectively invoke this defence in order to exclude his responsibility for crimes which he most likely committed as an LRA commander.

Attribution of specific labels to events or people often leads to a twofold distortion: first, it usually captures only part of the social reality assessed through the prism of legal norms (external distortion); and second, for even if such a categorization is correct from an external point of view, the label itself may distort the social complexity internally through its unifying force (internal distortion). Although this phenomenon is universal in scope, it is also very well exemplified

[82] K. Ambos, *Treatise on International Criminal Law...*, p. 359.

[83] This is possible because the LRA stores personal information about abductees and their families. In this regard, N. Grant refers in her research study to the massacre in Mucwini in Northern Uganda where over 50 persons were killed by the LRA during an attack on the community of an abducted escapee. See: N. Grant, *Duress as a defense for former child soldiers? Dominic Ongwen and the International Criminal Court*, ICD Brief 21, December 2016, p. 7.

by the interaction between child soldiers and international criminal law. First, as it is not possible – due to patent systemic limitation – for every person who have been victimized by crimes which fall under the Court's jurisdiction to participate in proceedings before the Court, the Court must apply certain selection criteria which inevitably lead to greater or lesser degrees of selectivity. As a result, some victims are excluded from participation and their victim status is not confirmed. An analogous effect may also eventuate due to limitations of the charges brought before the Court, for the concept of victimhood in international criminal law is inextricably linked to the concept of harm itself.[84] So, to take the case of Dominic Ongwen, only persons who have been wronged through the commission of two crimes – war crimes and crimes against humanity – can participate in the proceedings, while others – who were also harmed by the LRA and perhaps even by Ongwen himself – are deprived of this right.[85] Furthermore, in relation to the second – internal – distortion, it is undisputed that even those who are categorized as victims of certain crimes are not a homogenous group. In fact, quite the opposite seems to be true. After all, they all may have different experiences, interests, needs and expectations.[86] These divergent aspects of being a victim, however, usually fall outside the scope of the legally determined victim label, and even if they do fall within that scope, they often have very little bearing upon the procedural design of victim participation.[87]

In relation to the second question, and on the basis of an examination that was conducted in this article, my contention is that Dominic Ongwen will not be able to successfully invoke the defence of duress in the ongoing trial proceedings before the International Criminal Court. In a sense this view is in line with the decision on the confirmation of charges issued by the Court in which the ICC was not persuaded

[84] See, for instance: L. Chappell, *The Gender Injustice Cascade: 'Transformative' Reparations for Victims of Sexual and Gender-based Crimes in the Lubanga Case at the International Criminal Court*, "The International Journal of Human Rights" 2017, No 21/9, pp. 1223–1242 (arguing that the failure of the Prosecution in the case of Thomas Lubanga to fully investigate, gather evidence or include charges of sexual and gender-based crimes has led to a 'gender injustice cascade').

[85] So, for example, initially only people from Lukodi could apply and participate in Ongwen's trial because charges in the original arrest warrant were limited in geographic scope.

[86] Needless to say, the same could be imputed about perpetrators. It seems, however, that in relation to victims of international crimes this problem is multiplied by the large numbers of persons who are victimized and who participate in proceedings before the Court. The principle of individual responsibility, by definition, grants perpetrators a more individual treatment. See also: A. Smeulers, *Perpetrators of International Crimes: Towards a Typology*, (in:) A. Smeulers, R. Haveman (eds.), *Supranational Criminology: Towards a Criminology of International Crimes*, Antwerp–Oxford–Portland 2008, pp. 233–265 (introducing a typology of perpetrators of international crimes but also very ably outlining the 'grey area' between extreme images of offenders).

[87] On the basis of the Rome Statute, however, several exceptions to this rule can be identified. Without going into detail, these principally concern the so-called particularly vulnerable victims of international crimes.

by the Defence's arguments in relation to possible grounds for excluding criminal responsibility. Some scholars, however, underline the lack of choice on Ongwen's side (the compliance or death dilemma) which could serve as a strong argument for having this defence (re)considered by the Court.[88] Such statements, however, seem to be unsupported by the evidence as well as not entirely fall within the scope of duress provided for in Article 31(1)(d) ICCSt. Apart from the legal dimension, the moral and social ones could also serve – in my view – as an argument against defences in the Ongwen's case. After all, Ongwen continued committing these crimes long after becoming an adult (18 years). In addition, his innocence may be contested by reference to his 'career' in the LRA and the relatively strong position which he acquired with the lapse of time. Duress, therefore, is a useful defence especially for grassroots soldiers, since those who are at the top of a structure of power are less likely to be coerced because it is exactly their job to take decisions and give orders to subordinates, and not the opposite.

It is clear, therefore, that child soldiers – in general – can invoke the defence of duress before the ICC as no such limitation was introduced by the Statute itself. It could also be said that – as it appears – there is no reason why child soldiers should not be able to do so. Since the normative scope of the concept of duress enshrined in Article 31(1)(d) ICCSt. is still to be determined by the Court, it also remains to be seen, however, to what extent duress can be effectively invoked in practice. Should it, for instance, cover all four international crimes codified in Articles 5–8 ICCSt.?

Nevertheless, the general principle which I described in the previous paragraph does not apply – in my opinion – to Ongwen's case. On the basis of the facts available, I believe that Ongwen will be found guilty of committing at least some of the crimes enumerated in the charges (70 counts), and that his duress defence will not be effective. This does not mean, however, that Ongwen's complex life (i.e. his dual status as a victim and a perpetrator) will not have any impact upon the punishment imposed by the Court. In fact, even from a black-letter law perspective, the opposite seems to be true, for the Court is obliged – on the basis of rule 145(1)(c) of the Rules of Procedure and Evidence (RPE ICC) – to 'give consideration, inter alia, to (…) the circumstances of manner, time and location; and the age, education, social and economic condition of the convicted person'. In addition, according to paragraph 2(a) of this rule the Court shall take into account also mitigating circumstances which includes the circumstances falling short of constituting grounds for exclusion of criminal responsibility, such as substantially diminished mental capacity or duress.

As for my assessment of 'the law as it is' (*de lege lata*), it is definitely far from ideal. A particularly striking feature of Article 31(1)(d) ICCSt. is the combina-

[88] For instance: N. Grant, *Duress as a Defense for Former Child Soldiers? Dominic Ongwen and the International Criminal Court*, ICD Brief 21, December 2016, p. 20 (claiming that Ongwen faced the choice between compliance or his own certain death and that his acts were necessary).

tion in one defence of two related but, in fact, both theoretically and practically distinct concepts. This peculiar legislative decision will certainly result in many interpretative dilemmas which the Court will have to face in the future. Even more worrisome, however, is the fact that it seems almost impossible to identify the motives which directed the drafters to combine these two concepts together.[89] In short – to my mind – this is nothing else than a clear example of poor drafting in international criminal law.

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[89] Especially considering the fact that before 1998 necessity and duress were included in different provisions.

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CAN DURESS EXCLUDE CRIMINAL RESPONSIBILITY OF FORMER CHILD SOLDIERS? THE CASE OF DOMINIC ONGWEN BEFORE THE INTERNATIONAL CRIMINAL COURT

Summary

The phenomenon of child soldiers encompasses up to half a million of adolescents around the world and is – without a doubt – one of the most pressing humanitarian problems of contemporary armed conflicts. This article aims at addressing this issue by examining an ongoing trial of Dominic Ongwen before the International Criminal Court. The first part is dedicated to the description of Dominic Ongwen's life through the prism of the 'victim' and 'perpetrator' labels. In this respect I try to prove that in many situations these two labels do not fit the social reality which they are supposed to classify or categorize. In the second part, I refer to the taxonomy of defences, justifications, excuses and grounds for excluding criminal responsibility in domestic and international criminal law. I also analyse concepts of duress and necessity as they are codified in the Rome Statute of the International Criminal Court. On these basis, I give a negative answer to the question if Dominic Ongwen will be able to effectively invoke one of these defences in order to limit or exclude his criminal responsibility, while in conclusions I also provide a short assessment of 'the law as it is'.

KEYWORDS

duress, defences, child soldiers, Dominic Ongwen, International Criminal Court

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przymus, obrona, dzieci żołnierze, Dominic Ongwen, Międzynarodowy Trybunał Karny

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BASIC LAW: ISRAEL AS THE NATION-STATE OF THE JEWISH PEOPLE: LESSONS FOR PARTICULARISTIC AND UNIVERSALISTIC CONSTITUTIONAL LEGITIMATION

1. INTRODUCTION

The '*Basic Law: Israel as the Nation-State of the Jewish People*,' passed by the Knesset on July 19, 2018. This Article describes the main provisions of the Basic Law; it discusses some of the past history leading to the legislation. It also provides some evaluation as to its effects and speculations concerning its future. But the main argument made here uses this basic law to make a broader point concerning constitutional legitimation. More specifically I argue that there are two ways to gain constitutional legitimacy: representational and reasons-based. While particularistic values such as the ones entrenched in the basic law gain legitimacy from representation universalistic values need not rest on representation. I conclude by arguing that given the failure to gain consensual support for the basic law, it is an illegitimate attempt to entrench particularistic values in a divisive society. It is only by representing the public that this law can gain constitutional legitimacy.

The Basic Law purports to entrench the identity of the state as a Jewish state. While the older canonical official documents such as the Declaration of Independence and *Basic Law: Human Dignity and Freedom* speak of Israel as a Jewish state which also cherishes universal values (equality and justice in the case of the Declaration and democracy in the case of *Basic Law: Human Dignity and Freedom*), the new Basic Law omits any reference to such universal values. The key phrase that has been used in the last three decades in official documents was: 'Israel as a Jewish and a democratic state.' The omission of this phrase or any reference to democracy or equality in this Basic Law was a deliberate choice on the part of the Knesset. For reasons that will be mentioned later all proposals to add references to universal liberal values were rejected by the Knesset. The novelty of the Basic Law is not therefore in the willingness to entrench

the status of Israel as a Jewish state but in the deliberate omission of any reference to universal values.

Section 1 describes the provisions of the law and the debates surrounding some of them. Section 2 points out the deeper roots of the debate and its effects on the Israeli polity. I will also argue that the initiative to pass this law can be regarded as indicating a shift in the status and perception of the Court in Israel. Instead of being regarded as an ally of liberalism and liberal forces in Israel, it has now been transformed so radically that it may be regarded as an ally of nationalism and particularism. In section 3 I differentiate between two means of legitimation: representative legitimation and reason-based legitimation. I shall argue that the basic law entrenches particularistic values and consequently its legitimacy must rest on a consensual represntation. Given that no consensus has been achieved I argue that while the basic law is legally valid, it represents an illegitimate attempt on the part of a sectarian group, namely nationalist and conservative forces to entrench their own sectarian values.

2. THE SECTIONS OF THE BASIC LAW

The Basic Law consists of 11 sections dealing with different aspects including broad ceremonial provisions, provisions concerning immigration, official symbols, e.g., flag and anthem etc. Some of the sections are very controversial while others raise little public interest. I will describe each section and with respect to some of the sections I will also provide general background information.

Section 1 is a general section affirming the right to Jewish self-determination in the land of Israel. There are two major novelties in this provision. First it speaks for the first time of the "natural cultural, *religious*, and historical right to self determination". The right to 'religious' self-determination is new and has not been mentioned in any official documents in the past. Second, for the first time, section 1 of the Basic Law emphasizes that the right to national self-determination in the state of Israel is granted *exclusively* to the Jewish nation. This is a direct reference to proposals to regard Israel as facilitating, encouraging or at least acknowledging collective self-determination for both Jews and Palestinians. The section therefore is designed specifically to pronounce that there is an asymmetry between the status of Jews and Palestinians in Israel. While the former have both individual and collective rights as a group, the latter have only individual rights.

Section 2 specifies the official symbols of the state: the name of the state, the flag, the anthem etc. The symbols of the State of Israel refer exclusively to Jewish culture and history. There were proposals to design more inclusive symbols. Late Justice Miriam Ben-Porat supported changing the Israeli anthem (Hatikva – the Hope) and include in it references that will be more inclusive

and refer to the history of Palestinian citizens of Israel. Section 2 contains an implicit rejection of these proposals.

Section 3 reiterates what has already been entrenched in *Basic Law: Jerusalem as the Capital of Israel* (1980). It declares the status of unified Jerusalem as the capital of Israel. It is worthwhile mentioning that after the Six Day War many villages which have never been part of Jerusalem have been annexed to it. As a result, unified Jerusalem consists of many Palestinian villages which have never been part of the city.

Section 4 has been one of the stumbling blocks in the negotiations leading to the legislation. The issue in this section is the status of the Arabic language. The official languages in mandatory Palestine were English, Hebrew and Arabic. After independence, English was excluded and the official languages in Israel have since then been Hebrew and Arabic. The recognition of Arabic as an official language has had practical effects. Several decisions of the Supreme Court protect the status of Arabic language. For instance, in HCJ 4112/99 the Court decided that municipalities are obliged to use street signs in Arabic in addition to Hebrew. The Court in this case has said that Hebrew has a superior status but Arabic has also a significant place in the public life in Israel. Section 4 demotes Arabic from its status as an official language to a language "with a special status". An indication to the debates preceding the legislation can be found in the last sub-section of section 4 which asserts: This law does not detract from the status that was given in practice to the Arabic language before the enactment of this law. This provision was included to appease some of the potential opponents of the Basic Law.

Section 5 declares that Israel will be open to Jewish immigration and section 6 speaks of the duties of Israel towards Jews abroad. It declares among other things that Israel will act to preserve the cultural, historical and religious tradition of the Jewish nation in the diaspora.

Section 7 has been probably the most contentious section. Zionism at its beginnings cherished the value of settling in the land. The Zionist organizations bought land and promoted Jewish settlement on the land of Israel. The ideal of the 'occupying the land' was regarded as central to the success of the Zionist movement. After the Independence remnants of this idea were retained in Israeli legislation. In particular, the Israel Land Authority leased some of its lands to Jews only as they officially belonged to Zionist organizations and not to the State. In a famous decision HCJ 6698/95 (Ka'adan) which can only be compared with the famous US *Brown v. Board of Education*, the Supreme Court decided that this practice is illegal. Since then there were consistent efforts to revive the legality of racially homogenous settlements which so far failed. Section 7 does not explicitly allow racial segregation but its proponents hope that this will be its practical effect. It declares that the state regards the development of Jewish settlement as a national value and will act in order to promote and advance the establishment of Jewish settlements. The opponents of the Basic Law regard this provision as the most anti-democratic section in the Basic Law.

Section 8 establishes the official status of the Jewish Calendar; section 9 dictates the national holidays and memorial days; section 10 declares that the Jewish holidays will be the holidays in the State of Israel but protects also the rights of religious minorities to celebrate their own religious holidays. Section 11 declares that this Basic Law can be changed only by a majority of the members of the Knesset (61 members).

3. THE POST TRAUMATIC EFFECTS AND NORMATIVE EVALUATION

The Basic Law has occupied the Israeli Knesset for many years. The idea to enact such a statute was first raised in 2011. Various proposals some of which were more nationalist than the new Basic Law and others more moderate have been made. The reactions to the enactment of the Basic Law have been dramatic. A Palestinian member of the Knesset (Zouhir Bahloul) resigned as a protest. The Basic Law has been described by its opponents as an apartheid law and some members of the Knesset suggested that this should be its official title. The proposal to amend the name of the law to Basic Law; Apartheid was however rejected. The hostile reactions to the law come from the left, the center and from the more traditionalist rightwing conservatives who are still faithful to the liberal-legalistic tradition of Menachem Begin and the revisionist movement. Further, after the law was passed leaders of the Druze community which has traditionally been very loyal to Israel and its members serve regularly in the army raised bitter protests. As a result, even some ardent supporters of the Basic Law, such as the extreme rightwing Minister Naftali Bennett has expressed his concern that the law may alienate the Druze community. The witty opponents of the law suggested that the Basic Law should be revised and declare that Israel is a Jewish and a Druze State. It is time now to evaluate the law, examine the arguments made by its proponents and opponents and predict (of if you wish speculate) about its potential future effects.

The proponents of the Basic Law argue that the Israeli society has become too westernized; in particular, it is argued that the legal system has been too activist in promoting western values at the expense of Jewish and nationalist values.[1] Under this view, the Basic Law restores the proper balance between Jewish and universalist values. This is why the proponents of the Basic Law were so opposed to the inclusion

[1] Echoes to this accusation can be found in Aviad Bakshi & Gideon Sapir, Israel as a Nation State in the Supreme Court Ruling, https://euiha41fnsb2lyeld3vkc37i-wpengine.netdna-ssl.com/wp-content/uploads/2018/07/%D7%A1%D7%A4%D7%99%D7%A8-%D7%91%D7%A7%D7%A9%D7%99-%D7%97%D7%95%D7%A7-%D7%94%D7%9C%D7%90%D7%95%D7%9D-%D7%91%D7%92%D7%A6.pdf.

of universalist values into this Basic Law as such an inclusion would not restore in their view the balance between Jewish and universalist values.

There is however a great inconsistency in the arguments of the proponents of the new Basic Law which unfortunately has not been pointed out in the debates preceding the legislation. Most of the proponents of the Basic Law have been very critical of the powers of the Court and also highly critical of the basic laws themselves and the judicial interpretation of these laws.[2] In particular, it has been argued that basic laws, in particular basic laws which entrench central values, should be passed only on the basis of broad consensus that reflects the deeper shared values of the nation as a whole. Yet, the Basic Law that is supposed to entrench Israel as a Jewish state was passed by a very small margin (62 in favor 55 against). So while most of the supporters of this law complain about the small margin in which the previous basic human rights laws have been passed (and draw the conclusion that they are not sufficiently representational and therefore illegitimate), they have not followed their own judicial philosophy: short term interests, hypocrisy and most likely intellectual dishonesty of monstrous magnitude led the supporters of the Basic Law to act against their own philosophical inclinations.

Given the intense opposition to the Basic Law on the part of all opposition members from the left and center as well as opposition on the part of the traditional rightwing conservatives and almost all minority Knesset members, the law cannot be genuinely regarded as resting on the shared values of the Israeli society. It is clearly a sectarian law promoting not the values of Israel as such but the values of the current government as such. The values promoted by the law are not the shared values of the State of Israel but the shared values of two political parties: the Likud and the Jewish Home party. Moreover, the law is vague in its provisions and it grants therefore courts broad discretion. It is difficult to reconcile the traditional criticisms and often also verbal abuse of the Court by prominent members of nationalist parties arguing that the Court is too activist with the willingness to pass a basic law which is highly vague and inevitably leaves much powers in the hands of the Court. It seems therefore that the only way to explain the shift in the tactic of conservative forces is their belief that the composition of the Court has changed and that the Court can now be regarded as an ally of conservativism rather than liberalism. This results from many recent appointments made by current Minister of Justice Ayelet Shaked.

The opponents of the Basic Law raise both principled and pragmatic reasons. The Basic Law contains some provisions which are very difficult to reconcile with a democratic or an egalitarian state. Most clearly section 7 prioritizes Jewish settlement over settlement of non-Jews. The ardent supporters of the law have not succeeded to pass a provision which will override Ka'adan and allows the estab-

[2] I wrote about this previously in: https://verfassungsblog.de/the-israeli-override-clause-and-the-future-of-israeli-democracy/.

lishment of racially segregated municipalities. But even its more moderate form is regarded by many as pernicious. The demotion of the Arabic language to a language with 'special status' is also regarded as unacceptable. In addition, pragmatic arguments are being raised; it is argued that the law will strain the already uneasy relationships between Israel and its Palestinian citizens. The Druze community has also expressed its intense resistance to the Basic Law.

The opponents also point out that the Basic Law is part of a much larger enterprise to weaken and even to eradicate the liberal foundations of the Israeli legal system. In recent years there has been a flood of legislation limiting the right to free speech, limiting the ability of human rights organizations to raise money abroad, limiting the freedom of movement and others. Here are some examples: The "Nakba Law" restricts the right to commemorate the Nakba (the day of mourning of Palestinians expelled from Palestine in 1948); a new law regards the call to boycott settlements in the Occupied Territories as a civil wrong; another amendment prevents the entrance to Israel of people who are supportive of the BDS. Many other proposals are being discussed now in the Knesset and may pass in the future. One ought therefore to evaluate the Basic Law in light of the broader encroachment on basic liberties in Israel.

As this Article is being written several petitions against the Basic Law are being prepared and will be submitted to the Supreme Court. The Court however may find it very difficult to declare the Basic Law void. This is not only because of the political threats directed against the Court made almost daily by prominent politicians or because of the flood of political appointments to the Court made by the Minister of Justice Ayelet Shaked. It is also because the law is a basic law; to strike its provisions and declare them void would require the Court to use the doctrine known as the unconstitutional constitutional amendment doctrine used famously by the Indian Court. This doctrine allows the Court to strike down constitutional amendments when they conflict with fundamental constitutional principles. Given the current composition of the Court and its vulnerability, it is very unlikely to happen. One potential effect of the petitions against the Basic Law is to force the Court to express its opinion concerning the interpretation of the more provocative sections of the law. The hope of the opponents of the Basic Law is that in order to maintain the image of Israel as a liberal state, the Court will express its opinion that section 7 that declares that promoting Jewish settlement is a national value should be interpreted narrowly and it does not allow the establishment of racially segregated settlements.

This observation provides the basis for my prediction regarding the effects of the law in the short term. In the short term at least, the Court will interpret the provisions of the Basic Law narrowly to minimize the conflict between the provisions of this Basic Law and the provisions of other basic laws such as *Basic Law: Human Dignity and Freedom*. This will no doubt provide a basis for accusing the Court of activism. But this accusation cannot but be disingenuous.

The Basic Law contains so vague provisions that any judicial interpretation can be classified as activist. In the longer term and with new political appointments to the Court, Israel may gradually resemble democratic-authoritarian states such as Turkey or Hungary rather than democratic-liberal states such as Britain or Germany.

4. THE SYMBOLIC UNDERLYING CLASH: UNIVERSALISM VERSUS PARTICULARISM

The clash between the courts and the executive is no doubt governed partly by questions of ego and power. The Court is often depicted as elitist and as an institution that is detached from the genuine popular sentiments. But it would be hardly surprising for those who follow the news in Israel or similar conflicts abroad that the conflict has its roots in the conflict between what can be labelled universalist values and particularistic values. The Israeli Supreme Court is perceived to be the defender of universalist values while the government has become gradually the advocates of particularistic values in particular Jewish values.

In this section I wish to first to establish this claim in the Israeli context and second to explain the historical roots of the conflict. While I believe my explanation applies also in the context of other legal systems I will focus my attention on Israel.

One of the most persistent accusation directed against the court is that it is not sufficiently 'Jewish' and Zionist. Both the ultra-orthodox community and traditionalists accuse the court in being anti-Jewish and/or anti Zionist. Let me provide a few examples:

Aryeh Deri a member of an Ultra-Orthodox party said:

"even if you were to bring the Ten Commandments as a basic law of the constitution committee I would vote against it … I do not know what you and the Supreme Court are conspiring to do to us."[3]

In 1999 hundreds of thousands of ultra-orthodox demonstrated against the Supreme Court. The main grievances raised by the ultra-orthodox involved the divisive proposal to conscript the ultra-orthodox to the army, the status of rabbinical courts and the relations with the more conservative and reform Jews. In addition, judgments of the court protecting gays and women have also been subjected to harsh criticisms. In reaction to the decision of the Court granting rights to the same sex couples, MK Avraham Ravitz said:

Again we have to encounter a decision of the Israeli Supreme Court which changes the fundamentals of life and sets up norms which violate the most fun-

[3] Divrei Haknesset 30 (1992).

damental conventions of human society... The Court created a novel definition of couple a definition which has been fundamental to human society since God Created man.[4]

In contrast to the ultra-orthodox who focus their attention on religious values, traditionalists and right-wing Jews focus their attention on the alleged hostility of the Court to Zionism. Thus Minister of Justice Ayelet Shaked who is known in her hostility to the activism of the Court argued that: "national challenges have become a legal blind spot" that carry no decisive weight in comparison to questions of individual rights. She added that the court's rulings do not consider the matter of demography and the Jewish majority "as values that should be taken into consideration."[5] This accusation is characteristic; it is often claimed that the Court is not sufficiently Zionist and it places universal human rights values above Zionist values.

These examples are illustrative of two sets of particularistic values that come into conflict with universalistic values in Israel: Jewish values on the one hand and Zionist values on the other. The Court is perceived by many to give priority to universalistic values over the particularistic ones (religious or Zionist). This perception is far from being accurate but it is an established perception – one that is shared by both advocates and opponents of the Court.

This perception has led the conservative forces in Israel to use two different tactics. The first is to curb the power of the Court and thereby limit its influence; the second is to change its composition and to steer it away from its allegedly liberal values.

Minister of Justice Ayelet Shaked uses both tactics. On the one hand she protests against the powers of the Court and on the other, she also does her best to change the composition of the Court and to steer it away from its alleged universalistic values.

Minister Shaked has suggested that "decision-making and governance are not in the hands of the people but in the hands of the justice system"; due to judicial "supremacy", the elected branches "fail to achieve their goals and fulfil the will of the people."[6] Shaked also criticized the civil service, accusing it of advancing political goals which, in her view, should be left to elected representatives.[7]

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[4] Divrei Haknesset 3240 (1994).

[5] https://www.haaretz.com/israel-news/israel-s-top-court-disregards-zionism-justice-minister-says-1.5446684.

[6] A. Mageazi, *Shaked: "It seems that governance…"*, Ynet (May 18, 2015), http://www.ynet.co.il/articles/0,7340,L-4658424,00.html [Heb.]; J. Liss, *Shaked: "We are proud of our Supreme Court…"*, Haaretz (May 12, 2015), http://www.haaretz.co.il/news/politi/1.2634880 [Heb.]. *See also* Y. J. Bob, *Shaked: Judges are not the sons of light*, *legislators are not sons of darkness*, Jerusalem Post (Dec. 22, 2017), https://www.jpost.com/Israel-News/Shaked-Judges-are-not-the-sons-of-light-legislators-are-not-sons-of-darkness-519767 (Shaked suggesting that judges are members of "detached old elites").

[7] M. Sones, *Shaked: "Political power has passed to the bureaucrats"*, Arutz Sheva (May 22, 2017), http://www.israelnationalnews.com/News/News.aspx/230022; Yonah Jeremy Bob, *Shaked*

In a pointed manifesto, she argued that representatives "ought to express the will of the people" and the government is "committed to a people who seeks to determine its fate *directly* and through its representatives."[8] In a similar vein, upon the HCJ invalidating the Anti-Infiltration Law for infringing the Basic Law: Human Dignity and Liberty, Minister Miri Regev declared that the HCJ is "disconnected from the people."[9] Alongside these statements, a bill has been proposed to curb the powers of the HCJ, including its authority to invalidate unconstitutional legislation.[10]

On the other hand, Minister Shaked has been involved in changing the composition of the Court and also an ardent supporter of Basic Law; Israel as the Nation State of the Jewish People. In a highly publicized statement, Minister Shaked asserted that "High Court no longer a branch of left-wing Meretz party.[11]

This section has established that the conflict between the courts and the executive branch is often a dispute between universalistic values and particularistic values. The Court is perceived as the defender of universalistic values at the expense of particularistic values. These particularistic values consist of both traditionally Jewish values as well as Zionist values.

5. CONSTITUTIONAL LEGITIMATION: REPRESENTATIONAL V. REASON-BASED LEGITIMATION

Constitutions, I shall argue, can be legitimated in two ways: representational legitimation and reasons-based legitimation. I further argue that representational legitimacy is relevant when the constitutional values are particularistic ones while reason-based legitimation can legitimate only universalistic values.

Tells Eilat Confab that Unelected Bureaucrats Endanger Our Democracy, Jerusalem Post (May 24, 2017), http://www.jpost.com/Israel-News/Shaked-tells-Eilat-confab-that-unelected-bureaucrats-endanger-our-democracy-493718.

[8] A. Shaked, *The Path to Democracy and Governance*, 1 Hashiloach 37, 54 (2016) [Heb.]. (emphasis added).

[9] *See* Filc (2018), *supra note*, at 134. *See also* G. Morag, T. Tzimuki, *Shaked denounces HCJ illegal aliens ruling*, *calls for new constitutional revolution*, Ynetnews (Aug. 29, 2017), https://www.ynetnews.com/articles/0,7340,L-5009369,00.html.

[10] *See* Draft Private Members Bill amending the Basic Law: Judiciary (Amendment – Judicial Review of Legislation) 2017 (Isr.) The Bill includes an "override clause" that would enable a majority of 61 Knesset Members (out of 120) to override HCJ decisions which invalidated laws on constitutional grounds. Roznai, *supra* note, at 9. *See also* Press Release, *What is the Public's Opinion on the Override Clause?*, Israel Democracy Institute (Apr. 29, 2018), https://en.idi.org.il/articles/23379.

[11] https://www.timesofisrael.com/justice-minister-high-court-no-longer-a-branch-of-left-wing-meretz-party/.

Representational legitimation grounds legitimacy in claims concerning popular will, consent, voluntary endorsement, active engagement, participation etc. The constitution is binding because we want it; we have agreed to it, we have voted for it, it reflects our identity as a community, etc. Crudely phrasing it, it is binding because it is *our* constitution – the constitution to which we agreed and which we cherish; most typically, it is also the constitution which we ratified on the grounds that it entrenches the values that are constitutive of our political identity. In contrast under the reason-based mode of legitimation we endorse the constitution because it is just or effective. In such cases the constitution need not be ceremonially accepted by citizens and it need not guide them in their public life. The Constitution simply entrenches values which are binding irrespective of our acceptance or willingness to accept. For instance it entrenches dignity, freedom, equality and the normative force of these values is independent of our willingness to accept them.

Let me provide an analogy: compare the type of engagement that an individual has with his private garden and the engagement that an engineer has with his enterprise of building a bridge. The owner of the garden aims to shape her garden in a way that addresses her own needs, tastes, sensibilities and preferences. She wants the garden to appeal *to her* aesthetic judgments. She can assert truthfully that other gardens are equally or even more beautiful than hers and nevertheless she prefers *her* garden to that of others. In contrast an engineer who builds a bridge aims at building *a good bridge* rather than a bridge *that appeals to him*. An engineer typically does not say that he builds a bridge to satisfy his own inclinations or to appeal to his own aesthetic judgments; the bridge simply ought to be a good, safe, solid and even a beautiful bridge but not one that is designed to appeal to its creator. Representational legitimation can be analogized to the case of the garden; it rests on the conviction that the constitution is a constitutive component in the lives of the polity. Consequently, it ought to represent the collective values, ideals and aspirations of the political community. In contrast, reason-based legitimation rests on not on the conviction that the constitution is constitutive of our collective identity but simply on the conviction that it is a good constitution; it serves our interests and/or effectively promotes our well-being.

The conventional reservations applying to any dichotomy (except perhaps in logics) should also apply here as well. The dichotomy between the two modes of legitimation is not a sharp dichotomy; it is often the case that legitimation rests on both representational and reason-based modes of legitimation. Often the judgment that a constitution is legitimate on representational grounds and the judgment that it is legitimate on reasons-based grounds are inter-related. Typically, different political and social movements use both representational arguments and reason-based arguments to justify their allegiance to a particular constitutional order. Further the balance between these two types of legitimation can shift in time such that a constitution that has been primarily legitimated on reason-based

grounds may eventually be transformed and be legitimated on representational grounds and vice versa.

I stated earlier that the conservative and in particular the nationalist forces in Israel condemned the basic laws on the grounds that they have not passed in a consensual manner. This is hardly surprising; as the conservative forces push forward a nationalist agenda which is also a particularistic agenda, its only claim to be legitimate is *to represent*. Legitimacy must in such cases derive from popular will which is shared by many segments of the population. The Constitution can legitimately entrench such values because these values are not sectarian; they are shared by all segments of the public. On the other hand, the earlier human rights basic laws have been enacted on the basis of the conviction that they entrench universal values: dignity and freedom. Hence under the view of their supporters the legitimacy of these laws does not hinge on the fact that they represent the values of the nation. Their normative force rests on the fact that they entrench universal values. Hence representation is not the foundation of the legitimacy of these provisions; instead their legitimacy derives from fundamental principles of political morality.

The best way to illustrate the contrast between representation and reason-based concerns is to compare the US and the German Constitution. The US Constitution is legitimate because it is the constitution of the people of the United States – one which they shaped in light of their own distinctive values and aspirations and which they sustain by virtue of their allegiance to these values. Hence the famous beginning of the Preamble to the US Constitution: we the people of the United States establish this constitution for the United States of America. It is our willingness to establish ths constitution which explains its normative force. In contrast the German Constitution was written under military conditions and its claim to be representative was severely compromised by these conditions. How can the non-representative German Constitution be legitimate?

The answer to this puzzle is that the German Constitution is legitimated not by virtue of popular assent or endorsement that rests on the conviction that it is constitutive of German values or on a ceremonial referendum that conveys the voluntary allegiance to the constitution or on any other form of representational legitimacy. Instead, it is legitimated on the grounds that it is believed to be desirable, or just or more broadly grounded in reason.

Acknowledging that not all constitutions are representational explains a fundamental difference between US citizens' and German citizens' attitude to constitutionalism. The former hail the Constitution as a great achievement of their own; they study its provisions in school, debate their meanings in the media and often justify their political positions on constitutional grounds. It is the constant engagement with the constitutional provisions which facilitates the constitutional patriotism characteristic of the USA. In contrast German citizens traditionally are not engaged in debating the substantive provisions of their constitution. Instead,

they defer to the expertise of the Constitutional Court and accept its determinations as binding.[12] Their deference to the Court relies at least in part on the German (understandable) distrust of representative institutions. History has taught the German people that representative institutions may fall prey to brutal extremism and the deference to the Court rests on the conviction that the Court is an institution that may protect the polity from such risks.[13] I suggest that this difference in attitudes between US citizens and German citizens is attributable to the difference between the two forms of legitimation: representational legitimation in the US context and reason-based legitimation in the German context.

The fundamental difference can be further understood given the different timings in the history of the nation at the time the respective German and US constitutions were established. As a matter of fact, the German Constitution is a tool to counter all attempt to embody a national entity; it can therefore be described as an anti-representational constitution. When the German Constitution was established, the most urgent task was to distance the new State from the nation establishing it (rather than represent it). Representation must represent some pre-existing entity that is worth representing and there was no such entity to represent in 1949. The less representative the constitution is, the better. In contrast the US nation had traditions which it was willing to endorse and entrench and hence, the establishment of a representational constitution.

The debate in Israel should in my view be conceptualized as a debate between advocates of particularistic values who must ground their claims on representation and advocates of universalistic values who ground their claim in universalistic values. It is therefore not only a political debate concerning which values should govern but also a philosophical debate concerning the way constitutions can be legitimated. Particularists believe that constitutions must rest on representational grounds while universalists believe that representation is not needed for legitimacy. The basic law which is at the center of this Article is a particularistic law; its claim to legitimacy must rest on representation. We can turn now to examine the normative implications of this observation.

A constitution is legitimate either on the grounds that it entrenches universal values or on the grounds that it is representational. To the extent that the constitution entrenches particularistic values it ought to do so only on the grounds that these values represent the nation. The Basic Law: Israel as the Nation State

[12] Research has shown that the German Constitutional Court is highly popular and enjoys broad public support. See, e.g, J. L. Gibson et al., *On the Legitimacy of High Courts*, "American Political Science Review" 1998, issue 92, pp. 343–358. For the distinct attitudes of Germans towards their constitution and the constitutional court, see also B. Schlink, *German Constitutional Culture in Transition*, "Cardozo Law Review" 1992, issue 14, pp. 711, 724–725; J. L. Gibson, G. A. Caldeira, *Defenders of Democracy? Legitimacy*, *Popular Acceptance and the South African Constitutional Court*, "The Journal of Politics" 2003, Vol. 65, pp. 1, 5.

[13] See, e.g., G. Vanberg, *The Politics of Constitutional Review in Germany*, Cambridge 2005, pp. 8–12.

of the Jewish People entrenches particularistic values. It needs therefore to rest on consensual endorsement of these values. However, as the intense opposition to the basic law shows this Basic Law is divisive rather than consensual. Hence it is incompatible with the very logic of advocates of particularism; it entrenches particularistic values when these values remain sectarian and are not shared by large segments of the Israeli society.

Needless to say the conflicts described above are not unique to Israel. The conflict between universalistic values protected traditionally by courts and particularistic values promoted by the executive is a common phenomenon. It seems that the recent conflicts in Poland can be conceptualized in similar terms. Hence, I hope this analysis could be used to better understand the recent political developments there.

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BASIC LAW: ISRAEL AS THE NATION-STATE OF THE JEWISH PEOPLE: LESSONS FOR PARTICULARISTIC AND UNIVERSALISTIC CONSTITUTIONAL LEGITIMATION

Summary

The 'Basic Law: Israel as the Nation-State of the Jewish People,' passed by the Knesset on July 19, 2018. This Article describes the main provisions of the Basic Law; it discusses some of the past history leading to the legislation. It also provides some evaluation as to its effects and speculations concerning its future. Last I use this basic law to make a broader point concerning constitutional legitimation. More specifically I argue that there are two ways to gain constitutional legitimacy: representational and reasons-based. While particularistic values such as the ones entrenched in the basic law gain legitimacy from representation, universalistic values need not rest on representation. I conclude by arguing that given the failure to gain consensual support for the basic law,

it is an illegitimate attempt to entrench particularistic values in a divisive society. It is only by representing the public as a whole that this law can gain constitutional legitimacy.

KEYWORDS

constitutional theory, Basic Laws of Israel, Israel as the Nation State of the Jewish People, representation

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RIGHT TO SUSTAINABLE DEVELOPMENT AS ONE OF THE RIGHTS OF HUMANITY

1. BACKGROUND FOR RESEARCH ON THE RIGHTS OF HUMANITY

Despite existence of the numerous documents and mechanisms created to protect human rights internationally, the full protection is far from being achieved. This article provides innovative concept of rights of humanity, which is built on ideas of third generation of human rights. Current development of global interdependency allows defining humanity as a separate subject of rights, which can and should be protected. Harmonious and peaceful existence on the planet Earth for all its inhabitants and future generations looks like a utopian goal, which is not suitable for a responsible legal research. However, it is precisely the goal that the United Nations (UN) put in its Sustainable Development Goals[1], which constitutes a global guidance based on shared values of humanity.

Violation of peace, pollution or exhaustion of the environmental resources jeopardizes the development not only of people, who have suffered from these violations directly, but also that of future generations. The three global values – peace, healthy environment and sustainable development – are the principles of international cooperation. The understanding of the interdependence between these values and people marks the beginning of the search for a legal definition of ways to protect physical existence and rights of individual human beings and humanity.

In this article the right of humanity to sustainable development is discussed as one of the rights of humanity, which include the right to peace, right to healthy environment, and right to sustainable development[2]. These rights cannot and

[1] UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1, available at: http://www.refworld.org/docid/57b6e3e44.html (accessed: 4.08.2018).

[2] For example, see: I. Sheiko-Ivankiv, *Ludzkość jako podmiot stosunków społecznych*, „AVANT. Pismo Awangardy Filozoficzno-Naukowej" 2012, pp. 132–140; І. Іванків, Відмінні ознаки прав людини третього покоління. Наукові записки НаУКМА. 2016. Том 181.

should not be considered a solution to global problems, but rather an alternative way of development of philosophy, and possibly human rights doctrine and practice. The proposed theory is one of the first attempts to combine three values into the concept of rights of humanity, therefore, unavoidably having shortcomings and limitations. However, further work on its improvement will contribute to the diversification of approaches to understanding human rights and ways to protect them. This article is part of wider research work, which is directed on developing philosophical ground and legal mechanism of defining and protecting rights of humanity. These rights are regarded as specific solidarity third-generation rights. The specific features of these rights, differentiating them from other human rights, are the following:

1) humanity is a subject of these rights;

2) there is direct co-dependency between rights of humanity and human rights;

3) rights of humanity protection requires their implementation for all with respect to individual rights;

4) extraterritoriality;

5) belonging to different generations of humanity.

Detailed research in this area provides grounds for arguing that the rights characterized by all these features are the right to peace, right to healthy environment, and right to sustainable development. The choice of these rights is not accidental, since legal research has repeatedly attempted to substantiate them. P. Alston in late 1980's wrote about strengthening of ideas about several new rights, namely: the right to development, the right to clean environment, the right to peace, and the right to humanitarian assistance[3].

The rights of humanity can be considered as the ground for the existence of individual human rights and "umbrella" that protects them from violations. In this regard, Alston rightfully notes that the continuation of discussions on new rights about whether they are really rights or just legal principles is a repetition of the discussions preceding the adoption of the Universal Declaration of Human Rights[4], and therefore is a normal process of legalizing natural rights. In this regard it is important to point out Alston's statement that: "*human rights are no longer an area artificially divorced from the most urgent issues of the day such as peace*, *development and environmental protection*[5]". In turn, C. G. Fernandez and D. F. Puyana emphasize that "*sustainable development cannot be realized without peace and security*, *and peace and security will be at risk without*

Юридичні науки, 54-47; І. Іванків, Право людства на мир як умова дотримання прав людини, Наукові записки НаУКМА. 2017. Том 200. Юридичні науки.

[3] P. Alston, *Making Space for New Human Rights: The Case of the Right to Development*, "Harvard Human Rights Yearbook" 1988, p. 3.

[4] *Ibidem*, p. 6.

[5] *Ibidem*, p. 4.

sustainable development[6]", and that "*human rights*, *peace and development are interdependent and mutually reinforcing*[7]". As a matter of fact, the interdependence between the possibility of protecting human rights and the need to protect the discussed rights of humanity originates from the inability to protect human rights in the case of a violation of any of the three rights of humanity.

The idea of rights of humanity is also grounded in philosophical ethics of the ubuntu, which has been legally reflected in the African Charter on Human and Peoples' Rights. It has become the ethical foundation for the determination of solidarity rights. The basis of this philosophy as described by B. E. Winks lies within the African humanism[8].

It is on this fraternal solidarity that the rights of the third generation were founded by K. Vasak[9]. The scholar of the ubuntu philosophy M. F. Murove emphasizes that "ubuntu" is a system of values deeply rooted in African society. He is critical about the over individualized doctrine of human rights pointing out the need for solidarity or community aspect for the real protection of rights[10], some of which cannot really be provided outside of society. The understanding of ubuntu, as described by Murove is important for sustainable development, which aims not only at economic growth, but more on equal opportunities for people all over the world[11]. Perhaps the European-centered approach to the study of human rights indeed limits the potential development of this doctrine. Global interdependence requires responding to planetary challenges, one of which may be the rights of humanity.

2. RIGHT OF HUMANITY TO SUSTAINABLE DEVELOPMENT IN SOFT-LAW DOCUMENTS

Sustainable development is difficult to describe or define clearly, because its modern understanding is extremely broad. The complex discourse of interna-

[6] C. G Fernández., D. F. Puyana, *In Pursuit of Broad Agreement in the Future Development of the Declaration on the Right to Peace within the United Nations*, „Przegląd Strategiczny" 2017, issue 10, p. 387.

[7] C. G. Fernández, D. F. Puyana (with the contribution of M. Bosé), *The Right to Peace: Past*, *Present and Future*, San Jose, November 2017, p. 151, https://www.upeace.org/uploads/file/publication/Right%20to%20Peace.pdf (accessed: 16.06.2018).

[8] B. E. Winks, *A covenant of compassion: African humanism and the rights of solidarity in the African Charter on Human and Peoples' Rights*, "African Human Rights Law Journal" 2011, issue 11, pp. 461–462.

[9] See: K. Vasak, *30-Year Struggle: Sustained Efforts to give Force of Law to Universal Declaration of Human Rights*, "Unesco Courier" 1977, issue 10.

[10] M. F. Murove, *L'Ubuntu*, *Diogène*, 2011, issue 3, p. 45.

[11] *Ibidem*, pp. 49–50.

tional development is reflected in a large number of declarations, conventions, as well as legal and economic studies.

The separate problem that was intentionally left behind the scope of this article is the international development law that has begun to evolve from the mechanisms of assistance to third world countries in the 1960s. Due to such origin most of the documents on the right to development refer to freedom from colonial rule and the right to self-determination of peoples and nations. Currently, the law of international development relates mainly to international aid, development projects of international organizations, as well as international co-operation. Research in such a wide area requires special attention and cannot be realized within this limited space of an article. Despite this limitation, international development law is largely correlated with international human rights law, so the analysis of certain documents in this area will be given for a more detailed discussion of the concept of development and its relationship with human rights. Moreover, the correlation is important to define sustainable development as a right of humanity.

In human rights context, sustainable development includes commensurable development opportunities for different peoples, groups, individuals, human race as a whole, as well as future generations. The concept of sustainable development can be considered in three areas: environmental, economic and social. Sustainable social development implies that the state and the public must be organized in such a way as to limit social unrest, while the conflicts must be resolved peacefully. The Nobel laureate in economics A. Sen considered development as freedom: "*Viewing development in terms of expanding substantive freedoms directs attention to the ends that make development important*, *rather than merely to some of the means that*, *inter alia*, *play a prominent part in the process*[12]". This approach has definitely influenced the formation of international discourse on sustainable development. As Sen points out that achieving economic growth is one way of achieving freedom, which he understood in a broad sense. His concept of freedom is based on the protection of human rights, as well as the proper economic conditions under which development is achieved.

Indeed, the relationship between human rights and human development is also expressed as follows: "*human development is necessary for the realization of human rights*, *and human rights are necessary for full human development*[13]". As R. Scharfenberg stresses, understanding of human rights from the perspective of human development and vice versa, as well as a policy based on this perspective, requires not only the appropriate reflection in legislation at the state level, but also the creation of appropriate institutions and favorable conditions worldwide[14].

[12] A. K. Sen., *Development as freedom*, Oxford 2001, p. 3.

[13] *Ibidem*, p. 2.

[14] R. Szarfenberg, *Prawo do rozwoju* (version: 16.05.2004), p. 6, http://rszarf.ips.uw.edu.pl/pdf/pdr.pdf (accessed: 6.04.2014).

Some scholars believe that the right to development, although not mentioned directly, was reflected in art. 28 of the Universal Declaration of Human Rights, which provides for the right of every person to a social and international order where the rights and freedoms can be fully implemented[15]. Although in the absence of a clear recognition it was difficult to talk about the content and subjects of this right.

Despite the criticism of the concept, the right to development was recognized as an inalienable human right in art. 1 of the Declaration on the Right to Development, adopted by the UN General Assembly on December 4, 1986[16]. In accordance with this Declaration, States are obliged to pursue their national development policy considering the continuous improvement of the well-being of the public and of all people; improvement based on a fair sharing of benefits. The right to development is defined in art. 1 of the Declaration as "*an inalienable human right by virtue of which every human person and all peoples are entitled to participate in*, *contribute to*, *and enjoy economic*, *social*, *cultural and political development*, *in which all human rights and fundamental freedoms can be fully realized*".

The right to development in art. 1 is simultaneously an individual and a collective one that clearly establishes its connection with the human rights and fundamental freedoms. The right to development is a cumulative right, its content derives from other legal instruments used to implement human rights and freedoms. Researchers sometimes call it *sui generis "umbrella concept"*, not a human right[17]. The purpose of this concept is to emphasize the coherent nature of human rights (individual and collective, social and political, etc.), as well as human rights in the process of development.

One of the important features of the right to development as described in art. 2 of the Declaration, is the responsibility of all people to care for development, both individually and collectively. The states also have responsibility to develop appropriate national development policies, as well as to continually improve the living standards of the population through free development and the equitable distribution of benefits derived from it. The Declaration is permeated with the spirit of peoples' equality, the denial of discriminatory practices, and the promotion of international peace. According to art. 3, the primary responsibility of the states is to create national and international conditions conducive to the realization of the right to development. It can be concluded that such an understanding of the

[15] D. Turk, P. J. de Waart, *The Right to Development*, *from Lege Ferenda to Lex Lata*, SIM Newsletter 1985, issue 10, p. 13.

[16] UN General Assembly, Declaration on the Right to Development: resolution, 4 December 1986, A/RES/41/128, http://www.refworld.org/docid/3b00f22544.html (accessed: 20.08.2018).

[17] For example, see: B. A. Andreassen, S. P. Marks (eds), *Development as a Human Right*, Harvard 2006; U. Baxi, *The Development of the Right to Development*, (in:) J. Symonides (ed.), *Human Rights: New Dimensions and Challenges*, Paris 1998; A. Rosas, *The Right to Development*, (in:) E. Asbjørn, C. Krause, A. Rosas (eds.), *Economic, Social and Cultural Rights: A Textbook*, Dordrecht–Boston 1995, p. 247.

right to development confirms the thesis that this right is the right of humanity. One of the most distinctive features of rights of humanity is extraterritoriality. It is inherent to the right to development, since impossibility to protect this right in only one state or to restrict within certain boundaries is obvious.

Back in 1988 P. Alston emphasized the complex nature of the right to development, which was and still is criticized by many Western scholars for its non-individualistic nature[18]. He argues in favor of the need to protect the right to development, as well as the right to peace and a safe environment.

The Brundtland Report of the World Commission on Environment and Development "Our Common Future" [19] issued in 1987 added intergenerational angle to understanding of the sustainable development: "*Humanity has the ability to make development sustainable to ensure that it meets the needs of the present without compromising the ability of future generations to meet their own needs*[20]". This document refers to the interdependence of the environment and opportunities for sustainable development, which has only intensified since then.

Since the adoption of the Declaration on the Right to Development in 1986, the understanding of development has changed substantially and now the prevailing concept is "sustainable development". Issue to be pointed out is that within the discourse of the goals of humanity, sustainable development is used. However, within the human rights discussion development loses its adjective – sustainable.

At the UN conference in Johannesburg in 2002 the global environmental crisis was discussed, including environmental, social, economic and health issues. Two important final documents were adopted: "Action Plan" and Johannesburg Declaration on Sustainable Development[21]. This declaration recognizes the continuation of the purpose of the Stockholm Declaration[22], which was the first document to explicitly recognize the right to a healthy environment, the declaration places great emphasis on protecting both species and their habitat[23]. In the preamble one of the goals of the world community is determined as the need to save our planet, promote human development and achieve universal prosperity and peace.

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[18] P. Alston, *Making Space for New Human Rights…*, p. 26.

[19] Our Common Future. Brundtland Report of the World Commission on Environment and Development (1987), http://www.urv.cat/media/upload/arxius/catedra-desenvolupament-sostenible/Declaracions%20VIP/1987_-_brundtland_report.pdf (accessed: 6 April 2014).

[20] *Ibidem*, p. 13.

[21] UN General Assembly, Declaration on the Right to Development: resolution, 4 December 1986, A/RES/41/128, http://www.refworld.org/docid/3b00f22544.html (accessed: 20.08.2018).

[22] UN General Assembly, United Nations Conference on the Human Environment, 15 December 1972, A/RES/2994, available at: http://www.refworld.org/docid/3b00f1c840.html (accessed: 4.07.2018).

[23] Sustainable development 2015. Advocacy Toolkit Mini-Site, https://www.sustainabledevelopment2015.org/AdvocacyToolkit/index.php/earth-summit-history/historical-documents/91-stockholm-declaration (accessed: 2.09.2018).

The Johannesburg Declaration confirms the task of global society to achieve sustainable development (paragraph 16). Paragraph 21 contains a reference to the recipient and beneficiary of sustainable development, which is humanity: "*We recognize the reality that global society has the means and is endowed with the resources to address the challenges of poverty eradication and sustainable development confronting all humanity. Together, we will take extra steps to ensure that these available resources are used to the benefit of humanity.*"

The analysis of the Johannesburg Declaration allows identifying sustainable development as a new philosophy of global, regional and local development, which is opposed to economic growth understood in the narrow sense. It also emphasizes another distinctive feature of the right to sustainable development, namely importance to different generations of humankind. This philosophy, emerging in response to the global nature of environmental hazards, formulates the vision and ways to reduce or eliminate them by implementing the concept of respectful public attitude to the environment.

According to this philosophy, the features of sustainable development are the following:

– socio-economic development, harmonized with environmental protection;

– permanent, but limited socio-economic development with respect to the natural resources;

– the pursuit of any economic activity should be conducted in harmony with nature in such a way as not to cause the irreversible changes.

It can be argued that development facilitates the use of all human rights. However, one cannot rely on a lack of development and thus justify human rights violations, since the universal nature of these rights is beyond doubt[24]. The topics of human rights dependence on sustainable development were also devoted to the Human Development Report 2000, entitled "Human Rights and Human Development[25]". It states that human rights and human development have the same purpose: "*to secure the freedom*, *well-being and dignity of all people everywhere*[26]".

However, the link between human rights and development is not simple. For example, W. Vandenhole, analyzing the relationship between human rights and development, points out that before the introduction of a human rights-based approach, in times of exclusively economic development, the latter contradicted the idea of protecting human rights in many cases[27]. In this context, it would

[24] *Prawa człowieka trzeciej generacji*, http://www.unic.un.org.pl/prawa_czlowieka/pcz_trzecia_generacja.php (accessed: 6.04.2014).

[25] Human Development Report 2000, Oxford, 2000, p. 1, http://hdr.undp.org/sites/default/files/reports/261/hdr_2000_en.pdf (accessed: 2.09.2018).

[26] *Ibidem*.

[27] W. Vandenhole, *Interplay between Human Rights Law and Development Law: Potential*, *Ambiguities and Tensions*., "Human Rights and International Legal Discourse" 2008, issue 2, pp. 10–11.

be inappropriate to ignore the Millennium Development Goals in the United Nations Millennium Declaration 2000–2015, adopted in 2000, and the Sustainable Development Goals 2016–2030, adopted in September 2015, within the framework of the 70th session of the UN General Assembly New York in the Declaration "Transforming our world: the 2030 Agenda for Sustainable Development[28]". The document approved 17 Sustainable Development Goals and 169 tasks.

Both documents describe the global goals of humanity, the achievement of which is a condition not only for sustainable development, but also for the very existence of humankind on the planet. R. Pavoni and D. Piselli define the transition from the Millennium Development Goals to Sustainable Development Goals as an important stage in human development, considering that the approach of regarding the sustainable development as a mechanism for international cooperation "*playing an important role in the advancement and further specification of the concept of sustainable development as a (legal) principle of integration*[29]". Researchers also point out that integration itself is one of the key elements for the success of sustainable development goals and reflects the planetary scale of long-term cooperation[30].

Therefore, the sustainable development goals can be considered a procedural aspect of the right to sustainable development, since both documents refer to the right to development among the goals of humanity. Accordingly, it can be argued that securing the right to development is possible only if sustainable development mechanisms are used, which are aimed not only at the survival of humankind, but also in ensuring balanced development in different parts of the planet, avoiding drastic differences in opportunities and living conditions.

The Millennium Development Goals also contain provisions on the right to development, but in the context of the goals of poverty eradication and on human rights, democracy and good governance[31]. Paragraph 35 of the declaration "Transforming our world: the 2030 Agenda for Sustainable Development" also contains provisions that combine peace, environment, sustainable development and the right to development into one human right, stressing that "s*ustainable*

[28] UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1, http://www.refworld.org/docid/57b6e3e44.html (accessed: 2.09.2018).

[29] Pavoni R., Piselli D., *The Sustainable Development Goals and International Environmental law: Normative Value and Challenges for Implementation*, "Veredas do Direito" 2016, issue 13, p. 17.

[30] *Ibidem*, p. 27.

[31] UN General Assembly, *United Nations Millennium Declaration*, *Resolution Adopted by the General Assembly*, 18 September 2000, A/RES/55/2, http://www.refworld.org/docid/3b-00f4ea3.html (accessed: 4.08.2018).

development cannot be realized without peace and security; and peace and security will be at risk without sustainable development[32]".

Obviously, such an approach to understanding the right to development and sustainable development may raise some doubts about the effectiveness of their differentiation and the need for a separate right to development, if sustainable development constitutes *de facto* procedural rules of international cooperation and politics. The UN Sustainable Development Goals Report 2018[33] states that possibility to achieve some of the goals by 2030 is questionable. Such situation puts in vulnerable position not only those countries where problems exist, but also humanity in its entirety[34]. The interrelated nature of the goals of sustainable development is also emphasized. Therefore, the international community, together with the national governments should work both independently and together to make societies more sustainable to resist the global challenges.

The gradual transition to more resilient and sustainable societies requires an integrated approach that recognizes that common challenges and their solutions are interconnected[35]. In addition, the adoption of national development strategies based on the UN Sustainable Development goals and the activities of the United Nations Development Program (UNDP) in different countries shows the dual nature of the sustainable development goals, as they operate simultaneously at the international and national levels.

Unfortunately, there is also no consensus regarding the subject of the right to sustainable development. For example, G. Peces-Barba argues that the right to development can only have collective subject, since it deals with the social consequences of the global inequality caused by the differences in economic status between the peoples[36]. The researcher emphasizes the moral component of this right, since the right to development also aims at overcoming the global inequality, which currently helps some states, depriving at the same time others of opportunities for development[37]. He draws attention to the fact that any subject of the right to development will be criticized, therefore he notes that such a complex problem as international development requires additional study[38].

In another research D. Turk and P. J. de Waart emphasize the pluralism of the subjects of the right to development, however, in their opinion, it is the indi-

[32] UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1, http://www.refworld.org/docid/57b6e3e44.html (accessed: 4.08.2018).

[33] *The Sustainable Development Goals Report* 2018, https://unstats.un.org/sdgs/files/report/2018/TheSustainableDevelopmentGoalsReport2018.pdf (accessed: 16.06.2018).

[34] *Ibidem*, p. 3.

[35] *Ibidem*, p. 14.

[36] G. Peces-Barba, *Teoria Dei Diritti Fundamentali*, Milan 1993, p. 166.

[37] *Ibidem*.

[38] *Ibidem*.

vidual subject that causes the least problems and discussions[39]. The researchers also question the possibility of recognizing peoples as subjects of this right, because in this case it would add confusion with the right to self-determination. On the other hand, they recognize the need to define a collective entity that more clearly corresponds to the essence of the right to development. There is an interesting point in their analysis that is recognizing states as potential subjects, although at the same time, they admit that such approach contradicts the essence of the human rights doctrine. However, if the principle of sustainable development is the principle of international relations, then states must have subjectivity for its application, and at the same time they are responsible for ensuring the human right to development. Therefore, it is important to highlight the need to differentiate the right to development, which subjects are any natural communities of people, and development as a principle of international law[40]. Speaking of "any natural communities of people" as the subject of the right to development, one can assume that such a subject may as well be humanity, confirming, therefore, the legitimacy of its recognition as a subject of the right to sustainable development.

In view of the problem of the definition of the subject of the right to sustainable development, humanity may be recognized its subject. The analyzed arguments of researchers and documents indicate confusion in the understanding of the right to development. This right cannot be protected for one person or a limited group of individuals. On the other hand, the global approach to defining the goals of sustainable development for the benefit of humanity suggests that humanity itself could be recognized as the beneficiary of the right to development, which in modern terms should be called sustainable development.

3. RIGHT TO SUSTAINABLE DEVELOPMENT IN REGIONAL HUMAN RIGHTS SYSTEMS

The recognition of the human right to development in the Declaration on the Right to Development has contributed to its recognition in regional human rights systems. Of course, each system, having its own peculiarities, reflected this right in a different way. Further analyzed regional documents indicate fragmentary certainty about the subjects and understanding of the right to development.

[39] D. Turk, P. J. de Waart, *The Right to Development*…, p. 17.
[40] *Ibidem*.

3.1. EUROPEAN SYSTEM

In the European system of human rights protection, the right to development is not mentioned. However, the Aalborg Charter of European Cities and Towns Towards Sustainability[41] defines the commitment to sustainable development at the local level and emphasizes the importance of cities as centers for the realization of sustainable development goals. According to O. Gonchar: "*The European community was one of the first to react to global transformations*, *adopting the concept of sustainable development as the basis for its functioning*[42]". The Aalborg Charter deals with the obligation of cities and towns to carry out their activities in accordance with the principles of sustainable development. The document does not mention the right to development, but it thoroughly describes the responsibility of cities for maintaining the proper environmental conditions, which are essential for the health of humankind, as well as for existence of future generations and the preservation of their capacity for development and realization of their potential.

To give a national example, in Ukraine, seven cities and one oblast undertook the obligations under the Aalborg Charter. Unfortunately, out of those cities Donetsk, Yevpatoria and Sevastopol currently have status of territories temporarily occupied by Russian Federation[43]. The population of these territories is deprived of the right to sustainable development and a healthy environment due to the violation of the right to peace.

In addition, fighting in a zone adjacent to Donetsk threatens the Donetsk filtering station (DFS), whose work is constantly interrupted. According to the facts of the OSCE Special Monitoring Mission in Ukraine: "*This [situation] places the women and men maintaining the plant [...] in danger*, *and jeopardizes the operation of the plant itself*, *upon which over 300,000 civilians on both sides of the contact line depend for drinking water*[44]". In this example, the link between human rights and rights of humanity is clearly traced, since hundreds of thousands of people are deprived of their right to health due to a violation of the right

[41] Aalborg Charter (Charter of European Cities & Towns towards Sustainability, Aalborg, Denmark); May 1994, http://www.urv.cat/media/upload/arxius/catedra-desenvolupament-sostenible/Declaracions%20VIP/1994_-_aalborg_charter.pdf (accessed: 12.08.2018).

[42] О. М. Гончар, Ефективність участі міст України в європейському русі за сталий розвиток. *Науковий вісник Полтавського університету економіки і торгівлі. Сер.: Економічні науки 2014*, issue 6, p. 41.

[43] Закон України «Про особливості державної політики із забезпечення державного суверенітету України на тимчасово окупованих територіях у Донецькій та Луганській областях», від 18.01.2018 № 2268-VIII.

[44] Security situation around the Donetsk Filtration Station in eastern Ukraine remains critical, says OSCE Chief Monitor Apakan, 6.06.2018, https://www.osce.org/special-monitoring-mission-to-ukraine/383592 (accessed: 15.08.2018).

to peace, their right to life, as well as collective rights to a healthy environment and sustainable development are endangered.

3.2. AFRICAN SYSTEM

Unlike the European one, the African human rights system provides for the right to development in the African Charter on Human and Peoples' Rights (African Charter) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women[45].

Paragraph 1 of the art. 22 of the African Charter provides for the right to development, namely: All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind[46].

The duty to ensure the exercise of this right is entrusted to the states, which have to carry it individually or collectively (para. 2 art. 22). The right to development is also mentioned in Art. 24 of the African Charter, which establishes the right to a generally satisfactory environment.

Art. 19 of the Protocol in the Rights of Women to the African Charter, which defines the right of women to fully enjoy the right to sustainable development is even more progressive. Among the responsibilities of the state are the use of indicators for human development in the implementation of women's rights policies, as well as to reduce the negative effects of globalization in the implementation of trade contracts and economic policies.

The right to development at the African continent is of particular importance, since its peoples were mostly affected by colonial rule. The Sustainable development report on Africa states, that this continent remains not only the poorest, but also the least developed, the most technologically backward, most indebted, and most vulnerable due to food shortages, and the most marginalized region in the world[47]. Only the African continent has not been able to achieve the majority of the Millennium Development Goals by 2015[48]. The report also states that peace and health are essential to sustainable development, and the constant armed conflicts in the region together with significant pollution, combined with natural disasters and recurrent epidemics, make it much more difficult to overcome the critical level of poverty.

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[45] Cit. by: *Human Rights in International Law. Basic Texts*, Council of Europe Publishing, 2007.

[46] *Ibidem*.

[47] *United Nations. Economic Commission for Africa (2011-01). Sustainable development report on Africa I: managing land-based resources for sustainable development*. Addis Ababa, p. 1, http://hdl.handle.net/10855/14946 (accessed: 16.06.2018).

[48] *Ibidem*.

The difficult situation on the African continent forces governments to look for new ways to solve problems. One of them is the definition of a special catalogue of human and peoples' rights. Sustainable development in the context of the philosophy of the ubuntu, mentioned above, promotes the idea of solidarity as a necessary condition for the protection of globally important rights as are the rights to peace, to healthy environment, and sustainable development. The African Charter might provide the legal and philosophical ground for development of rights of humanity, based on the value of solidarity.

3.3. ASIAN SYSTEM

Asian system of human rights is usually but undeservingly overlooked. Its problem lies in the absence of mechanisms of protection, and the declarative nature of the human rights catalogue. However, given that the Association of Southeast Asian Nations (ASEAN) adopted its Human Rights Declaration (AHRD) in 2012, this system is the most comprehensive and most reflective of the modern understanding of the right to sustainable development. Articles 35–37 describe in detail the right to development and the obligations of States with regard to its protection and enforcement:[49]

The right to development is an inalienable human right by virtue of which every human person and the peoples of ASEAN are entitled to participate in, contribute to, enjoy and benefit equitably and sustainably from economic, social, cultural and political development. The right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations. While development facilitates and is necessary for the enjoyment of all human rights, the lack of development may not be invoked to justify the violations of internationally recognized human rights.

The last two sentences of the article emphasize the essential features of the right to sustainable development: belonging to present and future generations and interconnectedness with the environment. The position of J. Donnelly about the impossibility of providing a certain right due to an inadequate level of development cannot be used to justify its violation[50] was expressed in the ASEAN Declaration. This provision is an important indicator of the interdependence of development and human rights.

[49] ASEAN. *Human Rights Declaration (AHRD) and the Phnom Penh Statement on the Adoption of the AHRD.* 2013, http://www.asean.org/storage/images/resources/ASEAN Publication/2013 (7. Jul) – ASEAN Human Rights Declaration (AHRD) and Its Translation.pdf (accessed: 14.07.2018).

[50] See: J. Donnelly, *The relative universality of human rights*, "Human Rights Quarterly" 2007.

Article 37 of the ASEAN Declaration obliges ASEAN member states to cooperate with each other and outside the community, since sustainable development is achievable only in the case of multidimensional international cooperation. It is worth paying attention to the definition of the subject of the right to development, which is every person and people of ASEAN. The potential recognition of the right to sustainable development by the right of humanity would help identifying the subject more specifically. The characteristic features of which are neither completely individual nor collective, however protection of this right requires international co-operation.

3.4. AMERICAN SYSTEM

In the American Convention on Human Rights (the San Jose Pact) in art. 26 deals with progressive development. This article is the only one in the section on economic, social and cultural rights, but it does not refer to the right to development.

4. CONCLUSIONS

Based on the provided analysis of soft law documents and regional instruments, the following conclusions can be made:

1. Rights of humanity are independent rights, emerging from the third-generation human rights, based on solidarity.

2. The transformation of the human right to development into the right of humanity to sustainable development will contribute to a more coherent understanding of these complex legal constructs and more effective planning for its protection.

3. The sustainable development goals can be considered a procedural aspect of the right to sustainable development, which may facilitate the protection of all rights of humanity.

4. The regional peculiarities of development influence the definition of the right to development and help creating global understanding of the right to sustainable development. The modern documents on human rights reflect global trends in defining and protecting the right to sustainable development. The importance of sustainable development for the present and future generations of humanity, as well as for the protection of human rights, requires further research in this sphere.

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RIGHT TO SUSTAINABLE DEVELOPMENT AS ONE OF THE RIGHTS OF HUMANITY

Summary

Right of humanity to development is described within the global search for responses to the planetary challenges. The idea of the rights of humanity is an attempt to propose the new approach to human rights protection, based on global interdependency. The article offers analysis of soft law documents on human right to development, as well as regional instruments for protection of human and peoples' rights. It is argued that right to sustainable development viewed as a right of humanity may create a broader mechanism of protection both for individual human being and humanity in general.

KEYWORDS

rights of humanity, right to sustainable development

SŁOWA KLUCZOWE

prawa ludzkości, prawo do zrównoważonego rozwoju

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RESPONSIBILITY – AN ANTHROPOLOGICAL OUTLINE

Law – right or wrong, or even preposterous – for those who apply it, therefore, raises a compulsion of the will: obscuring or even replacing it.[1]

1. PREFACE

The notion of crime, adopted in the Polish Penal Code of 1997 (further on referred to also by the Polish abbreviation KK) and often named as a five-adjective concept, differs from the classical one (respectively called three-adjective). According to the binding Code, a crime is defined as an (1) act which is jointly (2) punishable, (3) reprehensible, (4) culpable and (5) socially harmful. In the regular course of a lecture in criminal law, it is generally accepted that the five-adjective concept is indeed five-*graded*. Thus, the crime is seen as if it had a stepped structure. Climbing down from an individual act, we take further steps from (2) criminality to (5) social harmfulness. (This scheme of reasoning finds its basis e.g. in Article 1(2) of the Penal Code. It allows for the exclusion of criminal liability, although an act does meet the criteria of a crime, and in particular is both (3) reprehensible and (4) culpable, but its social harmfulness is negligible).

However, the five-graded understanding of crime, although justified, might be misleading, since the "grades" taken together create rather a polarized dialectic than a compatibility of concepts. Thus, we can say that the complex idea of crime resembles a musical composition made of counterpoints (from point 1 up to point 5).

Let us notice an important circumstance. Seemingly, in the assessment of criminality, the weightiness of guilt is inversely proportional to the weightiness of its

[1] G. Morselli, *Krótka rozprawa o samobójstwie*, „Literatura na Świecie" 2018, issue 1–2, p. 6.

social harm. Article 1(2) KK thus appears to deviate from the notion of responsibility classically based on the principle of guilt.[2] Gottlob Frege, a great logician and the author of the first formal system, considered concepts as functions (in strict analogy to the mathematical ones). Accordingly, the task of philosophy, one out of many, is to study their variation. Taking the notion of crime into consideration, one may notice its "complexity", and, to be more clear, non-monotonicity.

2. AIM OF THE PAPER

In this paper, we are going to ponder the legal responsibility in two of its *genres*: criminal and administrative (vividly, but not sufficiently precisely referred to as the *subjective* and *objective* aspect of responsibility). As it has been rightly asserted, "there is no responsibility without freedom." The more general theory of freedom is thus an introduction to considerations concerning responsibility. Reflections on freedom are supposed to bring us closer to an answer to two questions fundamental for all legal philosophy: (I) what justifies punishment as a social practice?, and (II) what exactly is the subject of criminal damnation?

Following the suggestion made by Professor Marcin Poręba, two preliminary conditions (understood as necessary conditions for its adequacy) should be imposed on each theory of freedom. First of all, it ought to (c1) determine whether exceptions from necessity are possible at all, and, secondly, (c2) ascertain whether these exceptions correspond to the colloquial understanding of freedom[3] (in order to eventually prescribe the degree of their suitability). The Poręba Criterion, as we might call it, is not only limited to metaphysical considerations, but might be also extended, so that it includes the theory of criminal responsibility, as well.

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[2] By the principle of guilt we mean here the formal assumption that punishment is supposed to be a function of guilt – e.g. that it should be directly proportional to it (as Kant claimed). The perpetrator's guilt is both a sufficient and exclusive justification for the violence inflicted on them. "All of its preventive, educative and educational aims are indeterminate, and therefore they broaden the essence and function of punishment, thereby expanding the scope of penalisation, directing it to vaguely understood social relations, which should not be related to criminal punishment", as G. Rejman notes. "The worst effect of such a broad delineation of the function of punishment is the possibility of transposition its implementation beyond the limits of justice transfer it to another administrative factor". Deviations from the formal principle of guilt therefore erode the institution of punishment. The observation made above points to the conceptual symmetry of two quite different, it might seem, phenomena: the liberal striving to form a punishment against its retaliatory essence and the totalitarian practice of "entrusting in Poland in 1944–1956 matters related to the execution of the security and public order service". See: G. Rejman, *Z rozważań o karze*, (in:) J. Utrat-Milecki (ed.), *Kara w nauce i kulturze*, Warszawa 2009, pp. 43–44.

[3] Cf. M. Poręba, *Uwagi o wolności*, (in:) M. Poręba, *Wolność i metafizyka*, Warszawa 2017, p. 102.

Hereafter, I intend to take a step towards the proper theory of responsibility, which I suggest to call *proleptic*. The idea of *prolepsis* refers to Timothy Chappell, a contemporary American philosopher, who maintains that the idea of personhood has a proleptic nature and that its social application is rather *performative* than descriptive (both ideas are closely related).[4] Chappell's findings, which are profound and of great importance, will serve as, let us say, a hand guide in further deliberations. Notice that the proleptic theory of responsibility is immersed in the general and the specific view on the person, the origins of which go back to the thought of Immanuel Kant. Following Kant, Chappell defines morality as ethics understood in terms of personhood.[5] The ethical notion of responsibility (in both *moral* and *legal* sense) is thus one of the shoots growing from the root of the regulative idea of personhood. The mechanics of prolepsis hereby reveal the anthropological basis of the (*inter alia* criminal) punishment.

The present article consists of two parts, with each of them again being divided into two subsections. In the first part, which initiates our considerations, (i) I present a well-known argument which has been often raised in the historical dispute on determinism. Subsequently, (ii) I discuss the very notion of free will, trying to lay out several aspects relevant to criminal law. To do this, I refer further to the anthropology of Peter Abelard, a great philosopher of the scholastic era. In the second part, on the other hand, (iii) I will attempt to specify the concept of possibility, thus closing the philosophical reflections over freedom. The conclusions will finally render it possible (iv) to outline the concept of the person – which is supported by the properly understood freedom of will. At the end of the investigation, it is necessary to answer whether the proleptic theory satisfies the Poręba Criterion (i.e. the condition for its accuracy). Merely fulfilling it does not guarantee that the outlined theory is adequate. However, it is – I believe – a promising beginning.

3. QUANDARY OF DETERMINISM

Ad rem. "There are two labyrinths within the human mind", Leibniz says emphatically, "one is related to the notion of continuity and the other to the nature of freedom".[6] Let us then try to follow at least a path in the Leibnizian labyrinth.

[4] T. Chappell, *On the Very Idea of Personhood*, "The Southern Journal of Philosophy", March 2011.

[5] O. Höffe, *Immanuel Kant*, trans. M. Kaniowski, Warszawa 1995, p. 175.

[6] "… and their source lies in the same notion of infinity", as Leibniz continues. Quoted after: M. R. Antognazza, *Leibniz. Biografia intelektualna*, transl. Z., Ł. Lamżowie, Kraków 2018. See also: B. Wolniewicz, *Z aksjologii Elzenberga*, (in:) B. Wolniewicz, *Filozofia i wartości*, Warszawa 1993, p. 146.

As has been noticed already, there is no responsibility without freedom. Nevertheless, determinism can be pointed out as one of the most serious threats to the freedom of will. In this paper, philosophical considerations on determinism will play a primarily heuristic role, illustrating in a *pars pro toto* manner the theoretical significance of the problem. What exactly does determinism claim? Its position is frequently perceived fallaciously, and its clear presentation causes considerable difficulties.[7]

Determinism requires to be expressed in causal terms. Following Poręba's (c2) recommendation, we can take a well-known proverb as our theoretical material: "man proposes, God disposes". It accurately reflects the determinist thesis: when I write these words, the future of my article (e.g. whether it *will or will not be* completed) is a foregone state of affairs. A determinist believes that the future is strictly determined by a *certain* event preceding it[8] (whereas the totality of events creates a sequence causally connected in a timeline), although it is not both resolved and independent from a causal relation (as a fatalist may claim). The future event is here an element of the following alternative: the bullet will hit the target or fail. Whatever happens, however, is determined by the necessity of a causal relation. The main question is therefore: are acts of will fully determined by events?

The subject of our interest is thus a quandary of determinism understood in this manner.[9] Does it exclude free will? Philosophers who deny it sometimes present the following reasoning.[10] Without rejecting the freedom of will, they notice, we can agree that the future is determined and the logical values of future contingents are – at the same time – already fixed. Let us assume, just for the purpose of the example, that in the future, humans will populate the planet Mars. This means, consequently, that whatever I or anyone else will do *now*, Mars will be populated *in the future*. Yet such a statement does not imply that populating Mars is independent of our actions! The current state of the world indeed determines the fact that Mars will be populated; but if the present state of the world were different, then… .[11]

[7] Let us show just one of them as an example. The deterministic view is often not sufficiently distinguished from the fatalistic position. The thesis of fatalism can be expressed in the form of implication: if it is true that it will be as it is said, it has always been the case as it is said. Determinism is a naturalistic view, fatalism – a magical one. By the by, we can note that the theses of determinism and fatalism logically exclude each other.

[8] Or following after it.

[9] If the future is clearly determined by the present event, then judgments about the future have a fixed logical value. For the sake of simplicity, we accept this *quasi*-Aristotelian explication of the deterministic thesis.

[10] K. Miller, *Presentism*, *Eternalism*, *and the Growing Block Theory*, (in:) H. Dyke, A. Bardon (eds.), *A Companion to the Philosophy of Time*, Malden 2016, p. 351.

[11] *Ibidem*.

The answer presented above refers to the classical argument raised particularly by George E. Moore, who also tried to show that determinism does not exclude responsibility. The argument has the following structure: (I) *A* is equivalent to *B*, (II) *B* is consistent with determinism, therefore (III) *A* is consistent with determinism, where the variables are interpreted as: *A* = "*S* could have done otherwise", *B* = "if *S* had chosen to do otherwise, then he would have done otherwise."[12] Notice that sentence *B* is wholly consistent with the thesis that "all S's actions are causally determined". Hence, *A* – in virtue of assuming the equivalence (I) – remains consistent with causal determinism.

As Roderick M. Chisholm has shown, the conclusiveness of Moore's argument strictly depends on the enthymematic premise *C*. The premise *C* states that "*S* could have chosen to do otherwise."[13] The conviction that determinism is consistent with responsibility is therefore valid only when the premise *C* is accurate. If we are then forced to reject it – although still having good reason to accept *B* – there are no good reasons to admit *A*. An agent who could not decide that they would act otherwise – says knowingly Chisholm – would not have acted differently regardless of the veracity of *B*, that is: even if *S* had decided that they would do otherwise, then S would have acted differently.[14] Moore's argument seems to fall like dominoes.

This difficulty led Chisholm to present another concept of free will. Remember that causality is a relation between states of affairs. However, personal responsibility, as we read, is based on the circumstance that a certain event or set of events is caused not by other events or states of affairs, but by the acting agent themselves.[15] The uniqueness of causality, then – that in accordance with the scholastic tradition Chisholm called *immanent* – consists in the fact that an act of will, although it has no *cause* in the world of events, has certain *effects* in it (which naturally contradicts determinism). In the next section, I will try to refer these remarks to the main problem of our paper, which is legal responsibility.

4. STRUGGLING WITH GUILT

Guilt is a penal reflection of freedom. Assume that condition *B*, presented above, is an adequate explication of responsibility. According to *B*, *S* is responsi-

[12] R. M. Chisholm, *Freedom and The Self*. Cf. https://kuscholarworks.ku.edu/bitstream/handle/1808/12380/Human%20Freedom%20and%20the%20Self-1964.pdf;sequence=1 (accessed: 3.08.2018). Cf. also: R. M. Chisholm, *„Ja" a wolność człowieka*, (in:) J. Górnicka-Kalinowska (ed.), *Filozofia podmiotu*, trans. J. Golińska, Warszawa 2001, pp. 352–353.

[13] *Ibidem*.

[14] *Ibidem*, p. 353.

[15] *Ibidem*, p. 354.

ble for their actions only if they could have done otherwise (than they in fact did). This premise (claiming that "they could have acted differently") simply means, in pursuance of *B*, that if *S* had decided that they would do otherwise, then they would have acted differently. The notion of free will is therefore complex and breaks into two simpler conceptual substrates: the *subjective* decision and thet *objective* possibility. The first one is characterized by the metaphysical concept of will, the second – contrarily – by purely empirical terms (notable is the circumstance that they correspond respectively to the *definition* and the *criterion* of a free action).

Thus, it is necessary to distinguish the definition of the notion from its criteria (ascertaining that a certain action is free indeed).[16] Defining a concept is merely a logical task. We may reasonably ask: what does it mean, then, that *S* chose they would do *so-and-so*? What sense should be attached to the intention – so important in considerations on guilt? To answer the questions above, I will resort to the useful conceptual tools provided by Abelard. Let us shortly review his anthropology of the tact, leaving for now the specific problem of the criteria on the margin (I will return to it in the next section).

As research material, we will take the initial paragraphs of Abelard's *Ethics*, his foremost opus created in 1135/1136.[17] Let us firstly note that "the roman-canonical conception of guilt was finally formed in 1191–1196 and found its expression in the Papal Bull, and then was transposed to canon law in the form expressed in the famous principle: *versanti in re illucitae impantur omnia seguuntur ex delicto.*"[18] Abelard's idea is sometimes overlooked in historical reflections on criminal law. Therefore, it is worth trying to even roughly describe its grounds (also in order to deepen understanding of the historical development of the institution of guilt). However, an introductory reservation should be made now. Above all, it has to be noticed that the subject of Abelard's *tractatus* is the essence of sin, not of crime. He does make some remarks about crime, as well (claiming e.g. – as it

[16] This distinction comes from R. Swinburne. Swinburne notes that the notorious confusion of the definition of a concept with the criteria for its affirmation is a mistake of the empiricist theory in the discussion on personal identity. The naturalistic tendency to combine both problems applies more broadly to the issue of personal responsibility; according to Swinburne, we can say that the core reason for that is the original sin committed in the personal identity theory. Cf. R. Swinburne, *Personal Identity: The Dualist Theory*, (in:) S. Shoemaker, R. Swinburne, *Personal Identity: Great Debates in Philosophy*, Oxford 1984, pp. 317–318.

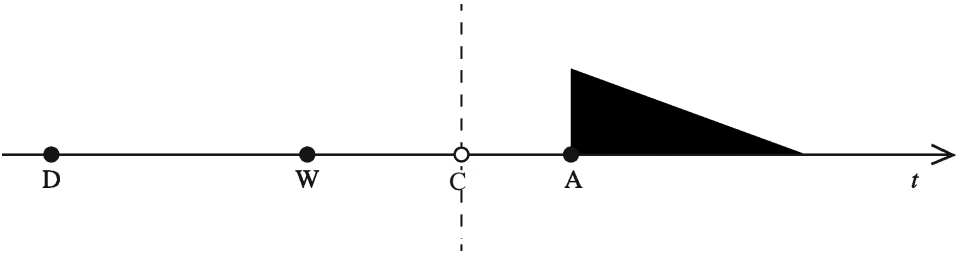
[17] P. Abelard, *Etyka*, *czyli Poznaj samego siebie*, (in:) P. Abelard, *Rozprawy*, transl. L. Joachimowicz, Warszawa 1969. Fragments of Abelard's *Ethics* are referred to in a translation based on the Polish translation of L. Joachimowicz. However, we allow for a significant modernization of terminology, following in this unpublished translation prepared by participants of the Latin translatory in the Institute of Philosophy of the University of Warsaw in the academic years 2014/2015 and 2015/2016.

[18] G. Rejman, *Zasady odpowiedzialności karnej*, Warszawa 2009, p. 38.

seems – that *mens rea* of the crime and sin do not differ significantly),[19] but they are but a peripheral topic of his *Ethics*.

Consider an important circumstance. The penal problem of responsibility intersects with the question of freedom in exactly two points: either in (1) act or in (4) fault. In the first case, it is relatively simple and amounts to distinguishing *vis compulsiva* from *vis absoluta*. The real theoretical difficulties arise in view of the problem of guilt, i.e. personal culpability for the deed. All difficulties thus concern the subjective side of a deed. The "tuning" of Abelard's ethics – in order to adjust it to legal, not moral, theory – depends, therefore, on the conceptual calibration of intention. Ultimately, it is convenient to assume that the theoretical scaffolding is taken from Abelard, but it is our task to "renew" the whole construction.

At the beginning let us introduce several needed terms, which are foremost: disposition (D), desire (W), *consensus* (C), act and its consequences (A). They are the successive border posts in the genealogy of crime: from the culpable disposition (ingrained already in the nature of the perpetrator, given them at the very point of conception) to the distant consequences of the act (see e.g. result crimes). Their temporal order can be seen on the following timeline; with the highlighted area of action and its consequences:[20]



Following Abelard's thought, we distinguish two types of disposition: *spiritual* and other (which might be called *bodily*). Spiritual dispositions are latterly divided into morally positive (i.e. *virtues*) and morally negative (i.e. *defects*). The first make us willing to do good, and the other – to act wrongfully. (In order to preserve neatness, we list the main definitions and statements below).

[T1] The defect of the soul is the tendency to do evil (for example, although not exclusively, the tendency to evil will).[21]

[19] Abelard assumes that both sin and crime at the source correspond to the ambivalence of will. Regardless of the material content of ethical codes (moral and legal), without detriment to the precision of consideration, we can agree that (moral) sin and (legal) crime are formally indistinguishable from the subjective perspective. The difference between them applies to jurisdiction (divine and human, respectively) and, accordingly, to punishment.

[20] The concept of deed applies also to the initial forms of the offence.

[21] There is also a third set of morally ambivalent dispositions (it is not that the lack of virtues is always a morally relevant defect). The above division is therefore a trichotomy.

"To have an attribute of anger", says Abelard, "means to be tempted… to anger, that is to have a defect that inclines the soul to violent and unreasonable deeds, which are wicked to do. This defect is rooted in the soul therefore, namely, it is prone to anger, although in fact it does not rise up in anger".[22] However, if particular deeds of an agent do not embody defects of their soul (conveniently understood in dispositional terms), the agent themselves yet could not be called 'evil'.[23] On the contrary, the innate contamination of the soul can be seen as an invitation to gain a moral merit, "if [a man – *S. J.*] fights … struggling not so much with people as with his defects … not to force him to agree to a bad deed".[24] The totality of so understood (*inter alia* moral) dispositions adds up to an individual character.

Later, Abelard directs his attention towards desire.[25] There are two "species" of will, as he calls the power of desire, the first and the second order will. Abelard consciously observes that "there are also those who feel disgusted before agreeing to lust or bowing to bad will, but the weakness of the body forces them to want it, although they would rather not want to".[26] Speaking of the first order will, he notices that – just like inborn propensities – it lies in the nature of the agent. The first order desire or – as Schopenhauer would say – the "first inclinations" are thus not within the range of the will power, despite being its creations. The will power consists in the fact that its dictate, regarding what is or is not the object of one's desire, is substantially autonomous. Thus, recalling the famous metaphor presented in Plato's *Gorgias*, the freedom of will resembles the mastery of a tyrant (and is, as Socrates and Abelard concurrently taught, a certain form of slavery). It turns out, therefore, that, in a sense which is significant in the light of our deliberations on responsibility, the will – at first glance paradoxically – is not free. However, as Abelard maintains, as every sin is voluntary, the will of the first order cannot be sinful at all and, therefore, felonious. In conclusion, a so defined will contaminated by evil could not be recognized as guilty.

[T2] Turning of the will to a certain object is not the result of a free choice.

Character and will, says Abelard, are therefore equally determined. This fact implies consequently that:

[T3] Guilt does not lie in the culpable will.

Such a statement is justified by their logical independency: neither is guilt necessarily followed by a culpable will nor *vice versa*. The circumstance just underlined clarifies Abelard's assent to the theorem claiming that guilt is always an echo, albeit a very distant one, of a free choice.

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[22] P. Abelard, *Etyka*, *czyli Poznaj samego siebie*..., p. 166.

[23] Let us assume for the sake of simplicity that evil is understood axiologically as a negative value. This can occur in two aspects: sin and crime.

[24] P. Abelard, *Etyka*, *czyli Poznaj samego siebie*..., p. 167.

[25] In the system of his ethics, "desire" is a primal notion, that is it is not defined.

[26] P. Abelard, *Etyka*, *czyli Poznaj samego siebie*..., p. 176.

A deed is the external manifestation of an intention (which is internal). Moreover, Abelard maintains that an act, like every disposition and like the will itself, is neither culpable nor sinful. "And if we consider this matter accurately", he argues, "we will find out that where the deeds are commanded or prohibited, there is a command and prohibition more related to the will or *consensus* to act than to a deed. Otherwise nothing that is related to merits would be dictated by an order, and the less a thing can be ordered, the less it depends on our capabilities. There are many things that cannot be made by us, but when it comes to will and *consensus* – both always belong to our free decision".[27] The outlined argument is clear enough: deeds, as we affirm, are *per se* morally colourless. What we condemn (morally or legally) is not the action itself, but the culpable consensus that has been merely revealed in it.

[T4] A deed itself cannot be called "culpable". Guilt does not lie within an act.

As Abelard says: "It is not a sin to murder a man, nor is it adultery with another's wife, which can be done without sin".[28] The moral tinge of a deed is strictly connected with guilt, with a *consensus* – i.e. the creation of will. For if guilt blames the soul, it must lie inside it, not in a purely external action.

[T5] The substance of guilt is the act of culpable agreement. What, however, does such an act rely on?

In the premise B, it was characterized by a very vague phrase; part of the reason for this might be that "decision" is uttered there. Anthropologically, guilt (based on a free act of will) is located "between" the first order desire and the act. George H. von Wright described the act of will as follows: "it would not be right I think to call acts a kind or species of events. An act *is* not a change in the world. But many acts may quite appropriately be described as the bringing about or *effecting* ('at will') of a change. To act is in a sense to *interfere* with 'the course of nature'".[29] Such an act is thus neither a psychological phenomenon nor an event – nor even *any* state of affairs (it also has no temporal extent, as indicated in the Figure). As Chisholm accurately expressed, it has an effect, although it has no cause. Its freedom lies in the fact that it is not precisely determined by external circumstances, or by will (in the meaning of the first order) and character; free simply means *independent* from the situation, which includes an internal state of consciousness, as well.[30]

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[27] *Ibidem*, p. 183.

[28] *Ibidem*. As an example of adultery that is not a sin Abelard describes, among others, a deed committed as the result of an error (the adulterer mistakenly thinks of a person who is not in fact his wife as his wife).

[29] G. H. von Wright, *Norm and Action: A Logical Enquiry*, London 1963, p. 36. Quoted after: B. Wolniewicz, *Hedonizm teoretyczny i prawo Ehrenfelsa*, (in:) B. Wolniewicz, *Filozofia i wartości III*, Warszawa 2003, p. 31.

[30] B. Wolniewicz, *Determinizm i odpowiedzialność*, (in:) B. Wolniewicz, *Filozofia i wartości III*, p. 113.

Abelard reduces guilt to the culpable consent *tout court*. He defines it in two ways, introducing the notion of sin. According to his beliefs, (I) it is a sin to agree to do what we think we should not do or to give up on what we think we should do.[31] At the same time, (II) sin is contempt for God and an insult to him. The only harm that a man is capable of doing to God (resp. to *law*) is contempt for him. Let us introduce some symbols: *S* = sin, *C* = consent, to do what we think…, and *I* = contempt for God. Now note that between the ranges of the terms *S*, *C* and *I* the following relationships occur: (i) *S* = *C*, (ii) *S* = *I*, i.e. (iii) *C* = *I*. Therefore, we should assume that their semantic ranges are equal. Without detriment to the accuracy of the considerations, we can assume that sin (in Abelard's understanding, and *resp.* a crime) is the same as guilt.[32] Abelard emphasizes the fact that the act does not increase guilt – it only reveals it. Punishment is thus a legal result of guilt, not of the act itself.

According to Abelard, we are tempted to utter the essence of the rule of law which is distinctly reflected in the words of Morselli, already quoted as the motto: "law… for those who apply it, raises a compulsion of the will: obscuring or even replacing it".

5. STRUGGLING WITH POSSIBILITY

We have already outlined a certain picture of the metaphysical concept of will and its freedom. The previous considerations were supposed to fulfil the function of Wittgenstein's ladder. Having climbed it, we have obtained the required theoretical perspective. Duns Scotus once said that philosophy is the art of distinguishing what is difficult to distinguish; our considerations pertaining to a theory of law, however, do not demand a metaphysical lancet. Therefore, according to Wittgenstein's notable recommendation, one is now to supposed to "throw away the ladder after [one] has climbed up it".[33] Hitherto we have been moving across the labyrinth of freedom. The task of legal philosophy is now to provide a conceptual tool that, like Ariadne's thread, will allow us to find the way out of this conceptual labyrinth.

As could be recalled, condition *B* characterizes the concept of free will by two components – the subjective decision and the objective possibility. The first

[31] It is necessary to distinguish between the subjective and the objective element of sin (guilt). The most suitable solution is to accept that "to judge" in the above paraphrase means simply "to know".

[32] Then, from the outlined concept of guilt (understood as a consent), two of its aspects ought to be derived: the *intentional* and the *unintentional* one.

[33] L. Wittgenstein, *Tractatus logico-philosophicus*, trans. C. K. Ogden, London 1981, numerous: 6.54.

one is assessed individually, the second one – generally. We have already agreed to identify guilt with culpable consent, expressed (at least) in volitional ambivalence to the law. It was an important step, but one that leads still deeper into the labyrinth. The concept of possibility (formally established by Wolniewicz and referred to as *pseudo*-Diodorian) will now turn out to be the Ariadne's thread we have sought.

Let us go back to the main question: how to understand responsibility? The answer has been already prepared. The freedom of will, a necessary condition of responsibility, is defined, as we claim following Wolniewicz, by the formula: "*S* is responsible for their actions if, and only if, they could have acted otherwise".[34] Its further characterization is based on the clarification of the meaning of the phrase "they could have acted otherwise", which also appears in condition *B*, that is the point of our interest. The concept of possibility is polychromatic. The success of a pragmatic solution depends on whether we can give it (a) an empirical sense, which – at the same time – (b) corresponds to modal contexts in legal reasoning. Wolniewicz argued that *pseudo*-Diodorian modality fulfils both the foregoing conditions. We will now proceed to explicate it.

"The question whether an individual *S* could have acted otherwise in a given situation is, from point of view of the philosophy of law, equivalent to the question whether in fact every normal human being, put in this situation, acts as the other person has acted", Wolniewicz maintains. "The latter is in turn equivalent to the third one: has it ever happened that someone acted differently in this situation? If it has happened, it means that in this case, the action of S was not an absolute species norm. And that is just what one means by saying that someone could have done otherwise. They could have, because others could; and they could, because they did. It does not matter whether the metaphysical freedom of will [expressed in an individual act – *S.J.*] is attributed to an agent".[35] In other words, *S*'s action was free if *S* could have acted otherwise. This in turn means that someone – assuming the identity of the situation[36] – actually did so. The metaphysics of freedom is hereby reduced to an empirical solution. The accomplishment of the interpretation depends, however, on the adequate wording of the identity criterion – and this task has to be left to the jurisprudential practice.

We do not intend to deliver the formal explication of the notion of *pseudo*-Diodorian modality; it can be easily found in subject literature.[37] Let us instead point to a straight fact. Namely, the consistent transition from the statement that "*O* decided so that *p*" to the formula "*S* decided so that *p*" depends on the acceptance that *S* and *O* – and all human beings – are free to an equal extent. This

[34] See: B. Wolniewicz, *Determinizm i odpowiedzialność*..., p. 114.

[35] *Ibidem*.

[36] *Ibidem*, p. 117.

[37] Cf. B. Wolniewicz, *Krytyka teodycei u Bayle'a*, (in:) B. Wolniewicz, *Filozofia i wartości II*, Warszawa 1998, p. 100 and following.

circumstance reflects the fact that the relation of equivalence defined on the set of humans is that of *congruence*. This means that "if both [i.e. the entities *S* and *O* – *S.J.*] are equally free, what could have been decided by one, could also be decided by the other one".[38] This *datum* highlights the laws of dynamics governing the above-mentioned concept of possibility. Let us try to bring them out, noting the anthropological basis of punishment, which is inherent for the evolutionary emergence of personhood.

6. A PROLEPTIC VIEW

The concept of pseudo-Diodorian modality might be considered as a part of a wider picture, which is the proleptic view on personhood. In this section, I will try to outline it. It has become a milestone in the history of logical development of personhood, being at the same time a handy tool for the philosophy of law. The free will, discussed in the previoust paragraphs, is a definitional component of the person. Following Saint Bonaventure, we can say that persons are special creatures capable of free acts of will – clearly distinctive against the background of the causally determined world of phenomena (i.e. the whole nature).

The legal concept of the person, we claim, is *proleptic*. One could now be tempted to finally ask: what does this mean? In order to illustrate this circumstance, Chappell reaches for penology. We punish recidivists while striving to create conditions for their improvement. Although resocialization turns out to be statistically ineffective, we do not abandon it: some criminals do live lawfully after serving their sentences. According to Chappell, the mechanics of the concept of the person make us expect each one to improve, if only some of them improved (it vaguely resembles the induction scheme). At least we assume – admittedly *contra factum* – that each individual person has the opportunity to improve.

The reasoning sketched above – modelled, according to Chappell, after the concept of the person (which shapes our conscience) – is based on the *pseudo*-Diodoric concept of possibility. If, following Wolniewicz's example, two perpetrators have an equally free will, then whatever one of them could have decided, could also be decided by the other one. So, *mutatis mutandis*, if some of the perpetrators undergo resocialization – and everyone is equally a person – then our ethical attitude implies the possibility of improvement in all individual cases; the opposite solution would be excluded *a limine* by the proleptic nature of personhood as unjust.

The philosophical recognition of the proleptic nature of personhood is an important step on the way to self-knowledge of a certain philosophical tradition,

[38] B. Wolniewicz, *Determinizm i odpowiedzialność*..., p. 116.

dated at least two hundred and fifty years ago. Its sources should be seen in Kantian metaphysics of morality. Kant limited his reflections on ethics to the personal aspect of practice, making the concept of the person the nerve of his ethics. He then memorably divided it into morality and legality (i.e. law). Morality is understood as ethics referred to a person, while legality refers to the mutual coexistence of people in a community.[39] Kant's lasting achievement was to include each human being in the circle of persons. The profound humanism of his metaphysics of morality is expressed in the acceptance of the following axiom: "*S* is a person if and only if *S* is a human being". The left-sided implication simply means that every human is a person, i.e. a moral subject, and therefore shares the fullness of rights (and is subject to the correlated duties). Exceptions are unacceptable, and treating human beings differently than through a personal prism would also undermine one of the categorical imperative formulae. The right-directed implication states that, apart from all human beings, there are no moral subjects (thus, according to Kant, care for animals expressed in terms of rights would be a metaphysical travesty). Ethical concepts are therefore tailored to the human measure. All transhumanistic claims should be treated as no more than fairy tales.

The idea introduced by Kant has been recently developed by Timothy Chappell. He claims that our understanding of ethics is owed to the regulative idea of personhood belonging in fact to our *Lebensform* (it thus implies putting away metaphysical discourse on morality and directs philosophical attention to the empirical area). Legal discourse likewise occurs in common language, and therefore it holds for the common notion of personhood. Chappell, like Kant, identified the moral subject with the person. The extension of this term is accordingly a class of creatures that equally enjoy the full range of rights and privileges; a class which he called distinctly "the primary moral constituency"[40] (PMC). The *personalistic* approach to ethics led to the conclusion that its scope is set by the limits of the applicability of personhood. Every creature to which we refer personally belongs at the same time to the moral circle (that is to PMC). Whenver we speak of persons, moral (and thus also legal) terms are involved.

The proleptic standpoint is opposed to the family of theories jointly called by Chappell *criterial*. The adherents of criterialism characterize the concept of personality by means of the necessary or sufficient conditions of being a person. Therefore, an individual is a member of the moral circle if they meet the criteria of being a person, i.e. they actually have the properties that are necessary and sufficient to obtain membership in PMC. "Criterialists", as Chappell says aptly, "can make personhood sound rather exclusive; it can seem as hard to qualify for

[39] Cf. O. Höffe, *Immanuel Kant*…, p. 175. It is worth noting that according to Kant, the connection between law and morality is based on axiomatic theory, and all attempts to relate them to a simpler set theory relation he considers naïve.

[40] T. Chappell, *On the Very Idea*..., s. 4.

personhood as it is to make membership of the country club".[41] As a representative example of criterialism, he indicates the utilitarian concept of Peter Singer. According to the Australian philosopher, the aim of moral philosophy is to draw up a list of the constitutive features of a person.

Nonetheless, Chappell responds, treating each of them as a necessary condition for being a person involves various difficulties; here I will point out only one of them. Chappell illustrates it with an example taken from developmental psychology and language learning: "Do I possess the capacity to communicate only when I have learned a language? Or just when I have learned to sign, or to get others to read my thoughts and feeling? Or do I have the capacity to communicate all along, just in virtue of being a member of a species that communicates, linguistically and in other ways?".[42] The mechanics of personhood is not as simple as Singer's analogy misleadingly suggests. Turning a marker of personhood – such as self-awareness, rationality or ability to feel second-order desires – into a strict criterion of being a person does not allow us to include in the moral circle individuals who we actually consider persons.

Such properties, although not treated as any criteria, form a significant part of the definition. Similarly, the colloquial (and therefore legal) concept of the person includes rationality, self-awareness, etc. Furthermore, these are the features that determine the moral status of a person. However, criterialism suggests that before we consider a being a person – and thus will treat them like any other person – we examine whether they meet the intended criterion. The recognition of an individual as a person would be then preceded by an inherent, say, "personality test". Chappell, on the other hand, noticed that the markers which philosophers are inclined to simplify as personality criteria do not function as the criteria in practical reasoning. On the contrary, they constitute a linguistic interpretation of human attitudes towards creatures that have been recognized as persons. The practical reason does not look for personality criteria on the basis of which it grants the individual the status of a person. The attitude towards a person is what precedes empirically acquired testimonies. Only the recognition of a person in an individual subject entails the expectation that they exhibit personal features, the ones that people usually do.

Let us observe the personal stance – a notion closely related to the "intentional stance", a term invoked by Chappell and introduced to the philosophical discussion by Daniel C. Dennett. Intentional stance, as Dennett persuades, is a tactic of prediction. It is a strategy of behavioural interpretation of another being (which could be a person or an animal, an object and anything else) as if it were a rational subject that follows its "choices" and regards its "action" through considerations,

[41] *Ibidem*.
[42] *Ibidem*.

and also takes into account its own "beliefs" and "desires".[43] The inverted commas indicate that the system, though interpreted intentionally, does not really lead a mental life. Nonetheless, an intentional attitude is of great importance in predicting its behaviour and allows us to expect the system to "behave" in a certain way.

Chappell motivates his position pragmatically, offering an analysis of empirical material. As an example of applying the concept of the person to entities that do not meet the pre-set requirements based on Singer's personality criteria, he uses the phenomenon of parenthood. From the moment of birth, parents treat children fully subjectively while remaining aware of the degree of their psychological development. According to Chappell, parents who act properly demonstrate "a systematic *refusal* to treat the child in a way that is proportionate to its qualities and aptitudes".[44] In the behaviour of the parent, as in the lens, the essence of moral reasoning is revealed, which conforms to the proleptic concept of the person. "By years of treating her children as creatures who 'have the personal properties' – in the sense that interests the criterialist – [mother] makes it true that they *are* creatures who have the personal properties in just that sense".[45] And this practice is leading, as Chappell remarks, "in the light of the ideal of personhood". The application of the idea of the person thus bears the hallmark of a performative act of speech. Referring to an individual as a person, we make them a person, and people make each other moral subjects through this very inherent socio-linguistic practice. In the light of the proleptic view, punishment appears as a recognition of individual responsibility, or personality and – simultaneously, according to Kant – *dignity*.

7. CONCLUSION

Let us recall the questions posed at the outset: "what justifies punishment as a social practice?" and "what exactly is the subject of criminal stigma?" The answer has already been given. The punishment justifies the perpetrator's guilt. The object of stigma, on the other hand, is their contempt for law – revealed by the criminal act.[46]

[43] See: D. Dennett, *Dźwignie wyobraźni i inne narzędzia do myślenia*, transl. T. Kwiatek, Kraków 2015, p. 112.

[44] T. Chappell, *On the Very Idea…*, p. 8. Chappell repeats this expression after Alasdair McIntyre.

[45] *Ibidem*, pp. 8–9.

[46] And already present in guilt, if the act took place. The complex logic of responsibility is based on counterfactual conditionals.

Following Abelard, we define guilt classically as evil (*differentia specifica*) consent (*genus proximum*). We also presented – after Wolniewicz – an empirical criterion of guilt based on the pseudo-Diodorian concept of possibility. Thus, we are allowed to limit the metaphysical adjustment within legal reasoning to the heuristic function, and pave way for the reality of the phenomena. The proleptic view belongs to the anthropological structure of the human being; along with it, it belongs to the very concept of punishment, i.e. the legal effect of guilt. It might be seen at once that the presented concept of guilt motivates a theory of punishment. Clearly, the ideal of personhood calibrates ethical intuitions, and this observation seems to have a great philosophical significance.

By using the concept of person, we subordinate our practice, including its penal and penitentiary aspects, to a certain ideal, which we design posteriorly for each of us. In this model, punishment becomes a shadow inseparable from responsibility. It is not necessarily an evil, but – to recall a famous Socratic metaphor – it is rather the medicine of the soul. In *Gorgias*, Socrates turned to one of his interlocutors with the words: "Happy is he who has never committed injustice, and happy in the second degree he who has been healed by punishment. And therefore the criminal should himself go to the judge as he would to the physician, and purge away his crime. Rhetoric will enable him to display his guilt in proper colours, and to sustain himself and others in enduring the necessary penalty. And similarly if a man has an enemy, he will desire no to punish him, but that he shall go unpunished and become worse and worse, taking care only that he does no injury to himself".[47] Moreover, this statement should be strengthened. Since the punishment is not only the means (to heal a soul of a criminal), but also an end: it is a value in itself (the fact that the culpable act did not remain unpunished is good).[48]

Therefore, the legal sense enforces this understanding of punishment. In other words (remembering the empirical criterion of guilt): there is no unpunished guilt, and punishment itself has to be its function. We can now see the difficulty of repressive responsibility in legal theory. Criminal and administrative sanctions are imposed by state coercion; there is no penalty without jurisdiction.[49] In the latter case, the principle of guilt is sublimated and dispersed in the fog of state coercion, that is in a form of (state) violence. This does not mean that an administrative sanction is evil *ex natura sua*. Its boundary should be marked as narrowly as the limits of all state violence. It rather points out that the boundary of criminal punishment runs elsewhere, marked out by guilt. Focusing on pure

[47] *Gorgias* 472 e. Cf. Plato, *Plato in Twelve Volumes*, Vol. 3, transl. W. R. M. Lamb. Cf. http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.01.0178%3Atext%3DGorg.%3Asection%3D472c (accessed: 3.08.2018).

[48] B. Wolniewicz, *Sens kary podług Kanta*, (in:) B. Wolniewicz, *Filozofia i wartości IV*, Warszawa 2016, pp. 180–181, 185.

[49] *Ibidem*, p. 187.

repression, instead, we face an alternative: the object of stigmatization is the disposition lying either in the perpetrator or in the act itself; it is not the guilt, which is never the subject of concern.

Finally, let us return to the Poręba criterion. We agreed that the theory of freedom (which also characterizes legal responsibility) should: firstly, (c1) decide whether exceptions are possible at all, and secondly, (c2) determine the extent to which these exceptions correspond to the colloquial understanding of freedom. It seems that the concept presented by us meets the given criterion. Moreover, the condition (c2) was fulfilled *a fortiori* – since I considered the concept of freedom of will as a component of personhood. This in turn derives genetically from language and a social practice that is our form of life, and its scope is therefore determined by common practice and understanding.

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RESPONSIBILITY – AN ANTHROPOLOGICAL OUTLINE

Summary

In the article, I try to present an outline of the theory of responsibility. Its double root – based on the logical distinction between criterion and testimony – is derived from Abelard's anthropology of action and the theory of personhood developed by Timothy Chappell. Initially, I discuss the metaphysical difficulties related to the problem of freedom (especially linked with determinism). Afterwards, following Abelard, I try to indicate an anthropological justification of punishment based on guilt. The last part of the paper is devoted to the attempt to enter the free will into a broader view of Chappell's theory. The aim of the work is to prepare the ground for future studies on the *proleptic* notion of personhood and its further application within the philosophy of law.

KEYWORDS

proleptic view on personhood, responsibility, pseudo-Diodorian modality, freedom of will, consensus, guilt

SŁOWA KLUCZOWE

proleptyczna koncepcja osoby, odpowiedzialność, modalność pseudo-Diodorowa, consensus, wina

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PROOF OF CAUSATION IN TORT CASES

1. INTRODUCTION

In any national legal system (regardless of whether it belongs to civil law or common law tradition) plaintiff in order to succeed has to prove the relationship of causality between wrongful acts of the defendant and the damage plaintiff sustained. Whenever plaintiff fails to do so court dismisses the suit. In other words, in all national legal systems it is the plaintiff who bears the burden of proof (*onus probandi*) of causation. This rule is justified by the fact that it is the plaintiff who initiates litigation and involves others in it[1]; it is the plaintiff who seeks to change the existing state of affairs (*status quo*)[2] and to reallocate costs, *i.e.* to shift damage he or she sustained onto some other person, namely defendant.

The burden of proof has to be distinguished from the standard of proof. As long as the *burden* of proof is concerned all national legal systems seem to be unanimous, but when it comes to the *standard* of proof there is a significant divergence between national laws. Whereas burden of proof indicates which one of the parties has to prove certain fact (or, to be more precise, whose failure it is when the fact is not proven), standard of proof indicates *when* the fact has to be deemed proven and the party has to be deemed as having discharged the burden. Put simply, burden of proof defines *what* is to be proven, standard of proof – *how* it has to be proven. In respect of the latter there is a sharp distinction between common law and civil law systems.

The aim of this article is to compare standards of proof of causation in common law and civil law systems from the pragmatic point of view, *i.e.* from the perspective of practical outcomes entailed by each of the approaches. With comparative analysis in the background the article also aims to reveal the peculiarities of Ukrainian law in the respect of the issue raised.

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[1] C. R. Williams, *Burdens and Standards in Civil Litigation*, "Sydney Law Review" 2003, Vol. 25, issue 2, pp. 183–184.

[2] E. Voyiakis, *Causation and Opportunity in Tort*, "Oxford Journal of Legal Studies" 2018, Vol. 38, issue 1, pp. 34–35.

2. MODEL CASE: NUTSHELL IN A PRUNE

Let us take the following hypothetical situation as a model for further analysis. Having bought walnut stuffed prunes the Consumer brakes his tooth due to the nutshell piece in one of the sweets. In order to get his harm indemnified the Consumer brings an action against the Producer demanding the latter to compensate the costs of the tooth restoration. Let us further assume (and this assumption seems to be the most plausible) that forensic evidence can only confirm that the tooth crack was caused by a contact with some solid material; however, it is impossible to identify the exact material, let alone proving that the material was contained in one of the sweets the Consumer ate. There were no witnesses and neither video-taping of the process of consuming the sweets. Therefore, the crux of the problem in this case is proving the causal link between the defective sweets and broken tooth. Is it possible to prove it in the first place? If yes, then how?

The first thing that comes to mind is the idea to do a test purchase: to buy some quantity of sweets and to find out the frequency of nutshell's appearance in the sweets. But what if it appears that every 5 sweets out of 100 contain nutshell? Would it be enough for the court to consider the causation proven in the case concerned? Would the frequency of 51 or 85 or 99 per 100 be enough? The problem raised is a complex one and its solution depends on numerous factors. Among those factors the standard of proof established in particular legal system constitutes a factor of major importance.

3. COMMON LAW APPROACH: BALANCE OF PROBABILITIES

In common law there are two different standards of proof: one for criminal cases and one – for civil cases[3]. The standard applied in criminal cases is known as 'proof beyond reasonable doubt' (hereinafter *BRD*-standard). *BRD*-standard means that certain fact is deemed to be proven as long as existing evidence support the probability of the fact to such a degree that excludes any reasonable doubts (that is to say that there could be some doubts, but only 'unreasonable' ones, *i.e.* based on far-fetched assumptions that could hardly be true in everyday life).

In *Miles v. United States*, 103 U.S. 304 (1880) US Supreme Court put it as follows: "[t]he evidence upon which a jury is justified in returning a verdict of guilty must be sufficient to produce a conviction of guilt, to the exclusion of all reason-

[3] K. M. Clermont, E. A. Sherwin, *Comparative View of Standards of Proof*, "American Journal of Comparative Law" 2002, Vol. 50, issue 2, p. 251; T. Ward, *Expert Evidence*, *"Naked Statistics" and Standards of Proof*, "European Journal of Risk Regulation" 2016, Vol. 7, issue 3, p. 580.

able doubt". In *Miles v. United States* one can find also an illustrative instruction to the jury saying that: "[t]he prisoner's guilt must be established beyond reasonable doubt. Proof beyond a reasonable doubt is such as will produce an abiding conviction in the mind to a moral certainty that the fact exists that is claimed to exist, so that you feel certain that it exists. A balance of proof is not sufficient. A juror in a criminal case ought not to condemn unless the evidence excludes from his mind all reasonable doubt".

This standard sets quite a high threshold that must be reached by the prosecution in order for the accused to be convicted of a crime. *BRD*-standard demands conviction that is close to definite certitude of the court or jury that the statements substantiating criminal charge are true.

In contrast, in civil matters another standard of proof applies. It is called 'preponderance of probabilities', 'preponderance of evidence' or 'balance of probabilities' (hereinafter – *BoP*-standard). Compared to criminal standard, it sets the threshold much lower: in order to succeed a party has to convince the court that the probability of his or her assertions being true is higher than probability of the opposite[4]. In *Re H (Minors) (Sexual Abuse: Standard of Proof) [1996] AC 568* Lord Nicholls of Birkenhead said: "[t]he balance of probability standard means that the court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not". Put in figures it means that a fact is considered to be proven (for the purpose of civil litigation) whenever the party bearing the burden of proof manages to demonstrate that the probability of the fact alleged is more than 50%[5].

That being said, common law judges openly acknowledge that such a standard does produce some margin of error. In other words, it can happen that the decision made is based on the facts that are not true, because 50+ probability leaves much room for opposite assumption being true. Lord Phillips in *Sienkiewicz v Greif* [2011] UKSC 10 stated: "[t]his broad test of balance of probabilities means that in some cases a defendant will be held liable for damage which he did not, in fact, cause. Equally there will be cases where the defendant escapes liability, notwithstanding that he has caused the damage, because the claimant is unable to discharge the burden of proving causation".

It has to be mentioned, though, that errors (notwithstanding they are not always admitted) are always inevitable no matter what standard applies. In this

[4] M. Brinkmann, *The Synthesis of Common and Civil Law Standard of Proof Formulae in the ALI/UNIDROIT Principles of Transnational Civil Procedure*, "Uniform Law Review" 2004, Vol. 9, issue 4, p. 877; M. Martin-Casals, *Causation Conundrums: Introduction to the Annotations to Sienkiewicz v. Greif (UK)*, "European Review of Private Law" 2013, Vol. 21, issue 1, p. 302; E. Voyiakis, *Causation and Opportunity*..., p. 26; G. Wagner, *Asbestos-Related Diseases in German Law*, "European Review of Private Law" 2013, Vol. 21, issue 1, p. 324; C. R. Williams, *Burdens and Standards*..., p. 180.

[5] M. Martin-Casals, *Causation Conundrums*..., p. 302; C. R. Williams, *Burdens and Standards*..., p. 180.

respect *BoP*-standard has two advantages. Firstly, it minimizes the overall cost of errors; secondly, it allocates the risk of some facts being unprovable in a balanced manner[6].

Regardless of the standard set, there are always two types of errors: false positive (when the fact is considered to be proven, though in deed it did not happen) and false negative (when the fact is considered to be not proven, though in deed it did happen). The higher the threshold set by the standard, the more difficult it is to reach it, and hence the less the number of false positive errors (*i.e.* situations where despite some fact did not exist it is considered as proven) in comparison to false negative. Therefore, it can be said that the standard of proof setting high threshold is in some way biased *against* the party who bears the burden of proof and *in favor of* the adverse party[7]. Severity of the standard applied in criminal cases is justified by the fact that as far as criminal charge is concerned false positive errors are considered to be worse than false negative ones: it is better for the system sometimes to absolve guilty persons and never to convict innocent ones than sometimes to convict innocent persons and never to absolve guilty ones.

On the contrary in civil litigation both types of errors are equally weighted, because every dollar mistakenly recovered from the defendant has the same value as a dollar mistakenly not obtained by the plaintiff[8]. That is why *BoP*-standard is an honest[9] and balanced[10] standard that equipoises positions of plaintiff and defendant as to proving relevant facts.

What solution can be obtained if we apply *BoP*-standard to the model situation with nutshell in a prune? At the first glance it may seem that application of *BoP*-standard in this case means that the Consumer can succeed if the sample purchase shows frequency of defective sweets > 50 per 100. However, it would be a hasty judgement. The fact that 51 sweets out of hundred contain nutshell means that when you buy one sweet there is a 51% chance that it is defective. At the same time the Consumer's tooth could have been broken due to numerous other reasons (*e.g.* fall, hit or small rock contained in salt or some other product) that were not taken into account in the above calculation.

That is why the frequency of defective sweets is not equal to the probability of causal nexus between defective sweets and the Consumer's harm. In this respect some other statistics could be useful, for instance that amongst all cases of broken teeth 20% are caused by the patient's fall; 10% – by rapid temperature change (eating ice-cream right after hot beverage); 10% – by small rocks that

[6] K. M. Clermont, E. A. Sherwin, *Comparative View...*, pp. 252–253; T. Ward, *Expert Evidence...*, p. 586.

[7] K. M. Clermont, E. A. Sherwin, *Comparative View...*, p. 267.

[8] *Ibidem*, pp. 252–253, 268.

[9] M. Brinkmann, *The Synthesis of Common…*, p. 891; K. M. Clermont, E. A. Sherwin, *Comparative View...*, pp. 258, 273.

[10] K. M. Clermont, E. A. Sherwin, *Comparative View...*, p. 273.

get into food with salt; and 60% – by nutshell in walnut stuffed prunes. Needless to say that in relation to this particular situation it is improbable that such a statistics exist. Nevertheless, a broad statistical data has been collected in relation to many other diseases (perhaps, the strongest example is the statistics on carcinogens). Collection and analysis of the statistical data on causes of various deceases is the concern of epidemiology. In this respect there is a lot of law literature addressing the problem of whether epidemiological data (also known as 'naked statistics'[11]) can serve as a reliable evidence of causation in concrete case[12].

The main argument against recognizing epidemiology as an evidence consists in opposing 'general causation' and 'specific causation'[13]. It is said that unlike the epidemiology that deals with aggregates, the court deals with individual case. Thus, even if, according to epidemiology, the disease of the kind like plaintiff suffers in 60% cases is caused by agent X, nevertheless it does not prove for sure that particular plaintiff did contract the disease due to the agent X. However, the argument does not seem much convincing if one takes seriously *BoP*-standard of proof, since this standard does not demand certainty. Therefore, from the standpoint of *BoP*-standard 40% chance of error should not preclude finding the fact proven.

Criticizing the probative value of 'naked statistics' many scholars refer to so called 'proof paradox'[14]. Imagine that a pedestrian was hit by a regular bus. It is known that 90% of all the regular buses in town are owned by the Blue Bus Co[15]. Can the Blue Bus Co be held liable solely on the ground of statistical data (according to which the probability of the Blue Bus Co vehicle being involved in the accident amounts to 90%) in the absence of any other information, *e.g.* about the color of the bus that hit the pedestrian, routes where Blue Bus Co vehicles drive or information about damaged buses etc.?

In this context the concept of 'resiliency of evidence' is employed. High resiliency of particular evidence means that probative value of the evidence can hardly be negated by new evidence. Instead, low resiliency means that probative value of particular evidence can easily be rendered null by new evidence obtained afterwards. As T. Ward puts it "[t]he resiliency of the evidence is its susceptibility to revision in the light of further evidence"[16].

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[11] T. Ward, *Expert Evidence*…, p. 580.

[12] See: T. Ward, *Expert Evidence*..., p. 580; S. Steel, *Sienkiewicz v Grief and exceptional doctrines of natural causation*, "Journal of European Tort Law" 2011, Vol. 2, issue 3.

[13] D. Hamer, *Probability*, *Anti-Resilience*, *and the Weight of Expectation*, "Law, Probability and Risk" 2012, Vol. 11, issue 2–3, pp. 137–138; M. Martin-Casals, *Causation Conundrums*..., p. 305; T. Ward, *Expert Evidence*…, p. 585; S. Steel, *Sienkiewicz v Grief*..., pp. 297, 301.

[14] D. Hamer, *Probability*, *Anti-Resilience*..., pp. 136–137; T. Ward, *Expert Evidence*…, p. 585; C. R. Williams, *Burdens and Standards*..., p. 184.

[15] See: D. Hamer, *Probability*, *Anti-Resilience*…, pp. 136–137.

[16] T. Ward, *Expert Evidence*…, p. 583.

It can be said that statistical data (no matter how high the probability it indicates) is of low resiliency, since finding new individualizing evidence can nullify the value of statistics. For example, if in the Blue Bus case the pedestrian recalls that it was a red bus that hit him, the statistics cannot be taken into account anymore.

In view of the above one has to conclude that even when the *BoP*-standard is applied causation usually cannot be proven solely with reference to statistical data not supported by some individualizing evidence[17]. Instead, reliable statistical data coupled with some individualizing evidence can lead the court to the conviction that existence of causal nexus is more likely than not. Returning to sweets case let us assume that there is 'epidemiological' data indicating that 60% of all broken teeth broke because of a nutshell in walnut stuffed prunes. Then, if we add high frequency of defective sweets (say 70%), receipt from the grocery store and the Consumer's testimony, would it be enough for causation to be deemed established? As long as *BoP*-standard is applied affirmative answer seems to be quite plausible.

4. CIVIL LAW APPROACH: INNER CONVICTION BEYOND REASONABLE DOUBT

Civil law system starkly differs from common law because unlike the latter it recognizes only one standard of proof applicable both to criminal and civil cases[18].

Moreover, it has to be noted that standard of proof is a twofold concept: it has objective and subjective aspects[19]. On the one hand standard of proof can be defined as a certain level of conviction that trier of fact has to have in order to conclude that some statement is true (subjective aspect). However, each and every legal system demands fact trier's conviction to be based on evidence obtained; otherwise (if the conviction is groundless and arbitrary) it cannot serve as a justification for the conclusion of fact. Therefore, the standard of proof can also be defined as a certain 'amount' of evidence that is necessary to justify the conclusion that some fact is true (objective aspect).

In comparative studies it is often underlined that unlike the common law *BoP*-standard (which is focused on objective aspect) civil law standard is focused on subjective aspect[20]: in order to consider some fact as having been proven judge

[17] *Ibidem*, p. 585.

[18] K. M. Clermont, E. A. Sherwin, *Comparative View...*, pp. 243, 246, 250, 254, 256; G. Wagner, *Asbestos-Related Diseases...*, p. 325.

[19] M. Brinkmann, *The Synthesis of Common…*, p. 876; D. Hamer, *Probability*, *Anti-Resilience...*, pp. 136–137.

[20] M. Brinkmann M., *The Synthesis of Common…*, p. 882.

has to gain inner conviction in trueness of this fact. Thus it is this 'inner conviction' (Fr. *intime conviction*) that serves as a criterion for deciding whether a party has discharged the burden of proof or not.

Pursuant to Sec. 286 of German Code of Civil Procedure "[t]he court is to decide, at its discretion and conviction, and taking account of the entire content of the hearings and the results obtained by evidence being taken, if any, whether an allegation as to fact is to be deemed true or untrue". As M. Brinkmann notices "[i]n its interpretation of the rule, the German Federal Supreme Court underlines the subjective component of the process of weighing the evidence. The court emphasizes that even a very high objective probability as such does not suffice to treat a fact as established as long as it does not induce the judge's conviction of its truth"[21]. G. Wagner puts it even more plainly saying that "[a]s such, a probability of 0.5 is just as insufficient as probabilities of 0.6 or 0.7"[22].

Although French legislation does not define the standard of proof in a direct manner, in French Civil Code and Code of Civil Procedure one can find provisions implying that civil litigation aims at finding the truth[23]. Thus the corollary should follow that judicial decision cannot be based on the statements that are not true but merely probable.

Having regard to the above many scholars conclude that universal standard of proof applicable in civil law system both to criminal and civil cases is nothing more or less than standard beyond reasonable doubt[24].

As long as *BRD*-standard is applied the plaintiff in the sweets case most probably will lose the case, because no matter how high the frequency of defective sweets and how high the general probability of breaking a tooth due to a nutshell, there always remains room for absolutely reasonable doubts as to the alternative cause of breaking the tooth.

Ukrainian law evolves in the context of civil law tradition. Similarly to German and French law Art. 80 (para. 2) of Ukrainian Code of Civil Procedure reads: "[w]hether the evidence suffices to establish relevant facts is to be decided by the court at its inner conviction". Though in Ukrainian legal doctrine the standard of proof concept is not payed much attention, there is no doubt that civil and criminal standards are not distinguished.

What is more, in Ukrainian law one can find a unique provision not encountered in any European law. Following the Code of Criminal Procedure (Art. 373 para. 3) Ukrainian Code of Civil Procedure states that "[p]roof cannot be based on assumptions" (Art. 81 para. 6). Being interpreted literally this provision means that as long as some statement remains to be an assumption (no matter how prob-

[21] *Ibidem*, p. 879.

[22] G. Wagner, *Asbestos-Related Diseases...*, p. 319.

[23] M. Brinkmann M., *The Synthesis of Common*…, p. 880.

[24] K. M. Clermont, E. A. Sherwin, *Comparative View...*, p. 245; M. Martin-Casals, *Causation Conundrums...*, pp. 303–304; G. Wagner, *Asbestos-Related Diseases...*, p. 319.

able it is) the court cannot base its decision on it, because a judicial act can be underpinned only by statements that are true and hence absolutely exclude the possibility of any other alternatives. However, this approach seems extremely unrealistic: modern outlook has abandoned the idea of the Enlightenment according to which there is only one absolute truth amongst dozens of lies. Perhaps, the most complicated challenge modern tort law faces with is the necessity for the tort law to cope with uncertainty of causation. In response to this challenge many national courts invented new approaches to causation problem in asbestos exposure cases[25] DES-cases[26] and numerous cases concerning medical malpractice. Best practice of national courts demonstrate that tort law can and should master the uncertainty. Modern law cannot ignore the probability; moreover, from the point of view of modern epistemology the very concept of human's knowledge has changed: the dividing line between certain (knowledge) and probable (assumption) is getting more and more fuzzy. And tort law has to take it into account.

As to the sweets case Ukrainian court for sure would conclude that causal nexus is not proven, since notwithstanding all evidence mentioned in the article ('epidemiological' statistics, frequency of defective sweets, receipt from the grocery store and even the Consumer's testimony) allegation of causal relationship between broken tooth and defective prune remains to be an 'assumption'. This result, however, does not seem to be optimal if one takes into consideration that on the one hand there is a producer that acted wrongfully and hence endangered consumers while on the other hand there is a consumer that suffered damage of exactly that kind, the risk of which was created by the producer. Therefore, Ukrainian law science has to search for alternative solutions of the problem posed in this case.

5. FOUR POSSIBLE SOLUTIONS

Thus, first possible solution is to reverse the burden of proof. It would mean that whenever the plaintiff suffers the damage of exactly that kind, the risk of which was created by the defendant the causal nexus is presumed to exists

[25] See: J. M. Emau, *Asbestos Exposure at the Workplace*, *Smoking Habits & Lung Cancer: Dutch Reflections on Employer Liability*, "European Review of Private Law" 2017, Vol. 25, issue 6; A. Ruda, *From Salamander's Wool to Lethal Dust: Asbestos Liability Under Spanish Law in Light of Heneghan*, "European Review of Private Law" 2017, Vol. 25, issue 6; S. M. Samii, A. Keirse, *Taxonomy of Asbestos Litigation in the Netherlands: Duelling with Causal Uncertainty*, "European Review of Private Law" 2013, Vol. 21, issue 1.

[26] See: A. Ruda, *The DES Daughters in Spain: Liability for Damage Caused by the Exposure to a Defective Drug in Utero*, "European Review of Private Law" 2013, Vol. 21, issue 2; T. Thiede, *Defective Pharmaceuticals and Indeterminate Tortfeasors: A German Law Perspective on DES-Daughters Scenarios*, "European Review of Private Law" 2013, Vol. 21, issue 2.

and hence it is the defendant who has to prove that in fact damage was caused by some other reason. This approach was applied by California Supreme Court in two hunters case – *Summers v. Tice*, 33 Cal.2d 80. In this case the plaintiff was injured by one of two hunters; but since both were armed with the same shotguns it was impossible to prove which hunter's shot injured the plaintiff. Justice Carter stated: "[w]hen we consider the relative position of the parties and the results that would flow if plaintiff was required to pin the injury on one of the defendants only, a requirement that the burden of proof on that subject be shifted to defendants becomes manifest. They are both wrongdoers – both negligent toward plaintiff. They brought about a situation where the negligence of one of them injured the plaintiff, hence it should rest with them each to absolve himself if he can. The injured party has been placed by defendants in the unfair position of pointing to which defendant caused the harm. If one can escape the other may also and plaintiff is remediless".

Despite some similarity, the sweets case significantly differs from *Summers v. Tice.* In two hunters case reversing the burden of proof is justified because of several reasons. First, all the alternative causes are wrongful acts (which is not the case in situation with sweets). Second, hunters are better placed (than injured person) to prove whose shot caused injury (which is also not the case in situation with sweets). Third, hunters had an opportunity to cooperate with each other so as to eliminate the uncertainty (which is also not the case in situation with sweets). For this reason, we believe that reversing the burden of proof is not an appropriate solution for the sweets case.

Second solution could be the recalibration of the standard of proof for certain categories of cases. This approach, however, needs legislative measures defining these categories and describing the exact way of recalibration.

Third solution. Maybe the very subjecting someone to abnormal risk should be recognized as a compensable damage? in which case there is no problem with causation, since causal nexus has to be established between wrongful behavior and risk creation (and not between wrongful behavior and actual harm).

The prominent recent case of *Sienkiewicz v Greif (UK) Ltd; Knowsley MBC v Willmore* [2011] UKSC 10 can be seen as combining both second and third approaches. On the one hand this case is all about section 3 of UK Compensation Act 2006 which sets forth "special rule governing the attribution of causation" (as Lord Philips puts it). On the other hand, this special rule imposes tort liability for 'material increase of the risk'. In para. 107 the Judgement directly provides that "[l]iability for mesothelioma falls on anyone who has materially increased the risk of the victim contracting the disease".

However, it is important to underline that this approach has its limitations; and defining the exact boundaries of its application calls for thorough research. Thus in UK Compensation Act 2006 the special rule is established for mesothelioma cases only. Some scholars argue that the same approach has to be applied

in every case where due to the current state of medical science it is not possible to determine with certainty the actual cause of the injury. However even this much extended the mentioned approach can hardly suit the sweets case. In the case of mesothelioma there are no individualizing evidence at all; they are *unobtainable* due to the state of medical science. On the contrary in the case of defective sweets there is at least one evidence, namely Consumer's testimony, but this evidence is *unreliable* (since if courts accepted this testimony as a reliable evidence then everyone would restore his broken teeth at the expense of the sweets producers). Therefore, sweets case does not fall into the scope of the application of *Sienkiewicz* principle.

Eventually, fourth and perhaps the most suitable solution is to multiply the plaintiff's damages by the probability factor (that indicates the probability of damage being actually caused by the defendant). In this case if we assume that Consumer's damage amounts to 100 € and the probability of this damage being caused by the Producer's sweets is equal to 60% then the Consumer has to be awarded compensation of 60 €. This approach is upheld by law and economics and has been embodied in the Principles of European Tort Law (hereinafter – PETL). Pursuant to Art. 3:103(1) PETL "[i]n case of multiple activities, where each of them alone would have been sufficient to cause the damage, but it remains uncertain which one in fact caused it, each activity is regarded as a cause to the extent corresponding to the likelihood that it may have caused the victim's damage". Since the formulation of this article does not specify the reasons of uncertainty (for instance, that it has to stem from the state of medical science) the realm of its application is not confined to mesothelioma cases or the like. The sweets case, therefore, falls within the scope of Art. 3:103(1) PETL. However, one pragmatic issue remains unsolved, viz where to find reliable 'epidemiological' data in relation to causes of broken teeth. Yet the approach enshrined in PETL seems to be the most optimal for the mentioned hypothetical case. The more so since in a modern information-oriented society the amount of available data increases rapidly at an exponential rate. The PETL approach strikes a fair balance between the interests of the parties in tort litigation, provides effective reallocation of costs, guarantees both compensation and deterrence which are the main objectives of tort law.

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PROOF OF CAUSATION IN TORT CASES

Summary

The article addresses the problem of uncertainty over causation in tort cases. It reveals the interconnection between burden of proof and standard of proof. The author provides a comparative overview of approaches to standard of proof in common law and civil law systems. It is argued that while in common law there are two different standards viz: beyond-reasonable-doubt-standard for criminal cases and balance-of-probabilities standard for civil cases in civil law system there is only one standard applicable both to criminal and civil cases. With comparative analysis in the background the article also reveals the peculiarities of Ukrainian law in the respect of the issue raised. The problem is approached in a pragmatic manner: using a hypothetical case the author

models practical outcomes entailed by each of the approaches being applied to the case. Eventually the conclusion is made that there are four ways of coping with uncertainty over causation: (1) to reverse the burden of proof; (2) to calibrate the standard of proof for certain cases; (3) to recognize the very creation of the abnormal risk as a compensable damage; and (4) to multiply damage plaintiff sustained by the probability factor indicating the likelihood of the damage being actually caused by the defendant.

KEYWORDS

tort law, causation, uncertainty, burden of proof, standard of proof

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prawo deliktów, kauzalność, niepewność, ciężar dowodu, standard dowodowy

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THE PROBLEMS OF APPLYING BOTH CRIMINAL AND ADMINISTRATIVE PENAL SANCTIONS IN LIGHT OF ARTICLE 50 OF THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

The problem of the simultaneous application of both criminal and administrative sanctions has never been straightforwardly regulated, either in the primary law of the European Union or in the legal acts of secondary law. The European Union's legislation clearly lays down the rule of *ne bis in idem* – the prohibition to punish twice for the same offence, but only in criminal proceedings. It was included in Article 50 of the Charter of Fundamental Rights of the European Union[1] (hereinafter referred to as "the Charter"), which, as stated in Article 6 section 1 of the Treaty on the Functioning of the European Union[2] (hereinafter referred to as "TFEU") is a part of the primary law of the EU. According to Article 50 of the Charter, no one can be prosecuted or punished in criminal proceedings twice for the same penal act under the threat of punishment, in relation to which they were already proven innocent or sentenced with a final judgement within the territory of the Union. Regardless of the fact that the literal interpretation of the quoted regulation seems to suggest an objective scope of the prohibition of double punishment only with regard to the proceedings in criminal courts, there are doubts in the case-law of the member states' courts in practice whether the said prohibition also applies to cases in which criminal proceedings overlap with administrative proceedings. In order to settle this dispute, the member states' courts made references to the Court of Justice of the European Union (hereinafter "CJEU") for a preliminary ruling and initiated procedures that resulted in several important rulings regarding Article 50 of the Charter.

[1] Journal of Laws of the European Union, C 202, 7th June 2016, p. 389.
[2] *Ibidem*, p. 13.

1. ACCEPTABILITY OF PARALLEL SANCTIONING AND THEPROBLEM OF THE CRIMINAL NATURE OF SANCTIONS

The first ruling in which the CJEU addressed Article 50 of the Charter in the context of the overlap of criminal liability and administrative liability was passed by the Grand Chamber on 26th February 2013 in case No. C-617/10.[3] It concerned the criminal proceedings against Hans Åkerberg Fransson, an individual entrepreneur dealing with fishing and fish selling.[4] The Swedish prosecutor's office (Åklagaren) had charged him with breach of the local criminal tax legislation, based on the fact that he had filed a false tax statement and therefore exposed the Swedish fiscal authorities to a potential loss of revenue from the income tax and VAT tax by 319–143 SEK in 2004 and by 307–633 SEK in 2005. Hans Åkerberg Fransson was also charged with not having filed the employer contribution declarations for October 2004 and October 2005. Therefore, the Swedish social insurance institution never received the due amounts of 35–690 SEK and 35–862 SEK, respectively. The total value of depletions was assessed as significant and, therefore, the accused was charged with a grievous tax offence punishable with six months to six years of imprisonment. However, the described procedure was not the only one that the Swedish authorities carried out in the matter of irregularities in the payment of public liabilities found on the part of Fransson. The local tax office (*Skattenverket*), by decision of 24th May 2007, imposed additional tax obligations on him in the total amount of SEK 112–219. Interest on arrears was charged, as well. Fransson did not appeal against the decision. In view of the fact that the accused had been prosecuted in administrative proceedings, the criminal court (*Haparanda*) came to the conclusion that from the point of view of the *ne bis in idem* principle – defined, among others, in Article 50 of the Charter – the admissibility of the accused also being prosecuted in criminal proceedings was dubitable. In order to obtain an answer to this question, the Swedish court referred to the CJEU for a preliminary ruling and stayed the pending criminal proceedings.

[3] Judgement of the CJEU of 26th February 2013, C-617/10, ECLI:EU:C:2013:105.

[4] It should be noted that this judgement was important not only from the point of view of the subject of this study, but also in the context of such problems of European law as the possibility to invoke the Charter of Fundamental Rights in domestic proceedings and the mutual relations between this Charter and the Convention on the Protection of Human Rights and Fundamental Freedoms. The CJEU expressed its position there that it is possible to refer directly to the provisions of the Charter of Fundamental Rights in national proceedings when a Member State applies EU law in the course of a given procedure. The CJEU also pointed out that as long as the European Union does not become a party to the Convention on the Protection of Human Rights and Fundamental Freedoms, this document cannot be a direct basis for adjudication by the CJEU, although the Convention's norms themselves also constitute general principles of EU law.

In the judgement of 26th February 2013, the CJEU ruled that Article 50 of the Charter does not prevent a Member State from imposing in parallel for the same act consisting in a failure to comply with declaration obligations in the field of VAT, sanctions under tax law and criminal sanctions. The Member States have the freedom to choose sanctions in order to ensure the collection of full revenue from VAT, and thus the protection of the Union's financial interests. Nevertheless, the *ne bis in idem* principle would apply to criminal proceedings of such kind as the proceedings conducted by the Swedish court only if the sanctions already applied to the accused by way of a final administrative decision were of a criminal nature. This matter is, however, to be resolved by the national court. The CJEU only noted that the criminal nature of tax sanctions should be assessed with three criteria in mind. The first is the legal classification of the breach in national law, the second – the very nature of the infringement, and the third – the nature and severity of the sanction concerned.

When discussing these criteria, the CJEU referred to its judgement of 5th June 2012 in case C-489/10.[5] This ruling was delivered in response to a preliminary inquiry made by the Polish Supreme Court. In this case, farmer Łukasz Marcin Bonda was convicted by the District Court in Goleniów for a so-called subsidizing fraud (Article 297 (1) of the Polish Penal Code). It was supposed to consist in extorting subsidies based on a fraudulent certificate regarding the agricultural area used. The ruling was revoked by the Regional Court in Szczecin, which discontinued the criminal proceedings, considering that the accused had already been punished for the act by the administrative decision of the head of the Office of the Agency for Restructurization and Modernization of Agriculture. This decision deprived the accused of the right to receive grants during three subsequent years following the year in which the false statement was made. What is important, the decision was issued on the basis of EU law, i.e. Article 138 (1) of Regulation No. 1973/2004.[6] When considering the appeal, the Supreme Court had doubts whether the administrative penalty based on the EU regulations can be considered as a punishment within the meaning of criminal law, and thus whether the fact of its prior imposition constitutes a negative premise in the form of *res judicata* (Article 17 (7) of the Polish Code of Criminal Procedure). In answer to the question referred for a preliminary ruling, the CJEU decided that the sanction was not of a criminal nature. Citing the judgement of the European Court of Human Rights in Strasbourg of 8th June 1976 in Engel and Others v. The Netherlands,[7] the CJEU repeated after this court the three criteria for determining the criminal nature, that is the classification of sanctions under national law, its repressive

[5] Judgement of the Court of Justice of the European Union of 5th June 2012 in case C-489/10, ECLI:EU:C:2012:319.

[6] EU Official Journal L 345, 20th November 2004.

[7] Judgement of the ECtHR (Grand Chamber) of 8th June 1976 in Engel et al. v. the Netherlands (complaints No. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72), series A 22, para. 82.

function and the degree of severity for the punished citizen.[8] The CJEU – like the Strasbourg Court – found that the occurrence of even one of these criteria was sufficient to establish the criminal nature of the sanction. Referring to the decision issued in the case of Łukasz Marcin Bonda, the CJEU indicated that, from the point of view of EU law, the sanction imposed by the decision was not adjudicated in the criminal proceedings and did not perform a repressive function, as it only temporarily excluded the farmer from the system of payments in case of a possible application. The CJEU also recognized that the administrative penalty applied was not sufficiently severe, since the only consequence of its imposition was the short-term deprivation of the farmer of his right to the subsidy.

2. ADMINISTRATIVE PENALTY AS AN EXTENUATING CIRCUMSTANCE IN IMPOSING THE PUNISHMENT

Coming back to Frasson's case, it is impossible not to mention the opinion of the Advocate General of the Court of Justice of the European Union, Pedro Cruz Villalon.[9] He drew attention to one extremely important aspect. Addressing the issue raised by the Swedish court, the Advocate General wrote that Article 50 of the Charter does not result in the fact that the previous final and binding administrative penalty permanently excludes the possibility to initiate proceedings before the criminal court. However, it expressly provided that the principle of fair trial, inherent in the rule of law, gives rise to an obligation on the part of national legislation to enable the criminal court to take into account the previous administrative penalty in order to commute the penalty. The Advocate General even stressed that it would be unacceptable for the criminal court to completely ignore the fact that the act under assessment was already the subject of the administrative penalty.

According to the Advocate General, Article 50 of the Charter would preclude the Member States from initiating proceedings before the criminal court in relation to factual circumstances which had previously been the subject of final and binding administrative penalties. The problem of treating an administrative penalty as an extenuating circumstance in imposing the sentence in criminal proceedings has not yet been discussed by the Court of Justice of the European

[8] In the Engel et al. case, the Strasbourg Court dealt with complaints lodged by Dutch soldiers punished by military disciplinary courts. It then assessed whether the judgements of these courts were of a criminal nature and thus whether Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms was applicable to them.

[9] Opinion of the Advocate General Pedro Cruz Villalon of 12th June 2012 in case C-617/10, ECLI:EU:C:2012:340.

Union itself, although it undoubtedly concerns an extremely important issue for the practice of the criminal courts.

3. THE LIABILITY OF A LEGAL PERSON AND THE LIABILITY OF ITS REPRESENTATIVE

With the preliminary ruling of 5th April 2017 in the joint cases C-217/15 and C-350/15, the Court of Justice of the European Union addressed the issue of the possibility to prosecute a legal person who acts as the legal representative of an entity who has previously been subject to an administrative penalty.[10] The judgement was delivered as a result of the questions referred for a preliminary ruling by an Italian criminal court (*Tribunale di Santa Maria Capua Vetere*). Two proceedings were pending in this court. In one of them, the file was charged against Massimo Orsi, representative of the S.A. COM Servizi Ambiente e Commercio Srl, and in the other one against Luciano Baldetti, representing the company Evoluzione Maglia Srl. Both men were accused of tax offences in the form of non-payment of the due VAT on time. In the criminal cases concerning both men – Massimo Orsi and Luciano Baledetti – VAT arrears due to the Italian tax authorities from the companies represented by the accused men amounted to over EUR 1 million. However, what is most important from the point of view of the discussed problem, the companies represented by the accused had already been penalized by the Italian tax authorities (*Agenzia delle Entrate*) and the administrative penalty had been imposed on them in the form of the payment of 30% of the due tax. As a result, the criminal court which was to rule on the liability of the representatives of these companies had doubts as to whether the potential conviction of the accused would be in accordance with EU law.

When giving an answer, the Court of Justice of the European Union emphasised that the application of the *ne bis in idem* principle presupposes in the first place that applicable penalties or criminal proceedings concern the same person. Meanwhile, the records of the examined cases indicated that the tax penalties were imposed on two companies with legal personality, i.e. S.A. COM Servizi Ambiente e Commercio and Evoluzione Maglia. The criminal proceedings which were the subject of the question referred for a preliminary ruling were conducted in the cases of Massimo Orsi and Luciano Baldetti, who were natural persons. The Court of Justice of the European Union concluded that the pecuniary sanction and the criminal proceedings concerned different persons and therefore the condition for the application of the *ne bis in idem* principle did not seem to be met.

[10] Judgement of the Court of Justice of the European Union of 5th April 2017 in joint cases C-217/15 i C-350/15, ECLI:EU:C:2017:264.

However, the Court emphasised that the final decision on this matter rested with the national court. Article 50 of the Charter must be interpreted in such a way as to not preclude the application of the national provision which renders it possible to conduct criminal proceedings in connection with the non-payment of VAT, if a definitive tax penalty for the same acts has been imposed, provided that the sanction is imposed on a company with a legal personality and the criminal proceedings are initiated against a natural person.

4. EXCEPTIONS TO THE *NE BIS IN IDEM* PRINCIPLE

On 20th March 2018, the Court of the European Union passed three judgements relating to the issue of the overlap of criminal liability and administrative liability in the context of the *ne bis in idem* principle. In all these cases, the judgements were passed in response to questions referred for a preliminary ruling by Italian courts. Case C-524/15 concerned criminal proceedings which were pending before the court in Bergamo (*Tribunale di Bergamo*) against Luca Menci, a sole trader, who was accused of a tax offence that involved the failure to pay within the statutory deadline due VAT for the year 2011 in the total amount of EUR 282 495.76.[11] The Italian court found that the administrative proceedings related to the same omission had already been conducted before the initiation of the criminal proceedings. The administrative proceedings had resulted in a final and binding decision of the Italian tax authority, in which Luca Menci had been ordered to pay outstanding VAT as well as an administrative sanction in the form of the payment of 30% of the tax debt, which amounted to EUR 84 748.74. In view of such circumstances, the Italian criminal court had doubts whether according to Article 50 of the Charter, it was permissible to initiate criminal proceedings regarding an act for which the non-actionable administrative sanction had already been imposed on the accused.

As a reply to the Italian court, the Court of Justice of the European Union recalled its earlier ruling in Fransson's case. Moreover, the Court decided it was necessary to determine whether the final administrative decision which imposed the tax sanction was of penal nature. Referring these remarks to the Menci's case, the CJEU noted that in Italian law, the proceedings that had concluded by imposing the tax sanction on the accused were regarded as administrative proceedings. Therefore, it would appear that since the criterion of qualification of the proceedings according to the national law was not met, it would not be possible to assume that the tax sanction was of penal nature. However, the Court stated that the remaining criteria for acknowledging the sanction as a type of punishment

[11] Judgement of the CJEU of 20th March 2018, in Case C-524/15, ECLI:EU:C:2018:197.

were met. In the assessment of the Court, this sanction was primarily intended to serve the repressive purpose. It was not only of compensatory nature. Moreover, the CJEU noted that the tax sanction under review *de facto* took the form of a fine in the amount of 30% of the due VAT. In the opinion of the Court, this circumstance indicated a high degree of severity of this sanction and thus its penal nature as defined in Article 50 of the Charter. Therefore, the Court decided that Menci's case indeed involved a double punishment for the same act.

However, the Court of Justice of the European Union allowed such situation, stating that the *ne bis in idem* principle is not of absolute nature. This results from Article 52 (1) of the Charter. According to this provision, all restrictions on the exercise of rights and freedoms recognized in the Charter must be provided for by law and must respect the essence of these rights and freedoms. Moreover, subject to the principle of proportionality, restrictions on these rights and freedoms can only be introduced if they are necessary and meet the objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others. According to the CJEU, Article 50 of the Charter can therefore be interpreted in such a way that it does not preclude national provisions on the basis of which it is permissible to initiate criminal proceedings against a person for non-payment of VAT due within the statutory period, even if a non-appealable administrative sanction of a criminal nature has been imposed on the same person for the same act. In its answer to the inquiry referred, the CJEU, however, listed three obligatory conditions. First, such provisions must pursue a general interest objective of combating VAT offences. This objective, in the CJEU's view, justifies the accumulation of various proceedings and sanctions, although the fact that they are separate also implies the necessity that they at the same time serve as additional reference objectives. It therefore seems that, in the assessment of the CJEU, it is permissible to conduct both criminal and administrative proceedings in relation to the same act if each of these proceedings is to carry out different functions. The diversity of the objectives was observed by the CJEU in the scope of the fight with VAT offences. It emphasized that the Member States try on the one hand to discourage any failures to observe the rules for declaring and collecting VAT and to punish them by imposing administrative sanctions on a lump-sum basis, and on the other hand, to discourage serious offences against these rules more severely. If these failures are particularly socially harmful, in the CJEU's opinion, they justify conducting additional criminal proceedings, despite previous or parallel application of administrative sanctions aimed at counteracting any irregularities in this regard. To sum up, the CJEU's ruling shows that administrative sanctions may concern all offences with regard to fulfilling tax obligations. In relation to culpable and particularly harmful faults, it is possible to hold the obliged liable also for criminal offence under Article 50 of the Charter.

As a second condition for the admissibility of a regulation cumulating the sanctions, the CJEU pointed to the existence of rules ensuring such co-ordination

which limits the additional burden borne by the persons concerned as a result of a cumulation of proceedings to what is strictly necessary. In the case of Menci, the CJEU considered that this condition was met, because the Italian law limited the criminal liability punishable by imprisonment only to the most serious offences in the payment of VAT (i.e. over EUR 50 000), and these provisions obliged the courts to consider the fact that the payment of overdue tax with the additional amount imposed as part of the administrative penalty was made in advance, as a mitigating circumstance.

The third condition that according to the CJEU allowed for an accumulation of sanctions was the existence of rules that render it possible to ensure that the severity of all imposed sanctions is adapted to the seriousness of the offence. However, the CJEU left the analysis of this issue in its entirety to the national court.

5. CRIMINAL JUDGEMENTS AND SUBSEQUEENT ADMINISTRATIVE SANCTIONS

All the previously discussed rulings were delivered on the basis of cases in which national criminal courts considered admissibility of delivering a judgement of conviction after the person involved had been punished with a final and binding administrative sanction. However, in the remaining judgements delivered on 20th March 2018, the CJEU had the opportunity to analyse different situations, i.e. those in which the criminal proceedings ended first. The CJEU expressed its position in reference to both cases concluded with the delivery of a conviction as well as those concluded with acquittal.

The issue of the impact of the previous acquittal on the admissibility of a possible further sanctioning in administrative proceedings emerged in the joined cases No. C-596/16 and C-597/16. The CJEU answered the questions asked by the Italian Court of Cassation (*Corte suprema di cassazione*) dealing with complaints regarding the legality of fines imposed by the stock exchange supervisor (*Commissione Nazionale per le Società e la Borsa* – the so-called Consob) to Enzo di Puma and Antonio Zecca.[12] Both men were charged with unlawful use of confidential information in transactions carried out on the stock market (so-called *insider trading*). In particular, namely Enzo di Puma and Antonio Zecca were considered to have purchased 2375 shares of Permasteelisa SpA company based on knowledge on the planned takeover of the control over this company by another entity, while such knowledge was out of reach of the remaining participants on the market. Antonio Zecca held such information due to the position and responsibilities he

[12] Judgement of the CJEU of 20th March 2018 in Case No. C-524/15, ECLI:EU:C:2018:192.

performed within Deloitte Financial Advisory Services SpA. On the other hand, it was clear from the actual findings that Enzo Di Puma could not have known that this information was confidential. Consob decided that both men were guilty of illegal use of confidential information and imposed administrative sanctions on them by an administrative decision. Both Antonio Zecca and Enzo di Puma disagreed and appealed to the Milan appellate court (*Corte d'appello di Milano*). The court dismissed the action brought by Enzo di Puma and upheld the action brought by Antonio Zecca. This resulted in appeals to the highest instance in both cases. Enzo di Puma referred to the final judgement of the criminal court in Milan (*Tribunale di Milano*), which had acquitted him of the charge of committing the same act that Consob currently attributed to him in the administrative proceedings. Likewise, Antonio Zecca pointed out the previous acquittal. Therefore, the court of final instance that considered the complaints had doubts whether the sanctions imposed by Consob violated the *ne bis in idem* principle under Article 50 of the Charter of Fundamental Rights.

Referring to the problem put forward by the Italian court, the CJEU stated at the outset that the protection afforded by the *ne bis in idem* principle is not limited to the situation in which a person was convicted by a criminal sentence, but also refers to the previous acquittal of the person. Therefore, the subsequent imposition of an administrative pecuniary sanction based on the same acts constitutes a restriction of the fundamental right guaranteed in Article 50 of the Charter. The CJEU noted, however, that such a restriction of the application of the *ne bis in idem* principle may be justified on the basis of Article 52 (1) of the Charter by the general purpose, which is the need to protect the integrity of the financial markets and to protect public confidence in financial instruments. However, in the case presented by the Italian court, the CJEU found that such necessity was not in place. Imposing an administrative pecuniary penalty obviously went beyond what is necessary to effectively protect the stock market, as by virtue of acquittal, it was found that it did not satisfy the criteria of a crime against the functioning of this market. In such a procedural system, the CJEU considered the subsequent administrative proceedings as unfounded. Therefore, the CJEU's reasoning leads to the conclusion that the acquittal judgement definitively determines that no act has been committed, and thus it is pointless to consider whether an exception to the *ne bis in idem* principle in such a case is justified in the light of Article 52 (1) 1 of the Charter.

In its reply to the Italian court, the CJEU also referred to Article 14 (1) of Directive 2003/6/EC of the European Parliament and of the Council of 28th January 2003 on the use of confidential information and market manipulation (market abuse). Pursuant to that provision, irrespective of the possibility to adjudicate in criminal proceedings, Member States should ensure that appropriate, effective, proportionate and dissuasive administrative measures can be taken or administrative sanctions can be imposed on those responsible for a failure

to apply the provisions adopted in the implementation of the Directive.[13] Therefore, the established regulation practically allows for breaking the *ne bis in idem* principle. However, the CJEU ruled that it does not preclude national provisions that do not allow for the possibility to carry out an administrative penalty payment proceedings after the criminal court has issued a final acquittal, stating that the offence does not satisfy the criteria of the offence specified in the provisions on the use of confidential information. This conclusion was drawn by the CJEU based on the interpretation of Article 50 of the Charter.

On the other hand, in case C-537/16, the CJEU raised the issue of the admissibility of applying an administrative sanction in respect of an act for which a previous conviction was handed down.[14] This time it also replied to the Italian court of highest instance on the basis of a case concerning fraud in stock exchange transactions.

In the proceedings pending before the Italian court, the already mentioned Consob, by way of administrative decision, imposed on Stefano Ricucci, Magiste International S.A. and Garlsson Real Estate S.A. in liquidation, jointly and severally, an administrative fine of EUR 10.2 million. Consob accused Stefano Ricucci of committing acts that constitute a manipulation in the market causing deviation from the normal quotation of securities to the benefit of other entities. In the meantime, criminal proceedings were brought against Stefano Ricucci for the same act. They ended with the tribunal in Rome (*Tribunale di Roma*) on 10th December 2008 dismissing charges with manipulating transactions on the stock market. In the course of the administrative proceedings, the defendants appealed against the decision of the Consob to the Court of Appeal in Rome (*Corte d'appello di Roma*). This court, in the judgement of 2nd January 2009 – despite the existence of a final criminal judgement – only reduced the administrative penalty imposed on the appellants to the amount of EUR 5 million. This resulted in the lodging of appeals to the court of highest instance, on the basis of which a preliminary question was addressed to the CJEU. The appellants based their arguments on the infringement of Article 50 of the Charter of Fundamental Rights consisting in the imposition of administrative sanctions on them for an act for which a final conviction had been passed. The Italian court of highest instance decided that the resolution of this issue required a ruling of the CJEU.

At the outset, the CJEU noted that the files submitted by the Italian court showed that the provisions on the basis of which the appellants had been punished were intended to protect the integrity of the Union's financial markets and to protect public confidence in securities. Therefore, the possible accumulation of proceedings to fight against market-based crime would be justified if each of the sanctions applied would also fulfil additional objectives. The CJEU considered it

[13] Official Journal No. L 096, 12/04/2003 .

[14] Judgment of the CJEU of 20th March 2018 in Case C-537/16, ECLI:EU:C:2018:193.

legitimate to apply a solution with which a Member State is seeking to discourage any infringement, whether intended or not, of the prohibition of market manipulation by imposing administrative sanctions and, on the other hand, to discourage serious violations of these rules and to sanction them in criminal proceedings. The CJEU emphasized that these should be particularly serious infringements and thus justify the adoption of more stringent criminal sanctions than only administrative ones. The CJEU thus expressed a view identical with the position taken in other judgements issued on 20th March 2018. The ruling of the CJEU once again leads to the conclusion that the *ne bis in idem* principle of Article 50 of the Charter is not absolute. At this point, the CJEU referred to the aforementioned Article 52 (1) of the Charter. However, it clearly indicated that the permissible accumulation of proceedings and sanctions should not violate the principle of proportionality of the measures applied. The accumulation of sanctions should, therefore, be accompanied by rules ensuring that the severity of all sanctions imposed corresponds to the seriousness of the infringement in question, since such a requirement results not only from the said Article 52 (1) of the Charter, but also from Article 49 (3) of the Charter, which stipulates the principle of proportionality of penalties. According to the CJEU, both these rules should impose on competent authorities the duty to ensure that the severity of all imposed sanctions does not exceed the seriousness of the violation.

Following the above interpretation, the CJEU came to the conclusion that in a situation where the sentence imposed by a final judgement is an effective, proportionate and deterring response to the crime, then conducting proceedings aiming to impose an administrative fine goes beyond what is strictly necessary to achieve the general objective of protecting the proper functioning of the stock market. In this case, Article 50 of the Charter is an obstacle to imposing an administrative sanction on a person who has been previously punished with a final judgement of conviction. In the opinion of the CJEU, however, it is for the national court to ultimately re-examine this matter in the context of a specific case.

6. CONCLUSIONS

Summing up, it should be pointed out that it is clear from the previous case-law of the CJEU that the application of Article 50 of the Charter is not limited to conducting criminal proceedings several times in the same case. This provision also applies to situations in which national law admits the possibility of parallel sanctioning of unlawful acts comitted by the same entity by means of both criminal and administrative law instruments. The problem of applying Article 50 of the Charter does not occur in cases in which the punished entities are not legally identical.

Pursuant to Article 50 of the Charter, the EU legislature does not prohibit Member States to apply the accumulation of sanctions ruled in separate proceedings, provided, however, that the administrative penalty is deprived of penal nature typical of the sanctions imposed in criminal proceedings. Assessment of this character in accordance with the case-law of the CJEU needs to be based on three criteria: the classification of a given procedure in domestic law, the existence of a repressive function of the measure adjudicated under the procedure and the degree of its severity. The fulfilment of any of them essentially determines the criminal nature of the measure. However, even in such a situation, a prohibition under Article 50 of the Charter will not always be absolute. The EU legislative authorities has allowed restrictions to the use of the rights granted by the Charter (see Article 52 (1) of the Charter). It is therefore possible to double sanction a given act with measures of a penal nature, if it is justified by general objectives such as the protection of the tax system or the regularity of stock exchange trading, and each of the proceedings performs its own specific additional objectives. Administrative sanctions are meant to counteract any transgressions, and criminal sanctions are limited to the most serious, culpable abuses. However, the accumulation of sanctions must be based on the principle of proportionality. This means that the Member States should regulate the mutual influence of both proceedings, so as not to punish the same behaviour too severely and so that the sanctions applied jointly are absolutely necessary. EU law excludes the possibility of bringing a given entity to administrative responsibility in the event that it was legally acquitted of committing the same offence with a final judgement. This issue, however, is quite debatable, because it cannot be ruled out that the given act will remain an administrative tort, despite the lack of prerequisites of criminal liability, such as the intention to commit a prohibited act.

THE PROBLEMS OF APPLYING BOTH CRIMINAL AND ADMINISTRATIVE PENAL SANCTIONS IN LIGHT OF ARTICLE 50 OF THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

Summary

The aim of this study is to present the case law of the Court of Justice of the European Union (CJEU) regarding the admissibility of parallel punishments in proceedings conducted separately before criminal courts and administrative authorities.

Pursuant to Article 50 of the Charter of Fundamental Rights of the European Union, no one shall be liable to be tried or punished again in criminal proceedings for an offence

for which he or she has already been finally acquitted or convicted within the Union in accordance with the law (the *ne bis in idem* principle).

According to the CJEU, this principle does not constitute a legal obstacle to the application of sanctions for the same unlawful conduct of the same person in both criminal and administrative proceedings, if the sanction imposed by the administrative authority does not have the nature of a criminal penalty (the case C-617/10 *Fransson*). Assessment of such a nature in accordance with the case law of the CJEU (influenced by the judgment of the European Court of Human Rights in the *Engel* case) needs to be based on three criteria: the classification of a given procedure in domestic law, the existence of a repressive function of the measure adjudicated under the procedure and the degree of its severity (the case C-489/10 *Bonda*).

In the opinion of the CJEU, the *ne bis in idem* principle mentioned in Article 50 of the Charter is also not absolute, because the restrictions on the use of the rights granted by the Charter are allowed pursuant to Article 52 (1) of the Charter. Therefore, according to the CJUE, it is possible to double sanction a given behaviour with measures of a penal nature, if it is justified by general objectives such as the protection of the tax system or of the regularity of stock exchange trading, provided that each of the proceedings performs its own specific additional objectives and that the accumulation of sanctions is based on the principle of proportionality. While administrative sanctions could be meant to counteract any transgressions, criminal sanctions should be limited to the most serious, culpable abuses. Moreover, the Member States should regulate the mutual influence of both proceedings, so as not to punish too severely the same behaviour and so that the sanctions applied jointly are absolutely necessary (the case C-545/15 *Menci*, the case C-537/16 *Garlsson Real Estate and Others*).

On the other hand, according to the CJUE, Article 50 of the Charter excludes the possibility of bringing a given entity to administrative responsibility in the event that it had already been legally acquitted of committing the same offence with a final court ruling, because the acquittal judgement definitively determines that no act has been committed, and thus it is pointless to consider whether an exception to the *ne bis in idem* principle in such a case is justified in the light of Article 52 (1) of the Charter (joint cases C-596/16 and C-597/16, *Enzo Di Puma and Consob*).

Finally, the CJUE states that Article 50 of the Charter must be interpreted in such a way that it does not preclude the application of the national provision which allows for conducting criminal proceedings, if a definitive administrative penalty for the same acts has been imposed on a company with a legal personality and criminal proceedings have been initiated against a natural person (joint cases C-217/15 and C-350/15, *Orsi*, *Baldetti*).

KEYWORDS

ne bis in idem, European Union

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ne bis in idem, Unia Europejska

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HARMONIZATION OF THE UKRAINIAN LEGISLATION WITH THE LEGISLATION OF THE EUROPEAN UNION WITH REGARD TO TRADE DEFENCE

1. A BASIS FOR HARMONIZATION OF THE UKRAINIAN LEGISLATION

Creating a common legal space to regulate trade defense measures through harmonization of Ukrainian legislation with the legislation of the European Union is an objective requirement in the context of ratification of the Association Agreement between Ukraine and the EU and further Ukrainian Euro-integration aspirations.

The issue of the necessity of approximation, adaptation or harmonization of the Ukrainian legislation with the EU legislation was given a leading place in many normative legal documents, such as those adopted earlier, in particular, the Program of Ukraine's integration into the European Union, the EU-Ukraine Action Plan, the Law "On the National Program of Adaptation of Ukrainian Legislation to the legislation of the European Union", as well as in the Association Agreement between Ukraine and the EU. It should be stated that adaptation of Ukrainian legislation in many spheres is now an important priority of reforming Ukraine's legislation. Many scholars hold this opinion, emphasizing that it is one of the necessary and powerful factors for Ukraine's integration into the European Union, as well as the first stage of a long process of approximation of the national legal system to the European Union's system in accordance with the criteria set by the EU regarding states who intend to join it. Thus, it can be said that the purpose of harmonization of Ukrainian legislation to the legislation of the European Union is to achieve the conformity of the law of Ukraine with the law of the Union.

As for legislation of the European Union, it comprises the term "acquis communautaire" which, according to the definition of Professor V. Muravev, is a "common product, which, forming the basis of EU law, contains: first, the norms

of treaties and decisions of the EU institutions; second, declarations and resolutions adopted within the framework of the EU, and third, the practice of the EU Court".[1] That is, this term means basically a set of legal norms of the European Union, EU legislation in a broad sense. According to clause 1 of Section II of the National Program for the Adaptation of Ukrainian Legislation to the Law of the European Union, approved in 2004, the term acquis communautaire is the EU legal system, which contains acts of EU legislation (but not limited to them), adopted within the framework of the European Community, the Common Foreign and Security Policy and Justice and Home Affairs Cooperation.[2]

For the other hand, it is worth mentioning that terms "harmonization", "rapprochement", "adaptation", "mutual recognition", etc., were used more often to refer to the process of bringing legislation of the associated countries into conformity with the EU law.[3] As an example, the process of economic integration of the Central European and Baltic countries to the EU was accompanied by the gradual mandatory application of EU legislation in the field of trade relations, comprising anti-dumping, countervailing measures and safeguards.[4] For example, during the second stage of the approximation of the legislation of the Republic of Poland with the EU legislation, based on the proposals of the White Paper on the Single Internal Market, adopted by the EU Commission in 1995 Cannes, defining main priorities how to harmonize Central and Eastern Europe states' legislation with the legislation of the Union, common commercial policy laws was transposed when the country becomed a member of the Union.[5]

The process of harmonization of Ukrainian legislation with the law of the European Union has officially began when the Ukraine-EU Interim Trade Agreement, signed in 1995, entered into force. It appeared to be the first official doc-

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[1] В. Муравйов, *Право Європейського Союзу* [V. Muraviov, *Pravo Yevropeys'koho Soyuzu*] [V. Muraviov, *Law of the European Union*], Kyiv 2011, pp. 704–775.

[2] *Закон України «Про Загальнодержавну програму адаптації законодавства України до законодавства Європейського Союзу»* [*Zakon Ukrayiny «Pro Zahal'noderzhavnu prohramu adaptatsiyi zakonodavstva Ukrayiny do zakonodavstva Yevropeys'koho Soyuzu»*] [*Law of Ukraine "On the National Program of Adaptation of the Legislation of Ukraine to the Legislation of the European Union"*], http://zakon5.rada.gov.ua/laws/show/1629-15.

[3] В. Муравйов, *Гармонізація законодавства і Європейська інтеграція* [V. Muravyov, *Harmonizatsiya zakonodavstva i Yevropeys'ka intehratsiya*] [V. Muravyov, *Harmonization of legislation and European integration*], "Право України" ["Pravo Ukrayiny"] ["Law of Ukraine"], Kyiv 2013, issue 6, pp. 13–49.

[4] В. Тихонович, *Аналіз державних механізмів стимулювання співробітництва з країнами Європи* [V. Tykhonovych, *Analiz derzhavnykh mekhanizmiv stymulyuvannya spivrobitnytstva z krayinamy Yevropy*] [V. Tikhonovich, *Analysis of State Mechanisms for Encouraging Cooperation with European Countries*], "Науковий вісник Академії муніципального управління" ["Naukovyy visnyk Akademiyi munitsypal'noho upravlinnya"] ["Scientific Bulletin of the Academy of Municipal Administration"], Kyiv 2012, issue 3, pp. 259–271.

[5] E. Latoszek, *The EU's Common Commercial Policy and its Post-Entry Implications for Poland's Trade*, "Polish Quarterly of International Affairs" 1999, p. 14.

ument to emphasize on the need to harmonize legislation on competition and intellectual property rights with the EU law. Later, the Partnership and Cooperation Agreement between the European Communities and their Member States and Ukraine dated 16 June 1994, which entered into force on 1 March 1998, was the legal basis of Ukraine-EU trade relations was for a long time.[6] The Agreement was the main legal instrument for bilateral cooperation and operated until the entry into force of the EU-Ukraine Association Agreement, creating main prerequisites for harmonization of Ukrainian legislation with the law of the European Union. In particular, approximation of Ukrainian legislation with the legislation of the European Union in the field of trade was identified as one of the cooperation under this Agreement, whereas Article 51 provided for Ukraine's commitment to gradually bring national legislation into conformity with the Community law in certain areas.[7] Article 19 of the Partnership and Cooperation Agreement governed the investigation of antidumping or subsidy cases, in particular, it was noted that each Party agrees to consider the submission of the other Party and notify the Parties concerned of the essential facts and considerations on the basis of which the final decision will be taken and make every effort to achieve a solution to the problem.

Later, on February 21, 2005, the EU-Ukraine Action Plan was adopted within the framework of the European Neighborhood Policy. Here gradual approximation of the Ukrainian legislation, norms and standards to norms and standards of EU legislation was one of the main objectives.[8]

The Free Trade Agreement with the European Union is an important component of the EU-Ukraine Association Agreement, which offers Ukraine a framework to modernize its trade relations and gradual harmonization of laws and by-laws in accordance with the standards of the Union. According to Professor V. Muraviev "The Agreement will create preconditions for deeper implementation of the acquis communitaire into Ukrainian legal system",[9] which will positively affect Ukrainian legislation, provide a basis to enhance trade relations. Thus, the agreement will allow to liberalize trade relations with the EU, and also pro-

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[6] В. Муравйов, *Європейське право: право Європейського союзу* [V. Muravyov, *Yevropeys'ke pravo: pravo Yevropeys'koho soyuzu*] [V. Muraviev, *European Law: European Union Law*], Kyiv 2015, p. 111.

[7] *Угода про партнерство та співробітництво між Україною і Європейськими Співтовариствами та їх державами-членами* [*Uhoda pro partnerstvo ta spivrobitnytstvo mizh Ukrayinoyu i Yevropeys'kymy Spivtovarystvamy ta yikh derzhavamy-chlenamy*] [*Partnership and Cooperation Agreement between Ukraine and the European Communities and their Member States*], http://zakon2.rada.gov.ua/laws/show/998_012.

[8] *План дій Україна – Європейський Союз* [*Plan diy Ukrayina – Yevropeys'kyy Soyuz*] [*Action Plan Ukraine – European Union*], http://zakon2.rada.gov.ua/laws/show/994_693.

[9] В. Муравйов, *Європейське право: право Європейського союзу* [V. Muravyov, *Yevropeys'ke pravo: pravo Yevropeys'koho soyuzu*] [V. Muraviev, *European Law: European Union Law*], Kyiv 2015, p. 111.

vides for a deep regulatory approximation, that is, the harmonization of rules and procedures and convergence with the EU internal market. Since the Association Agreement provides for harmonization of legislation in almost all spheres, it is an extremely important component of mutual cooperation and a prerequisite for possible further integration of Ukraine into the EU. The goal of harmonization within the framework of cooperation between Ukraine and the EU is both economic integration, reform of the national economy and the legal system of Ukraine,[10] including the creation of favorable conditions for access of Ukrainian producers and providers to the markets of the EU and European enterprises to the Ukrainian market. Professor V. Muraviev also points out that in the EU itself the harmonization of the internal law of the member states with the law of the European Union covers, first of all, the sphere of functioning of the EU internal market, whereas means of harmonization comrise implementation of the provisions and directives of the Union into domestic law.[11]

2. DIFFERENT VIEWS ON THE TERM

It should be noted that the Association Agreement does not define the notion of "harmonization", but only refers to such concepts as "rapprochement", "legislative approximation", "adaptation", "transposition". Scholar views differ in this regard. A scholar S. Stanik uses the notion "approximation", referring to the approximation of law, legislative acts of Ukraine to the EU legal system.[12] Also, Y. Kapitsa believes that it is better to use the term "approximation" too

[10] Н. Мушак, *Гармонізація законодавства України з «acquis» Європейського Союзу та правовими стандартами ради Європи* [N. Mushak. *Harmonizatsiya zakonodavstva Ukrayiny z «acquis» Yevropeys'koho Soyuzu ta pravovymy standartamy rady Yevropy*] [N. Mushak. *Harmonization of Ukrainian legislation with the EU acquis and Council of Europe legal standards*], "Право України" ["Pravo Ukrayiny"] ["Law of Ukraine"], Kyiv 2013, issue 6, p. 83.

[11] В. Муравйов, *Гармонізація законодавства і Європейська інтеграція* [N. Mushak, *Harmonizatsiya zakonodavstva Ukrayiny z «acquis» Yevropeys'koho Soyuzu ta pravovymy standartamy rady Yevropy*] [V. Muravyov, *Harmonization of legislation and European integration*], "Право України" ["Pravo Ukrayiny"] ["Law of Ukraine"], Kyiv 2013, issue 6, p. 20.

[12] В. Гомонай, *Проблема юридичної термінології в процесі зближення законодавства України з правовою системою Європейського Союзу* [V. Homonay, *Problema yurydychnoyi terminolohiyi v protsesi zblyzhennya zakonodavstva Ukrayiny z pravovoyu systemoyu Yevropeys'koho Soyuzu*] [V. Homonai, *The Problem of Legal Terminology in the Process of Approximation of Ukrainian Legislation with the Legal System of the European Union*], (in:) *Інституційні та нормотворчі аспекти адаптації національних законодавств до норм та стандартів ЄС. Матеріали міжнародної конференції* [*Instytutsiyni ta normotvorchi aspekty adaptatsiyi natsional'nykh zakonodavstv do norm ta standartiv YES. Materialy mizhnarodnoyi konferentsiyi*] [*Institutional and regulatory aspects of the adaptation of national legislation to EU norms and standards. Materials of international conference*], Kyiv 2009, p. 213.

the terms "approximation" and "harmonization" are used in the EU law dealing about approaching one or another level of conformity.[13] However, according to Professor V. Muravev's conclusion, the term harmonization of legislation, i.e. bringing legislation of the member states and non-member countries in line with the requirements of the European Union based on the legal acts of the European Union, is more widely used in Ukrainian literature.[14] Also according to the "Dictionary of Terms and Concepts on International and European Law", harmonization of legislation is defined as bringing legislation of the Member States and non-member countries into conformity with the requirements of the EU on the basis of its legal acts.[15]

On the other hand, the term "adaptation" is also often used both in Ukrainian sources and in official documents, in particular, in the Law of Ukraine "On the National Program for the Adaptation of Ukrainian Legislation to the Law of the European Union" dated March 18, 2004, Resolution of the Cabinet of Ministers of Ukraine "Some Issues of Approximation of Ukrainian Legislation to the Legislation of the European Union" dated October 15, 2004, etc. The law states that the term adaptation of legislation is "a process of bringing the laws of Ukraine and other normative legal acts in line with the acquis communautaire".[16] Even earlier, in 1999, the Concept of Adaptation of Ukrainian Legislation to the Law of the European Union was adopted, approved by the Resolution of the Cabinet of Ministers of Ukraine in 1999, stating that the adaptation of the legislation was carried out in order to ensure compliance of the Ukrainian legislation with the obligations arising from the Agreement on Partnership and Cooperation, other international agreements regarding Ukraine's cooperation with the EU, development of national legislation in the direction of its rapprochement with the legislation of the Union.[17] Besides, the Strategy of Ukraine's Integration into the European

[13] *Ibidem*, p. 214.

[14] В. Муравйов, *Європейське право: право Європейського союзу* [V. Muravyov, *Yevropeys'ke pravo: pravo Yevropeys'koho soyuzu*] [V. Muraviev, *European Law: European Union Law*], Kyiv, 2015, p. 356.

[15] *Законотворчість. Словник термінів і понять з міжнародного та європейського права* [*Zakonotvorchist'. Slovnyk terminiv i ponyat' z mizhnarodnoho ta yevropeys'koho prava*] [*Legislation. Glossary of terms and concepts in international and European law*], Kyiv 2005, p. 160.

[16] *Закон України «Про Загальнодержавну програму адаптації законодавства України до законодавства Європейського Союзу»* [*Zakon Ukrayiny «Pro Zahal'noderzhavnu prohramu adaptatsiyi zakonodavstva Ukrayiny do zakonodavstva Yevropeys'koho Soyuzu»*] [*Law of Ukraine "On the National Program of Adaptation of the Legislation of Ukraine to the Legislation of the European Union"*], http://zakon3.rada.gov.ua/laws/show/1629-15?test=4/UMfPEGznhh.Sn.ZimcoWnbHI4bos80msh8Ie6.

[17] *Концепція адаптації законодавства України до законодавства Європейського Союзу* [*Kontseptsiya adaptatsiyi zakonodavstva Ukrayiny do zakonodavstva Yevropeys'koho Soyuzu*] [*The concept of adaptation of the legislation of Ukraine to the legislation of the European Union*], http://zakon2.rada.gov.ua/laws/show/1496-99-%D0%BF.

Union states: "adaptation of the Ukrainian legislation to the EU legislation is in line with the modern European system of law".[18]

Some scholars, for instance, prof. V. Beschastny, identify adaptation of Ukrainian legislation to the EU legislation as a "set of interrelated organizational, legal, socio-economic, scientific and technical processes and measures aimed at bringing Ukraine's legislation closer to the modern European system of law by designing a new one and amending the current legislation of Ukraine, taking into account common European standards reflected in the current legislation of the European Union and the EU member states".[19]

However, many scholars, in particular, N. Malyshev, emphasize that harmonization of legislation should provide mechanisms for obtaining the highest level of harmonization and compatibility of harmonized systems.[20] Also, L. Lutz and L. Baymuratov adhere to the same opinion, noting that "in the course of harmonization there is a convergence of law and legislation, elimination of contradictions".[21] Moreover, O. Kiyevets shares the opinion that, in the case of harmonization, the creation of a legal regime with the help of similar legal norms based on the standard.[22] In my opinion, the process of bringing Ukrainian legislation in line with the legislation of the European Union is appropriate to determine as harmonization of legislation. The same opinion is held by V. Gomonai, N. Mushak, R. Petrov, and others. Futhermore, the scholar K. Trychlib confirms this thesis, arguing that the main instrument of rapprochement and harmonization of legal systems of states is precisely the harmonization of laws, which consists of transformation of legal norms by bringing them into conformity with other norms.[23]

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[18] В. Бесчасний, *Право Європейського Союзу* [V. Beschasnyy, *Pravo Yevropeys'koho Soyuzu*] [V. Beschastnyi, *European Union Law*], Kyiv, 2011, p. 366.

[19] *Ibidem*, p. 342.

[20] Н. Малишева, *Теоретичні аспекти гармонізації національного законодавства з міжнародним правом* [N. Malysheva, *Teoretychni aspekty harmonizatsiyi natsional'noho zakonodavstva z mizhnarodnym pravom*] [N. Malysheva, *Theoretical Aspects of Harmonization of National Legislation with International Law*], (in:) *Проблеми гармонізації законодавства України з міжнародним правом: матеріали міжнародної науково-практичної конференції* [*Problemy harmonizatsiyi zakonodavstva Ukrayiny z mizhnarodnym pravom: materialy mizhnarodnoyi naukovo-praktychnoyi konferentsiyi*] [*Problems of Harmonization of Ukrainian Legislation with International Law: Materials of an International Scientific and Practical Conference*], Kyiv 1998, p. 88.

[21] Л. Луць, *Основні заходи та способи Європейської правової інтеграції* [L. Luts', *Osnovni zakhody ta sposoby Yevropeys'koyi pravovoyi intehratsiyi*] [L. Luts, *Main Measures and Methods of European Legal Integration*], "Право України" ["Pravo Ukrayiny"] ["Law of Ukraine"], Kyiv 2002, issue 5, p. 147.

[22] О. Київець, *У пошуках міжнародного права: переосмислюючи джерела* [O. Kyyivets', *U poshukakh mizhnarodnoho prava: pereosmyslyuyuchy dzherela*] [O. Kievets, *In Search of International Law: Rethinking Sources*], Kamianets-Podilskyi 2011, p. 406.

[23] К. Трихліб, *Гармонізація законодавства України і законодавства ЄС: наближення загальноправової термінології: монографія* [K. Trykhlib, *Harmonizatsiya zakonodavstva*

According to R. Petrov's definition a concrete form and direction of harmonization and convergence of the legal systems of states is the transposition, which is a process aimed at achieving adaptation, convergence, harmonization with the EU law and involves application of many methods and methods for achieving the goal of transfer EU acquis in the legal systems of third countries.[24] Also, prof. Y. Shemshuchenko emphasizes that the main ways of harmonization is adopting by our state internal legal acts aimed at ensuring legal approximation and harmonization of domestic sectoral legislation.[25]

3. HARMONIZATION OF LEGISLATION IN THE FIELD OF TRADE DEFENCE

If talking about trade law and trade defence legislation, in particular, in order to bring Ukraine's legislation closer to EU legislation in the area of trade defence measures in the light of the Association Agreement, Ukraine needs to adopt a number of internal regulatory acts against dumping, subsidies and massive imports, despite the fact that the Association Agreement between Ukraine and the European Union does not directly oblige Ukraine to harmonize its domestic legislation on trade defense measures with the EU legislation.

Legislation of the Union in the field of trade defense measures, as S. Osik notes, since the adoption of the first European legal instrument on protection against dumping and subsidies in 1968, all the legal acts were amended and supplemented, systematization and analysis of the application of norms has been conducted.[26] It means that the procedural rules were clarified and refined to provide more complete protection of the parties' rights to antidumping, anti-subsidy and

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Ukrayiny i zakonodavstva YES: nablyzhennya zahal'nopravovoyi terminolohiyi: monohrafiya] [K. Trichlieb, *Harmonization of Ukrainian and EU Legislation: Approximation common law terminology: thesis*], Kharkiv 2015, p. 42.

[24] Р. Петров, *Транспозиція права як складова процесу приведення законодавства України* [R. Petrov, *Transpozytsiya prava yak skladova protsesu pryvedennya zakonodavstva Ukrayiny*] [R. Petrov, *Transposition of Law as a Component of the Legislative Process of Ukraine*], "Право України" ["Pravo Ukrayiny"] ["Law of Ukraine"], Kyiv 2013, issue 6, p. 72.

[25] Ю. Шемшученко, *Наукова доповідь «Механізми гармонізації законодавства України з європейським та міжнародним правом»* [YU. Shemshuchenko*, Naukova dopovid' «Mekhanizmy harmonizatsiyi zakonodavstva Ukrayiny z yevropeys'kym ta mizhnarodnym pravom*»] [Yu. Shemshuchenko, *Scientific Report "Mechanisms of Harmonization of Ukrainian Legislation with European and International Law"*], Kyiv 2011, p. 27.

[26] С. Осыка, *Основы и особенности права США, Канады и Европейского Союза по защите от демпингового импорта* [*S. Osyka*, *Osnovy i osobennosti prava Ssha, Kanady i Yevropeyskogo Soyuza po zashchite ot dempingovogo importa*] [S. Osyka, *Fundamentals and Features of the Law of the USA*, *Canada and the European Union on the Protection against Dumping Imports*], Kyiv 2005.

safeguards investigations, in particular the latest changes were made by the Union at the end of 2017.

Thus, one of the ways of harmonization in this regard may be transposition of the norms of EU legal acts into the national legal order of Ukraine, in particular the provisions of the current regulations of the Union – Regulation (EU) 2017/2321, Regulation (EU) 2016/1036 and Regulation (EU) 2016/1037, on the protection against dumping, subsidies and mass imports into the laws of Ukraine "On the protection of the national producer from dumping imports", "On the protection of national producers from subsidized imports" and "On the application of special measures for the import into Ukraine".

This work has partly started at the moment. In particular, at the end of 2017 the Ministry of Economic Development and Trade of Ukraine developed and placed on the official website of the Ministry a new Law of Ukraine "On Amendments to the Law of Ukraine "On the Protection of the National Commodity Producer against Dumped Imports" in order to bring current legislation in the field of trade defence in accordance with the provisions of the WTO Agreements and the international practice of conducting anti-dumping investigations. This bill was discussed in expert circles, in particular, during a meeting of the Public Council under the Ministry of Economic Development and Trade of Ukraine, a meeting of the Public Council under the Cabinet of Ministers of Ukraine, the American Chamber of Commerce, etc. The explanatory note to the bill states that the draft Law is designed to improve the mechanism of anti-dumping investigations, as well as the mechanism of application of anti-dumping measures and conducting investigations taking into account international practice.[27] Thus, the main task of it's adopting would be to increase the transparency of anti-dumping process and predictability for all of its parties. One of the most positive new rules of the bill is increasing transparency of investigation procedures, for example, improving the procedure for informing interested parties about the progress and results of the process, obtaining better access to information, as well as the possibility to participate in hearings. In addition, the new law clarifies rights and obligations of parties to the anti-dumping proceeding, establishes a new rule on the return of a previously paid duty in the event of non-application of final measures, and improves the procedural deadlines for all parties and authorized bodies. It foresees clear deadlines for investigation stages, for example, publications in official

[27] *Пояснювальна записка до проекту Закону України «Про внесення змін до Закону України «Про захист національного товаровиробника від демпінгового імпорту»* [*Poyasnyuval'na zapyska do proektu Zakonu Ukrayiny «Pro vnesennya zmin do Zakonu Ukrayiny «Pro zakhyst natsional'noho tovarovyrobnyka vid dempinhovoho importu»*] [*Explanatory Note to the Draft Law of Ukraine "On Amendments to the Law of Ukraine "On Protection of the National Producer from Dumping Imports"*], http://www.me.gov.ua/Documents/Detail?lang=uk-UA&id=2d92511f-c6fa-468a-97f3-bc353742db15&title=ZakhistInteresivNatsionalnikhTovarovirobnikivNaVnutrishnomuRinku.

sources, providing information on the course of the investigation, holding consultations with the parties, etc.

At the same time, in mid-2017 the Ministry of Economic Development and Trade also developed the Draft Law of Ukraine "On Amendments to the Law of Ukraine On the Protection of a National Producer from Subsidized Imports" also in connection with the need to bring norms of the current legislation in the field of trade defence in conformity with the provisions of the WTO Agreements and international practice of conducting antisubsidy investigations.[28] The drafters of the bill consider it necessary to take into account the interests of all interested parties of the process, such as domestic producers, importers, consumers, small and medium enterprises, similar to the practice of the EU, and the task of adopting the bill is to increase transparency in the provision of anti-subsidy investigations. Thus, the draft law provides for: details of the stages of anti-subsidy investigations; specifying rights and responsibilities of competent authorities; extending rights of parties concerned during investigations; improving mode of use of measures; implementation of methods to ensure customs payments in the form of a cash deposit or debt obligation.[29]

In addition, the Government of Ukraine has drafted a draft Law of Ukraine «On Amendments to the Law of Ukraine «On the Application of Special Measures on Imports into Ukraine», setting it in the form of a new Law «On Safeguards». One can agree with this approach of the Government, which finally proposes to change the current wording of this type of trade defense measures from «special measures» in accordance with the current law to the term «protective measures», which corresponds to GATT / WTO terminology, as well as of others states, international organizations, particularly, the European Union. The Explanatory Note to the new draft law on safeguards also states that it has been designed to improve the mechanism for conducting investigations, as well as

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[28] *Пояснювальна записка до проекту Закону України «Про внесення змін до Закону України «Про захист національного товаровиробника від субсидованого імпорту»* [*Poyasnyuval'na zapyska do proektu Zakonu Ukrayiny «Pro vnesennya zmin do Zakonu Ukrayiny «Pro zakhyst natsional'noho tovarovyrobnyka vid subsydovanoho importu»*] [*Explanatory Note to the Draft Law of Ukraine "On Amendments to the Law of Ukraine "On Protection of National Producer from Subsidized Import"*], http://www.me.gov.ua/Documents/Detail?lang=uk-UA&id=cf27c8a4-b833-418b-9048-2b8d92138213&title=ProektZakonuUkrainiproVnesenniaZminDoZakonuUkrainiproZakhistNatsionalnogoTovarovirobnikaVidSubsidovanogoImportu.

[29] *Аналіз регуляторного впливу до проекту Закону України «Про внесення змін до Закону України «Про захист національного товаровиробника від субсидованого імпорту»* [*Analiz rehulyatornoho vplyvu do proektu Zakonu Ukrayiny «Pro vnesennya zmin do Zakonu Ukrayiny «Pro zakhyst natsional'noho tovarovyrobnyka vid subsydovanoho importu»*] [*Analysis of the regulatory impact on the draft Law of Ukraine "On Amendments to the Law of Ukraine "On Protection of National Commodity Producer from Subsidized Imports"*], http://www.me.gov.ua/Documents/Detail?lang=uk-UA&id=cf27c8a4-b833-418b-9048-2b8d92138213&title=ProektZakonuUkrainiproVnesenniaZminDoZakonuUkrainiproZakhistNatsionalnogoTovarovirobnikaVidSubsidovanogoImportu.

the application of measures in order to take into account the interests of all interested parties, while the general objective of this bill is to increase the transparency of the investigations and its predictability for all interested parties.[30]

It can be agreed that the adoption of the bill will help to improve the mechanism for conducting such investigations, in particular, by increasing the transparency of the investigation itself, legitimate expectations of all parties, providing for the possibility of consultation with the parties, etc. Thus, the draft law envisages improvement of the procedure for informing all parties of the process through the provision of simplified access to information, the broader possibility of interested parties to participate in the process. The document more broadly describes rights and obligations of all parties to the process, including the competent authorities, as well as clarifies some terms, establishing clear time limits for all procedural stages of the investigations. Also, expanded terminology, added some legal regulation of concepts, in particular, regarding the similarity of goods, the period of investigation. Nevetherless, it is considered necessary to align the definition in the draft law with the provisions of the WTO Agreement on Safeguards, for example, the definition of the term "safeguard" as "an action to restrict growing imports to the customs territory of Ukraine, which is applied by the Commission in accordance with this Law…" does not correspond to the terminology of the Agreement on safegurds. The draft law in Articles 2 and 3 adds the rights and responsibilities of the special authorities, namely, the Ministry and the Interdepartmental Commission for International Trade, and their powers are more clearly limited, comparing with the previous version of the Law. The draft law on special measures also should increase transparency and predictability of the application of measures. And better access to information involves the publication of a non-confidential version of the front-end and final report on the results of the investigation to familiarize with it all interested parties.

4. CONCLUSIONS

Thus, it may be noted that the adoption of amendments to the Laws of Ukraine «On the Protection of the National Producer against Dumped Imports», «On Pro-

[30] *Пояснювальна записка до проекту Закону України «Про внесення змін до Закону України «Про застосування спеціальних заходів щодо імпорту в Україну»* [*Poyasnyuval'na zapyska do proektu Zakonu Ukrayiny «Pro vnesennya zmin do Zakonu Ukrayiny «Pro zastosuvannya spetsial'nykh zakhodiv shchodo importu v Ukrayinu»*] [*Explanatory Note to the Draft Law of Ukraine "On Amendments to the Law of Ukraine "On Protection of the National Producer from Dumping Imports"*], http://me.gov.ua/Documents/Detail?lang=uk-UA&id=ae06901d-23f0-4978-a69c-b9d4b75f5b2c&title=ProektZakonuUkrainiproVnesenniaZminDoZakonuUkrainiproVnesenniaZminDoZakonuUkrainiproZastosuvanniaSpetsialnikhZakhodivSchodoImportuVUkrainu.

tection of the National Producer from Subsidized Imports» and «On the Application of Special Measures on Imports into Ukraine» are extremely timely, requiring their prompt adoption by the Verkhovna Rada of Ukraine. The relevant Committee of the Verkhovna Rada of Ukraine on Industrial Policy and Entrepreneurship has also recommended on May 23, 2018 to recommend the adoption of these bills in the first hearing on May 23, 2018. It is expected that these legislative changes will modernize and improve procedure for applying trade defense measures and increase the effectiveness of anti-dumping, countervailing and safeguard measures in Ukraine.

As a result, harmonization of the Ukrainian legislation with the EU law in the field of trade defense measures is an important step towards gradual rapprochement between Ukraine and the EU, which is particularly relevant in thre context of the Deep and Comprehensive Free Trade Area. It is related with the creation of an appropriate common legal framework with the European Union on anti-dumping, countervailing and safeguards closely connected with with the Association Agreement. Such a legal framework in this area will help to achieve other goals, in particular, further integration, improving trade relations between Ukraine and the European Union, as well as promoting more effective protection of national producers.

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natsional'nykh zakonodavstv do norm ta standartiv YES. Materialy mizhnarodnoyi konferentsiyi] [*Institutional and regulatory aspects of the adaptation of national legislation to EU norms and standards. Materials of international conference*], Kyiv 2009

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HARMONIZATION OF THE UKRAINIAN LEGISLATION WITH THE LEGISLATION OF THE EUROPEAN UNION WITH REGARD TO TRADE DEFENCE

Summary

The issue of the necessity of approximation, adaptation or harmonization of the Ukrainian legislation with the EU legislation has been tackled by a number of scholars in Ukraine. A number of normative documents also paid considerable attention to this issue in general. However, there is still an issue of defining the most suitable term which would better purpose bringing legislation into conformity with the requirements of the EU.

According to some scholars the notion “harmonization” could better reflect this process. This view is also shared by the author of this article.

The article also discusses the importance and the need to pass new draft laws in the field of trade defence in Ukraine, in particular, regarding anti-dumping, countervailing measures and safeguards. Since some of the new articles correspond to similar provisions in the EU directives, this is viewed as an important step to harmonize the Ukrainian legislation with the legislation of the European Union in this sphere.

KEYWORDS

harmonization, trade defence, antidumping measures, countervailing measures, safeguards, European Union, Ukraine

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harmonizacja, obrona handlu, środki antydumpingowe, środki antysubsydyjne, gwarancje, Unia Europejska, Ukraina

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THE ADMISSIBILITY OF MITIGATION OF THE ADMINISTRATIVE MONETARY PENALTY FOR THE OCCUPATION OF THE ROAD LANE WITHOUT PERMISSION IN THE LIGHT OF ARTICLE 189D OF THE CODE OF ADMINISTRATIVE PROCEDURE

The road lane of the public road is a special space in which traffic is allowed. Thanks to that, public administration is able to carry out tasks in the spheres of transport and movement. The road lane is an element of public property that should meet the basic needs of society. Moreover, it is an element of the development of state trade or internal security. The road lane is a public wealth which has been covered by special protection expressed in the Act on Public Roads.[1] The manifestation of this protection is a general prohibition of any activities that might cause damage or destruction to the road and its components, reduce its durability or pose a danger in the road lane (article 39 A.P.R.). One of such activities is occupying the road lane for purposes unrelated to construction, reconstruction, renovation, maintenance and protection of the road. In accordance with article 40 (12) A.P.R., the occupation of the road lane for non-road purposes without appropriate permission is subject to an administrative monetary penalty. In this article, the authors discuss the admissibility of mitigating the administrative monetary penalty for the occupation of the road lane in the light of article 189d of the Code of Administrative Procedure.[2]

[1] Act of 21 March 1985 on Public Roads (Journal of Laws of 2017, item 2222, as amended), further on referred to as: „A.P.R.".

[2] Act of 14 June 1960 – Code of Administrative Procedure (Journal of Lawsof 2017, item 1257, as amended), further on referred to as C.A.P.

It is indicated that penalties may be mitigated in the form of the competent legal authority determining their scope.[3] Before chapter IVa was introduced to the C.A.P., there were no regulations in administrative substantive law which standardized the rules and methods of imposing monetary penalties. The single manifestation of such intention on the part of the legislature could be found in specific regulations.[4] Presently, pursuant to article 189d C.A.P., a public administration body which wants to impose a monetary penalty is obliged to determinate the factual situation while simultaneously considering the circumstances that may reduce or increase this sanction.[5] In order to determinate the level of the penalty, the authority must take into consideration the following factors:

– the importance and the circumstances of the violation, especially circumstances relevant to the protection of: life or health, property of significant value or important public interest or an extremely important interest of the party, as well as the duration of violation;

– the frequency of the non-compliance with the obligations or of the violation of the prohibition in the past;

– previous punishment for the same action for a crime, fiscal crime, misdemeanour or fiscal misdemeanour;

– the degree to which the party on whom the penalty is imposed contributed to the violation;

– voluntary actions taken by the party to avoid the effects of the violation;

– the amount of the benefit that the party gained or the amount of loss that the party avoided;

– the personal circumstances of the party on whom the penalty is imposed (in the case of natural persons only).

The first factor is considered as a collective category.[6] It is noted that the expression "the importance and the circumstances of the violation" should be understood as "the consequences of the violation for specially protected goods",[7] whose catalogue is indicated in legal provisions. The second element refers to the conduct of the entity which violates the law. Therefore, the authority has to examine the frequency of non-compliance with obligations or of the violation of the prohibition in the past. It is pointed out that in this case, the authority should include in its considerations similar infringements which belong to the collective cate-

[3] H. Nowicki, (in:) R. Hauser, Z. Niewiadomski, A. Wróbel (eds.), *System Prawa Administracyjnego*, Vol. 7, *Prawo administracyjne materialne*, Warszawa 2012, p. 646.

[4] M. Kaczocha, *Miarkowanie sankcji administracyjnej – wybrane zagadnienia*, „Przegląd Legislacyjny" 2013, issue 3, p. 43.

[5] R. Stankiewicz, (in:) R. Hauser, M. Wierzbowski (eds.), *Kodeks postępowania administracyjnego. Komentarz*, Warszawa 2017, p. 1243.

[6] *Ibidem*, p. 1243.

[7] B. Adamiak, (in:) J. Borkowski, B. Adamiak (eds.), *Kodeks postępowania administracyjnego. Komentarz*, Warszawa 2017, p. 967.

gory of administrative delicts.[8] The next factor concerns previous punishments for the same conduct for a crime, fiscal crime, misdemeanour or fiscal misdemeanour. It forces the public administration authority to investigate the degree of the punished person's respect for the law.[9] Therefore, on the one hand, this factor can alleviate the punishment (if previous punishments or penalties were strict enough) or tighten it (if the entity keeps violating the law despite previous punishments). According to the next factor, the authority must determine the degree to which the punished entity contributed to the violation. The expression "contribution" should be understood in the light of civil law provisions (e.g. article 362 of the Civil Code[10]). It is said that "the contribution of an injured person to the damage or its increase takes place when the damage is the result of actions and conduct of the injured person, not only of another event which obliges another person to repair the damage".[11] As for administrative responsibility, it would be very difficult to find any "injured person", so it is noted that with regard to "contribution" in the meaning of article 189d (4) C.A.P., the authority should consider whether the entity had influence on the occurrence of the state of illegality with full knowledge or whether this type of state occurred as a consequence of the authority's action (e.g. the authority forced the entity to take an action which turned out to be illegal) or third party's actions, which the entity had no influence on.[12] Following the next factor, the authority should examine all voluntary actions taken by the party to avoid the effects of the violation. It cannot be denied that these actions can work either in favour or to the disadvantage of the punished entity. It is pointed out that it is enough in this case to take any actions (only if the action was not apparent), which is why it is not required to remove the effect of the violation.[13] Moreover, the authority should consider the amount of benefit that the party gained or the amount of loss that the party avoided by the violation. This element applies only to situations in which the imposition of the administrative penalty depends on the amount of the entity's financial gain.[14] The last factor indicated in article 189d C.A.P. concerns only natural persons. When determining the monetary penalty, the authority should take into account conditions such as: material, living, social, health and family circumstances as well as the resulting responsibilities.[15]

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[8] M. Jabłoński, *Komentarz do art. 189d KPA*, (in:) M. Wierzbowski, A. Wiktorowska (eds.), *Kodeks postępowania administracyjnego. Komentarz*, Legalis 2018.

[9] B. Adamiak, (in:) J. Borkowski, B. Adamiak (eds.), *Kodeks...*, p. 967.

[10] Act of 23 April 1963 – the Civil Code (Journal of Laws of 2018, item 1025, as amended).

[11] Z. Banaszczyk, *Komentarz do art. 632 KC*, (in:) K. Pietrzykowski (ed.), *Kodeks cywilny. Komentarz*, Legalis 2018.

[12] M. Jabłoński, *Komentarz do art. 189d KPA*, (in:) M. Wierzbowski, A. Wiktorowska (eds.), *Kodeks...*

[13] *Ibidem*.

[14] R. Stankiewicz, (in:) R. Hauser, M. Wierzbowski (eds.), *Kodeks*..., p. 1243.

[15] M. Jabłoński, *Komentarz do art. 189d KPA*, (in:) M. Wierzbowski, A. Wiktorowska (eds.), *Kodeks...* The author noted that this construction is similar to the construction indicated in article

It should be noted that not every monetary penalty can be mitigated under article 189d of the C.A.P. If special provisions indicate factors which should be taken into account by the authority in the course of the procedure of imposing a penalty, then it is impossible to make auxiliary use of the guidelines expressed in the Code of Administrative Procedure (in accordance with the principle *lex specialis derogat legi generali*). Therefore, it should be considered if the road administrator can mitigate the administrative monetary penalty for the occupation of the road lane.

It is recognised that the authorities can mitigate only relatively described penalties for which it is possible: to impose them within a specific range, to decide about the punishment itself (even if the penalty rate is fixed[16]) or to select one of allowed types of penalties depending on the individual aspects of the violation.[17] Penalties which are completely described are considered as mandatory, because in their cases,just committing the administrative delictis enough to impose the administrative monetary penalty.[18] The penalty established in article 40 (12) A.P.R. can be classified as a completely described penalty – the road administrator (guided by the principle of legalism) is obliged to impose a monetary penalty if it is possible to ascertain that the road lane was occupied without an appropriate permission or that the occupation time or the occupied area specified in the permission were exceeded, regardless of any circumstances in which the violation occurred. The statement quoted above is confirmed in the rulings of administrative courts, which drew attention to the fact that "if it is ascertained that the road lane was occupied without permission, the road administrator must impose a monetary penalty independently of the motives, the personal and mate-

53 (3) of the Criminal Code (Act of 6 June 1997 – Criminal Code; Journal of Laws of 2017, item 2204, as amended), according to which the court takes into account the motivation and the manner of conduct of the perpetrator, the fact that the offence was committed together with a minor, the type and degree of the transgression against obligations imposed on the perpetrator, the type and dimension of any adverse consequences of the offence, the characteristics and personal conditions of the perpetrator, their way of life prior to committing the offence and their conduct thereafter, and particularly their efforts to redress the damage or to compensate the public perception of justice in another form and also consider the behaviour of the injured person. It is assumed in criminal law that "personal conditions" include: family, social, environmental and occupational situation; marital status; the number of children and dependents, the source of income, the housing situation, social relations, contacts with positive and negative environments; the position on the labour market; the opportunity to earn money; the level of education and professional qualifications (cf. V. Konarska-Wrzosek, *Komentarz do art. 53 KK*, (in:) R. Stefański (ed.), *Kodeks karny. Komentarz*, Legalis 2017). In the author's opinion, the interpretation of the expression "personal conditions" adopted in criminal law should be applied to administrative monetary penalties.

[16] *Ibidem*, p. 1242.

[17] M. Kaczocha, *Miarkowanie*…, pp. 48–49; Ł. Sadkowski, *Zmiany w kodeksie postępowania administracyjnego*, Warszawa 2017, p. 129.

[18] M. Kaczocha, *Z problematyki administracyjnych karpieniężnych bezwzględnie określonych*, „Przegląd Legislacyjny" 2014, No. 2, p. 60.

rial situation of the person who occupied the road lane and the person's awareness of fact that he or she should have a permission to occupy the road lane".[19] Moreover, "it is unnecessary to examine any other additional circumstances, because they do not affect the entity's liability or the range of the imposed administrative sanction".[20] The impossibility to apply article 189d C.A.P. to monetary penalty for the occupation of the road lane results indirectly form the distinction specified in article 189a C.A.P. – it is pointed out that the provisions of chapter IVa apply to cases related to "imposing" and "determining the level" the penalties. The statement that the construction of article 189a is only and exclusively a consequence of the alternate use of the indicated terms in practice (without distinguishing their denotations)[21] should be admitted as unjustified, because in accordance with section10 of the Principles of the Legislative Technique,[22] the use of these two terms is a sign of that the legislative body gives them different meanings. Moreover, this distinction was highlighted in the explanatory memorandum to the law draft amending the act – Code of the Administrative Procedure and some another acts, according to which "imposing" a penalty involves only the fact of punishing the party who breached the law, while "determining the level" of the penalty refers to specifying the range and amount of it within the limits provided in specific legal provisions.[23] Therefore, it is noted that the "determination" of penalties (according to the legislative body's aim) should be understood as a special type of "imposition" that can only be applied when mitigation is allowed.[24] The road administrators have no discretionary power to determine the amount of the pen-

[19] Judgment of the Supreme Administrative Court of 14 October 2016, file No. II GSK 773/15, Legalis No. 1576953.

[20] Judgment of the Supreme Administrative Court of 25 February 2015, file No. II GSK 2326/13, LEX No. 1657694.

[21] M. Jabłoński, *Komentarz do art. 189a KPA*, (in:) M. Wierzbowski, A. Wiktorowska (eds.), *Kodeks postępowania administracyjnego. Komentarz*, Legalis 2018. The author rightly noted that in practice, these terms are used interchangeably. For example, in article 40 (12) of the A.P.R., it is indicated that the administrative monetary penalty should be "determinated" by the authority, but in fact it should be "imposed". Therefore, such wording definitely should be evaluated negatively.

[22] Annex to the Regulation of the Prime Minister on "Principles of the Legislative Technique" of 20 July 2002 (Journal of Laws of 2016, item 283).

[23] Explanatory memorandum to law draft amending the act – Code of Administrative Procedure and some other acts of 28 December 2016, Sejm papers No. 1183, Sejm of the 8th term of office, p. 70.

[24] K. Ziemski, *Wymierzanie a nakładanie administracyjnych kar pieniężnych*, http://prawodlasamorzadu.pl/2017-09-28-wymierzanie-a-nakladanie-administracyjnych-kar-pienieznych (accessed: 9.08.2018). The author noticed accurately that an expanding interpretation of chapter IVaof the C.A.P. (and according to its assumption authorities can mitigate penalties both relatively and complete determinated) could cause far-reaching interference in the provisions of substantive law which refer to "fixed" penalties. Moreover, the author mentioned that it could turn out in practice that "if the amount of penalty is predefined, it would result in an imposition of its upper limit". In the author's opinion, this could be considered as inconsistent with the principle expressed in chapter IVa.

alty (in any case, it must be a multiple of the amount of the fee for the occupation of the road lane), so it only can be "imposed".

Despite the fact that introducing the general principles of determining administrative monetary penalties should be evaluated positively, it should be pointed out that the practical application of article 189a C.A.P. can be marginal and in many cases even impossible (e.g. in cases related to the occupation of the road lane). There are calls to strive to create a system of administrative penalties in which there would be no provisions permitting "fixed" and complete determined penalties.[25] The currently adopted model of objective liability for administrative delicts was invalidated by the Constitutional Tribunal.[26] The views expressed by the Tribunal in its judgement in the case SK 6/12 deserves particular attention (the case concerned the constitutional assessment of the penalty for cutting trees without appropriate permission based on the provisions of the Nature Conservation Act[27]). The Tribunal noticed that pursuant to the examined regulations, the public administration authority is absolutely obliged to impose the administrative monetary penalty if a party breaches the law (in the form of an administrative delict). In the Tribunal's opinion, this procedure is "mechanized" and deprived of the possibility to consider any factors that could subjectivize the responsibility of the party who breached the law. Moreover, the Tribunal pointed out that the current system of adjudicating about administrative responsibility does not make it possible to adjust the amount and severity of the penalty to a specific, individual factual situation and the specificity of the case or does not make it possible to consider the financial situation of the punished party. Therefore, in the Tribunal's opinion, the provisions of the Nature Conservation Act did not pass the proportionality test and could not be considered as constitutional. It should be noted that in the same judgment, the Tribunal drew attention to the fact that "the premises of applying administrative monetary penalties and determining their amounts should follow the principle of adequacy of state interference in the constitutionally protected sphere of the individual. The severity of administrative penalties should be adequate to the degree of violation of a legally protected good in the form of an administrative penalty (…). Moreover, such administrative sanctions should not be determined without consideration for the financial situation of the person who will be punished, because it is particularly important for the real degree of severity felt by the entity – a high amount of administrative monetary penalty can lead a person who, in particular, has a low income to financial degradation (…). Substantive law should give the competent authority the possibility to mitigate

[25] W. Sawczyn, (in:) R. Hauser, Z. Niewiadomski, A. Wróbel (eds.), *System Prawa Administracyjnego*, Vol. 9, *Prawo procesowe administracyjne*, Warszawa 2017, p. 415.

[26] Cf. judgment of the Constitutional Tribunal of 14 October 2009, file No. Kp 5/09, LEX No. 51989; judgment of the Constitutional Tribunal of 1 March 1994, file No. U 7/93, Legalis No. 10199; judgment of Constitutional Tribunal of 1 July 2014, file No. SK 6/12, Legalis No. 981748.

[27] Act of 14 April 2004 on Nature Conservation (Journal of Laws of 2018, item 142, as amended).

the degree of the monetary penalty or to abstain from imposing the penalty (…). At the same time, the Tribunal emphasizes that it does not contest the whole mechanism of nature protection and afforestation, which consists of: the obligation – as a rule – to obtain the appropriate permission to fell a tree or cut a bush, connected – in certain situations – with the obligation to pay an administrative fee (in a rational amount), and the administrative penalty for non-compliance with these obligations. Neither does the Tribunal challenge the currently adopted concept of the administrative penalty as an administrative sanction for unlawful demeanour which breaches the administrative obligation, provided that the individual circumstances of a particular case are be take into account in the punishment procedure". In view of the whole presented considerations and comments, it might seem that provisions which limit the possibility of mitigating penalties to only selected situations should be evaluated negatively. They might be considered as aimed at differentiating the situation of various punished entities. Due to this, the situation in which in some cases it is possible to reduce the level of the administrative penalty after taking into account the premises which subjectivize the administrative responsibility, and in other cases the entities have no real chance to extenuate the monetary penalty or to "escape" from responsibility, should be considered as unjustified.

If we refer the above remarks and reflections to the Act on Public Roads, it seems that the admission of mitigation of the administrative monetary penalty for the occupation of the road lane without permission could be very important for parties that are natural persons. The administrative monetary penalty indicated in article 40 (12) A.P.R. is undoubtedly onerous and severe. It can often reach the amount of tens of thousands zlotys; combined with the inability to take into consideration, for example, the financial situation of the punished person, they might bring him or her to financial ruin. It should be noted that the imposition on natural persons of administrative monetary penalties which cannot be mitigated or flexibly determined can negatively affect the process of building the citizens' trust in public authorities. With regard to the administrative penalty provided for in article 40 (12) A.P.R., this may result in accusations against the public authorities and road administrators that they supposedly seek to increase their income at the expense of the interests of the punished entities. That is why changes are necessary with regard to the administrative monetary penalty for the occupation of the road lane without permission and other administrative penalties which are "fixed". It should be allowed to take into consideration the premises that render it possible to determine the penalty in each situation in which the competent authority has to impose an administrative monetary penalty on the entity responsible for breaching the law.

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THE ADMISSIBILITY OF MITIGATION OF THE ADMINISTRATIVE MONETARY PENALTY FOR THE OCCUPATION OF THE ROAD LANE WITHOUT PERMISSION IN THE LIGHT OF ARTICLE 189D OF THE CODE OF ADMINISTRATIVE PROCEDURE

Summary

It should be noted that not every monetary penalty can be mitigated pursuant to article 189d of the Code of Administrative Procedure – if special provisions include premises which should be followed by the authority in the course of imposing a penalty, then it is impossible to make auxiliary use of the guidelines expressed in the Code (following the principle *lex specialis derogat legi generali*). Pursuant to article 40 (12)

of the Act on Public Roads, the occupation of the road lane for non-road purposes without appropriate permission is punishable with an administrative monetary penalty. In this article, the authors discuss the admissibility of mitigation of the administrative monetary penalty for the occupation of the road lane in the light of article 189d of the Code of Administrative Procedure.

KEYWORDS

administrative monetary penalty, mitigation, Code of Administrative Procedure, public roads, Act on Public Roads

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REGULATORY SIMPLIFICATIONS FOR FOREIGN INVESTORS IN CHINA (SHANGHAI) PILOT FREE TRADE ZONE

1. GENERAL ISSUES CONCERNING TRADE BETWEEN THE PEOPLE'S REPUBLIC OF CHINA AND THE REPUBLIC OF POLAND

The statistics of the trade balance between the Republic of Poland and the People's Republic of China are all but favourable to the former. The almost ceaselessly increasing[1] volume of trade is not accompanied by any evident growth of exports to the Middle Kingdom.[2] Consequently, it is based solely on the growing import of products and services to Poland. The natural result of this trend is a rising trade deficit.[3] The continual increase of imports from China is rather obvious from the economic point of view, and the lack of a parallel growth in exports from Poland has remained a challenge for the successive Polish governments as well as for Polish businesses.[4]

The process of China opening to the world was initiated by Deng Xiaoping in 1979. It concerned both trade and foreign investment. Step by step, China underwent reforms aimed at transforming the closed and centrally planned economy into an open and more free-market economy. This transition can be perfectly

[1] The volume of trade dropped in 2015 in comparison to 2014 by 4.2%, as follows from the reports of the Polish Central Statistical Office (GUS), *Rocznik Statystyczny Handlu Zagranicznego 2015*.

[2] The value of exports to China in the years 2013–2016 amounted to approximately 2 billion USD.

[3] Conclusions based on the data presented by the Polish Central Statistical Office in *Rocznik Statystyczny Handlu Zagranicznego 2013*, *2014*, *2015* and *2016*.

[4] The existing deficit in the Sino-Polish trade relations was mentioned e.g. by Deputy Prime Minister Mateusz Morawiecki during the visit of General Secretary Xi Jinping. More on the subject in the article *Polsko-chińskie porozumienia gospodarcze*, available at: https://www.mr.gov.pl/strony/aktualnosci/polsko-chinskie-porozumienia-gospodarcze/ (accessed: 1.12.2018).

illustrated by the following statement made by H. L. Chan: 'it was more that the door [to China] was no longer closed rather than it being fully open'.[5]

Even though the People's Republic of China joined the World Trade Organisation in 2001, the barriers in access to the market continue to be perceived as the central reason for the poor performance of European exporters.[6] The main entry barriers may be divided into information-related, legal and financial ones.[7] The present article covers the issue of legal barriers, with daily press describing them often as related to administrative provisions, certification, establishment of partnerships or companies, hiring employees and dispute resolution. Rankings which assess the ease of doing business in various economies confirm that administrative barriers present in China render it considerably difficult to run a business.[8] Difficulties are encountered particularly by foreign investors, the so called Foreign-Invested Entities, which are subject to additional restrictions.

2. LEGAL REGULATIONS APPLICABLE TO FOREIGN BUSINESSES

The Chinese legal system is characterised by a duality with respect to commercial partnerships and companies. The entities whose shares are held solely by citizens of the People's Republic of China are treated differently than those owned or co-owned by foreigners. The latter are jointly referred to as Foreign-Invested Entities (FIE).[9] The principal difference concerns the admissibility of taking up business activity in a particular sector on the territory of the PRC, which is determined by the Catalogue of Industries for Guiding Foreign Investment.[10] This legal act is essentially equivalent to a Polish regulation. It consists of three parts. The first one lists sectors in which entrepreneurs are encouraged to make investment (Catalogue of Encouraged Industries for Foreign Investment). Parts two and three are jointly referred to as the negative list, as they enumerate the areas which

[5] H. L. Chan, (in:) M. J. Foster, Ch. S. Tseng, *China FDI Booms but problems persist for FIEs*, "Journal of International Business and Economy" 2017, issue 18(1), p. 71.

[6] T. Sporek, *Analiza stosunków handlowych pomiędzy Chińską Republiką Ludową a Unią Europejską*, „Studia Ekonomiczne" 2012, issue 123, p. 24.

[7] M. Piekut, *Wirtualny gigant: rynek e-commerce w Chinach*, PAIiIZ, Warszawa 2016, p. 5.

[8] China is ranked 78th in the World Bank Group's report *Doing Business 2018*. The report is available at: http://www.doingbusiness.org/~/media/WBG/DoingBusiness/Documents/Annual-Reports/English/DB2018-Full-Report.pdf (accessed: 1.12.2018).

[9] M. J. Foster, Ch. S. Tseng, *China FDI Booms but problems persist for FIEs*, "Journal of International Business and Economy" 2017, issue 18(1), p. 71.

[10] Q. Wang, *The Management of Foreign Private Equity Funds Involves Foreign Investment and Foreign Exchange in the China (Shanghai) Pilot Free Trade Zone*, "The Chinese Economy" 2017, issue 50(4), p. 249.

feature investment constraints (part one – Catalogue of Restricted Industries for Foreign Investment)[11] or in which foreign business activity is completely forbidden (part three – Catalogue of Prohibited Industries for Foreign Investment).[12] If the partnership's or company's objects are not included in the negative list, they are deemed allowed.[13] The catalogue is updated on average every two years and the negative list is systematically shortened.[14] As from 1 October 2016, establishing a partnership or a company whose objects are not included in the negative list does not require the permission of the Chinese Ministry of Commerce (MOFCOM) any more and the entire procedure is completed on the local level (with Administration for Industry and Commerce acting as the competent authority).

3. ESTABLISHING A COMPANY IN CHINA

Even when the planned activity is not listed in the negative catalogue, the investor may not freely take up business in the Middle Kingdom. The Chinese regulations on companies essentially provide for two types of such entities, with the first one being equivalent to the Polish private limited liability company (spółka z ograniczoną odpowiedzialnością) and the second corresponding to the Polish public limited liability company (spółka akcyjna).[15] However, foreign investors may neither establish such companies nor buy their shares. Special types of companies are dedicated to foreign entities instead, with the Chinese provisions applying to them only *mutatis mutandis*. The main types of companies available to foreign citizens are: Wholly Foreign Owned Enterprise (WFOE), Sino-Foreign Equity Joint Venture (EJV) and Sino-Foreign Cooperative Joint Venture (CJV).[16]

[11] These constraints consist mainly in the requirement to obtain a relevant permission and to undergo additional verification. Before that, numerous ownership restrictions were in place, as well, for instance the company was required to have a Chinese majority shareholder.

[12] *Catalogue of Industries for Guiding Foreign Investment (Revision 2017)* promulgated on 28 June 2017, Promulgation Number: No. 4, Decree of the National Development and Reform Commission and the Ministry of Commerce of the People's Republic of China, Promulgation Department: National Development and Reform Commission, Ministry of Commerce of the People's Republic of China, available at: http://www.fdi.gov.cn/1800000121_39_4851_0_7.html (accessed: 1.12.2018).

[13] Q. Wang, *The Management of Foreign Private Equity...*, p. 250.

[14] Currently, the list of encouraged industries consists of 348 items, the list of restricted sectors – of only 35, and the catalogue of prohibited industries – of 28.

[15] Company Law of the People's Republic of China (Revised in 2013) promulgated on 28 December 2013 by the Standing Committee of the National People's Congress.

[16] Regulated by the Law of the People's Republic of China on Wholly Foreign-Owned Enterprises, the Law of the People's Republic of China on Sino-Foreign Equity Joint Venture and the Law of the People's Republic of China on Sino-Foreign Cooperative Joint Venture, respectively.

Each of them is subject to regulation by a separate act.[17] Currently, the most popular form is the WFOE, as it allows foreign citizens to retain full ownership and, consequently, control over the company. Furthermore, Wholly Foreign Owned Enterprises can be subdivided according to the type of business activity into those which: offer services, engage in trade or deal with production.[18] Depending on which type of the WFOE an investor wishes to register, they need to meet a different set of requirements, for instance with regard to real property, in which the entrepreneur has to have a title prior to establishing the company.

Since foreign investors are subject to other provisions than Chinese entities, the admissible forms of running business are less flexible and involve certain flaws. These include: restrictions with regard to hiring staff, complex administrative procedures related to obtaining additional permits as well as problems with the protection of intellectual property rights and with asserting claims. A further problem are the disparities in the application of law in various provinces and by various authorities.[19]

The Chinese authorities intended to introduce equal forms of running business for Chinese and foreign entities. In January 2015, the Ministry of Commerce published draft Foreign Investment Law of the People's Republic of China,[20] which was supposed to abolish the special types of companies dedicated to foreign entrepreneurs and to allow them to establish companies in the forms so far dedicated to Chinese entities, plus to buy shares in the already existing Chinese companies.[21] The main objective of the legislation was to introduce a complex regulation of foreign business activity in China. However, the draft was not enacted for the following two years. In the meantime, a law[22] was passed which liberalised the procedure of establishing foreign-owned companies and which included

[17] The Chinese legislation on foreign businesses is published online in English on the government's website devoted to foreign investment, available at: http://www.fdi.gov.cn (accessed: 1.12.2018). Each amendment is published separately and no consolidated texts can be viewed on the website, which is fairly inconvenient. Consolidated texts are published in databases operated by other entities, for instance the database run by Peking University available at: http://en.pkulaw.cn (accessed: 1.12.2018). The access to those databases, however, is paid.

[18] Usa Ibp Usa, *China Company Laws and Regulations Handbook*, International Business Publications, 2009, p. 58.

[19] M. J. Foster, Ch. S. Tseng, *China FDI Booms…*, p. 74.

[20] EY, *Detailed interpretation of "The Foreign Investment Law of the People's Republic of China (Draft for Comments)"*, available at: http://www.ey.com/Publication/vwLUAssets/EY-the-foreign-investment-law-of-peoples-republic-china/$FILE/EY-the-foreign-investment-law-of-peoples-republic-china.pdf (accessed: 1.12.2017).

[21] I. Duncan, *Development of China's Foreign Investment Law*, "Quarterly Journal of Chinese Studies" 2016, issue 4(4), p. 3.

[22] Decision of the Standing Committee of the National People's Congress on Amending Four Laws Including the Law of the People's Republic of China on Foreign-funded Enterprises, promulgated on 3 September, Presidential Decree of the People's Republic of China No. 51, Promulgation Department: The National People's Congress of the People's Republic of China.

some of the provisions from the draft Foreign Investment Law of the People's Republic of China. The fact that the legislative process was never completed and that another law was passed which included some of the provisions from the draft suggests that the concept of the Foreign Investment Law had lost the support of the Chinese government. On the other hand, the spokesperson of the Ministry of Commerce said in a press conference on 3 November 2017 that the Ministry continued to work on the draft and intended to accelerate the related works.[23]

4. PROVISIONS ON B2B AND CROSS-BORDER TRADE

The restrictions mentioned above concern doing business on the Chinese market through an entity registered in China. However, it is possible to trade[24] on the Chinese market without establishing a company in the PRC. This applies to two types of commercial transactions. The first one is B2B, that is when a foreign investor sells a product or a service which meets all the requirements necessary to gain access to the market, including relevant certificates, to a business entity which is registered in China and has an import permit.

The second type of transaction, called cross-border e-commerce (CBEC), involves the sale of products by a foreign business directly to the Chinese consumer[25] via a dedicated Chinese online platform. This is possible subject to a number of requirements. The central one is for the product to be included in the Cross-border E-commerce Retail Import Commodity List, which enumerates products that may be sold in this manner.[26] It is key to sell the product via a Chinese e-commerce platform. Most platforms do not offer solutions which enable foreign businesses to engage in this type of trade, and the few that do are

[23] S. Jing, *Foreign investment law enactment progresses*, China Daily, available at: http://www.chinadaily.com.cn/business/2017-11/03/content_34053394.htm (accessed: 1.12.2017).

[24] This does not apply to all commodities. Certain products do not require certificates, which are available solely to entities registered in the People's Republic of China.

[25] Some products may be sold in the form of 'bonded imports', which means that the commodity is first transported to China, where it is placed in a warehouse located in the bonded area and subsequently sold via a Chinese platform to the Chinese consumer.

[26] Cross-border E-commerce Retail Import Commodity List, issued on 6 April 2016 jointly by the Ministry of Finance, the National Development and Reform Commission, the Ministry of Industry and Information Technology, the Ministry of Agriculture, the Ministry of Commerce, the General Administration of Customs, the State Administration of Taxation, the General Administration of Quality Supervision, Inspection and Quarantine, China Food and Drug Administration, the Endangered Species Import & Export Management Office and Cryptography Administration Office, available at: https://2016.export.gov/china/build/groups/public/@eg_cn/documents/webcontent/eg_cn_100092.pdf (accessed: 1.12.2017).

several times more expensive. The majority of e-commerce platforms require that the company be registered in the People's Republic of China.[27]

5. CONCLUSION

Regardless whether a foreign investor intends to carry out commercial activity in the People's Republic of China in a manner which requires it to register a company there or whether its business model involves selling commodities to an entity registered in China or directly to the consumers in the form of cross-border e-commerce, Shanghai Free Trade Zone is supposed to facilitate doing business by such entrepreneurs.

6. SHANGHAI FREE TRADE ZONE

China (Shanghai) Pilot Free Trade Zone – which is the full name of the Shanghai Free Trade Zone (SHFTZ) – was launched on 29 September 2013. The free trade area initially occupied a territory of 29 square kilometres (Shanghai FTZ Bonded Area). It expanded in 2014 to 120 square kilometres, including the areas of Lujiazui Financial Area, Jinqiao Export Processing Zone and Zhangjiang High Tech Park.[28]

From the legal point of view, the SHFTZ is an area subject to other regulations than the remaining territory of the People's Republic of China. This solution is in line with Article 89 of the Chinese constitution, pursuant to which the State Council of the People's Republic of China is competent to section off a part of a province and to introduce administrative regulations in this zone, as well as with Article 9 of the Legislation Law (an act on law-making), according to which the Standing Committee may authorise the State Council to pass provisions that will close loopholes in legislation.[29] The operation of the Shanghai FTZ is governed by an act of local law passed by the city authorities in 2014 under the name Regulations of China (Shanghai) Pilot Free Trade Zone.[30]

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[27] More on the subject in M. Piekut, *Wirtualny gigant...*

[28] China (Shanghai) Pilot Free Trade Zone (the official website of the Shanghai Free Trade Zone), http://en.china-shftz.gov.cn/About-FTZ/Introduction/ (accessed: 1.12.2018).

[29] D. Peng, X. Fei, *China's Free Trade Zones: Regulatory Innovation*, *Legal Assessment and Economic Implication*, "The Chinese Economy" 2017, issue 50, p. 240.

[30] Regulations of China (Shanghai) Pilot Free Trade Zone, available at: http://en.china-shftz.gov.cn/Government-affairs/Laws/General/319.shtml (accessed: 1.12.2018).

From the perspective of economic sciences, free trade areas are a category of special economic zones, that is they are areas in which business and trade laws are different from those in the remaining part of the relevant country. This concerns particularly provisions related to investment climate and trade, including customs, taxes and administrative provisions, which in principle are supposed to be more liberal and efficient than those which are in effect elsewhere in the country.[31]

Moreover, Shanghai FTZ has a socio-political significance for the Middle Kingdom, which is related to the manner in which economic reforms have been implemented since the times of Deng Xiaoping: individual solutions are first tested in a limited area, and if they meet the expectations, they are gradually introduced elsewhere. This was the case in this event, as well, as three further free trade zones were founded in 2015[32] and the area of the Shanghai FTZ expanded fourfold. Currently, eleven free trade areas exist in China. Furthermore, the negative list which has been mentioned with reference to the registration of foreign entities and which was introduced in 2017 was modelled on such a list developed for SHFTZ.[33] Prior to that, each branch of business was subject to the consent of MOFCOM.

To sum up, the fact that the solutions adopted in Shanghai were copied in other areas firstly reveals that they were approved by the Chinese authorities and secondly indicates the course of the PRC's policy with regard to foreign investors.[34]

Simplifications in Shanghai FTZ

The regulatory simplifications available to Chinese and foreign entities in Shanghai FTZ concern particularly: the procedure of establishing a company, financial operations in the renminbi, dispute resolution, protection of intellectual property rights and taxation. These are additional functions of the FTZ, with the principal role being to provide an area where products may be manufactured, processed, imported and stored and not be subject to customs procedures as long as they stay within the zone. That is why the zone was initially called Shanghai FTZ Bonded Area and constituted a place where a foreign investor could supply and store commodities on Chinese territory without fulfilling customs obligations until it sold the product abroad. Businesses are not always exempted from sanitary controls and quality checks carried out by a special authority established

[31] T. Farole, *Special Economic Zones in Africa: Comparing Performance and Learning from Global Experiences*, World Bank 2011, p. 23, (in:) A. Klimek, *Shanghai Free Trade Zone: Expectations and reality*, „Prace Naukowe Uniwersytetu Ekonomicznego we Wrocławiu" 2015, No. 413, p. 33.

[32] D. Peng, X. Fei, *China's Free Trade Zones...*, p. 239.

[33] Q. Wang, *The Management of Foreign Private Equity...*, p. 250.

[34] D. Yao, J. Whalley, *The China (Shanghai) Pilot Free Trade Zone: Background*, *Developments and Preliminary Assessment of Initial Impacts*, "The World Economy" 2016, p. 2.

within the zone – the Shanghai Entry-Exit Inspection and Quarantine Bureau. Essentially, however, the inspection and customs procedures have been considerably simplified.[35]

7. REGISTERING BUSINESS ACTIVITY

The main types of companies which foreign entities may establish in Shanghai FTZ are identical with the forms available in the People's Republic of China that have been discussed above. Upon the foundation of the zone in 2013, the Standing Committee authorised the State Council to temporarily adapt the regulations on the WFOE, EJV and CJV in terms of registration.[36] At first, the exceptions were planned to apply for three years. Then, they were prolonged and extended to other free trade areas.[37]

As opposed to the remaining part of the People's Republic of China, the Catalogue for the Guidance of Foreign Investment Industries does not apply in Shanghai FTZ. Instead, all free trade areas have their completely independent negative list.[38] Similarly as the general Chinese catalogue, also this list is updated almost annually. It is characterised by a different structure, as it enumerates industries, individual lines of business in each industry and the constraints applicable to such lines of business in the FTZ. It is considerably shorter (covering only 15 sectors)[39] and less restrictive.[40] If a particular line of business is not listed in the negative catalogue, it may be freely carried out following registration and the company is supposed to be treated equally with Chinese entities. In addition, it means that

[35] *Ibidem*, p. 10.

[36] D. Peng, X. Fei, *China's Free Trade Zones*..., p. 240.

[37] Circular of the State Council on Promoting the Replicable Experience from the Pilot Reform of the China (Shanghai) Pilot Free Trade Zone available in Chinese at: http://www.gov.cn/zhengce/content/2015-01/29/content_9437.htm (accessed: 1.12.2018).

[38] The Catalogue for the Guidance of Foreign Investment Industries was a so called positive list until 2017, that is only the types of business it enumerated were not subject to the requirement of a permission at the central level. Currently, the catalogue has a negative character, as well, similarly as the negative list in effect in Shanghai FTZ. Still, the Chinese list still includes the category of encouraged industries, which indicates which lines of business are especially needed from the perspective of the Chinese economy. Shanghai FTZ's negative catalogue does not include such a section.

[39] Example sectors are agriculture, forestry, animal husbandry or fishery. The relevant lines of business subject to restrictions are fishing and the production of seeds. In the case of fishing, it is for instance the requirement to obtain a fishing permit, which is granted by the Chinese government to individual ships.

[40] The 2017 negative list concerning the activity of foreign businesses in the free trade zones, available in Chinese at: http://www.gov.cn/zhengce/content/2017-06/16/content_5202973.htm (accessed: 1.12.2018).

launching a business is not contingent any more on a discretionary administrative decision of central administration (MOFCOM), which has been replaced with the mandatory act.[41]

8. TRANSACTIONS IN THE RENMINBI

The official currency of the People's Republic of China is the renminbi (abbreviated as CNY or RMB). Otherwise than the majority of currencies, exchange of the renminbi is subject to considerable restrictions, which are only gradually being lifted.[42] The People's Bank of China,[43] which is the central bank of the PRC,[44] issued on 21 February 2014 detailed rules on settling transactions with foreign entities in Shanghai FTZ. They entail simplifications in the form of the possibility to transfer the renminbi directly from a foreign entity to a Chinese one. In addition, persons employed in SHFTZ may open an account which renders it possible to make transactions with foreigners in the renminbi. This is not allowed outside of the zone: international transactions use the United States dollar, which is then converted into the renminbi.[45]

9. DISPUTE RESOLUTION IN SHANGHAI FTZ

Disputes are an inevitable element of carrying out business activity, particularly if it is international. Shanghai FTZ was founded in order to attract foreign investors to carry out business in the People's Republic of China.[46] Foreign businesses attach great weight to the possibility to assert their claims efficiently and to fair dispute resolution. They often fear that the Chinese system of justice might be susceptible to political influence. Therefore, in order to ensure efficiency and fairness in dispute settlement, a special court competent for the zone was

[41] Q. Wang, *The Management of Foreign Private Equity...*, pp. 252–253.

[42] Transactions in RMB are subject to the Regulations on Foreign Exchange System of the People's Republic of China, available at: http://www.pbc.gov.cn/english/130733/2830262/index.html (accessed: 1.12.2018).

[43] People's Bank of China (official website in Chinese and in English) available at: http://www.pbc.gov.cn/ (accessed: 1.12.2018).

[44] Law of the People's Republic of China on The People's Bank of China, available at: http://www.pbc.gov.cn/english/130733/2941519/2015082610501049304.pdf (accessed: 1.12.2018).

[45] D. Yao, J. Whalley, *The China (Shanghai) Pilot…*, p. 11.

[46] B. Wang, *Arbitration Within the China (Shanghai) Pilot Free Trade Zone*, "The Chinese Economy" 2017, issue 50(4), p. 274.

established under the name Free Trade Zone Court of Shanghai Pudong New Area People's Court. Yet the number of suits and the preferences of the investors created the need to found a court of arbitration, as well. China (Shanghai) Pilot Free Trade Zone Arbitration Court was launched on 1 May 2014 under the auspices of Shanghai International Arbitration Commission (SHIAC).[47] Thus, foreign and Chinese businesses can choose whether they wish their disputes to be settled in the course of court or arbitration proceedings.[48]

10. PROTECTION OF INTELLECTURAL PROPERTY RIGHTS

The greatest worry of foreign entities that carry out or intend to carry out business activity in China are infringements of intellectual property rights. The Chinese government has taken numerous actions recently in order to ensure a fair standard of protection of intellectual property. One of the measures was to establish within the structures of Shanghai Pudong New Area People's Court a special court competent solely for matters of intellectual property, which is why it is unofficially referred to as 'the IP Court'. It has adjudicated upon 420 cases since its establishment, which took place on 9 April 2015.[49] The court itself is not directly related to the zone, but the choice of its location seems to have been intentional.

11. HIRING STAFF

According to the guidelines of the State Council of the PRC with regard to Shanghai FTZ,[50] matters related to employment regulations fall within the competence of the authority governing the zone. However, no solutions that would essentially modify the generally applicable labour law have been adopted.[51] Despite the different character of employment in Shanghai FTZ, which consists mainly in varying durations of employment contracts, the employment

[47] *Ibidem*, p. 274.

[48] Both parties to the dispute have to consent to arbitration.

[49] L. Shang, *Intellectual Property Protection in China (Shanghai) Pilot Free Trade Zone-Judicial and Administrative Practice in Trademark Infringement of OEM*, "The Chinese Economy" 2017, issue 50(4), p. 259.

[50] Overall Plan for the China (Shanghai) Pilot Free Trade Zone.

[51] Administrative Regulations on the Employment of Foreigners in China, People's Republic of China Labor Law, People's Republic of China Labor Contract Law, People's Republic of China Law on Mediation and Arbitration of Labor Disputes, People's Republic of China Labor Promotion Law.

of numerous foreigners and flexible working hours, no detailed provisions that would render hiring staff easier for foreign and Chinese entities in the zone have been introduced, although it is possible to do so. This lack of initiative has been criticised by the representatives of legal doctrine, particularly on account of conflicting legislation, which falls behind the world standards in labour law.[52]

12. CONCLUSION

China (Shanghai) Pilot Free Trade Zone is an interesting example of introducing reforms by way of testing them first within a specific area for a particular period. This method leads to certain 'innovation in regulation',[53] which thanks to its experimental character is verified in practice and then copied in successive areas until it becomes generally applicable. Even though China joined the WTO and has become gradually more open ever since 1978, it remains a country with a great number of barriers to doing business, the majority of which concern solely foreign investors. Nevertheless, it ought to be noted that the course of gradual liberalisation is maintained, which sets the solutions adopted in Shanghai FTZ in the right context.

The current experience of almost four years since the establishment of the Pilot Free Trade Zone reveals that: 1) the solutions which work are subsequently adopted in the entire country (example being the negative list); 2) solutions applicable in Shanghai FTZ are gradually expanded to cover further free trade areas. It is fairly obvious that the legal regime in those zones is less restrictive with regard to foreign entities, which considerably facilitates foreign investments in the People's Republic of China. That said, it ought to be noted that despite numerous simplifications, the investment climate is far from perfect and that entering the Chinese market requires the services of local lawyers even within free trade areas.

The stipulations that need amendment most and first of all are those which concern hiring employees, and in particular aliens, in foreign-invested entities. Next, it would be beneficial to abolish the numerous additional permits[54] which hamper economic activity of both foreign and local entities and which apply in Shanghai FTZ to the same extent as in the rest of the country.

[52] B. Wang, *Arbitration Within the China…*, pp. 267–269.

[53] D. Peng, X. Fei, *China's Free Trade Zones…*, p. 239.

[54] Permit to run a shop, import permit, export permit, permit to create online content etc.

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Report 'Doing Business 2018'

REGULATORY SIMPLIFICATIONS FOR FOREIGN INVESTORS IN CHINA (SHANGHAI) PILOT FREE TRADE ZONE

Summary

The present article deals with the legal regime in Shanghai Free Trade Zone in the context of business activity taken up by foreign (Polish) entities on the territory of the People's Republic of China. First of all, the author discusses the general problems in international exchange between Poland and the PRC as well as the chief barriers in access to the Chinese market. The following section of the article is devoted to the general legal provisions that apply to foreign businesses in the Middle Kingdom. Part three discusses preliminary issues related to Shanghai Free Trade Zone with regard to partnerships and companies established by foreign entities. The final section concerns the legislative simplifications in the Free Trade Zone as compared with the general regulations which apply to foreign (Polish) businesses in the PRC. The conclusion features an evaluation of the simplifications and their attractiveness for Polish businesses.

KEYWORDS

China, legal and administrative barriers to trade, Free Trade Zone, foreign businesses in China

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Chiny, prawne i administracyjne bariery w handlu, Strefa Wolnego Handlu, biznes obcy w Chinach

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THE NUMERUS CLAUSUS ISSUE IN PROPERTY LAW – EUROPEAN PRIVATE LAW AND THE POLISH PERSPECTIVE

1. INTRODUCTION

The *numerus clausus* is a fundamental principle of property law in Europe. It presupposes the existence of a closed catalogue of property rights. Consequently, it is impossible to freely create new property rights which are not recognized by statute. In this way, the state consciously limits the activity of the parties in this regard, indicating the socially and legally acceptable types of property rights they can use.[1]

It can be easily observed that such a solution, which is commonly accepted in virtually every modern European legislation (including Poland),[2] undermines the parties' autonomy – after all, the actors on the market are to a great extent deprived of the freedom to customize the content of a given property right, and their choice is restricted to a closed 'menu' approved by the authorities. This freedom, in turn, is after all a hallmark of the law of obligations, the cornerstone of modern, globalized market economy.[3]

If that is so, is the centuries-old principle of *numerus clausus* justified nowadays? With the advancing unification of private law in Europe,[4] a closer look

[1] See B. Akkermans, *The Numerus Clausus of Property Rights*, (in:) M. Graziadei, L. Smith (eds.) *Comparative Property Law. Global Perspectives*, Cheltenham–Northampton 2017, pp. 100–120; *idem*, *The Principle of Numerus Clausus in European Property Law*, Antwerp–Oxford 2008, s. 6 et seq.; S. van Erp, *A Numerus Quasi-Clausus of Property Rights as a Constitutive Element of a Future European Property Law*, "Electronic Journal of Comparative Law" 2003, 7/2.

[2] P. Machnikowski, *Ogólne wiadomości o prawie rzeczowym*, (in:) E. Gniewek (ed.), *System Prawa Prywatnego. Tom 3. Prawo rzeczowe*, Warszawa 2013; E. Drozd, *„Numerus clausus" praw rzeczowych*, (in:) S. Sołtysiński (ed.), *Problemy kodyfikacji prawa cywilnego (studia i rozprawy). Księga pamiątkowa ku czci profesora Zbigniewa Radwańskiego*, Poznań 1990, pp. 257–269.

[3] S. van Erp, *A Numerus…*

[4] B. Akkermans, *The Principle…*, p. 7 et seq.; S. van Erp, *European Property Law: A Methodology for the Future*, (in:) R. Schulze, H. Schulze-Nölke (eds.), *European Private Law – Current Status and Perspectives*, Munich 2011, p. 227 et seq.

at this issue seems to be necessary. However, it is difficult to arrive at one right solution due to the dissimilarities between various European legislations. A recipe for overcoming these difficulties might be, in my opinion, to take an insightful look at the development and explanation of this principle over the centuries and now. In this broad context, it would be worthwhile to investigate the Polish legal solutions more precisely. It will give us a fresh approach to the problem of the *numerus clausus* in Polish property law, which will have to, sooner or later, participate in the process of law unification on the European continent.

The present article discusses the dogmatic basis of the concept of *numerus clausus* (II) and outlines its history and economic reasoning behind it (III). Then, the main models of the *numerus clausus* in European legal orders (IV) as well as the functioning of this principle in Polish property law (V) are presented. Subsequently, the strengths and weaknesses of the *numerus clausus* are examined (VI). This provides us with general conclusions concerning the harmonization of this area of private law (VII).

2. THE CONCENPT OF *NUMERUS CLAUSUS*

At the very beginning, it would be useful to make some remarks on the differences between property rights and other subjective rights, especially obligations. It is obvious for the legal doctrine that the relation of a right with a material object cannot serve as a defining feature because other rights can relate to a thing, as well.[5]

Generally, property rights can be distinguished from other rights according to the criterion of 'absoluteness', i.e. their enforceability against third parties (*erga omnes*).[6] Third persons take the role of a passive audience which is obliged not to do anything that could infringe these rights.[7] Naturally, 'the audience' has to be properly informed about the existence of such extremely effective rights – in the case of immovable property, this purpose is served by registration systems (such as land and mortgage registers in Poland). When it comes to movable property, it is presumed that the possessor is the owner.[8]

[5] E. Drozd, *„Numerus clausus" praw rzeczowych*..., p. 259. It is worth noting that property rights usually refer to material objects. Nevertheless, e.g. in Polish law, a right can be the object of a usufruct or a pledge, as well.

[6] B. Akkermans, *The Numerus Clausus*..., p. 102. This enforceability against third parties makes these rights much stronger than personal rights, which are effective only between the parties to a legal relationship.

[7] M. Pyziak-Szafnicka, *Prawo podmiotowe*, (in:) M. Safjan (ed.), *System Prawa Prywatnego. Tom 1. Prawo cywilne – część ogólna*, Warszawa 2012.

[8] S. van Erp, *A Numerus*...

The effectiveness of an absolute right can make itself manifest e.g. against a purchaser who acquires a thing from a person without the right to it or in the course of enforcement proceedings. A classic example of this specific quality is the enhanced protection of property rights against persons who prevent or interfere with the authorized use of a thing. However, this absoluteness is not a constitutive quality,[9] but rather a secondary one. Therefore, it should be stated that property rights are distinguished from other rights according to not conceptual, but normative criteria. A property right is only a right which is expressly recognized as such by the law (an act, a code, a statute…).[10]

Hence, the *numerus clausus* in property law is a catalogue that is closed due to the decision of the legislative body and not necessarily because of a requirement for the right to have specific qualities.[11] Nevertheless, the closed character of this catalogue is not definitive, made once and for all – it can be modified and expanded by the legislature. It is the key point in understanding the *numerus clausus*, for it expresses the principle that it is impossible to impose a duty upon third persons otherwise than by statute. For that reason, the parties' autonomy to modify the content of a property right is limited. On the other hand, such a restriction is not accepted in contract law.[12]

To sum up, the *numerus clausus* of property rights indicates that a mandatory closed catalogue of property rights exists in a given legal system; the content (method of creation, conveyance, expiration) of a right falling within this closed list is strictly specified and cannot be changed by the parties.[13]

3. HISTORY AND SOCIO-ECONOMIC CONTEXT

As it was stressed at the beginning, the concept of limiting the parties' freedom to create new property rights has a centuries-old tradition.[14] Long before the idea of property rights appeared in classical Roman law, a limited number

[9] Situations in which rights traditionally considered 'relative' turn out to be more effective than property rights are described in detail by E. Drozd, „*Numerus clausus" praw rzeczowych*..., pp. 260–263.

[10] E. Drozd, „*Numerus clausus" praw rzeczowych*..., pp. 263–264.

[11] It is worth mentioning, for example, the issue of the 'extended effectiveness of relative rights' – e.g. article 670 of the Polish Civil Code: 'The provisions on the protection of ownership shall apply accordingly to the protection of the lessee's rights to use premises'. Such rights obtain protection typical of property rights, but do not it automatically become property rights – the lease keeps its original, obligative character.

[12] P. Machnikowski, *Ogólne wiadomości o prawie rzeczowym*...

[13] S. van Erp, *A Numerus*...

[14] B. Akkermans, *The Numerus Clausus*..., pp. 101–102; *idem*, *The Principle*..., pp. 19–82; S. van Erp, *A Numerus*...

of proprietary actions existed, i.e. the praetor would give protection to a property relation only in a limited number of situations. Precisely this system of actions can be considered as the first manifestation of the *numerus clausus*.[15] However, a clear distinction between personal and property rights was necessary to establish the principle of *numerus clausus*. The beginnings of the search for this distinction date back to the times of the Glossators; then it was perfected throughout the *ius commune*. Nevertheless, the *numerus clausus* of property rights was not recognized normatively until the Pandectists, who adopted the idea of the so-called 'Hahn's Pentarchy',[16] which had been developed by seventeenth-century legal scholar Heinrich Hahn (1605–1668).[17]

The presence of the *numerus clausus* principle in various legal systems has been strongly connected with the socio-economic circumstances throughout the ages. They have constituted the source of differences between property law in continental legal systems and in English common law.

At this point we can notice some regularity. Closed lists of property rights differ from each other; however, they follow a certain scheme: the main right is ownership, from which other property rights arise.[18] This scheme stems from Roman property law. First of all, the central part of this ancient system was the most complete and uniform right over the thing – ownership. Secondly, individual elements of ownership constituted limited property rights, such as the praedial servitude. With regard to the latter, some kind of application of the *numerus clausus* can be noticed.[19]

The first of the above-mentioned legal institutions forms the basis of contemporary property law, as well. Nevertheless, ownership underwent significant transformations in the feudal system – more precisely, fragmentation. It resulted from a specific model of social hierarchy which was related to the possession of land. Unitary ownership could not exist any longer:[20] such a system (with a functional

[15] 'Especially when the Corpus Iuris Civilis was adopted, the available actions became exclusively those mentioned in a codification of law'. Next to *rei vindicatio*, which was supposed to protect ownership, there were also actions protecting servitude, usufruct, *emphyteusis*, *superficies*, pledge and hypothec. B. Akkermans, *The Principle*..., p. 78 et seq.

[16] 'Hahn's Pentarchy' is an enumeration of five property rights (*dominium*, *pignus*, *servitus*, *possessio* and *hereditas*) which were derived from five actions in Roman law. See B. Akkermans, *The Principle*..., p. 65.

[17] See J. Smits, *The Making of European Private Law: Towards a Ius Commune Europaeum as a Mixed Legal System*, Antwerp–Oxford–New York 2002, pp. 251–252.

[18] B. Akkermans, *The Principle*..., pp. 410–413. The author proposes a division: primary law – ownership, lesser laws – derived from the primary law of ownership.

[19] W. Dajczak, T. Giaro, F. Longchamps de Bérier, *Prawo rzymskie. U podstaw prawa prywatnego*, Warszawa 2009, pp. 348–354, 368–370, 400–412.

[20] F. Parisi, *The Fall and Rise of Functional Property*, George Mason Law & Economics Research Paper, No. 05–38, https://ssrn.com/abstract=850565, p. 10 (accessed: 27.07.2018): 'feudal property became quite distinct from the Roman paradigm of property, as feudal grants were always limited by the act of license and title; possessory interests never resided in the same hands.

fragmentation of property) was the most effective way to ensure the maintenance of the army, which was of great importance on account of continual wars.[21]

Yet the fragmentation of the right of ownership was insufficient for non-agricultural areas. The return of the Roman concept of ownership dates back to the times when capitalism emerged in Europe and feudalism was abolished in many parts of the continent. A unitary right of ownership reappeared in the centre of the system of property law, and its fragmentation was achieved by means of appropriate legislation, when the number of property rights was limited to a socially acceptable catalogue. This reasoning is reflected in modern civil codes in Europe. The *numerus clausus* is a manifestation of the pursuit of unity in property as well as of the desire to prevent the return of the feudal system.[22]

The situation unfolded differently in England (and other countries under the influence of English law), where the Revolution did not abolish the feudal system. The system of land law developed precisely on the foundations of feudalism. In such conditions of, in fact, still fragmented property (which was not as uniform as on the continent: all the land belonged to the Crown, and the tenant was entitled to estate), it was impossible to adapt the *numerus clausus* principle.[23] However, as it is indicated in subject literature,[24] the standardization of property rights has already taken place in common law jurisdictions (e.g. in the United States), and the result is conceptually similar to the continental *numerus clausus*.[25]

To summarize, it can be assumed that the principle of a closed catalogue is intended to protect the basis of all property rights – ownership, and therefore it has emerged to be the very foundation of the modern property law. This principle is also present in common law systems.

When it comes to praedial servitudes, the statement that the *numerus clausus* principle has its beginning in Roman law is undue. Indeed, praedial servitudes in times of the Principate usually took forms which were customarily accepted (e.g. *luminum* – the right providing protection against restricting access to light; *altius tollendi* – the right to demand from the neighbour that they tolerate higher

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Property ownership was neither unlimited nor absolute; interests were not enforceable erga omnes, but rather consisted of a bundle of rights and duties, partially applicable to the whole community and partially determined by the specific contractual relationship between the grantor and the grantee. A complex system of political and social control reinforced this transition from the Roman system to the feudal regime of dispersed ownership (and property fragmentation)'.

[21] *Ibidem*, p. 11.

[22] *Ibidem*, p. 16.

[23] S. van Erp, *A Numerus...*

[24] See T. W. Merrill, H. E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, "The Yale Law Journal" 2000, Vol. 110, No. 1; H. Hansmann, R. Kraakman, *Property*, *Contract*, *and Verification: The Numerus Clausus Problem and the Divisibility of Rights*, Harvard Law School John M. Olin Center for Law, Economics and Business Discussion Paper Series 10/2002, paper 388.

[25] Although standardization is not exactly the same as the *numerus clausus*, it may lead to the same results in practice – enhancing legal certainty. See footnote 38.

buildings on adjacent ground) or expressed in the Praetor's Edict (e.g. *oneris ferendi* – the right to use the neighbour's wall to sustain one's own building; communication servitudes, e.g. *iter* – the right to pass or walk, but not to drive a beast of burden through another's land).[26]

Nevertheless, from the times of the last Republic, Roman jurists allowed (by analogy) servitudes which did not fit in the above-mentioned categories. Such servitudes would later be called irregular – *servitutes irregulares*. These included rights that were established for neither agricultural nor construction purposes (unlike rural or urban servitudes; irregular servitudes are conceptually close to the so-called industrial servitudes), e.g. servitude which involved tolerating dunghill set up by the neighbour[27] or fumes from a cheese factory.[28]

What is important, servitudes could not be created freely – as natural forms of limiting the unity of ownership, they were subject to rules of creating and exercising them.[29] Thus, in the case of Roman praedial servitudes, we are dealing not with the *numerus clausus*, but with an open catalogue of typical rights,[30] which was intended to meet the requirements of the then actors on the market. That definitely less rigorous approach to the principle of closing a catalogue of property rights is a common feature of some models of the *numerus clausus*.

4. EUROPEAN MODELS. SOUTH AFRICA

As it has been established above, the principle of *numerus clausus* is omnipresent in European property law. Various classifications of this principle can be applied, for example according to the criterion of how it is expressed by the statute.[31] It could be explicitly stipulated in a legal act that only specific forms of prop-

[26] O. Lenel, *Das Edictum Perpetuum. Ein Versuch zu seiner Wiederherstellung*, Leipzig 1927, pp. 193–194.

[27] D. 8,5,17,2. The English translation of the Latin name of the right as proposed by S. P. Scott (ed. and trans.), *The Civil Law*, Cincinnati 1932; for online access visit: https://droitromain.univ-grenoble-alpes.fr/Anglica/D8_Scott.htm#V (accessed: 27.07.2018).

[28] D. 8,5,8,5. *Ibidem*.

[29] These included: *servitus in faciendo consistere nequit* – servitude cannot consist in action; *servitus servitutis esse non potest* – servitude cannot be encumbered with a servitude; *nemini (nulli) res sua servit* – no one can have a servitude on their own thing; *servitutibus civiliter utendum est* – servitudes are meant to be exercised cautiously; *praedia debent esse vicina* – land proximity requirement; *servitus praedio utilis* – praedial servitude has to be useful for a land, permanent cause (*perpetua causa*) of establishing a servitude is required. See W. Dajczak, T. Giaro, F. Longchamps de Bérier, *Prawo rzymskie*..., pp. 410–412.

[30] W. Dajczak, T. Giaro, F. Longchamps de Bérier, *Prawo rzymskie*..., p. 403.

[31] Ch. Von Bar, *The Numerus Clausus of Property Rights: A European Principle?*, (in:) L. Gullifer, S. Vogenauer (eds.), *English and European Perspectives on Contract and Commercial*

erty rights can be used (e.g. in the Netherlands – Article 3:81(1) of the Dutch Civil Code) or the discussed principle may not be directly provided for in the law, but apply implicitly (witness Austria or England). Another division can be made according to the criterion of the competence to create new types of property rights.[32] There are three possibilities, namely when new rights may be established (a) only by the authorities; (b) by the courts in case law; or (c) by the parties themselves. At the same time, it is indicated that the last option is either rejected or merged with the second option. In the latter case, the legal actions of the parties are subject to the assessment by the court.[33] It is worth having a brief look at several model solutions present in European legal orders.

In Germany, the *numerus clausus* principle is understood very rigorously. Two terms are ordinarily used by the doctrine to describe it: *Typenzwang* and *Typenfixierung*.[34] The first one means that there is a limited number of property rights, while the second entails that the content of these rights is determined by mandatory norms and therefore cannot be modified by the parties. Only the legislature is competent to establish new property rights, and the autonomy of the parties is excluded in this respect.[35]

In France, the concept of a catalogue of property rights is conceived less strictly, with a related controversy existing in the French civil law doctrine.[36] According to the first (and dominant) view, the list of property rights is closed and confined to the rights mentioned in *Code civil* and the rights recognized in the *Cour de cassation*'s case law. In accordance with the second, minority view, the parties are allowed to create new property rights. It is reported[37] that France, despite the fact that the *Cour the cassation* is competent to establish new property rights, has not developed a fully open system.

In turn, English law is an example of the least rigorous approach to the concept of a closed catalogue of property rights. Obviously, one should bear in mind a different historical background, which has resulted in a greater number of property rights as well as in the significant complexity of the system.[38] Subsequently, albeit not directly, it led to the acceptance of this principle.[39]

Naturally, the freedom of the parties to form new property rights is not unlimited. However, owing to the lack of a civil code in England, it does not encounter

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Law. Essays in Honour of Hugh Beale, Oxford–Portland 2014, p. 441 et seq.; see also B. Akkermans, *The Numerus Clausus…*

[32] *Ibidem*, pp. 6–7.

[33] See section VII of this article.

[34] See J. T. Füller, *Eigenständiges Sachenrecht?*, Tübingen 2006, pp. 370–373.

[35] See B. Akkermans, *The Principle…*, pp. 169–252.

[36] *Ibidem*, p. 167.

[37] *Ibidem*, p. 168.

[38] *Ibidem*, pp. 565–570.

[39] Compare section III of this article.

any major legislative obstacles.[40] An essential factor which determines the shape of property law in England is *duplex ordo* – the coexistence of two legal orders: common law and equity. It is pointed out that the closed character of the catalogue only existed in common law, and in this case the term 'standardization of rights' would be more suitable.[41]

The most radical concept from the viewpoint of the European legal tradition is undoubtedly a complete rejection of the *numerus clausus*. The country in which this principle, so deeply rooted in the minds of European lawyers, is not recognized is a typical example of a mixed jurisdiction – South Africa.[42] Its open catalogue comprises ownership, servitudes (including *servitutes irregulares*, created in respect of a person, not the property itself), 'pandrecht' – pignus, 'verband' – security interest mortgage, emphyteusis, 'huurpag', lease of land, mineral rights (typical for South Africa), hire registered by notarial deed and statutory property rights based on the Sectional Titles Act of 1971.[43]

The parties can establish new property rights, but such actions are subject to supervision by the land registry, which can refuse to register them when the rights do not pass the so-called 'subtraction from the dominium test', which has been developed in case law. According to B. Akkermans, "[t]his test allows the land registry to accept new types of property rights when (a) it is the intention of the parties to bind not only themselves but also their successors in title and (b) the right that the parties create amounts to a subtraction from the dominium".[44] The first criterion means that the new right has to bind any current owner of the land; the second expresses the rule that every property right must be derived from full ownership – it is the only way for a right to obtain a proprietary nature.[45]

Although not many such new rights have been created,[46] the example of South Africa clearly shows that the existence of a legal system without the *numerus clausus* is possible. In addition, it proves that the distinction between personal

[40] '[W]hereas civil law systems with their Civil Codes froze the law as it stood at that moment, enabling the possibility to enumerate the available property rights in a law code, English courts continue to develop property law until they are stopped by legislation'. See B. Akkermans, *The Principle*..., p. 387 et seq.

[41] According to S. van Erp, *A Numerus*...: '[s]tandardisation means that a limited number of categories is used for a practical reasons, but it does not imply that this number is completely closed. Courts may still decide that certain rights, created by two parties and not to be found in the existing categories, bind certain or even all third parties. Standardisation also does not mean that the contents of the various categories is as fixed as it is in the civil law by mandatory rules'. The Law of Property Act of 1925 can serve as an example of standardization of property law in England. Compare B. Akkermans, *The Principle*..., p. 390 et seq.

[42] Similarly Spain, although new property rights have not been recognized there yet. *Ibidem*, pp. 550.

[43] J. Smits, *The Making of European Private Law*..., p. 257.

[44] B. Akkermans, *The Numerus Clausus*..., p. 103.

[45] J. Smits, *The Making of European Private Law*..., p. 258.

[46] B. Akkermans, *The Principle*..., p. 482.

and property rights can be developed not only by the decision of the legislature but also in practice.[47]

It can be easily seen on the example of above-mentioned countries how differently the *numerus clausus* principle is understood in various legal orders, and hence – how extremely diverse property law is.

5. THE *NUMERUS CLAUSUS* IN POLISH PROPERTY LAW

In Polish civil law, the *numerus clausus* principle is generally recognized. However, two interpretations exist in subject literature. According to the first one, property rights are only those rights that are explicitly mentioned and regulated in the legislation as types of property rights. A competing view adds that the catalogue of property rights includes also those rights of which the thing is the subject and which can be deduced from the provisions of civil law (especially property law). This broad understanding of the *numerus clausus* principle has been criticized in the doctrine – it has been indicated that the authors who support this view generally have problems with specifying the number of rights included in the closed catalogue. Thus, as a more logical solution, the first notion prevails.[48]

The *numerus clausus* principle is expressed in the Polish Civil Code (articles 140, 232 and 244).[49] The catalogue of property rights can be changed only by means of a statute. Hence, the Polish model can be classified as one of the most restrictive systems in Europe.

The rigour in the application of this principle makes itself evident in case law.[50] Nevertheless, the tendencies to soften the *numerus clausus* are becoming

[47] J. Smits, *The Making of European Private Law...*, p. 260.

[48] P. Machnikowski, *Ogólne wiadomości o prawie rzeczowym...*; E. Drozd, „*Numerus clausus" praw rzeczowych...*, pp. 263–264 i 268.

[49] Act of 23 April 1964 – Civil Code (Journal of Laws 1964, No. 16, item 93). The Polish version of this catalogue consist of: **ownership** (articles 140 and following of the Code), **perpetual usufruct** (articles 232 and following of the Code), limited property rights (articles 244 and following of the Code): **usufruct** (articles 252–284 of the Code), **servitudes** (articles 285–305 of the Code), **pledge** [articles 306–335 of the Code and Act of 6 December 1996 on Registered Pledges and the Register of Pledges (Journal of Laws 1996, No. 149, item 703)], **cooperative ownership right to premises** [articles 171 and following of the Act of 15 December 2000 on Housing Cooperatives (Journal of Laws 2001, No. 4, item 27)] and **mortgage** [articles 65 and folowing of the Act of 6 July 1982 on Land and Mortgage Registers and on Mortgage (Journal of Laws 1982, No. 19, item 147)]. As we can see, some of these rights are decodified.

[50] Compare e.g. judgment of the Supreme Court of 3 April 2009, II CSK 470/08 (LEX No. 599755), in which the Supreme Court ruled that it was inadmissible to create obligations which are formally of a relative nature (in fact are real obligations) whose content would correspond with that of a property right (praedial servitude) and bind every owner of the servient land, as it would

ever more frequent. The latest case law of the Polish Supreme Court opens up the possibility of encumbering with transmission easement not only ownership, but also the right of perpetual usufruct.[51] Furthermore, in its decision of 27 October 2004,[52] the Supreme Court created, in fact, a new type of limited property law – the right to a parking space in a multi-station garage. This judgment has received a huge amount of criticism precisely because it violated the *numerus clausus* principle.[53]

This short review of the Polish civil law doctrine and case law shows that the *numerus clausus* principle is understood rigorously in Poland. On the other hand, there are some indications from participants in legal transactions that there is a need to regulate situations unprovided for by the Civil Code and that this need can be satisfied by creating new types of property rights. An analysis of the Supreme Court's case law can serve as a detector of necessary changes. These, in order to obtain the features of property rights, should be expressed directly in the Civil Code – but only in the case of an urgent need and after considering all economic factors.

6. STRENGHTS AND WEAKNESSES OF THE *NUMERUS CLAUSUS*

Subject literature offers various explanations of the existence of the *numerus clausus*. These include, among others, the lack of need to create new rights (those already existing are sufficient), the need to inform third parties about the existence of rights which have effect against them and which shape their duties without their consent (and so to ensure the public character of these rights), and the prevention of pyramiding of obligations, which can happen from when the successive owners

lead to circumvention of the *numerus clausus* principle. Another illustrative example is decision of the Supreme Court of 12 November 1997, I CKN 321/97 (LEX No. 50520) relating to establishing usufruct which is not a personal and inalienable right. The Supreme Court ruled that the parties may establish only rights recognized by statute, taking into account that each of them has strictly defined features which are not subject to modification. The Court unwillingly referred to *Typenzwang* and *Typenfixierung*, widely known in the European private law.

[51] Resolution of the Supreme Court (seven judges) of 16 May 2017, III CZP 101/16 (LEX No. 2284273) and decision of the Supreme Court of 8 June 2017, V CSK 259/16 (LEX No. 2352168). See also J. R. Antoniuk, *Dopuszczalność obciążenia użytkowania wieczystego służebnością przesyłu*, „Opolskie Studia Administracyjno-Prawne" 2017, Vol. XV, issue 1, pp. 9–30. See also A. Grebieniow, *Prawo rzeczowe*, (in:) J. Kosonoga (ed.), *Studia i analizy Sądu Najwyższego. Przegląd orzecznictwa. Rok 2017*, Warszawa 2018 [forthcoming].

[52] IV CK 271/04 (LEX No. 147751).

[53] See M. J. Naworski, *Glosa do postanowienia SN z dnia 27 października 2004 r., IV CK 271/04*, „Rejent" 2005, No. 12, p. 124 oraz S. Rudnicki, *Glosa do postanowienia SN z dnia 27 października 2004 r., IV CK 271/04*, OSP 2005, No. 5, p. 62.

encumber a land with ever new property rights. The desire to prevent a fragmentation of the uniform right of ownership can be added to the list, as well. Above all, the main advantage is that the parties can choose from a set of rights whose creation, transfer and termination are regulated by statute. This provides legal certainty and ensures predictability and simplicity; legal relations are thus stabilized.[54]

Economic reasons for the existence of the discussed principle are, *inter alia*, the desire to ensure the marketability of land (which decreases significantly when ownership is encumbered with numerous third persons' rights), the need to provide lower costs of informing parties about the existence of a given right or its transferability (those costs increase when many unknown forms of such rights are used), and the desire to keep transaction costs and costs of verification low, if the other party knows the content of a given right.[55] Additionally, this principle ensures a better use of property.[56]

By contrast, when the *numerus clausus* is applied too restrictively, it poses a risk of a rather slow evolution of legal institutions. In the times of dynamically developing global economy, rigid adherence to old, fixed solutions may be harmful to the economy, especially in the case of smaller countries.[57]

Furthermore, it is only the legislature which is able to create new property rights, and hence it is responsible for adapting the law to current economic requirements.[58] When the tension becomes too high and the legislature remains inactive, the judicature starts to create new property rights itself. If we consider it in the context of the most inflexible models of the *numerus clausus* (e.g. the German or the Polish one), we will realize that such court activity is *contra legem*, that it undermines legal certainty, and that it should therefore be assessed negatively.

As we can see, the *numerus clausus* has a strong economic background. Its task is to protect the autonomy of legal entities, which – without a particular legal provision or the consent of the authorized persons – cannot be limited.[59]

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[54] B. Akkermans, *The Numerus Clausus*..., p. 107 et seq. See also B. Rudden, *Economic Theory v. Property Law: The Numerus Clausus Problem*, (in:) J. Bell, J. Eekelaar (eds.), *Oxford Essays on Jurisprudence. Third series*, Oxford 1987, pp. 239–263.

[55] See H. Hansmann, R. Kraakman, *Property*, *Contract*, *and Verification*..., pp. 39–40, where the authors considered this factor to be decisive.

[56] B. Akkermans, *The Numerus Clausus*..., pp. 107–108. The problem of the effective use of property is known in subject literature as the 'tragedy of commons' and the 'tragedy of anti-commons'. See G. Hardin, *The Tragedy of the Commons*, "Science" 1968, Vol. 162, issue 3859, pp. 1243–1248, and M. A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, "Harvard Law Review" 1998, Vol. 111, No. 3, pp. 621–688.

[57] Smaller economies tend to be weaker and therefore should seek to reduce the possible obstacles that can appear in the area of trade. Such a hindrance can be unique legal system which is not congruent with those of other countries. See B. Akkermans, *The Numerus Clausus*..., p. 107 et seq. and the references therein.

[58] S. van Erp, *A Numerus*...

[59] Z. Radwański, *Zagadnienia ogólne czynności prawnych*, (in:) Z. Radwański (ed.), *System Prawa Prywatnego. Tom 2. Prawo cywilne – część ogólna*, Warszawa 2008.

On the other hand, this principle can lead to a 'stiffness' of the legal system, which is not always desirable.

7. UNIFICATION OF PROPERTY LAW IN EUROPE AND THE *NUMERUS CLAUSUS*

In the times of the unification of private law in Europe, property law still remains one of the least harmonized branches of law.[60] The reason lies in its specific nature; as M. C. Mirow puts it: '[l]and does not move across international borders like checks, goods, and the Internet. Land is grounded; it sits in a particular country with particular laws'.[61] The *numerus clausus* emerges as a principle strictly connected with national law – after all, it functions within the borders of a given country, among other areas of private law,[62] such as contract law, inheritance law, family law etc. And although essentially all of the catalogues of property rights follow a similar pattern,[63] lesser rights diverge.[64] This along with the coexistence of two legal families in Europe – civil law and common law – has resulted in the lack of considerable successes in the unification of property law.[65]

In practice, there are situations (especially when international private law applies) that require the choice of legal provisions which are relevant in a given case. It may lead to a situation in which it would be impossible to recognize a specific right as it is unknown to the native legal system – because of either rigidity in applying the *numerus clausus* principle or simply dissimilarity of the property rights' catalogues.[66]

For that reason, the unification is a positive process, for it can help to prevent difficulties in trade between European countries. However, the main problem is which approach to the *numerus clausus* should be adopted. Doctrine identifies several positions.[67]

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[60] J. Smits, *The Making of European Private Law...*, p. 245.

[61] M. C. Mirow, *Globalizing Property: Incorporating Comparative and International Law into First-Year Property Classes*, "Journal of Legal Education" 2004, Vol. 54, No. 2, p. 187.

[62] B. Akkermans, *The Numerus Clausus...*

[63] Compare section III of this article.

[64] 'Such a menu of available property rights has come about in the context of a specific legal system, allowing for national preferences. For example, some systems adhere to a transfer of ownership for security purposes (fiducia cum creditore; Germany), whereas other systems recognise non-possessory security rights to fulfill the same function (England, France, The Netherlands)'. See B. Akkermans, *The Numerus Clausus...*, p. 107 et seq.

[65] See B. Akkermans, *The Principle...*, p. 503 et seq.

[66] See B. Akkermans, *The Numerus Clausus...*, p. 107 et seq. and the references therein.

[67] *Idem*, *The Principle...*, pp. 436–488.

The first of them assumes that the *numerus clausus* should be upheld, but the property law system should be rearranged because, in practice, the distinction between property law and contract law is growing weaker. A reconstruction of the system would consist in creating patrimonial law concerning the assets and liabilities of a given entity.[68] J. Smits and V. Sagaert are in favour of blurring the differences between property law and contract law even further. In fact, they propose a system of obligations dominated by bottom-top reasoning, that is a system in which a property right arises not when it is introduced by legislation, but when the parties themselves make it apply against the third parties.[69]

A change in the understanding of the closed catalogue is also declared by Sjef van Erp. He advocates a restriction of this principle and introduces the concept of the *numerus quasi-clausus*. Property law based on this rule would be a more flexible legal system which would allow for e.g. trusts or even the creation of property rights by courts – of course with utmost care and only in special situations. Thanks to this flexibility, property law would be better adapted to the economic circumstances and thus economically less harmful.[70]

8. CONCLUSIONS

Due to its many advantages, the *numerus clausus* turns out to be a central concept throughout the evolution of property law. At the time of its inception, it mainly referred to immovable property and served as a protection from remains of feudalism. Today, its role is changing. The principle of a closed catalogue of property rights is the main element that distinguishes property law from contract law.[71] In view of the above, the question arises: should the *numerus clausus* principle continue to be applicable? How can we reconcile legal orders that are so different in terms of property law? Doctrine states that the approach to this principle should be changed as well as adjusted to the legal and economic realities to a greater or lesser extent.[72] Considering the Polish law, it is interesting how our legal system will behave in the face of these changes – after all, it is one of the legal orders in Europe that respect the *numerus clausus* principle most restrictively.

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[68] See J. T. Füller, *Eigenständiges Sachenrecht?...*, p. 558 et seq.; B. Akkermans, *The Principle...*, p. 465.

[69] *Ibidem*, pp. 469–473; J. Smits, *The Making of European Private Law...*, pp. 252–254.

[70] S. van Erp, *A Numerus...*; B. Akkermans, *The Principle...*, pp. 467–469.

[71] *Ibidem*, p. 457.

[72] Interesting economic analyses of the application of the *numerus clausus* have been made by T. W. Merrill, H. E. Smith, *Optimal Standardization in the Law of Property...* and H. Hansmann, R. Kraakman, *Property, Contract, and Verification...*

Undoubtedly, the best functioning solutions to the above-mentioned problems lie within our, often discordant, legal traditions. Knowledge of similarities and awareness of differences between them can serve as a powerful tool in the process of unifying property law.

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THE NUMERUS CLAUSUS ISSUE IN PROPERTY LAW – EUROPEAN PRIVATE LAW AND THE POLISH PERSPECTIVE

Summary

The *numerus clausus* of property rights indicates that a mandatory closed catalogue of property rights exists in a given legal system; the content (method of creation, conveyance, expiration) of a right falling within this closed list is strictly specified and cannot be changed by the parties. In this way, the state consciously limits the activity of the parties in this regard, indicating the socially and legally acceptable types of property rights they can use. An insightful look at the development and explanation

of this principle over the centuries and now seems to be necessary with the advancing unification of private law in Europe.

The present article discusses the dogmatic basis of the concept of *numerus clausus* and outlines its history and economic reasoning behind it. Then, the main models of the *numerus clausus* in European legal orders as well as the functioning of this principle in Polish property law are presented. Subsequently, the strengths and weaknesses of the *numerus clausus* are examined. This provides us with general conclusions concerning the harmonization of this area of private law.

KEYWORDS

numerus clausus, property law, comparative law, European private law, European legal tradition

SŁOWA KLUCZOWE

numerus clausus, prawo rzeczowe, prawo porównawcze, europejskie prawo prywatne, europejska tradycja prawna

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INTRICACIES OF SIGNIFICANT IMBALANCE AS THE CORNERSTONE OF PROTECTION AGAINST UNFAIR TERMS IN CONSUMER CONTRACTS UNDER EU LAW

1. INTRODUCTION

Significant imbalance in the rights and obligations of the parties to a consumer contract is codified in Article 3(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts[1] (hereinafter as "the Directive" or "Directive 93/13") as one, next to good faith, requirement of substantive unfairness of terms in consumer contracts. Under the scheme of the Directive, a substantive inquiry follows a procedural one. For a judge seized of a dispute concerning a purportedly unfair clause must first decide whether the matter falls at all within the ambit of the legislation. To this end, it must be ascertained that a given contract is governed by the terms of the Directive (excluded are, *inter alia*, contracts relating to employment, contracts relating to succession rights, contracts relating to rights under family law and contracts relating to the incorporation and organization of companies or partnership agreements). Next, it must be decided that the term in question was not individually negotiated with the consumer. This is left to the discretion of the judge to decide, however guidance is given by Article 3(2) under which a "term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract". Finally, excluded from the assessment are terms defining the main subject matter of the contract or the adequacy of price and remuneration relative to the services or goods supplied in exchange (Article 4(2)). It is also worth noting that consumer contracts should be drafted in plain, intelligible language (Article 5 of Directive 93/13), and the consumer should actually be given an opportunity to examine all the terms. Should any doubts arise, the interpretation

[1] OJ L 95, 21.4.1993, pp. 29–34.

most favourable to the consumer should prevail. Only after the foregoing considerations are taken into account may the court set out to analyse the disputed term at hand through the prism of the substantive fairness criteria enshrined in Article 3(1). Such assessment shall take into account the nature of the goods or services for which the contract was concluded and refer, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent (Article 4(1)).

By reference to the preamble of Directive 93/13 alone one can decode the primary motivations behind the seemingly paternalistic approach of the unfair terms regime. Consumers are asserted to not know the rules of law which, in Member States other than their own, govern contracts for the sale of goods or services, and lack of awareness may deter them from direct transactions for the purchase of goods or services in another Member State (recital 5). Another goal is the furtherance of the internal market and the desire to safeguard the citizen in his role as consumer when acquiring goods and services under contracts which are governed by the laws of Member States other than his own (recital 6). Of importance are also the economic interests of consumers, in accordance with Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy[2] and Council Resolution of 19 May 1981 on a second programme of the European Economic Community for a consumer protection and information policy[3]. An overall evaluation of the different interests involved is necessary (recital 16).

The principal aim of the paper is to showcase the heterogeneous nature of the significant imbalance requirement. A comprehensive account is given of the semantic, legal and practical connotations of the term by reference to the case law of the CJEU and that of Polish courts. An evolution is recorded from the initial position, under which scrutiny of significant imbalance consisted of an of exercise in balancing the advantages and disadvantages of a given clause as against the consumer's position to what appears to be the modern two-prong test which focuses on a comparative analysis between the contractual term in issue and national rules which would apply in the absence of any agreement between the parties. As the CJEU has consistently applied a narrow interpretation of significant imbalance, leaving its application to particular cases to national courts, its usefulness as a tool to strike out unfair clauses at EU level is limited. Consequently, it is for the national courts to perform at least two, as I demonstrate in the paper, important functions. First, they are tasked with applying a purposive interpretation to extend the benefit of substantive unfairness to vulnerable consumers pursuant to national laws, customs and sensitivities. Further, they shall

[2] OJ C 92, 25.4.1975, p. 1.
[3] OJ C 133, 3.6.1981, p. 1.

fill the gaps which inevitably appear in practice including, *inter alia*, the question of interplay between the two substantive fairness criterions – significant imbalance and good faith.

2. GROWING PAINS: EMERGENCE OF THE CONCEPT IN EU CASE LAW

As a preliminary point, it must be recalled that the CJEU's task in the field of expounding upon the general meaning of the criteria in Article 3(1) of the Directive is generally limited to defining "in a general way the factors that render unfair a contractual term"[4] and interpreting "general criteria used by the Community legislature in order to define the concept of unfair terms"[5]. In the early case of *Freiburger Kommunalbauten*, in the context of abstract control proceedings the CJEU implied that the "significant imbalance in the parties' rights and obligations" could be restated as an exercise in balancing the advantages and disadvantages of a given clause as against the consumer's position, within the context of a Member State's national law[6]. The disputed clause in that case mandated that, in a sale of a parking space, the entire sum was to be payable by the consumer buyer upon production by the construction company of a security (a bank guarantee on the facts) in respect of any and all claims the consumers could have by virtue of non-performance or undue performance of the contract. The drafter of the clause posited that the bank guarantee properly counterbalances

[4] Case C-478/99 *Commission v Sweden*, ECLI:EU:C:2002:281, paragraph 17; Case C-342/13 *Sebestyen*, ECLI:EU:C:2014:1857, paragraph 26; Case C-537/12 *Banco Popular Espanol*, ECLI:EU:C:2013:759, paragraph 64. L. Niglia, *The Rules Dilemma – The Court of Justice and the Regulation of Standard Form Consumer Contracts in Europe*, "Columbia Journal of European Law" 2006, Vol. 13, issue 1, p. 134. For more on the CJEU's reluctance to attempt overarching and universal definitions of broad ethical concepts, see: J. Basedow, *The Court of Justice and Private Law: Vacillations*, *General Principles and the Architecture of the European Judiciary*, "European Review of Private Law" 2010, Vol. 18, issue 3, p. 456 et seq.; F. Cafaggi, *Self-Regulation in European Contract Law*, "European Journal of Legal Studies" 2007, Vol. 1, issue 1, pp. 178–182.

[5] Case C-237/02 *Freiburger Kommunalbauten*, ECLI:EU:C:2004:209, paragraph 22; Case C-243/08 *Pannon GSM*, ECLI:EU:C:2009:350, paragraph 42. G. Straetmans, C. Cauffman, *Legislatures*, *courts and the Unfair Terms Directive*, (in:) P. Syrpis (ed.), *The Judiciary*, *the Legislature and the EU Internal Market*, Cambridge 2012, p. 102 et seq.; C. Twigg-Flesner, *The Europeanisation of Contract Law: Current Controversies in Law*, London 2013, pp. 48–50; P. Rott, *What is the Role of the ECJ in EC Private Law – A Comment on the ECJ Judgments in Oceano Grupo*, *Freiburger Kommunalbauten*, *Leitner and Veedfald*, "Hanse Law Review" 2005, Vol. 1, issue 1, p. 6 et seq. The generality of the criterion is confirmed also by recital 15 to the Directive ("Whereas it is necessary to fix in a general way the criteria for assessing the unfair character of contract terms").

[6] *Freiburger Kommunalbauten*, paragraph 15.

the disadvantages to which a consumer might be exposed as a result of the obligation to pay the price before performance of the contract. The balance consisted in, on the one hand, reversing the order in which the respective performances of a consumer contract were to be rendered (with the consumer performing first), thus reducing the risk sustained by the trader in connection with a sizable construction undertaking whilst, on the other, ensuring the proper construction of the parking space contracted for on account of provision of sufficient funds facilitating the smooth operation of the contractor. This was countered by the consumer, who called upon the "equality of arms" principle[7] which, in his estimation, necessitated contemporaneous performance of both parties' duties. The CJEU relegated the proceedings to the national court as consideration had to be given to domestic law in respect of distilling the detailed substantive criteria indicating significant imbalance, however two cases were distinguished: one where the effectiveness of the legal protection of the rights which the Directive affords to the consumer is undermined (and unfairness can be inferred on the basis of consideration of all the circumstances surrounding the conclusion of the contract in issue and without having to assess the advantages and disadvantages, in other words, the substance of the contested term)[8]; and another situation where the effectiveness is not so brazenly impeded and there is a need to have regard to the substantive test laid down in Article 3(1). It generally appears that *Oceano Grupo* conflated substantive unfairness examined through the prism of Article 3(1) with procedural ineffectiveness, further developed in cases like *Invitel*[9]. As it was the first case on the interpretation of Article 3(1) to ever come before the CJEU, the Court first applied the substantive test (albeit neglecting to break it down into constituent parts, instead treating all of the requirements together in paragraphs 21–24 of its judgment), to then make a sweeping assertion based on procedural fairness[10].

[7] Now codified in the Charter of Fundamental Rights (Article 47).

[8] This was the case in Case C-240/98 *Oceano Grupo*, ECLI:EU:C:2000:346, where the clause in issue conferred jurisdiction on the courts of Barcelona, Spain, a city in which none of the consumers involved were domiciled but where the trader had its principal place of business. See also paragraph 23 in *Freiburger Kommunalbauten*.

[9] Case C-472/10 *Invitel*, ECLI:EU:C:2012:242.

[10] The utility of this differentiation is put into question by the fact that it has not been explicitly referred to post-*Freiburger Kommunalbauten* (although it found expression shortly beforehand, in Case C-473/00 *Cofidis*, ECLI:EU:C:2002:705, paragraphs 33–36), however it could indicate that there are levels to a clause being abusive of the contractual balance between the parties. Importantly, the Court in *Pannon GSM* appeared uneasy with how *Oceano Grupo* was disposed of, and purported to distinguish it on the grounds that it interpreted the general criteria used by the Community legislature to define the concept of unfair terms whilst direct application of those criteria to a particular case is impermissible (*Pannon GSM*, paragraph 42). In the meantime, this is exactly what the Court in *Oceano Grupo* did by explicitly declaring a term unfair. See also: E. Poillot, *The European Court of Justice and General Principles Derived from the Acquis Communautaire*, "Oslo Law Review" 2014, issue 1, pp. 72–77; N. Reich, *A European Contract Law, or an EU Contract Law Regulation for Consumers?*, "Journal of Consumer Policy" 2005, Vol. 28, issue 4, p. 388

It is premature to say that claimants could rely on Articles 3 and 6 interchangeably, however *Oceano Grupo*, if it were to be upheld nowadays, appears to create such an avenue. I would submit that the "undermining of effective consumer protection" argument could apply, as a way of circumventing the unfairness test under Article 3(1) of Directive 93/13, where the term in question is so radically lopsided that it benefits only one side of the bargain. On the contrary, where the imbalance between the rights of the parties is significant and not all-encompassing, the general rules would apply[11].

Aside from the differentiation made above, early CJEU cases rendered little theoretical substantiation regarding the meaning of "significant imbalance", and were largely reduced to making proper inferences in respect of specific contract clauses. So, in *Oceano Grupo*, a term conferring exclusive jurisdiction on a consumer, one that was convenient for the trader, was held to adversely impact the consumer's right to defence (right to be heard or the right of representation) by making it radically easier for the trader to enter an appearance in court if need be[12]. *Cofidis*, without explicit regard to Article 3(1), surmised that protection afforded by the Directive extends to cases where the consumer is unaware of his rights or is deterred from enforcing them due to exorbitant costs of judicial pro-

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et seq.; M. Hogg, G. Arnokouros, A. Pinna, R. Cascão, S. Watterson, *ECJ C-240/98 – C-244/98*, *27 June 2000*, *(Océano Grupo Editorial and Salvat Editores) Scottish Case Note*, "European Review of Private Law" 2002, Vol. 10, issue 1, pp. 157–173; K. Sein, *Protection of Consumers against Unfair Jurisdiction and Arbitration Clauses in Jurisprudence of the European Court of Justice*, "Juridica International" 2011, Vol. XVIII, pp. 54–62; B. Fauvarque-Cosson, D. Mazeaud, *European Contract Law: Materials for a Common Frame of Reference: Terminology*, *Guiding Principles*, *Model Rules*, Berlin 2008, 171 et seq.

[11] I base this tentative proposition on the phrasing of paragraph 23 of the judgment in *Freiburger Kommunalbauten*, which refers, in the context of hindering effective consumer protection, to "a term which was solely to the benefit of the seller and contained no benefit in return for the consumer". A mention in paragraph 71 of Case C-143/13 *Matei*, ECLI:EU:C:2015:127, appears to lend support to this hypothesis – the CJEU appeared to be ready to outrightly declare a term unfair provided that a number of preconditions was established (particularly that the disputed term burdened the consumer with a fee for which no consideration flew in such a consumer's direction).

[12] *Oceano Grupo*, paragraphs 23–24. G. Straetmans, C. Cauffman, *Legislatures*, *courts and the Unfair Terms...*, p. 100; V. Lazić, *Procedural Justice for 'Weaker Parties' in Cross-Border Litigation under the EU Regulatory Scheme*, "Utrecht Law Review" 2014, Vol. 10, issue 4, p. 113 et seq.; L. E. Gillies, *Electronic Commerce and International Private Law: A Study of Electronic Consumer Contracts*, London 2016, pp. 99–100; S. Yuthayotin, *Access to Justice in Transnational B2C E-Commerce: A Multidimensional Analysis of Consumer Protection Mechanisms*, Berlin 2013, pp. 119–120. For a discussion of aspects peculiar to arbitration, see: A. J. Belohlávek, *B2C Arbitration: Consumer Protection in Arbitration*, Huntington 2012, p. 112 et seq.

ceedings[13]. The clause in issue in *Mostaza Claro*[14] purported to refer any disputes arising under a challenged mobile telephone contract for arbitration to the European Association of Arbitration in Law and in Equity. *Pénzügyi Lízing* concerned a similar clause, one that conferred jurisdiction in any dispute on a specific court. The Court again, just as in *Oceano Grupo*, explained that the imbalance between the parties here is introduced by the fact that the consumer's ability to enter an appearance and have a day in court is impaired. On the flipside, the trader gains an unfair advantage by reserving for himself the right to deal with all consumer claims in one court, regardless of where the claimant lives. One must bear in mind that such clauses are particularly one-sided in the context of the EU internal market which greatly facilitates arm's-length sales between traders and consumers located in different Member States, and distances between the counterparties may be sizable. Further, in *Invitel* the Court mandated that national courts shall, when considering a term that subjected consumers to money order fees (fees incurred in relation with paying invoices issued by a telephone network operator), examine the reasons for or the method of calculating the additional fees and, specifically, whether the consumer has the right to terminate the contract upon being informed of such fees[15]. Even though the additional fees were inserted in small print in the contract in issue, they had to be specifically brought to the attention of the consumer, and it was a manifestation of imbalance between the parties that the trader had the means of executing and concealing such terms from the consumer[16].

The CJEU has propounded the idea that it is the imbalance between a consumer and a seller or supplier that actually empowers legislators to intervene and

[13] *Cofidis*, paragraph 34. M. Piers, *Consumer Arbitration in the EU: A Forced Marriage with Incompatible Expectations*, "Journal of International Dispute Settlement" 2011, Vol. 2, issue 1, pp. 226–228. American scholars have referred to an imperfect information paradigm where the imperatives of efficiency and universality make the public goal of informed and confident consumers practically unattainable. See: S. I. Becher, *Asymmetric Information in Consumer Contracts: The Challenge That Is Yet to Be Met*, "American Business Law Journal" 2008, Vol. 45, issue 4, pp. 733–773; *Standard Form Contracts: A Call for Reality*, "St. Louis University Law Journal" 2000, issue 44, p. 909 et seq.

[14] Case C-168/05 *Mostaza Claro*, ECLI:EU:C:2006:675.

[15] *Invitel*, paragraph 30.

[16] Interestingly, there are outliers to the contrary found in Polish case law. See the judgment of the Appellate Court for Warsaw of 15 February 2013, ref. number VI ACa 1113/12, "Monitor Prawa Bankowego" 2014, issue 3, pp. 29–34, where mere attachment to a consumer credit contract of a table of fees, commissions, legal costs and enforcement proceedings is sufficient so long as the contract clearly indicates that the attachment(s) constitute an integral part of the agreement. See, critically: B. Paxford, *Wyrok SA z dnia 15 lutego 2013 r., VI ACa 1113/12*, „Monitor Prawniczy" 2014, issue 6, pp. 317–321; K. Lehmann, *Glosa do wyroku s. apel. z dnia 15 lutego 2013 r., VI ACa 1113/12*, „Monitor Prawa Bankowego" 2014, issue 3, pp. 49–56; for wider context, see: T. Czech, *Efektywność instrumentów prawnych ochrony kredytobiorcy konsumenta w świetle orzecznictwa sądowego*, „Prawo w Działaniu" 2014, issue 20, p. 280 et seq.

strive towards assisting the parties in achieving contractual equilibrium[17]. To that end, courts shall use all legal and factual elements necessary, and the CJEU has identified, somewhat to the disappointment of a substantive fairness enthusiast, the duty of national courts to assess unfair terms of their own motion as a device fit for purpose[18]. Positive action unconnected with the actual parties to any given contract is said to best serve the interests of conflicted consumers.

3. MATURATION OF THE CONCEPT – EXPLANATIONS IN LATER JURISPRUDENCE AND DOCTRINE

One mechanism invented by the CJEU as regards mitigating the imbalance of rights and obligations between the parties involves the right of the consumer, to consent, as it were, to an unfair term. This was first articulated in *Pannon GSM* where the CJEU accorded to the consumer the right not to assert a disputed term's unfair or non-binding status in the event that the domestic court seized of the dispute informs the consumer of a finding of unfairness[19]. The point was strengthened in *Banif Plus Bank* where the CJEU accepted the practice of a national court which afforded the consumer an opportunity to set out his own

[17] The role of the courts has been identified as "compensation" for such imbalance wherever necessary. See: Case C-421/14 *Banco Primus*, ECLI:EU:C:2017:60, paragraph 43; Case C-415/11 *Aziz*, ECLI:EU:C:2013:164, paragraph 46; Case C-154/15 *Gutierrez Naranjo*, ECLI:EU:C:2016:980, paragraph 58. The concept is not new as the idea of compensation was prominently featured in the Guidelines for Consumer Protection adopted by the General Assembly of the United Nations by virtue of Resolution 39/248 in April 1985. See: P. Merciai, *Consumer Protection and the United Nations*, "Journal of World Trade Law" 1986, Vol. 20, issue 2, p. 214 et seq.

[18] *Aziz*, paragraph 46; Case C-280/13 *Barclays Bank*, ECLI:EU:C:2014:279, paragraph 34; Case C-169/14 *Sanchez Morcillo*, ECLI:EU:C:2014:2099, paragraph 24; Case C-377/14 *Radlinger and Radlingerová*, ECLI:EU:C:2016:283, paragraph 52; Case C-32/14 *ERSTE Bank Hungary*, ECLI:EU:C:2015:637, paragraph 41. For more, see: F. Cafaggi, *On the Transformations of European Consumer Enforcement Law: Judicial and Administrative Trialogues*, *Instruments and Effects*, (in:) F. Cafaggi, S. Law (eds.), *Judicial Cooperation in European Private Law*, Cheltenham 2017, pp. 239–244; C. Pavillon, *ECJ 26 October 2006*, *Case C-168-05 Mostaza Claro v. Centro Movil Milenium SL – The Unfair Contract Terms Directive: The ECJ's Third Intervention in Domestic Procedural Law*, "European Review of Private Law" 2007, issue 5, pp. 744–746.

[19] *Pannon GSM*, paragraph 35. This facet of judicial treatment of unfair terms has been criticized as overreaching and according too much latitude to the judiciary under the guise of empowering the consumer. See: M. Kenny, *The Law Commissions' 2012 Issues Paper on Unfair Terms: Subverting the System of 'Europeanized' Private Law?*, "European Review of Private Law" 2013, issue 3, pp. 886–887. For a more moderate view, see: J. P. Devenney, *Gordian Knots in Europeanised Private Law: Unfair Terms*, *Bank Charges and Political Compromises*, "Northern Ireland Legal Quarterly" 2011, Vol. 62, issue 1, pp. 39 et seq. More generally: S. Whittaker, *Judicial Interventionism and Consumer Contracts*, "Law Quarterly Review" 2001, issue 117, p. 217 et seq.

views on the unfairness of a term in issue. The Court went on to say that the relevant intention of the consumer may be taken into account where "conscious of the non-binding nature of an unfair term, that consumer states nevertheless that he is opposed to that term being disregarded, thus giving his free and informed consent to the term in question"[20].

The two ground-breaking cases, decided within one week from each other, were *RWE Vertrieb*[21] and *Aziz*. They offered comprehensive guidance as to the principles (or "general criteria") governing the meaning of "significant imbalance"[22]. *RWE Vertrieb* concerned contracts concluded between natural gas suppliers and consumers. German law lays down terms and conditions to be used in gas supply contracts, which gas operators are obliged to follow (standard tariff contracts). A number of obligations attach to these terms, most importantly the consumer's right to terminate in the event of a variation or amendment to the terms. The claimants in *RWE Vertrieb* entered into contracts which were not governed by the said regulations (special contracts). The contracts provided for a mechanism of amendment that did not accord to consumers the right to terminate. The Court held that to restore the balance between the parties a proviso must be inserted in gas supply contracts that prepares consumers for situations where an increase in the fees is applied. Specifically to this end, information duties shall be imposed on gas suppliers which shall explain to their consumers conceivable potential consequences of an increase. Further, the right of termination must not be purely formal or theoretical (left "on paper" and qualified with implausible caveats)[23]. Crucially, the consumer shall be facilitated in that, in the event that an amendment giving rise to the right of termination is exacted, he has a wealth of options open to him, including the right to change his gas supplier. This could well imply that gas supply contracts should not stipulate contractual penalties for termination, and even (although this was not articulated by the Court) perhaps that the consumer should be informed of other competitive options available on the market.

In *Aziz*, the Court steered towards caution by declining to provide its own substantive directives governing the meaning of "significant imbalance", following instead the guidance of Advocate General Kokott that "[i]t is not possible to assess whether a term causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer, without a comparison with the legal situation under national law in the event that the parties themselves have not made any contractual provision"[24]. Deference to national law means that

[20] Case C-472/11 *Banif Plus Bank*, ECLI:EU:C:2013:88, paragraph 35.

[21] Case C -92/11 *RWE Vertrieb*, ECLI:EU:C:2013:180.

[22] *RWE Vertrieb* also contains a number of explanations concerning the scope of the "plain and intelligible language" requirement featured in Articles 4(1) and 5 of Directive 93/13.

[23] *RWE Vertrieb*, paragraph 54.

[24] Opinion of Advocate General Kokott in *Aziz*, paragraph 71.

the CJEU abdicated its power to intervene in the actual consequences of a domestic regulation governing consumer contract terms, blindly treating any and all national regulations as permissible[25]. Thus, freedom of contract is preserved, even more so since most provisions in modern contractual codifications impose only a floor of obligations, which may be relatively freely modified by the contractual parties themselves[26]. It is worth mentioning that the Advocate General's views went even further in that she posited that even where the position of the consumer is less favourable than that envisaged in national provisions, there is still room for consideration and such an arrangement should not be automatically struck down as unfair[27]. The Court conflated the two substantive criteria of good faith and significant imbalance and offered a mixed subjective-objective standard. For under the *Aziz* test the national court seized of a dispute shall ascertain, by reference to the trader's actual conduct, whether he acted fairly and equitably; second, a determination must be made whether the consumer would have agreed to the term in issue had it been brought to his attention in individual negotiations[28]. In its analysis of the specific contract terms in issue, the Court attached importance, in respect of the term concerning unilateral determination by the lender of the amount of unpaid debt, to the fact that the term hindered the consumer in taking legal action and exercising defence (although subject to the relevant national

[25] Confirmed in *Banco Primus*, paragraph 58: "It is thus clear that the Court must limit itself to providing the referring court with guidance which the latter must take into account in order to assess whether the term at issue is unfair".

[26] An illustration of this phenomenon with respect to three major legal systems is offered in: C. Valcke, *Convergence and Divergence Between the English*, *French and German Conceptions of Contract*, University of Toronto Faculty of Law, Legal Studies Research Series, No. 08-14, pp. 10–45.

[27] Opinion of Advocate General Kokott in *Aziz*, paragraph 72. This proposition, it appears, has been rejected resoundingly in later iterations of the overarching principle, particularly in *Banco Primus*: (paragraph 59): "In order to ascertain whether a term causes a 'significant imbalance' in the parties' rights and obligations under a contract to the detriment of the consumer, particular account must be taken of which rules of national law would apply in the absence of an agreement by the parties in that regard. Such a comparative analysis will enable the national court to evaluate whether and, as the case may be, to what extent, the contract places the consumer in a legal situation less favourable than that provided for by the national law in force." See: K. Gutman, *The Constitutional Foundations of European Contract Law: A Comparative Analysis*, Oxford 2014, pp. 73–75; P. Rott, *Unfair Contract Terms*, (in:) C. Twigg-Flesner (ed.), *Research Handbook on EU Consumer and Contract Law*, Cheltenham 2016, pp. 299–301; G. Howells, M. Durovic, *The Rise of EU Consumer Law between Common Law and Civil Law Legal Traditions*, (in.) F. de Elizalde (ed.), *Uniform Rules for European Contract Law?: A Critical Assessment*, Oxford 2018, pp. 128–129; C. Mak, *On Beauty and Being Fair – The Interaction of National and Supranational Judiciaries in the Development of a European law on Remedies*, (in:) K. Purnhagen, P. Rott (eds.), *Varieties of European Economic Law and Regulation: Liber Amicorum for Hans Micklitz*, Berlin 2014, pp. 827–828.

[28] A similar conflation is found in the recent Case C-186/16 *Andriciuc*, ECLI:EU:C:2017:703, paragraph 57.

rules)[29]. R. Mańko has noted that the idea of juxtaposing the situation of the consumer under a disputed contractual term with the arrangements imposed by the relevant *ius dispositivum* is derived from the German notion of *Leitbild des dispositiven Gesetzrechts*, however no explanation was given in the judgment as to why the concept was embraced[30].

Whilst *Aziz* was a step forward in that the CJEU attempted to address the convoluted issues of good faith and significant imbalance, it introduced a significant amount to confusion due to its rather sweeping propositions and a broad-brush approach. In *Constructora Principado* the Court followed the construction proffered in *Aziz* by limiting the ambit of an inquiry into significant imbalance to a comparative analysis between the contractual term in issue and national rules which would apply in the absence of any agreement between the parties[31]. In addition, courts shall have regard to the legal situation of the consumer having regard to the means at his disposal, under national legislation, to prevent continued use of unfair terms[32].

A recent elucidation of the factors underlying instances of "imbalance in the parties' rights and obligations" came in the case of *Verein fur Konsumenteninformation v Amazon EU Sarl* (C-191/15) , where the Court pointed to an insertion of a choice of law clause in favour of a jurisdiction other than that of the consumer's own (i.e. that of his habitual residence), which is likely to prevent them from bringing an action against their counterparty, chiefly due to lack of familiarity with the law applicable to their registered office. Regrettably, even this latest development merely adds to the succession of cases (not that lengthy at that) where the concept of imbalance has been shed light on in a piecemeal fashion. Because the CJEU is firmly chained to the idea that Directive 93/13 concerns itself principally (if not exclusively[33]) with what is termed procedural unfairness of terms in consumer contracts, and the letter of Articles 3 and 4 of the Directive makes it apparent that it is the conclusion of a consumer contract that is being regulated[34]. An explicit reference is made in Article 4(1) to "the time of conclusion of the contract" when delineating the scope of circumstances which may be validly picked

[29] *Aziz*, paragraph 75.

[30] R. Mańko, *The Use of Extra-Legal Arguments in the Judicial Interpretation of European Contract Law: A Case Study on Aziz v Catalunyacaixa (CJEU, 14 March 2013, Case C-415/11)*, "Law and Forensic Science" 2015, Vol. 10, issue 2, p. 21.

[31] Case C-226/12 *Constructora Principado*, ECLI:EU:C:2014:10, paragraph 21.

[32] *Sebestyen*, paragraph 27.

[33] A court may conduct an investigation into the substance of an alleged unfair contract term governing the adequacy of price and remuneration where the relevant term is not expressed in plain intelligible language (Article 4(2) of Directive 93/13).

[34] Pronouncements have been made to the effect that procedural imbalance of rights is a sign of, and is amplified by imbalance in the substantive rights and obligations. See: case C-169/14 *Sanchez Morcillo*, ECLI:EU:C:2014:2099, paragraph 46; Case C-413/12 *Asociacion de Consumidores Independientes de Castilla y Leon*, ECLI:EU:C:2013:800, paragraph 50.

up on when arguing the unfairness of a term (the reference is repeated again towards the end of the provision so as to disperse any and all doubts as to whether substantive unfairness is to be considered). Little assistance is to be gleaned from the Court's assertion that examination of instances of imbalance must be carried out with reference to national rules which are applicable where no agreement between the parties is discernible, the devices the consumer has at their disposal under national law to render the unfair term in disputes inapplicable, the nature of the goods and services covered by the contract at issue and all the circumstances surrounding the conclusion of the contract. The first observation merely pushes the task of determining what makes up an "imbalance" down to national courts (and potentially does damage to the ideal of consistency as national courts may take a more or less consumer-friendly approach), and the other two repeat the provisions of the Directive. It may only be surmised that the Court is liable to take a more sensitive approach as regards services where the consumer is at a particular disadvantage and operates at a significant information deficit. Sophisticated sectors, e.g., banking and insurance, come into mind. Aside from this being a mere conjecture, another roadblock relates again to the limited scope of inquiry – sophistication of the financial industry and contracts utilized thereby consists more in the fact that they stipulate risks which may not reveal themselves until long after the contract has been signed. Any imbalance liable to ensue later in the contractual relationship (e.g. by virtue of a sharp currency rate change) may be latent at the time of contract formation. Within the context of an onerous arbitration clause, courts are called upon to take positive action unconnected with the actual parties to the contract in order to correct the imbalance between the consumer and the seller or supplier. Provided that they have available to it the necessary legal and factual elements, the national court or tribunal is required to assess of its own motion the unfair nature of the contractual terms which give rise to the debt determined in that arbitration award when, under national rules of procedure, it is required to assess of its own motion, in similar enforcement proceedings, whether an arbitration clause is in conflict with national rules of public policy[35].

Notwithstanding, attempts have been made to stretch the idea of "imbalance in the parties' rights and obligations" in at least two ways. First, it must be considered whether in assessing unfairness regard may be had to circumstances which arose after the contract was concluded. For consumer contract terms may trigger consequences long after they were signed[36]. Take a gym plan contract which stipulates high contractual penalties for early termination or mandates that the consumer pays the entire amount of, say, a year-long plan upfront and stands to lose

[35] Case C-470/12 *Pohotovosť*, ECLI:EU:C:2014:101, paragraph 42; *Pannon GSM*, paragraph 32.

[36] Long-term, framework contracts are of note here. See, by reference to franchising agreements: E. C. Spencer, *The Applicability of Unfair Contract Terms Legislation to Franchise Contracts*, "University of Western Australia Law Review" 2013, Vol. 37, issue 1, pp. 156–175.

the money should they terminate early. The penalty clause in question may get upheld as fair if a short-sighted view is taken and only the parties' rights and obligations at the time of conclusion of the contract are taken into account. It appears that the current letter of the Directive facilitates such a reading and may therefore render unjust results as regards long-term consumer contracts[37].

The second avenue of stretching the scope of "parties' rights and obligations" rests upon broadening it beyond the strictly legal understanding seemingly employed by the courts. Even though the CJEU has alluded to terms like "bargaining position", "bargaining power" and "contractual advantage" on a handful of occasions, as demonstrated above, the terms have barely any teeth in failing to give meaningful guidance on what factors to take into account in deciding on the fairness of a term. The *Amazon EU* case limited itself to reiterating what we already knew, i.e. that a broad interpretation of "imbalance" is favoured, however it still appears that the inquiry entails merely the legal rights obligations of the parties, and this is potentially broadened only by reference to merely procedural constraints, such as expression of terms in plain intelligible language, dependence on another contract, an opportunity to influence the substance of the term. It is difficult to gather much from this rhetoric, aside from the Court's apparent sensitivity to the knowledge of the consumer at the time of conclusion of the contract. The more the consumer knows about the transactional dynamic, the market as a whole, the more aggressive terms the trader is entitled to put forward. In other words, the permissibility of consumer contract terms hinges to a large extent on two factors, neither of which is connected directly to the bargaining position of the consumer. First, the level of familiarity of the consumer with the circumstances within which the trader operates is relevant. This entails, at least post-*Amazon EU*, the language the trader does business in. Ordinarily, however, one should add to this a host of market-related variables, such as (depending perhaps on the sophistication of the business) applicable interest rates, price swings, fluctuation of currency rates, supply and demand, regulatory and political measures etc. The second key factor is the negotiation process between the parties. The Directive's focus on the formal aspect of unfairness has put a disproportionate strain on the exercise in negotiation, which is liable to, ironically, take the focus away from the substance of negotiations. It is tempting and, looking at the letter of the law as it stands today, viable to argue that an extensive negotiation followed by a refusal by the trader to include any of the consumer's suggestions in the ultimate terms of the contract complies with the Directive's minimum requirements. The trader could sensibly maintain that the consumer was able to influence the substance of the term but was inept at convincing the trader of the strength of their arguments.

[37] The term "relational contract" has been gaining traction in this context, particularly in the common law world, after it was used by Leggatt J in the English case of *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB).

4. FURTHER REVERBERATIONS

An in-depth reading of later cases, notably *Banco Primus*, reveals a foray into, first, lumping good faith and significant imbalance together, but also an example of the comparative analysis as applied to substantive unfairness. The approach, which, admittedly, does a little more than muddle the waters on the delineation between the two factors, does touch upon the economic interests of the consumer. The court in that case analysed a clause relating to ordinary interest, which provided for the calculation thereof on the basis of a formula under which the outstanding loan principal and interest accrued was divided by the number of days in a financial year, namely 360 days, and not 365 days representing a calendar year[38]. The CJEU instructed the relevant national court "to compare the method of calculation of the rate of ordinary interest laid down in that term and the actual sum resulting from that rate with the methods of calculation generally used, the statutory interest rate and the interest rates applied on the market at the date of conclusion of the agreement at issue in the main proceedings for a loan of a comparable sum and term to those of the loan agreement under consideration"[39]. Importantly, the impact of adoption of a 360-day calculation period, which did not overlap with an ordinary calendar year, upon the amount to be repaid and the amount of interest due, had to be considered. For our purposes, it is commendable that the CJEU referred to the market rate of interest as it represents a significant step in providing a frame of reference for courts when assessing unfairness, particularly for judges reluctant to take a more activist role. It appears clear from the passage cited that a conclusion in favour of unfairness of a clause is warranted where there is a marked deviation from the market standard.

The Court in *Banco Primus* also made comments on another disputed clause, namely one that entailed a so-called accelerated repayment procedure under which, in the event of repeated default on the part of a lendee, the entire amount of the loan (or a significant portion of it) is called in by the bank. On the facts of *Banco Primus*, the default lasted 7 months before the bank demanded the repayment. In such a context, the CJEU held, that a national court should, first, examine whether there is a causal link between the right of the bank to call in the totality of the loan at hand and the consumer's failure to regularly pay loan instalments (with the CJEU couching this generally in terms of "non-compliance by the consumer with an obligation which is of essential importance in the context of the contractual relationship in question"). Next, it shall be considered whether an instance of non-compliance (a particular instance, it appears[40]) is sufficiently

[38] *Banco Primus*, paragraph 20.

[39] *Ibidem*, paragraph 65.

[40] Although, conceivably, the court could examine this by reference to documents only, engaging in a hypothetical exercise, relying, for instance, on numbers on the face of the document.

serious considering the amount and term of the loan. Another factor is whether the right to demand the accelerated repayment is contrary to "applicable common law rules"[41] in the absence of contractual provisions mitigating its potentially harsh effects, and whether national law provides for adequate and effective means enabling the consumer subject to such a term to remedy the effects of the loan being called in.[42] Economic undertones are also present when analysing certain procedural arrangements connected with enforcing unpaid debts. Notably, in the second instalment of the *Sanchez Morcillo* saga, the Court upheld a clause which allowed for an assessment of unfairness of a contract term forming the basis of an enforcement order provided that a negative conclusion was capable of rendering mortgage proceedings invalid[43]. Such a term was held to no longer expose the consumer the risk of final and irreversible loss of their dwelling in a forced sale before a court has even been able to assess the unfairness of the contractual term upon which the seller or supplier bases his application for mortgage enforcement[44]. The Court, as demonstrated above, couched its reasoning not only in terms of furnishing consumers an opportunity to have their case heard by a court at second instance, but also in terms of preventing them from losing their homes, thus embracing the economic aspect of unfairness.

5. *GUTIERREZ NARANJO* – FLOOR CLAUSES

A recent case which explored in depth the real-life consequences of contractual imbalance of rights and obligations is *Gutierrez Naranjo*. There, the CJEU grappled with so-called floor clauses which establish, within the confines of a loan agreement, the minimum rate below which a variable interest rate of interest cannot fall, regardless of attendant market conditions, throughout the duration of a loan. Legally, the question was whether consumers were entitled to repayments of sums incurred and paid on the basis of provisions subsequently held to be unfair[45]. The Spanish Supreme Court had found that "floor clauses" were objectively lawful, neither unusual or extravagant, their use had long been tolerated

[41] Reference to "common law" is somewhat puzzling. It gets at, it is submitted, universally applicable law (i.e. statutes and universally binding secondary legislation).

[42] *Banco Primus*, paragraph 66.

[43] *Sanchez Morcillo* C-539/14, paragraph 40.

[44] *Ibidem*, paragraph 47.

[45] For a discussion of the factual background, see S. C. Lapuente, *A Critical Analysis of the CJUE Judgment of 21 December 2016: Retroactive Nullity Yes*, *but Not Unfair Transparency Test of Floor Clauses*, "Cuadernos de Derecho Transnacional" 2017, Vol. 9, issue 1, pp. 383–388. In English: Á. Pereda, M. Corbacho, *Spain: consumer protection – floor clauses*, "Journal of International Banking Law and Regulation" 2017, Vol. 32, issue 9, pp. N111–N113.

on the market for credit agreements for immovable property, that the banking institutions had complied with the regulatory requirement for information, that the fixing of a minimum interest rate responded to the necessity of maintaining a minimum return on the mortgage loans in question in order to enable the banking institutions to cover the costs of production involved and continue to provide such financing, and that the clauses were calculated in such a way so as not to involve significant changes to the initial amounts to be paid[46]. Consequently, the Spanish court limited, in reliance upon the principle of legal certainty, the temporal effects of its judgment – only amounts overpaid after the date of its publication[47].

The Court inferred that a temporal limitation is unwarranted and impermissible where there has been a finding of unfairness. Although the Court expressed its judgment primarily in reliance upon Article 6(1), arguing the obligation to ensure unfair terms are not binding on the consumer is not limited in time and the effect of that temporal limitation is an incomplete and insufficient protection that cannot constitute an adequate or effective means of preventing the use of unfair terms, as required by the Directive[48], this determination ties into the concept of significant imbalance and consumer economic interests. For the prohibition on limiting the temporal effects of a finding of unfairness, coupled with the restitutory effect that national law shall have (i.e. that consumers shall be restored to the position they were in before entering into a contract "tainted" by unfair terms), is instrumental in ensuring that a proper balance is injected into contractual relationships involving consumers. The CJEU created here a synergy between the effects of Articles 3(1) and 6(1) rescuing, as it were, the practical significance of the former by preventing a national legal provision from shielding sellers and suppliers from the full extent of their liability by virtue of an unfair term. With economic interests of the consumers afforded extensive protection, it will be interesting to see whether there any other factual constellations which would push the European court to pursue this avenue of invoking Article 6(1). Despite receiving criticism on account of perceived judicial overreach consisting in an overruling of a judgment of a supreme national court[49], it demonstrates readiness

[46] As reported in *Gutierrez Naranjo*, paragraph 24.

[47] F. Pertíñez Vílchez, *La incompatibilidad con la Directiva 93/13 de la limitación temporal de los efectos restitutorios vinculados a la declaración judicial del carácter abusivo de una cláusula contractual. Comentario de la sentencia de 21 diciembre 2016*, *Gutiérrez Naranjo*, "Revista Europea de Derecho Comunitario" 2017, issue 57, pp. 671 et seq.

[48] See paragraphs 51–64 of the judgment. In other words, provisions of national law, to which Article 6(1) of Directive 93/13 refers, may not adversely affect the substance of the right of that the consumers acquire under that provisions. C. Mak, *Gutiérrez Naranjo – On Limits in Law and Limits of Law (August 30, 2017)*, Amsterdam Law School Research Paper No. 2017-38; Centre for the Study of European Contract Law Working Paper Series No. 2017-06.

[49] D. Sarmiento, *An Instruction Manual to Stop a Judicial Rebellion (before it is too late, of course)*, 2 February 2017, https://verfassungsblog.de/an-instruction-manual-to-stop-a-judicial-rebellion-before-it-is-too-late-of-course/ (accessed: 31.12.2018).

on the part of the Court to invoke other principles within Directive 93/13 to bolster the effect of a finding of substantive unfairness.

6. POSITION UNDER POLISH LAW

Generally, it shall be noted that the Polish regulation avails itself of the term "gross violation of the consumer's interests" which is semantically different from "significant imbalance in the parties" rights and obligations". Whilst it is generally acknowledged that the notions are synonymous (or they should be so interpreted), calls have been made for a higher standard of diligence in implementation[50]. Contractual imbalance (which, on its face, is tied, at least to an extent, to "significant imbalance" under Article 3(1) of Directive 93/13) has been examined as part of the good faith test, and the second prong (i.e. the "gross violation" of the consumer's interests under Article 385^1 paragraph 1 of the Civil Code) only serves the purpose of determining whether the contractual imbalance is sufficiently intense[51].

In the broadest terms, "gross violation of the consumer's interests" is defined in Polish case law as a gross disproportion between the rights and interests of the consumer and the trader, to the detriment of the former[52]. A violation must be "gross" – alternative formulations have included "significant", "relevant"[53], "drastic" or "egregious"[54]. "Gross" has also been understood as "patent", "indisputable" and "apparent" in relation to a particular adverse characteristic or breach of loyalty towards the consumer[55]. Courts have made assessments dependent on whether a given clause deviates from "contractual practice", acknowledging that

[50] K. Rymanowska-Mrugała, *Dostosowanie prawa polskiego w zakresie niedozwolonych klauzul w umowach konsumenckich do regulacji unijnej*, „Acta Universitatis Wratislaviensis" 2014, Vol. 316, issue 1, pp. 122–125.

[51] Judgment of the Supreme Court of 15 January 2016, ref. number I CSK 125/15, OSNC-ZD 2017/1/9.

[52] The first pronouncement of the principle at the highest judicial level came in the judgment of the Supreme Court of 14 April 2003, ref. number I CKN 308/01, LEX No. 80243. A similar iteration is "a significant deviation from the principle of fair proportion or rights and obligations" – see the judgment of the Appellate Court for Warsaw of 20 February 2015, ref. number VI ACa 250/14, LEX No. 1754203.

[53] See, for example, the judgment of the Supreme Court of 15 January 2016, ref. number I CSK 125/15, OSNC-ZD 2017/1/9; judgment of the Supreme Court of 8 June 2004, ref. number I CK 635/03, LEX No. 846537; judgment of the Appellate Court for Warsaw of 15 November 2017, ref. number VII ACa 950/17, LEX No. 2471080; judgment of the Appellate Court for Warsaw of 26 April 2016, ref. number VI ACa 551/15, LEX No. 2071249.

[54] Judgment of the Supreme Court of 13 October 2010, ref. number I CSK 694/09, LEX No. 786553.

[55] Judgment of the Appellate Court for Warsaw of 26 April 2013, ref. number VI ACa 1571/12, LEX No. 1339417.

it is a fluid concept[56]. Consequently, even an unused clause may be considered unfair and struck down as such where it is liable to exert pressure on a consumer to assent to terms which are in the vested interest of the other party. Further, it has been contended that a consumer's interest is an objective concept, one that is ascribed to a given agent which happens to act as a consumer. In this theory, consumers have rights even before they enter into a contractual arrangement. This is explained as follows: a contractual term may "arise" or "spring into life" only after an agreement is concluded, therefore any interest the term purportedly impinges upon must have existed, in one form or another, before the agreement was entered into[57].

As a rule, assessment of whether a gross violation of a consumer's interests occurred is objective, and it is insufficient for a party to argue that, in retrospect, a contract term detrimentally affected their interests given their individual preferences or expectations[58]. It was early on that the Polish Supreme Court recognized the significance of consumers' economic interest, with "economic situation of the consumer", together with organizational inconvenience, loss of time, unreasonable treatment and violation of privacy professed as principal elements of the definition of "interests" in Article 385[1] of the Civil Code[59]. These criteria will be applicable to individual contracts with varying intensity depending on the situational context and the imbalance of rights and obligations they create[60]. In making an assessment,

[56] Judgment of the Supreme Court of 13 April 2012, ref. number I CSK 428/11, LEX No. 1130420. More on this: A. Oponowicz, *Niedozwolone postanowienia wzorców umów zawieranych z konsumentami – zmienne tendencje w polskim orzecznictwie sądowym*, „Internetowy Kwartalnik Antymonopolowy i Regulacyjny" 2014, issue 4, pp. 30–31.

[57] M. Skory, *Klauzule abuzywne w polskim prawie ochrony konsumenta*, Kraków 2005, pp. 169–171.

[58] Judgment of the Appellate Court for Kraków of 13 November 2014, ref. number I ACa 1092/14, LEX No. 1648959. It is difficult to discern whether judges see a possibility of there occurring a violation of an economic interest without a concurrent violation of some other private interest. One Appellate Court-level judgment could be taken to mean that a violation of an economic interest is an extreme case and, as it were, a culmination of (a series of) violations of private, non-economic interests. See: judgment of the Appellate Court for Warsaw of 13 March 2014, ref. number VI ACa 1733/13, LEX No. 1454669.

[59] Judgment of the Supreme Court of 8 June 2004, ref. number I CK 635/03, LEX No. 846537; judgment of the Supreme Court of 13 October 2010, ref. number I CSK 694/09, LEX No. 786553; judgment of the Appellate Court for Warsaw of 6 March 2013, ref. number VI ACa 1241/12, LEX No. 1322083. These interests have been referred to as "unquantifiable". See: judgment of the Appellate Court for Warsaw of 13 March 2014, ref. number VI ACa 1733/13, LEX No. 1454669. See: M. Hejbudzki, *Klauzule odmowy realizacji złożonego przez konsumenta zamówienia w transakcjach typu business to consumer*, (in:) M. Królikowska-Olczak, B. Pachuca-Smulska (eds.), *Ochrona prawna konsumenta na rynku mediów elektronicznych*, Warszawa 2015, pp. 199–200.

[60] Courts are at liberty to take account of certain individual characteristics of given consumers, e.g. the fact that they are seniors or children, or the reputation of a trader company. See: judgment of the Appellate Court for Warsaw of 3 February 2016, ref. number VI ACa 12/15, LEX No. 2026414. Assessment of the gravity of a violation of a consumer's interests shall take account

courts shall be wary of the fact that conclusion of a consumer contract normally implies a high level of engagement and activity of a consumer related to, *inter alia*, the need to become familiarized with and choose from a wide array of offers available from traders and suppliers on the modern competitive market[61]. Other points of reference include the fact whether the consumer is aware, at the time of conclusion of the contract in dispute, of the total value of consideration they are expected to confer on the trader (it is a gross violation of consumer interests if the contract reserves for the trader the right to vary the price due without clearly articulating the grounds for it). It has been held that such mechanisms not only expose consumers to the threat of sustaining economic loss, but also deprive them of satisfaction related to successful completion of a deal[62].

Such a broad understanding of interest is at times, somewhat controversially and in passing, qualified by the fact that it should not violate the legitimate interest of a trader in conducting its business activity[63]. The type and specificity of a sector in which a given trader operates is also of significance. The Supreme Court, in a case concerning the alleged unfairness of clauses used by Allegro.pl, Poland's leading online e-commerce platform, overturned the Appellate Court's holding on exactly this ground. Here, of particular importance was the mass character and sheer magnitude of transactions in which Allegro acted as an intermediary and processor. Therefore, to distinguish whether the parties to a transaction are consumers or businesses acting as professional traders may prove excessively complicated. Difficulties abound especially since where both parties to an auction are natural persons, they are both consumers as against Allegro[64]. In a highly regulated sector

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of, inter alia, certain objective criteria attaching to the amount of consideration conferred by both parties, in tandem with a host of subjective criteria depending on the contractual relationship in question. A court cannot conclude its assessment with an analysis of the respective amounts of consideration themselves. For to establish the actual balance of rights and obligations one must consider certain substantive elements, subjective from the point of view of a given contractual party See: judgment of the Appellate Court for Warsaw of 11 December 2015, ref. number VI ACa 1815/14, LEX No. 2005410; M. Bednarek, (in:) E. Łętowska (ed.), *System Prawa Prywatnego. Tom 5. Prawo zobowiązań – część ogólna*, Warszawa 2012, p. 769.

[61] Judgment of the Supreme Court of 13 October 2010, ref. number I CSK 694/09, LEX No. 786553.

[62] Judgment of the Appellate Court of Warsaw of 9 April 2014, ref. number VI ACa 1828/13, LEX No. 1527305.

[63] Judgment of the Supreme Court of 13 October 2010, ref. number I CSK 694/09, LEX No. 786553; judgment of the Appellate Court for Warsaw of 9 April 2014, ref. number VI ACa 1828/13, LEX No. 1527305.

[64] Judgment of the Supreme Court of 13 August 2015, ref. number I CSK 611/14, LEX No. 1771389. The Supreme Court also accepted Allegro's efforts in terms of drafting internal guidelines and procedures which, on the whole, tended towards protecting the buyer even where both parties were consumers or where the seller was a consumer and the buyer not. The judgment has had profound consequences, and its exact ramifications have not been acknowledged nor realized in the literature. There have been more than 50 reported cases where the prominence of arguments pertaining to the trader's position within a given market or industry sector, its track record in terms

such as provision of electricity to consumers, traders face a host of additional obligations derived from the general concept of good faith, in particular to cooperate with administrative authorities and land owners with a view to duly performing their obligations, and to clearly defining the rights and obligations of respective parties in their standard contracts. This high threshold is typically explained by reference to the scarcity of the good the traders deal in and dearth of meaningful alternatives on the market, in other words – limited competition[65].

A recent case posits that the starting point in assessing the occurrence of a "gross violation of consumer interest" shall be the distribution of rights and obligations as provided for by dispositive laws (i.e. provisions that would have bound the parties had the matter not been regulated in the contract at hand – in line with *Aziz*) and in the absence of such relevant provisions – the general principles of and value judgments accepted in contract law, the nature of the fundamental contractual relationships enumerated in the Civil Code, correspondence of the disputed clause with its putative objectives, and, finally, the customarily shaped empirical precepts[66]. Importantly, it appears a court may refer, in scrutinizing modern contracts not codified in the Civil Code, to similar codified contractual types (such as mandate contracts or agency contracts) to make inferences regarding the desirability of a given arrangement.

6.1. TYPE OF AGREEMENT IN DISPUTE AS A GUIDING FACTOR

The courts have attempted to derive guidance for the purposes of assessing the magnitude of a violation of consumer interest from the type of agreement in dispute. In the context of a mortgage loan agreement, predicating a bank's right to terminate upon termination by the consumer of a related savings account with the bank has been held to amount to a gross violation of such a consumer's economic interests[67]. The court in that case went on analyse at length the nature

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of customer satisfaction (e.g. share of positive reviews), and, perhaps most controversially, the need to preserve widely perceived economic freedom is discernible. It is premature to assess the precise extent of impact of the judgment, however it is already evident that lower instance courts have accepted and embraced the trader-friendly tenor of the Supreme Court judgment. On a side note, it is worth mentioning that the new Entrepreneurship Law of 6 March 2018 (Official Journal of Laws of 2018, item 646) refers in Article 9 to the need for traders to act in accordance with reasonable interests of consumers (which could be used to qualify and limit the ambit of protection).

[65] Judgment of the Appellate Court of Warsaw of 9 April 2014, ref. number VI ACa 1828/13, LEX No. 1527305.

[66] Judgment of the Appellate Court for Katowice of 8 March 2018, ref. number I ACa 915/17, LEX No. 2475090.

[67] Judgment of the Court of Competition and Consumer Protection of 24 August 2012, ref. number XVII AmC 2600/11, LEX No. 2545868. Analogous observations have been made with regard to insurance policies. See, for example: judgment of the Appellate Court for Warsaw of 20 April 2017, ref. number VI ACa 67/16, LEX No. 2331726.

of a mortgage loan, accentuating its long-term character and detachment from other banking services that me offered at any time by the lender. Moreover, where the bank decided to amend the terms and conditions of a savings account (by, for example, increasing account management fees), the consumer would merely have a theoretical right to defend themselves from such changes by terminating the agreement. This would, however, lead, on the facts, to a breach of the related mortgage loan agreement. In this way the consumer's termination right is rendered illusory. Significant imbalance in the parties' rights and obligations manifests itself in two ways: first, by connecting rights stemming from two independent agreements; second, by effectively depriving the consumer of the right to contest adverse decisions of the bank throughout the duration of a bank account agreement. The right to contest adverse decisions made arbitrarily by the trader has been invoked in the context of a utility company's prerogative to issue corrective invoices without reserving for the consumer any recourse to have the basis of a correction verified. The trader, it has been held, cannot waive its duty to make accurate readings and records of electricity or water meters by empowering itself to correct its determinations *ex post* and arbitrarily charge the consumer for outstanding sums[68].

Further, imposition of a mechanism, within the context of a contract for the purchase of a newly constructed home, of price indexation according to an objective indicator none of the parties can influence or manipulate, shall not be equated with the creation of a right, on the part of the construction company, to "specify or to increase the price" contrary to Article 1(l) of the Annex to Directive 93/13 and Article 385^3 point 20 of the Polish Civil Code[69]. Where both parties are able to ascertain, with a marked degree of certainty, the ultimate gravity of the final consideration (such as the price to be paid for a home) by reference to commonly available market indicators, it is difficult to substantiate a claim that determination of the price was left entirely within the discretion of the trader or supplier. The conclusion does not change where it is the trader or supplier who performs a calculation of the final price by reference to an indexation indicator so long as the consumer is within his rights to challenge such a calculation. The Supreme Court went on to draw upon the nature and condition of the construction market, noting its technical and legal characteristics as well as the fact that often times it is external, market factors that influence the content, size and inter-relation of consideration conferred by parties upon each other. Specifically, the construction company's need to remain on the market with a view to performing its obligations towards the consumer was stressed, which makes it necessary for the consumer to render consideration that has sufficient purchasing power for the trader to stay in business. For only by staying in business can a trader fulfil its obligations towards a consumer. That the court noticed this inter-relation of mutual interests

[68] Judgment of the Appellate Court for Warsaw of 11 June 2015, ref. number VI ACa 1045/14, LEX No. 1916598.

[69] Judgment of the Supreme Court of 2 April 2015, ref. number I CSK 257/14, LEX No. 1710338.

is commendable – and it is worth noting that no reference was made to the bargaining position of either party[70]. Further, the court intimated that account shall be taken of the stage of the investment process at which a particular consumer contract is entered into. For a consumer who purchases a home at a very early stage of the process must be aware and accepting of the potential subjection to an indexation clause because the true purchasing power of their consideration is difficult to ascertain. Generally, it has been held that the type of business activity undertaken by a trader and the specificity of goods or services rendered thereby shall play a factor in determining unfairness[71].

There are, however, limits to the reliance a trader may place on the type of services provided under the agreement when imposing potentially onerous requirements on the consumer. Consequently, an insurer cannot call upon the peculiarity of an immediate "assistance" type insurance policy to burden a consumer with a duty to bring a claim under their policy within 5 days of incidence of a medical emergency event[72].

6.2. INDICATORS OTHEN THAN TYPE OF AGREEMENT

Reliance is placed on a claimant consumer's investment into a contract they have entered into. Therefore, in the context of a unit-linked life insurance policy involving certain investment elements, emphasis was put on the fact that the consumer entrusted the defendant insurer with a substantial sum of money, even a slight decrease of which materially affected their interests[73]. Since such a high-risk policy is maintained by an insurer at the expense of an insuring party, such a party should be entitled to withdraw its funds in any amount without punishment in the form of withdrawal fees. An insurer cannot justify its decision to introduce such fees or limits of withdrawal by reference to "optimization and adjustment of fees to the actual cost of the services tendered".

The element of choice is of some prominence too. A consumer cannot be subjected to convoluted contractual arrangements effectively depriving him

[70] Such references do, however, appear in the case law. Courts are particularly wary of utility contracts (adhesion contracts for the provision of utilities such as water or electricity), in the context of which it has been held that abuse of a privileged bargaining position strikes at the heart of significant imbalance of the parties' rights and obligations. See: judgment of the Appellate Court for Warsaw of 13 March 2014, ref. number VI ACa 1733/13, LEX No. 1454669.

[71] Judgment of the Supreme Court of 13 August 2015, ref. number I CSK 611/14, LEX No. 1771389.

[72] Judgment of the Appellate Court for Warsaw of 9 February 2012, ref. number VI ACa 1472/11, LEX No. 1213380.

[73] Judgment of the Appellate Court for Warsaw of 19 June 2013, ref. number VI ACa 1545/12, LEX No. 1402977; D. Leśniak, E. Sienicka, *Zmiany ubezpieczeniowych funduszy kapitałowych w trakcie trwania umowy ubezpieczenia na życie. Wybrane zagadnienia*, „Prawo Asekuracyjne" 2013, issue 3, p. 53 et seq.

of choice regarding the type of burden he is bound to bear. A standard type of life insurance policy ubiquitous on the Polish market in mid-2000s was extendable to instances of serious sickness, pursuant to an additional amount paid on top of whatever premium was payable under the baseline policy. Where an insured decided to trigger the payment procedure in respect of serious sickness, their survivors were no longer able to claim by virtue of their death and the policy was terminated. As premiums in respect of death and serious sickness were distinct and were calculated and paid separately, it was unfair to deny consumers choice as to the type of policy they wished to draw from following an insured event[74]. This was all the more true as insurers were reluctant to unbundle the two policy types. Equally, consumers cannot be deprived of the option of conducting business through proxies, especially where they have justified reasons to do so, such as a debilitating illness[75].

The foregoing has bounds, however. It is a gross violation of consumers' interests to unwarrantedly expand the compensatory liability of a consumer under the guise of additional payments, for example under a telecommunications services agreement – payments on top of regular monthly premiums should typically be justified by reference to general principles of civil liability (incidence of harm, causal relationship, fault)[76]. Judges have assessed certain additional fees in terms of whether they are justified by real costs borne by the trader in exchange. A debt management fee of PLN 40 and a fee for a letter of remainder of PLN 20 laid down by a bank administering a consumer credit contract has been thought of as excessive and economically unjustified. Further, the language of "debt management" was deemed too ambiguous as it failed to disclose exactly what services were being tendered. This, in turn, rendered consumer unable to question any fees the bank in fact charged, considering the ambit of "debt management" can potentially be very broad. With regard to the second charge with respect to letters of reminder, the judgment continued, it was possible to ascertain the scope of services offered, however the real costs of producing and sending such a letter were markedly lower, therefore this created an unreasonable economic inequality entitling the trader to undeserved economic benefit[77]. Specifically, it was no defence for the bank to argue that the high cost of letters of remainder was justified by reference to the loss the bank sustained by virtue of the consumer's failure to pay

[74] Judgment of the Supreme Court of 14 April 2009, ref. number III SK 37/08, OSNP 2010/23–24/303.

[75] Judgment of the Appellate Court for Warsaw of 13 March 2014, ref. number VI ACa 1733/13, LEX No. 1454669.

[76] Judgment of the Supreme Court of 13 April 2012, ref. number I CSK 428/11, LEX No. 1130420.

[77] The bank is obliged to accept the economic risk of ensuring that a sufficient number of debtors will regularly pay their instalments for the bank to maintain liquidity. See: judgment of the Court of Competition and Consumer Protection of 12 May 2016, ref. number XVII AmC 3004/14, LEX No. 2182440.

off their loan instalments in time. The Appellate Court for Warsaw underscored, on the other hand, that it is loan interest charged by the bank that serves the role of a security in respect of such circumstances, not excessive additional payments for administration of consumer debt recovery[78].

6.3. DECENCY AND REASONABLENESS

There is an evolving and ever-increasing body of case law and commentary which builds into the substantive unfairness test, underpinned by good faith and significant imbalance (or "gross violation of consumers' interests), a requirement of 'decency' and 'reasonableness'"[79]. The Supreme Court officially confirmed the validity of the decency test in its judgment of 29 August 2013[80]. The case concerned a contract for the provision of telecommunications services under which the services provider reserved for itself the right to claim from the user additional compensation under general principles of tort, going above and beyond the amount of penalties stipulated in the contract. The Court applied the decency test, opening its discussion by a helpful assertion that verification of "decency" is subsumed under reasonableness, therefore one should talk about a reasonableness test. The test requires an examination of whether a disputed clause is inconsistent with the general behaviour standards of entrepreneurs and businesses as against consumers and how the rights and obligations of the consumer would be shaped had the challenged clause not been stipulated. If the consumer's situation would have been better had dispositive provisions of law applied, the standard

[78] On a side note, a fee of 15 PLN for letters of reminder has also been found excessive and therefore unfair, and judges are on occasion very specific, even delving into the exact costs of postage and stamps. See: judgment of the Appellate Court for Warsaw of 23 April 2013, ref. number VI ACa 1526/12, LEX No. 1331152. The Court in this case also posited that administration of debt recovery does not generate any additional costs in terms of employment for the bank as such activities are already within the remit of duties of bank employees (the Court relied, it appears, on a generalized and typical bank employment contract as there is no evidence that contracts of the particular defendant bank in that case were examined). Hence, the only additional burden on the bank consists in the cost of distributing letters of reminder and other instruments of debt recovery. In this respect, the court emphasized, banks are free to seek the services of a specialized debt recovery firm.

[79] Generally, see: E. Wieczorek, *Art. 385[1]*, (in:) M. Glicz, M. Serwach (eds.), *Prawo ubezpieczeń gospodarczych. Komentarz. Tom II. Prawo o kontraktach w ubezpieczeniach. Komentarz do przepisów i wybranych wzorców umów*, Warszawa 2010, pp. 135–140; K. Doliwa, *Dobra wiara jako wyrażenie języka prawnego*, „Monitor Prawniczy" 2008, issue 6, p. 302 et seq.; W. J. Kocot, *Odpowiedzialność przedkontraktowa*, Warszawa 2013, pp. 33–47.

[80] Ref. number I CSK 660/12, LEX No. 1408133. There were *obiter* comments tacitly endorsing the test in the judgment of the Supreme Court of 19 March 2007, ref. number III SK 21/06, OSNP 2008, No. 11–12, item 181.

clauses shall be deemed unfair[81]. The latter formulation is heavily influenced by the *Aziz* judgment of the CJEU[82]. The crucial aspect, however, that the Court failed to address is the relation of the reasonableness test to the otherwise default test under Article 385[1] paragraph 1 of the Civil Code, which employs the concepts of good faith and significant imbalance. The reference to *Aziz* (taking account of the legal situation the consumer would have faced under applicable laws had there been no consumer contract clause in place) is of limited assistance, unfortunately, because, as I demonstrated previously, the European Court wrongly conflated both concepts into a hybrid whose particulars and constitutive elements are difficult to ascertain. Alternatively, it may be that the reasonableness test indeed is intended to conflate the two aspects of substantive unfairness and could be used interchangeably with the two-prong test. That would, in my opinion, be a significant departure from the letter of Article 3(1) of Directive 93/13 and require a full argument before a competent court followed by a considered judgment. The Supreme Court has not engaged in such an endeavour, instead handing down a judgment that is difficult to reconcile with the language of the Directive but is, at least on its face, an extension of the CJEU case law, which only goes to show the potentially dramatic doctrinal consequences of *Aziz*.

[81] Interestingly, the Court did not follow its own recommendation in the immediate case. Having agreed with the conclusion of the Appellate Court that general provisions of the Civil Code (Article 484 paragraph 1) afford the consumer a higher level of protection than the clause in dispute by prohibiting claims in damages going beyond the stipulated amounts of contractual penalties unless the parties agree otherwise (and there was an express agreement on the part of the consumer), the Court concluded that this was not sufficient to find unfairness. This fact, the Court stated, proved a violation of good faith (disproportion of rights and obligations of the parties), but did not show significant imbalance. This could mean that the reasonableness test attaches only to good faith and is not an overarching gloss over the two-prong substantive fairness test, however the Court's reasoning is too confused to warrant a definitive view. This is all the more so since the Court also mentioned in passing that no evidence was adduced to the effect that the disputed clause contravened the general behaviour standards of entrepreneurs and businesses as against consumers. Again, this probably means that at least two criteria must be met for a clause to clear the reasonableness test: (1) the situation of the consumer in terms of his rights and obligations as against the seller or supplier would be better under dispositive provisions of law and in the absence of the disputed clause; (2) the clause must contravene the general behaviour standards of entrepreneurs and businesses as against consumers. Still, these findings are only little more than tentative, and the exact position of the reasonableness test within the substantive fairness scheme is uncertain.

[82] The Polish Supreme Court had espoused a similar test back in 2007, and by the time the judgment in *Aziz* was rendered the test had been well established in Polish case law. See, *inter alia*, the judgment of the Appellate Court for Warsaw of 5 November 2008, ref. number VI ACa 973/08, OSA 2011/1/61–71; judgment of the Appellate Court for Warsaw of 25 May 2010, ref. number VI ACa 1256/09, LEX No. 1125298; judgment of the Appellate Court for Warsaw of 11 October 2011, ref. number VI ACa 421/11, LEX No. 1171445; judgment of the Appellate Court for Warsaw of 29 December 2011, ref. number VI ACa 855/11, LEX No. 1164713; judgment of the Appellate Court for Warsaw of 24 October 2012, ref. number VI ACa 549/12, LEX No. 1281152.

The Supreme Court elaborated upon the decency test in its judgment of 27 November 2015[83] where it was explained that the reasonableness test is a way in which decency of a contractual provision can be assessed. The court then reiterated the classic passage from *Aziz*, namely that what is assessed is the conformity of a clause with the general ideal of behaviour of traders as against consumers and one shall consider what a consumer's rights and obligations would look like had it not been for the purportedly unfair clause. I submit that this is unhelpful although it clears up the relation between decency and reasonableness. Nevertheless, if the standard of decency is merely "a" way of establishing reasonableness, are there any other potential applicable thresholds?[84] Some relief, however, is found in the latter part of the aforementioned judgment's reasoning. For the Supreme Court confirmed that the decency test is ancillary as against good faith and significant imbalance. It is unknown whether "ancillary" means "optional", albeit it hints that it should not on any account override the two statutory standards. The reasoning continues by asserting that the decency test should only be used for the purpose of ascertaining whether the conditions for substantive unfairness under Article 385^1 paragraph 1 of the Civil Code have been fulfilled. Unfortunately and regrettably, this again conflates reasonableness and good faith, and it is impossible to decipher whether reasonableness is merely an add-on or a legitimate "version" of the good faith standard. Further, the "ancillary" comment is puzzling considering what followed (in the same sentence, it shall be added), for it is difficult to conceptualize the ancillary character of a test used exclusively for the purpose of assessing substantive unfairness. Moreover, what follows if, hypothetically speaking, the decency test points towards the unfairness of a clause whilst other considerations suggest otherwise? Since decency is merely an ancillary indicator, should it be discarded at a judge's whim where they in good conscience consider a clause to be in good faith? Judicial discretion will continue to broaden until the status of the reasonableness test is clarified, particularly its inter-relation with the two codified precepts of substantive unfairness. Because of the conceptual problems noted above, and because it is unclear whether reasonableness brings into the conversation anything above and beyond what is already covered by good faith and significant imbalance, reasonableness, I submit, should be abandoned, especially if it could conceivably provoke a decrease in the level of protection afforded to consumers.

Confusion abounds if one were to consider authority rendered at lower instances. In its judgment of 11 June 2015 (which preceded the Supreme Court pronouncement discussed in the preceding paragraph)[85], the Appellate Court

[83] Ref. number I CSK 945/14, LEX No. 1927753.

[84] There is Appellate Court-level authority that any assessment of unfairness of consumer contract terms "demands" an analysis of the clause's decency. See: judgment of the Appellate Court for Warsaw of 30 November 2015, ref. number VI ACa 1609/14, LEX No. 2004474.

[85] Judgment of the Appellate Court for Warsaw of 11 June 2015, ref. number VI ACa 1045/14, LEX No. 1916598.

for Warsaw insisted that an assessment of reasonableness of a contractual term (which sits at the core of compliance with the overarching requirement of good faith) necessitates an inquiry into such a term's decency[86]. The Court in that case went on to say that a judge confronted with such a question shall hypothesise a general model of behaviour traders should display as against consumers, and that the model should take account of the reality of the free market. Importantly, the judgment underscored that it is the consumer that should ultimately benefit from intense competition among traders and suppliers[87]. Still, however, the assessment is only secondary to the *Aziz* test, in other words – a judge is allowed to resort to an extra-legal examination of decency only where it is impossible to determine how the rights and obligations of the parties are regulated by statutory provisions that would have held in the absence of an agreement between the consumer and the trader. In contrast, the same court in its judgment of 13 March 2014[88] expressed a more limited view, holding that the decency test *may* be used to make a determination regarding the unfairness of a term. Another Appellate Court-level pronouncement holds that verification of decency of a term is warranted (perhaps mandated) only in respect of abstract control proceedings[89].

6.4. INTERPLAY BETWEEN GOOD FAITH AND SIGNIFICANT IMBALANCE

The question of how good faith and significant imbalance interact is relatively unexplored with reference to Directive 93/13 whilst, within the Polish context, and this is a reverberation of the CJEU's tepid pronouncements and suggestions, it has become an axiom that a gross violation of consumer interests will usually constitute a breach of the requirement of good faith, whilst the latter need not in and of itself qualify as a gross violation[90]. It may be supposed, therefore, that good faith is a more encompassing and momentous concept, on the other hand, however, a sufficiently egregious violation of a consumer interest (or, in other words, an instance of sufficiently significant imbalance in the parties' rights and obligations) will automatically be treated as having been done in bad faith, without

[86] The same court has ruled that decency shall underlie any assessment of unfairness at large, hence its significance should not be confined to good faith only. See the judgment of the Appellate Court for Warsaw of 20 February 2015, ref. number VI ACa 250/14, LEX No. 1754203.

[87] Judgment of the Appellate Court for Warsaw of 27 January 2011, ref. number VI ACa 770/10, LEX No. 897993.

[88] Ref. number VI ACa 1733/13, LEX No. 1454669.

[89] Judgment of the Appellate Court for Warsaw of 27 January 2011, ref. number VI ACa 770/10, LEX No. 897993.

[90] Judgment of the Supreme Court of 13 October 2010, ref. number I CSK 694/09, LEX No. 786553; judgment of the Supreme Court of 27 November 2015, ref. number I CSK 945/14, LEX No. 1927753.

an extensive further inquiry. For the notions are typically conflated in academic literature and case law alike, however it has been pronounced that a substantive assessment of a clause should start with a basic examination of whether good faith has been breached (perhaps an instinctive yet principled "yes" or "no" steeped in an understanding of good faith established pursuant to past case law and statute), only to be followed by the assessment of the type and character of the breach[91]. One judicial panel has defined a gross violation of a consumer's interest as a manifestation of the legally relevant character of contractual imbalance (a breach of good faith recognized at law as legally relevant as regards the parties' rights and obligations)[92].

The relationship between good faith and significant imbalance is elucidated upon in the judgment of the Appellate Court for Szczecin of 2 August 2017[93]. It is a rare example of a case where the court refused to recognize a consumer contract term as unfair despite finding that it was contrary to the requirement of good faith. The dispute in that case concerned a loan denominated in the Swiss franc (CHF). The claimant argued that the agreement they signed failed to specify and spell out the manner in which the rate of the Swiss franc was to be calculated by the defendant bank for the purposes of currency conversion. A currency rate chart appended to the agreement merely laid down, they maintained, numerical values representing the applicable rates. The disputed indexation clause effectively imposed on consumers rates adopted unilaterally by the bank, upon which the exact magnitude of a consumer's liability under the agreement was to be calculated. This, in the opinion of the claimants, amounted to a situation where the bank usurped the right to share, in a lopsided manner, to decidedly affect the financial situation of the claimant consumers. Pertinently, the rates utilized by the bank deviated from standard market rates, to the detriment of the consumer.

The court drew a line between good faith and the interests of the parties. First, it recognized that the bank reserved for itself the right to unilaterally regulate the instalment amount by determining the rates as well as the applicable rate of spread (the difference between selling and exchange rates). The bank's right to determine the buying and selling rates of CHF was unlimited. No information was explicitly provided as to the manner in which the currency rates were calculated or otherwise adopted by the bank, and a mere reference was made to resolutions adopted by the bank's management board. This was, in the opinion of the Appellate Court, insufficient to secure the consumer's interests. For objective factors, that is factors verifiable for the consumer, such as the applicable exchange rates of CHF, have a limited bearing on the overall cost of the loan taken

[91] Judgment of the Supreme Court of 27 November 2015, ref. number I CSK 945/14, LEX No. 1927753.

[92] Judgment of the Appellate Court for Warsaw of 11 December 2015, ref. number VI ACa 1815/14, LEX No. 2005410.

[93] Ref. number I ACa 263/17, LEX No. 2369623.

out by the defendant consumer. The bank's profit margin (the premium levied on the CHF selling rate as provided for in the bank's currency rate chart) should not have been concealed.

A breach of the requirement of good faith notwithstanding, no gross violation of the consumer's interests was found. Having reiterated the Supreme Court's position that an inquiry must be made into whether the trader (here – the bank) could have reasonably anticipated (assuming it treated the consumer fairly, equitably and taking into account their legally justified claims) that the consumer would have consented to the clause in dispute had it been individually negotiated[94], the Appellate Court for Szczecin found no violation of the claimants' interests on chiefly economic grounds. It was shown in evidence before the judge at first instance that the average difference between the exchange rate adopted by the defendant bank and the theoretical rate based upon the interbank currency market stood at PLN 0.0078 in the years 2008–2016. This meant that payments made by the claimant towards settling the loan between 2008 and 2015 exceeded the amount he would have paid based upon the interbank currency market rate by CHF 3.37. Such a slight difference was deemed insufficient to strike down the disputed contract term. The court based its reasoning not on the average exchange rate of the National Bank of Poland but on the interbank currency market rate, as the latter represents a realistic market figure and not a hypothetical supposition employed chiefly for the purposes of financial calculation and conversion.

The ratio of the case is unclear, and it is possible that its outcome has momentous economic and political undertones. Perhaps its reasoning is to be confined to the rather peculiar set of facts and its political context. Undeniably, an opposite decision would have led to a floodgates effect, especially considering the litigiousness of claimants who were detrimentally affected by the sudden hike of the Swiss franc exchange rate in January 2015. Notwithstanding, a number of tentative corollaries could be drawn. First, the Supreme Court's axiom concerning the absence of automatism in finding breaches of good faith and consumer interests has been finally tested in practice at a high judicial level. Second, the Appellate Court accorded much weight to the economic dimension of the parties' relationship when assessing the question of significant imbalance of the parties' rights and obligations. When analysing good faith, it seemed sufficient that the bank had given itself a high degree of latitude in setting out currency rates. This observation may mean a plethora of things. It could be read as an outright rejection of arguments in favour of treating consumer choice as a viable defence for traders. On a competitive market of bank loans, the consumer had an opportunity to shop around.

[94] Judgment of the Supreme Court of 15 January 2016, ref. number I CSK 125/15, LEX No. 1968429. The formulation is similar in that adopted in *Aziz*, however it appears the CJEU referred it more to the requirement of good faith (see paragraph 69 of the judgment).

Looking from another angle, even though the rates themselves were not considered unfair, the mere fact that they were unilaterally imposed by the bank cleared the first stage towards a finding of substantive unfairness. This thread could be explored purposively. For the sake of argument, suppose the consumer was allowed a choice between a range of currency rates depending on other conditions of the loan. Suppose the consumer could choose a more attractive exchange rate tied to stricter payment deadlines. Conceivably, this is not contrary to good faith – but would it grossly violate the consumer's interests if the deadlines deviated markedly from the benchmark envisaged by the "basic" version of the contract? Value judgments and risky quantifications are unavoidable as is, as shown in the case analysed above, expert evidence.

The case could also form the groundwork for a broader theory on where economic ramifications of potential consent to a consumer contract term lie in a judicial assessment of substantive unfairness. I submit the Court was correct in assessing the actual economic loss sustained in the context of the claimants' interest. In doing so, however, the requirement of good faith was stretched to cover at least some information duties of the bank[95]. The breach of the good faith requirement appears to have rested on two pillars: (1) insufficient information on the premium the bank put on top of interbank currency market exchange rates, with mere references to resolutions of the management board; (2) unilateral power of the bank to shape currency rates[96]. The Appellate Court, it is submitted, elevated the status of economic interests by adopting a serious, quantifiable, mathematical approach to economic encumbrances. The court assessed the actual loss sustained by the claimants in comparison to the available market rate (lost benefits – *lucrum cessans*) and decided that due to its relatively low magnitude a term that merely gave an option to grossly violate a consumer interest was not unfair. This could be reformulated as follows: where a trader does not make excessive use of a power it accorded to itself unilaterally, this will not warrant judicial intervention. A larger point is that the court endorsed a "law in action" method of reasoning. A breach of good faith, it could be posited, means merely that a term gives the trader a hypothetical right to grossly breach a consumer interest (or to introduce a significant imbalance in the parties' rights and obligations. However, it is only when the trader actually makes excessive use of this right can we talk about substantive unfairness (creation of a right + use

[95] In this connection, see the judgment of the Appellate Court for Warsaw of 13 March 2014, ref. number VI ACa 1733/13, LEX No. 1454669, where it was implied that a consumer contract should clearly set out relevant consumer rights and prerogatives as codified in statutory law, which could potentially impose significant costs on traders.

[96] Interestingly, the bank did not have the right to vary the currency rates charged after the conclusion of the contract. This would have triggered Article 385^3 point 10 of the Civil Code (which reproduces Article 1(j) of the Annex to Directive 93/13 that prohibits terms enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract).

of that right = substantive unfairness). This attempt at distilling a principle is by all means tentative, however it could, coupled with a sophisticated mathematical approach to quantifying the magnitude of a breach of a consumer's economic interest, inject structure into an area mired in judicial discretion. These considerations may be all the more momentous considering that the observations of the Appellate Court for Szczecin have been confirmed in an analogous case before the Appellate Court for Katowice[97].

7. FINAL REMARKS

As discussed above, several important facets that give rise to the importance of the requirement of significant imbalance appear to be in flux, although there is a clear consumer-friendly streak in the practice of national courts as opposed to the CJEU which has preferred a moderate position focused strictly on the legal character of the parties' position. The role of national law is difficult to overestimate, for it is the means of legal recourse a consumer has at their disposal under national law render the unfair term inapplicable that shall serve as a consideration in determining substantive unfairness. It appears evident that European law on the matter tends to overvalue and overemphasize the procedural aspects of contractual imbalance. Courts are quick to examine the mode of entry, change and termination of a particular contract whilst overlooking the practical effects of the substance of the contractual terms at hand and the burden they may impose on the consumer subjected thereto. The picture is not that straightforward, though, and I sought to prove that attempts have been made to broaden the ambit of "imbalance in the parties' rights and obligations" by directing attention to the circumstances which arose as a consequence of the contract's conclusion and, second, by explicitly resorting to other terms of social and economic provenance whose conceptual and practical ramifications may conceivably be more far-reaching such as "bargaining position", "bargaining power" and "contractual advantage". Crucially, however, whilst it is accepted that the level of familiarity of the consumer with the circumstances within which the trader operates is relevant, the CJEU is reluctant to recognize that a host of market-related variables should also be considered, such as (depending perhaps on the sophistication of the business) applicable interest rates, price swings, fluctuation of currency rates, supply and demand, as well as relevant regulatory and political measures. Further, significant imbalance has recently been used to import a host of information duties, ultimately leaving the ultimate decision to sign a contract with the consumer, and

[97] Judgment of the Appellate Court for Katowice of 8 March 2018, ref. number I ACa 915/17, LEX No. 2475090.

it appears that a more sensitive approach as regards services is warranted where the consumer is at a particular disadvantage and operates at a significant information deficit.

Another unsolved puzzle in the case law of the CJEU is the conflation of good faith and significant imbalance in *Aziz* as explained above. The insistence on referring to the national rules of contract law is consistent with the Directive's self-professed tendency towards partial harmonization, however it fails to redress losses suffered by consumers from countries where dispositive contract laws are vague (or, for that matter, where no dispositive laws exist and the burden is placed on the judiciary to fill the blanks). The *Banco Primus* case could signal, however, that the *Aziz* formula could be extended beyond a merely legal comparison of rights and obligations and encompass certain economic considerations. The court in that case resorted to an economic comparison of interest rates imposed on the particular consumer and an average market rate. This is a notable extension and as such should be welcomed – it may be the case that what cannot be achieved by reference merely to the letter of national law, is attainable where regard is had to the market conditions affecting the entry into transactions. Significant imbalance lays the groundwork for drawing links between Article 3(1) of Directive 93/13, the core of substantive unfairness, and other provisions of the Directive, notably Article 6, which have been used to strike down or at least question unfair clauses where protection afforded by the former provision was deemed insufficient.

The foregoing corollaries drawn by reference to EU law have been complemented by an analysis of the relevant trends in Polish case law. Notably, the consumer's interest is objectified and it is generally irrelevant that a contract term detrimentally affects their individual preferences or expectations. An assessment of unfairness should consider a host of circumstances favourable to the consumer, particularly the need to become familiarized with and choose from a wide array of offers available from traders and suppliers on the modern competitive market. Problems may arise where courts have excessive regard to the subjectively perceived peculiarities and nature of a trader's business activity as this creates a risk of over-extending the protective reach of the Directive. On the other hand, the nature of the underlying contract containing an unfair term shall be taken into account, as shall be the consumer's freedom to choose the mode of providing consideration to the trader.

Polish courts have proposed the concept of decency, which has evolved into a reasonableness test, as a competing theoretical explanation of significant imbalance. As analysed above, the status of the test is unclear – in particular, it has not been definitively determined whether the test is an ancillary or a subsidiary test to the one envisaged in Article 3(1) of the Directive. It appears that the normative content of both tests is akin, however the courts on occasion have attempted to apply both thresholds cumulatively. Compatibility of the reasonableness test

with the Directive is also uncertain as, I submit, it constitutes an unnecessary gloss over the normative test.

Finally, the conceptual problem of delineation between good faith and significant imbalance is yet to appear before the CJEU. Although it has become an axiom that a gross violation of consumer interests will usually constitute a breach of the requirement of good faith, whilst the latter need not in and of itself qualify as a gross violation, the distinctions between the two made by Polish appellate courts rest upon the economic dimension of the parties' relationship when assessing the question of significant imbalance of the parties' rights and obligations. It appears that the key here is a comparative exercise and an economic (even mathematical) calculation. We shall wait until the Supreme Court renders its opinion on the matter, I submit however that the appellate authority discussed above could form the basis of a broader theory on where economic ramifications of potential consent to a consumer contract term lie in a judicial assessment of substantive unfairness.

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INTRICACIES OF SIGNIFICANT IMBALANCE AS THE CORNERSTONE OF PROTECTION AGAINST UNFAIR TERMS IN CONSUMER CONTRACTS UNDER EU LAW

Summary

Significant imbalance in the rights and obligations of the parties to a consumer contract term is, together with good faith, a fundamental pillar of substantive protection against unfair terms. It is the primary tool provided by Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts with a view to mitigating differences in bargaining power between professional traders and consumer on the ever-expanding capitalistic market within the EU. The paper comprehensively reviews the meaning of the "significant imbalance" element by reference to a cross-section of judgments handed by the CJEU and Polish courts. Generally, albeit with a few notable exceptions, the former court has engaged in a subjective-objective exercise aimed at discovering what the balance of rights and obligations would have been between the parties in the particular dispute at hand had it not been for the purportedly unfair clause. Besides that, the requirement has been utilized to impose ad bolster a host of information duties levied on traders so that protection is extended to cases where the consumer is unaware of their rights or are deterred from enforcing them due to procedural obstacles or prohibitive costs of judicial or administrative proceedings. The requirement of significant balance, rooted in the idea that the disproportion of market power between the parties to a disputed term necessitates government or judicial intervention to achieve or restore contractual equilibrium, is shown from a plethora of angles: its ideological foundations, practical connotations, its emphasis on consumer vulnerability and approach to economic power. Assistance and inspiration re gleaned from Polish jurisprudence where numerous questions either unanswered by the CJEU or left to the consideration of national courts, particularly the relation between reasonableness, on the one hand, and significant imbalance and good faith on the other, as well as between significant imbalance and good faith, have been tackled.

KEYWORDS

significant imbalance in the parties' rights and obligations, consumer interests, unfair terms, Directive 93/13, good faith

SŁOWA KLUCZOWE

znacząca nierównowaga praw i obowiązków stron, interesy konsumenta, klauzule niedozwolone, Dyrektywa 93/13, dobre obyczaje

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REGULATION OF ADMINISTRATIVE FINES IN THE POLISH CODE OF ADMINISTRATIVE PROCEDURE

1. PRELIMINARY ISSUES

In legal theory it is stated that a sanction is related to the threat of directing a certain burden (adverse effect) towards an entity that, in carrying out a certain action, violates a norm that applies to it/him. Sanctions are also used in administrative law. An administrative sanction is a legal instrument whose task is to impose a burden on an individual who does not perform administrative law obligations[1]. These obligations may arise directly from a normative act (law) or from an act of executive regulation or decision applying that law (administrative decision).[2]

The notion itself of an 'administrative sanction' has so far not received its own separate definition in positive law and is a product of legal language.[3] Administrative sanctions constitute a type of burden for committing an administrative offense through which should be understood an act of unlawful conduct or unlawful abandonment of an order of conduct that results in violation of the norms of administrative law. There is no doubt that the administrative sanction should be seen as an instrument of administrative power that is not a consequence of committing an offense, but is a result of the coming into existence of a state that is unlawful (in terms of administrative law).[4]

The doctrine outlines, in relation to administrative sanctions, constitutional, procedural and enforcement administrative sanctions, as well as sanctions related

[1] See: J. Filipek, *Sankcja prawna w prawie administracyjnym*, „Państwo i Prawo" 1963, issue 12, p. 87.

[2] R. Stankiewicz, *Prawo administracyjne*, Warszawa 2011, p. 79.

[3] M. Wincenciak, *Sankcje w prawie administracyjnym i procedura ich wymierzania*, Warszawa 2008, p. 13.

[4] R. Stankiewicz, *Administrative Sanctions as a Manifestation of State Coercion*, „Wrocławskie Studia Erazmiańskie" 2017, Vol. XI, p. 269 and others.

to inter-entity procedural law.[5] Constitutional sanctions are those that relate to the relationship between public administration bodies, e.g. in the structure of supervision or in internal relations, e.g. disciplinary penalties.[6] Procedural sanctions are sanctions related to administrative proceedings to safeguard the proper conduct of such proceedings and enforcement sanctions are sanctions to enforce the obligation that is the subject of execution proceedings, for example, a fine for the purpose of coercion.[7] Enforcement sanctions show far-reaching separateness from other administrative sanctions, especially from administrative punishment.[8] The doctrine notes that sanctions resulting from execution enforcement serve primarily to achieve effective enforcement of a duty imposed on the individual, rather than repression.[9]

A separate type of administrative sanction is the imposition of administrative fines related to a specific violation of administrative law. This article presents the problems of administrative fines in the Code of Administrative Procedure.[10] These solutions were introduced to this act in 2017.

The amendment to the Code of Administrative Procedure provided for the introduction of a new section (Section VIa), the provisions of which lay down the rules for imposing administrative penalties, ie penalties, cases justifying waiving the imposition of a penalty and granting the public administration authority the prescription, limitation of the imposition and enforcement of the penalty, and also the rules of postponement, payment in installments and cancellation of penalties. Added by the Act of 9 March 2017 amending the act – Code of Administrative Procedure and some other acts, provisions of art. 189a–189k Code of Administrative Procedure of is a novelty in the Polish legal system. It should be appreciated that the adoption of these rules has long been postulated in the doctrine, as well as in the statements of the Ombudsman or various organizations. Their establishment may be conducive to the pursuit of the principle of equality before the law, or the observance of the principle of proportionality.

Until now, there was a lack of coherent general regulation on the rules for imposing or administering administrative fines, and such issues as the penal

[5] H. Nowicki, (in:) R. Hauser, Z. Niewiadomski, A. Wróbel (eds.), *System Prawa Administracyjnego. Tom 7. Prawo administracyjne materialne*, Warszawa 2012, p. 636.

[6] *Ibidem*, p. 637.

[7] J. Filipek, *Sankcjonowane i sankcjonujące stosunki administracyjno-prawne*, (in:) *Księga pamiątkowa Profesora Eugeniusza Ochendowskiego*, Toruń 1999, p. 80.

[8] L. Klat-Wertelecka, *Sankcja egzekucyjna w administracji a kara administracyjna*, (in:) M. Stahl, M. Lewicka, R. Lewicki (eds.), *Sankcje administracyjne. Blaski i cienie*, Warszawa 2011, p. 72.

[9] M. Lewicki, *Pojęcie sankcji prawnej w prawie administracyjnym*, „Państwo i Prawo" 2002, issue 8, p. 6.

[10] The Act of 14 June 1960 – the Administrative Procedure Code (consolidated text: Journal of Laws 2017 No. 98, item 1257, as amended).

sanctions directive were sometimes regulated by specific provisions. This condition has been repeatedly evaluated negatively in the literature.[11]

2. ADMINISTRATIVE FINES AS A TYPE OF ADMINISTRATIVE SANCTION

There have long been voices challenging whether the institution of fines, imposed by the decisions of administrative bodies, belongs in the framework of the administrative law system, placing them in the broadly defined criminal law system.[12] Nevertheless, the majority of views (rightly so) treat such a sanction as one type of administrative sanction.[13] Therefore, this institution should be analysed, individually, each time, from the point of view of norms and the structure of administrative law. The imposition of an administrative fine is reduced to the issuance by an organ of public administration of an order to pay the amount specified in the act of application of the law by the entity that did not perform or performed inappropriately the administrative burden that had been placed upon it.[14]

The Constitutional Court emphasized that the process of imposing fines should be seen in the context of the application of instruments of administrative authority. Administrative punishment – in the opinion of the Constitutional Court – is not a consequence of committing a forbidden act, but a result of the coming into existence of an unlawful state, which results in that the assessment of the offender's attitude to the offense does not fit into the regime of objective liability.[15]

The imposition of an administrative fine is reduced to the issuance by an organ of public administration of an order to pay the amount specified in the act of application of the law by the entity that did not perform or performed inappropriately the administrative burden that had been placed upon it.[16]

Both in terms of doctrine and in case law, it is indicated that administrative fines are primarily intended to be preventive. The Constitutional Court stated that

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[11] See M. Wyrzykowski, M. Ziółkowski, (in:) R. Hauser, Z. Niewiadomski, A. Wróbel (eds.), *System Prawa Administracyjnego. Tom 2. Konstytucyjne podstawy funkcjonowania administracji publicznej*, Warszawa 2012, p. 367.

[12] For example, compare included views in: E. Szumiło-Kulczycka, *Prawo administracyjno-karne*, Kraków 2004, p. 45 and others.

[13] M. Lewicki, *Pojęcie sankcji prawnej*..., p. 66.

[14] See: L. Staniszewska, *Materialne i proceduralne zasady stosowane przy wymierzaniu administracyjnych kar pieniężnych*, (in:) M. Błachucki (ed.), *Administracyjne kary pieniężne w demokratycznym państwie prawa*, Warszawa 2016, p. 29.

[15] Judgment of the Constitutional Court of 31 March 2008, SK 75/06.

[16] L. Staniszewska, *Materialne i proceduralne zasady*..., p. 29.

fines constitute measures aimed at mobilizing individuals to timely and properly perform their duties for the benefit of the State and are automatically applied by law and are of preventative importance. By announcing the negative consequences that will occur in the event of a breach of the obligations set out in the law or in an administrative decision, they motivate the performance of statutory duties, and the basis for the application of the penalties is the objective violation itself of the law.[17] An administrative fine is intended to discourage breaches of duty and to prevent repeated infringements of designated obligations in the future.[18] By announcing the negative consequences that will occur in the event of a breach of the obligations set out in the law or in an administrative decision, it motivates the addressees to perform their statutory duties.[19]

This does not mean, of course, that the sanction of a particular type should fulfill only this one function. Administrative financial penalties also serve as a restitution function, although they do not negate the possibility of fulfilling their repressive function, which, however, cannot dominate the other functions. The primary purpose of administrative financial fines should, however, be a protective function in relation to the administrative order, and only at the end of the hierarchy of importance as a repressive measure.[20] Nevertheless, the Constitutional Court recognizes, in the function allotted to an administrative fine, that which distinguishes it from a criminal measure. It recognizes that the nature of criminal sanctions is repression, while that of administrative penalties is prophylactic and prevention (the latter are not punishments for the offense, but merely a coercive measure to ensure the implementation of executive and administrative tasks). However, its implementation basically determines whether the sanction is essentially criminal or administrative.[21]

It should be noted that since 1 June 2017 the Code of Administrative Procedure has introduced the regulation of administrative financial fines in Poland. According to Art. 189b, an administrative financial penalty means a monetary penalty imposed by a statute imposed by a public administration authority through an administrative decision following an infringement of the law based on the failure to comply with, or a breach of, a prohibition against an individual, a legal entity or an organizational unit that does not possess the status of a legal person. By means of the aforementioned amendment, the statute was supplemented with a new section that contains, most of all, general grounds for imposing such

[17] Judgment of the Constitutional Court of 25 March 2010, P 9/08.

[18] See: Judgment of the Supreme Administrative Court of 21 February 2012, II FSK 1442/10.

[19] Judgment of the Supreme Administration Court of 18 March 2015, I GSK 1456/13.

[20] I. Niżnik-Dobosz, *Aksjologia sankcji w prawie administracyjnym*, (in:) M. Stahl, M. Lewicka, R. Lewicki (eds.), *Sankcje administracyjne. Blaski i cienie*, Warszawa 2011, p. 136; A. Jaworowicz-Rudolf, *Funkcje sankcji administracyjnej i odpowiedzialności administracyjnej w ochronie środowiska*, Warszawa 2012, p. 223; see also M. Wincenciak, *Sankcje w prawie administracyjnym…*, p. 100.

[21] Judgment of the Constitutional Court of 14 October 2009, Kp 4/09.

admnistrativeness and using these types of sanctions by administrative bodies. It includes guidelines for the imposition of penalties, as well as rules for waiving penalties and granting relief. It also introduces a provision governing the accrual of interest from lateness and a prescription for imposing and enforcing administrativeness.[22]

In keeping with the example of existing penal liability regulations, a norm has been introduced into the Code of Administrative Procedure whereby, if, during the time in which a decision is issued concerning an administrative financial penalty, a law, other than that which existed at the time of the failure to fulfil the obligation for which the penalty is to be imposed, is in force, then the new law is applicable; if, however, it is more relative and pertinent for the parties, then the previous law should apply.[23] In turn, in art. 189d, what are known as directives of the administrative financial penalty are indicated. These directives constitute specific normative conditions affecting the determination of the amount of administrative financial penalties. These circumstances, like in the case of criminal liability, may have the effect of either mitigating or further encumbering the liability of the party upon whom the administrative financial penalty is imposed.

In addition, art. 189g provides for the introduction of the institution of the expiration of the possibility of imposing administrative penalties in the form of an administrative financial penalty by the issuing of an administrative decision (expiration of the imposition of a penalty) and the separate expiration of the obligation to perform obligations resulting from the fact of the imposition of an administrative financial penalty on the basis of a previously issued administrative decision (expiration of enforcement of a penalty).

The introduction of the above regulation will undoubtedly strengthen the guarantee system for the protection of the substantive rights of the party threatened with the imposition of an administrative financial penalty.

3. PREMISES FOR THE IMPOSITION OF AN ADMINISTRATIVE FINE

In art. 189d Code of Administrative Procedure defined the so-called directive on the administrative penalty payment. These directives constitute specific norms that influence the determination of the amount of administrative fines. The aforementioned circumstances, like criminal liability, may have a mitigating

[22] R. Stankiewicz, *Regulacja administracyjnych kar pieniężnych w Kodeksie postępowania administracyjnego po nowelizacji*, „Radca Prawny. Zeszyty Naukowe" 2017, issue 2, pp. 9–32.

[23] See art. 189 of the Code of Administrative Procedure.

or aggravating effect on the liability of the party to whom the administrative fine is to be imposed.

It should be clearly indicated that the application in a specific administrative procedure connected with the imposition of an administrative fine is possible only in proceedings that are based on the construction of administrative discretion involving the possibility of imposing a penalty within a specified financial range, or based on a strictly defined penalty rate; the discretionary provision allows the application of the directive to choose the consequences (punish or not punish). The application of a sentence in a given case to the assessment of a given case may give the authority the right to refrain from imposing a penalty by means of a decision, despite the violation of a specific administrative law provision. Therefore, it is not possible to moderate the penalty if the provision specifies in advance the amount of the penalty for violating a specific provision of administrative law.

If the nature of the norm on which the imposition of an administrative fine is based, then the authority is obliged to consider the premises indicated in the commented article that can be applied to a specific entity in a specific case. Restricting the penalty by means of the directives indicated in the commented provision may – depending on the circumstances determined – have both a mitigating and aggravating dimension.

There is no doubt that the penal directive is within the necessary assurance of proportional application of legal regulations. When applying them, the authority should keep in mind that the ailment of the punishment must be, however, proportional to the type and extent of the violation of the law.

The legislator introduced the following directives of administrative fines:

– the gravity and circumstances of the breach of law, in particular the need to protect life or health, protect property of considerable size or protect an important public interest or an extremely important interest of the party and the duration of the infringement;

– frequency of failing to comply in the past with an obligation to comply with a prohibition of the same type as failure to comply with the obligation or breach of the prohibition resulting in a penalty;

– previous punishment for the same behavior for a crime, fiscal offense, fiscal offense or petty offense;

– the contribution of the party to whom the penalty is imposed, to the violation of the law;

– actions taken by the party on a voluntary basis to avoid the consequences of the infringement;

– the amount of benefit the party has achieved or the loss it has avoided;

– in the case of a natural person – the personal conditions of the party to which the penalty is imposed.

There is no doubt that the use of the abovementioned conditions influencing the determination of the administrative fines will have a fundamental impact

on the proportionality of the complaints imposed on the addressees of administrative decisions. In addition, the case law of administrative courts will determine the manner of interpretation of individual premises affecting the amount of these fines. This will affect the implementation of the principle of equality before the law.

4. CASES THAT PRECLUDE THE IMPOSITION OF A PENALTY

According to art. 189f paragraph 1 of the Civil Procedure Code, an institution of obligatory withdrawal from imposing a penalty was introduced. This provision provides for the following cases conditioning the withdrawal from the imposition of a penalty: 1) the gravity of the violation is negligible and the party ceases to violate the law, or 2) the site has been previously imposed an administrative fine for the same violation of law by another authorized public administration authority or has been legally punished for a crime, tax offense, fiscal offense or petty offense and the previous penalty meets the purposes for which an administrative fine would be imposed.

Relevant to the wording of art. 189f paragraph 3, in cases other than those listed in paragraph 1 point 1 or 2, the public administration authority, by way of a decision, may set a deadline for submitting supporting evidence to the party – if it allows meeting the purposes for which an administrative fine would be imposed (the purpose of the penalty would result from the content, nature, location, etc. of the provisions constituting the basis for the sentence). In this situation, the authority may set a deadline for submitting evidence confirming the removal of the violation of law or notifying the relevant entities about the violation found, specifying the date and manner of notification.

The presentation by the party of evidence confirming the enforcement of the order issued by the authority will be conditional upon the withdrawal from the imposition of an administrative fine.

Withdrawal from the imposition of an administrative fine will involve the need to provide the side with instructions on what, in the opinion of the project creators, is aimed at "reducing the risk of repeated law violation in the future". The aforementioned circumstances justifying the non-imposition of penalties and ending the authority's granting constitute a set of cases where the breach is of no significant significance or the party has already been liable for its act or omission, or possibly for the unpublished behavior, e.g. restoring lawfulness.

Withdrawal from the imposition of an administrative fine will have the character of a substantive resolution of the case (decision on the merits of the case), and should therefore be made in the form of a decision.

5. EXPIRATION OF PUNISHMENT

Another institution provided for in the catalog of regulations on administrative fines is the institution of the so-called expiration of punishment. Article 189g introduces a limitation period for the possibility of imposing an administrative sanction in the form of an administrative fine by issuing an administrative decision (limitation of the imposition of a penalty) and separately, limitation of obligations to perform obligations arising from the imposition of an administrative fine on the basis of a previously issued administrative decision (prescription of penal recovery). Therefore, the institution of limitation is related to the expiration of a certain time determining the annihilation: 1) the possibility of drawing negative consequences for the subject of the external sphere related to taking or completing administrative proceedings against him in imposing an administrative fine, or 2) the possibility of effectively demanding the payment of an administrative penalty imposed on the basis of a previously issued decision (also using administrative enforcement instruments). Thus, the expiry of a certain period of time will constitute an absolute ground for evading the possibility of incurring liability in the form of the need to pay a fine for committing an administrative tort. In procedural terms, in turn, the passage of a certain time will result in the impossibility to take proceedings to impose a fine or the need to discontinue the proceedings already taken.

The literature on the subject has already criticized the failure to regulate the issue of limiting the punishability of administrative torts. It was rightly pointed out that administrative responsibility, in particular the responsibility for administrative tort under penalty of a repressive function, "[...] cannot be an eternal responsibility, without prescriptive standards[24]".

It was unequivocally suggested that such a state (no institution of prescription) leads to a significant tightening of the regime of administrative responsibility, in comparison with the functioning institution of limitation in law.[25]

In paragraph 1 of the discussed article, the legislator provided for the following defining of limitation periods for the imposition of a penalty – 5 years from the violation of the provisions or from the occurrence of the consequences of the violation. At the same time, the legislator indicated in the same paragraph that the statute of limitations for the collection of the penalty will also be 5 years, counting from the end of the calendar year in which the penalty should be executed.

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[24] M. Wincenciak, *Sankcje w prawie administracyjnym…*, p. 140.

[25] See also: E. Kruk, *Sankcja administracyjna*, Lublin 2013, p. 128; R. Lewicka, M. Lewicki, J. Wyporska-Frankiewicz, *Kilka uwag na temat przedawnienia sankcji administracyjnych*, (in:) M. Stahl, R. Lewicka, M. Lewicki (eds.), *Sankcje administracyjne*, Warszawa 2011, p. 556.

6. CONCLUSIONS

Although administrative fines as such exist in the Polish legal system not from today, until recently there were no general rules that would define the rules for their imposition and metering. As a consequence, it led to the differentiation of the situation of the entities punished and increased the risk of automatism in the scope of their imposition, in isolation from the specific causes and circumstances that led to the occurrence of the infringement. Such a situation was not conducive to creating trust in administration bodies and a sense of social justice.

Administrative fines are one of the most severe and, what follows, the most common administrative sanctions. Nevertheless, until now, no general rules have been formulated concerning their imposition and metering – they are only introduced by the latest amendment to the Code of Administrative Procedure. The amendment to the Code of Administrative Procedure provided for the introduction of a new section (Section VIa), the provisions of which lay down the rules for imposing administrative penalties, ie penalties, cases justifying waiving the imposition of a penalty and granting the public administration authority the prescription, limitation of the imposition and enforcement of the penalty, and also the rules of postponement, payment in installments and cancellation of penalties.

The adopted constructions are intended to serve all citizens, in particular, entrepreneurs from the sector of small and medium-sized enterprises, who are quite often exposed to automation and rigorism with the use of these sanctions, which has an impact on the possibility of running their business.

In the explanatory memorandum to the draft amendment, it was indicated that this act was adopted primarily to ensure the adequacy of administrative fines and to align the situation of entities to which such sanctions may be imposed. Until now, in many cases, administrative authorities could not waive the imposition of a fine or reduce its amount even in exceptional cases.

Although in order to impose a pecuniary penalty on a given administrative entity, the body does not have to prove the perpetrator's fault, many elements of the new regulation refer to the characteristics of institutions characteristic of criminal law. This treatment was deliberate, which was emphasized in the justification for the draft amendment.

One of the examples of such elements is the introduction of the aforementioned general administrative penalty directives. The reference to the degree of the party's contribution to the violation of the law and its personal conditions is similar to the directive on the criminal penalty.

The legislator also took into account that in many cases, administrative fines are in fact much more painful than sanctions imposed for committing crimes or fiscal offenses. Therefore, the purpose of the amendment was also to extend the procedural guarantees of entities that may be required to pay such a fine.

The subject of the considerations contained in this article was the issue of regulation of the administrative penalty payment in the Code of Administrative Procedure after its last amendment, which came into force on June 1, 2017. Pursuant to the above amendment, the section was added primarily to the general premises of: administering such penalties imposing sanctions of this type on the authorities, including the directive, the sentence and the rules of withdrawal from granting penalties and granting reliefs in their implementation. Also provisions regulating the interest on late administrative fines and statute of limitations on the imposition and enforcement of fines were introduced.

Doubts arise whether the approximation of the institution of criminal responsibility and liability for administrative tort is in accordance with the Constitution of the Republic of Poland. If we state that the administrative fine is in any other way than a financial impact on the perpetrator, then it should be considered whether accused of committing such an administrative tort should not benefit from the guarantee of protection contained in the constitution (art. 42 of the Constitution of the Republic of Poland). Therefore, it should be considered whether the subject of the proceedings should not be entitled to a defense (understood both as a possibility of raising claims and citing evidence in his defense, and the possibility of using a defender), the right to hear the case by an independent and independent court (so that only valid sentence allowed to break the presumption of innocence), or should it not be entitled to other rights (such as those resulting from the provisions regulating the criminal procedure).

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REGULATION OF ADMINISTRATIVE FINES IN THE POLISH CODE OF ADMINISTRATIVE PROCEDURE

Summary

This article presents the problems of administrative fines in the Code of Administrative Procedure. These solutions were introduced to this act in 2017. The amendment to the Code of Administrative Procedure provided for the introduction of a new section (Section VIa), the provisions of which lay down the rules for imposing administrative penalties, ie penalties, cases justifying waiving the imposition of a penalty and granting the public administration authority the prescription, limitation of the imposition and enforcement of the penalty, and also the rules of postponement, payment in installments and cancellation of penalties. This article presents only selected issues of the regulation of imposing administrative fines in the Code of Administrative Procedure.

KEYWORDS

administrative sanctions, administrative coercion, administrative law, administrative fines, Code of Administrative Procedure

SŁOWA KLUCZOWE

sankcje administracyjne, przymus administracyjny, prawo administracyjne, administracyjne kary pieniężne, Kodeks postępowania administracyjnego

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CASE LAW IN UKRAINE: ON THE ISSUES OF ITS INTRODUCTION AND DEVELOPMENT IN THE ACTIVITY OF SUPREME COURT

1. INTRODUCTORY REMARKS

In the post-Soviet legal space there is a tendency according to which post-Soviet states refuse from the explanations of the supreme courts on the basis of summarizing the judicial practice. Such explanations of supreme courts on the basis of summarizing the judicial practice were not known for common law and civil law systems. Refusal from such general explanations by the Supreme Courts leads to an increase in the role and significance of the decisions of the supreme courts in specific cases for unifying judicial practice. This is done by giving the decisions of the supreme courts in specific cases the value of an example (sample) for the resolving of similar cases, that is, case law practice is introducing.

The issues of unifying judicial practice and the significance of the case law of supreme courts are also important for European legal systems. Preparatory materials[1] and the last Opinion No. 20[2] of the Consultative Council of European Judges (CCJE) entitled "On the role of courts with respect to uniform application of the law" are good confirmation of that.

In this regard, the experience of introducing and developing case law of the Supreme Court in Ukraine is interesting. There are observed various stages, each of which has certain features. This article is devoted to their highlights and analysis.

[1] See: Compilation of replies to the questionnaire for the preparation of the CCJE Opinion No. 20 (2017) entitled "The role of courts with respect to uniform application of the law", https://rm.coe.int/compilation-of-replies-to-opinion-no-20/1680764112 (accessed: 1.07.2018).

[2] See: Opinion № 20 "On the role of courts with respect to uniform application of the law". Available at: https://rm.coe.int/opinion-no-20-2017-on-the-role-of-courts-with-respect-to-the-uniform-a/16807661e3 (accessed: 1.07.2018).

2. ISSUES OF THE PRECEDENT AND CASE LAW IN THE UKRAINIAN LEGAL DOCTRINE

The nature and the significance of the decisions of supreme courts traditionally has been researched by legal science with the considerable attention. However, there was formed an approach in the civil law doctrine according to which in these decisions does not see a precedental nature. Such decisions form the notion of "judicial practice" ("jurisprudence constante", "rechtsprechung", "settled jurisprudence", "orzecznictwo", "judicature", "судова практика"). Also, in Soviet legal science categorically denied the precedent nature of the decisions of supreme courts, since it contradicted the principle of socialist legality.

Due to such doctrinal non-recognition and negation of the precedent nature of the decisions of supreme courts, judicial practice was forming and developing spontaneously without the scientific assistance in its requests. And the requests of the judicial practice were to develop scientific concepts, constructions and mechanisms that would ensure the binding nature of the decisions of the supreme courts in similar cases. They remain not developed enough until now.

In the Ukrainian legal doctrine, the issues of the precedent and case law practice are investigated in the writings of O. Dashkovska, N. Kuznetsova, L. Luts, M. Mazur, R. Maidanyk, B. Malyshev, O. Petryshyn, P. Rabinovych, Ya. Romanyuk, O. Svyatotsky, S. Shevchuk and others[3].

In these researches, attention is drawn to the circumstances that cause the necessity and expediency of the functioning of a precedent in the legal system of Ukraine, in particular to the "low-quality system of legal acts (with gaps, duplications, collisions, etc.) and the need to preserve the essence of the judicial branch of power, which is intended not only to ensure the consideration of cases on justice, protection of the interests of the individual, but also to create a coherent, effective judicial practice with appropriate ensuring mechanism"[4].

At the same time, positions about the inappropriateness and harmfulness of precedent and case law for Ukraine are also expressed, in particular, it is noted that "the introduction of a case law in Ukraine for the already established civil

[3] For more details on doctrinal approaches to the normative nature of court decisions in the Ukrainian legal doctrine, see: S. Shevchuk, *Normative Acts of Judicial Power: The Evolution of Views in Ukrainian Jurisprudence*, "Law of Ukraine" 2013, issue 1, pp. 121–128, http://nbuv.gov.ua/UJRN/luk_2013_1_10 (accessed: 1.07.2018).

[4] L. Luts, *Perspektyvy stanovlennia sudovoho pretsedentu yak dzherela prava Ukrainy* [*Prospects for the formation of a judicial precedent as a source of law in Ukraine*], "Visnyk tsentru suddivskykh studii" 2006, issue 6, p. 9, http://www.judges.org.ua/article/Vesnik_6.pdf (accessed: 1.07.2018); V. Kosovych, *Sudova praktyka yak zasib podolannia nedolikiv normatyvno-pravovykh aktiv Ukrainy* [*Judicial practice as a means to overcome the disadvantages of normative legal acts of Ukraine*], "Visnyk Lvivskoho universytetu. Seriia yurydychna" 2015, issue 62, pp. 14–22, http://nbuv.gov.ua/UJRN/Vlnu_yu_2015_62_4 (accessed: 1.07.2018).

legal system, in the presence of detailed legislation, would lead to the emergence of a whole range of issues of a legal and doctrinal nature, in particular the correlation of the legal force of various sources of law. In Ukraine, as in other civil law countries, legal regulation is carried out by law, which can not be changed by court decisions"[5].

Legal scholars continue to contrast and differentiate between the concepts of "judicial precedent" and "judicial practice". Judicial practice continues to be understood as "stable legal statements, developed by courts in the consideration of specific cases that become models for the application and interpretation of legal rules in the future when dealing with similar cases"[6]. According to N. Kuznetsova, "the influence of the results of judicial activity on the development of national legal systems is differently formalized: in the common law systems through precedents; in the civil law systems through judicial practice. In our legal literature, these forms fairly and substantiatare do not identified equally"[7].

We believe that the similarity of legal phenomena, which are termed "judicial practice" in civil law sytems, and in commom law systems – "precedent", testifies to the expediency and necessity of using the unified concept of "case law practice" ("precedent practice") to overcome their inadequately justified differentiation in modern reality.

In civil law countries, unlike common law, the nature of a court decision is manifested in the fact that it is adopted on the basis of legislative acts and is binding only to the parties in specific case. Other similar cases are solving on the grounds of the same legislative acts, the generality and abstractness of which allow to act on them. However, court decisions, especially of the highest courts, in complex cases that overcome the problems of legal uncertainty, are also taken into account and should be binding in dealing with similar cases.

Consequently, the use of the unified term "case law practice" will help to overcome the traditional distinction, according to which the precedent is unique to common law, and judicial practice – to the civil law systems.

On the grounds of the current trends of legal development, we can propose the following unified features of case law practice: its purpose is to unify judicial

[5] Ya. Romaniuk, I. Beitsun, *Pravova pryroda oboviazkovosti rishen Verkhovnoho Sudu Ukrainy ta vdoskonalennia mekhanizmu zabezpechennia yednosti sudovoi praktyky* [*The legal nature of the bindingness of the decisions of the Supreme Court of Ukraine and the improvement of the mechanism for ensuring the unity of judicial practice*], "Pravo Ukrainy" 2012, issues 11–12, p. 128.

[6] O. Petryshyn, *Sudova praktyka yak dzherelo prava v Ukraini: problemy teorii* [*Judicial practice as a source of law in Ukraine: the problems of theory*], "Pravo Ukrainy" 2016, issue 10, p. 21; B. Malyshev, *Sudova praktyka: poniattia*, *oznaky*, *struktura* [*Judicial practice: notion, features, structure*], "Chasopys Kyivskoho universytetu prava" 2005, issue 2, p. 26, http://kul.kiev.ua/images/chasop/2005_2/2005_2.pdf (accessed: 1.07.2018).

[7] N. Kuznetsova, *Pravova pryroda rishennia Verkhovnoho Sudu Ukrainy* [*The legal nature of the decision of the Supreme Court of Ukraine*], "Pravo Ukrainy" 2016, issue 7, p. 66.

practice; is the result of the jurisdictional activity of courts; is created in specific court cases under conditions of legal uncertainty (gaps, vacuum, collision, rivalness, ambiguity, excessive abstractness and other legal defects); applies in such similar court cases where such problems of legal uncertainty occurs; its contents are legal positions (legal conclusions, "ratio decidendi"), which are examples of different degree of bindingness and persuasiveness; its forms are court decisions that are subject to official publication[8].

It should be noted that the general theoretical researches of various legal phenomena, including case law practice, should not be scholastic and speculative, but rather – aimed at solving significant applied issues of judicial practice. Such significant applied issues are the research of a mechanism for ensuring of case law practice – a system of legal means that facilitate the realisation of its purpose, in particular, the means of ensuring the creation and development, means of ensuring bindingness and application of case law practice, means of ensuring unity case law practice, etc. The theoretical study of such a mechanism will promote and confirm the methodological and heuristic potential of the legal theory in the current conditions of legal development.

3. INTRODUCING AND DEVELOPMENT OF CASE LAW AT DIFFERENT STAGES OF ACTIVITY OF THE SUPREME COURT IN UKRAINE

An analysis of contemporary legislation and court practice of Ukraine makes it possible to distinguish certain stages in the introducing and development of case law in the activity of the Supreme Court in Ukraine. Such stages are primarily related to the adoption of appropriate amendments and supplements to the laws on the judiciary and the procedural codes of Ukraine.

Let's consider consistently the peculiarities of the introducing and development of case law practice at these various stages[9].

[8] For more details, see: N. Stetsyk, *Pretsedentna sudova praktyka: teoretychni ta dydaktychni aspekty* [*Case-law practice: theoretical and didactic aspects*], (in:) *Problemy derzhavotvorennia i zakhystu prav liudyny v Ukraini*, Materialy XXIII zvitnoi naukovo-praktychnoi konferentsii (7–8 liutoho 2017) u 2-okh ch., 2017, Ch. 1, http://law.lnu.edu.ua/wp-content/uploads/2016/03/Конференція-2017-ч1.pdf (accessed: 1.07.2018).

[9] See the appendix to the article, which schematically describes these features at various stages.

3.1. IST STAGE – FORMALIZATION OF THE CASE LAW OF THE SUPREME COURT OF UKRAINE. INTRODUCTION OF CASE LAW IN ALL CATEGORIES OF COURT CASES

On 3 August 2010 came into force a new Law of Ukraine "On the Judiciary and Status of Judges" of 7 July 2010 № 2453-VI. By this law, decisions of the Supreme Court of Ukraine (here and after – SCU) in specific cases for the first time were given a binding and normative character. So, there was an supplement to all the procedural codes of Ukraine, according to which "the decision of the Supreme Court of Ukraine, adopted on the basis of the results of consideration of the application for review of the court decision on grounds of unequal use by the court (courts) of the cassation instance of the same substantive legal norm in similar legal relations, is binding for all subjects of authority that apply in their activities normative legal act that contains the specified legal norm, and for all courts of Ukraine. Courts are obliged to bring their judicial practice in line with the decision of the Supreme Court of Ukraine"[10].

It should be noted that such a supplement of the new law on the judiciary and the status of judges to the procedural codes does not confirm the purposeful desire of the legislature to introduce case law. By the new law, the legislator in reality deprived the SCU of the powers to consider and resolve cases in cassation, an admission of court cases to the SCU was carried out on the initiative of the higher specialized courts through the appropriate filtration mechanism. At the same time, the SCU could only review cases of higher specialized courts in cases of unequal application of substantive legal norms, but not procedural legal norms. Thus, the SCU was essentially deprived of the authority to realise justice.

Therefore, in such circumstances, the formalization ofbindingness and normativeness of the decisions of the SCU was intended to compensate for the essential deprivation of his powers and to demonstrate the importance of the SCU in the judicial system. Such processes were a manifestation of confrontation between the Administration of the President of Ukraine and the SCU and were criticized in the scientific and expert spheres.

However, despite this political component, the legal system of Ukraine for the first time formalized and officially recognized the case law nature of the decisions of the SCU.

The peculiarity of the introduction of case law in Ukraine was that it was immediately introduced in all categories of court cases, as opposed to some post-Soviet countries (Azerbaijan, Estonia, Latvia, Moldova), in which the introduction took place in separate types of judiciary.

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[10] *Pro sudoustrii i status suddiv* [*On the Judiciary and Status of Judges*], zakon Ukrainy vid 7 lypnia 2010 r. № 2453-VI, Ofitsiinyi visnyk Ukrainy 2010, № 55/1, stor. 7, http://zakon5.rada.gov.ua/laws/show/2453-17 (accessed: 1.07.2018).

Thus, in Ukraine, case law has begun to emerge. In the official edition of the SCU, during this period, extracts from 87 court decisions from a total of 647 cases were published, including 20 extracts from 142 civil cases, 23 extracts from 268 administrative cases, 17 extracts from 19 criminal cases, 27 extracts out of 170 comercial cases[11].

In connection with such statistics, questions arise as to what criteria the relevant structural subdivisions of the SCU selected such extracts for their official publication? It is obvious that the decisions in complex court cases, in which raised issues of legal uncertainty and which would facilitate similarity of judicial practice, should had been official published primarily.

However, the analysis of such extracts in relevant court cases suggests that not all of them contained provisions of a precedent nature. In the overwhelming majority of them, the SCU reproduced the relevant legislative provisions and stated a simple mistakenness in its application. Only in some decisions the SCU found problems of legal uncertainty and formed the corresponding legal positions, which were the content of its case law.

In this regard, we substantiate why and in what the precedent nature of the decisions of the SCU should be manifested. Precedental decisions of the SCU should be primarily decisions in complex cases, in which the problems of legal uncertainty are revealed and solved. Such complex court cases can be solved in different ways by different courts. Hence, the different solution of such complex court cases can lead to the adoption in similar cases different decisions with various legal consequences, that is, to a variety of court decisions, to the violation of the unity of judicial practice.

Therefore, the ground for solving a certain complex case should be relevant not only in this complicated case, in which the problem of legal uncertainty was resolved, but also for other similar complex cases, in which the same problems of legal uncertainty will be identified and resolved. Therefore, in order to prevent and overcome the differences in court decisions, and thus to unify courts practice, the ground for the solution of a complex court case should have a value of example (sample).

As an example of the precedental decision of the SCU, in which the problem of legal uncertainty was identified and the legal position that contributed to the unification of judicial practice, it is should be noted the Resolution of 4 April, 2011 in case № 5-1cc11.

In this criminal case, the person was prosecuted for the manufacture and possession of narcotic drugs, and, in particular, additional sanction was imposed in the form of confiscation of property. Such confiscation of property was specifically foreseen by the sanction of Part 2 of Article 307 of Criminal Code of Ukraine

[11] *Rishennia Verkhovnoho Sudu Ukrainy* [*Decisions of the Supreme Court of Ukraine*], Ofitsiine vydannia, 2011, № 1 (22); 2011, № 2 (23); 2012, № 1 (24), http://www.scourt.gov.ua/clients/vsu/vsu.nsf/(firstview)/rish.html?OpenDocument&Count=1000 (accessed: 1.07.2018).

for this crime. However, Article 59 of the General Part of the Criminal Code of Ukraine provided that confiscation of property could be imposed only for selfish crimes. Consequently, similar criminal cases were resolved in different ways, in some, the courts used the provision of Article 59 as a general rule and did not impose the confiscation of property, while the other courts – applied the provision of Article 307 as a special norm and imposed the confiscation of property.

Consequently, the SCU stated in this case the collision between the provisions of the General and Special Parts of the Criminal Code of Ukraine and preferred the provision of the General Part of the Criminal Code of Ukraine. In the legal position, the SCU concluded that "the court when imposing a punishment must come not only from the limits of punishment of the sanction established in the relevant article of the Special Part of the Criminal Code of Ukraine, but also those norms of the General Part of the Criminal Code of Ukraine, which regulate the purposes, the system of punishment, the grounds, the procedure and peculiarities of the application of its separate species, as well as other issues related to the imposition of punishment are regulated, which may influence the choice (election) by a court of its certain types and extent, including those provisions provided for in part two of Article 59 of the Criminal Code of Ukraine"[12]. Thus, the legal position was formulated as follows: "confiscation of property can not be applied as an additional punishment if the crime is not committed with selfish motives, even if the sanction of the article of the Criminal Code of Ukraine provides for such punishment to be mandatory"[13].

It is worth noting that subordinate courts applied this legal position in similar criminal cases. Thus, for a similar crime, the Ivano-Frankivsk District Court in the case № 344/1427/13-c on 12 August 2013 did not impose additional punishment in the form of confiscation of property, taking into account the legal position set forth in the Resolution of SCU of 4 April 2011 in the case No. 5-1cc11, noted that the court did not appoint an additional punishment provided for in the sanctions article in the form of confiscation of property in cases when the crime was committed not for selfish motives[14].

In connection with the introduction of case law in Ukraine, the issue of its addressees is important, that is, the circle of persons who are subject to binding decisions of the SCU. the legislative provision has established the addressees of the decisions of the SCU not only judicial bodies that will consider and solve similar

[12] Postanova Verkhovnoho Sudu Ukrainy vid 4 kvitnia 2011 u spravi № 5-1ks11, Yedynyi derzhavnyi reiestr sudovykh rishen, http://www.reyestr.court.gov.ua/Review/14887470 (accessed: 1.07.2018).

[13] Postanova Verkhovnoho Sudu Ukrainy vid 4 kvitnia 2011 u spravi № 5-1ks11, Yedynyi derzhavnyi reiestr sudovykh rishen, http://www.reyestr.court.gov.ua/Review/14887470 (accessed: 1.07.2018).

[14] Vyrok Ivano-Frankivskoho miskoho sudu vid 12 serpnia 2013 u spravi № 344/1427/13-k, Yedynyi derzhavnyi reiestr sudovykh rishen, http://reyestr.court.gov.ua/Review/32969386 (accessed: 1.07.2018).

cases, but all subjects of power. In this regard, doctrinal issues arise as to whether can be called as precedent decisions of supreme courts that apply to other non-judicial authorities that do not consider and can not solve similar cases?

Despite the fact that, according to the classical doctrine of the precedent, he matters to the judicial bodies in similar cases, we still believe that the precedental nature of supreme courts' decisions have to be manifested in their dissemination also to other non-judicial authorities. For example, the supreme court may reveal in the case at hand a problem of legal uncertainty, in particular an ambiguous legal provision, and in connection with the consideration of this case, to clarify its content. Other authorities and persons in other, non-court cases may also meet this legal provision, on which the supreme court has made an explanation.

Should such other authorities and persons apply the decision of the supreme court, which contains such clarification? We believe that the modern understanding of the precedent and case law should cover the necessity of its application by such other authorities and persons as well. It will promote both the legal certainty for the participants of social relations and the unity not only of the judicial practice, but also legal practice at all.

3.2. IIND STAGE – CONCRETIZATION OF THE ADDRESSEE AND THE SUBJECT OF CASE LAW. OFFICIAL PUBLICATION OF DECISIONS AND LEGAL CONCLUSIONS. INITIAL SYSTEMATIZATION OF LEGAL CONCLUSIONS

This stage of the development of case law begins on 13 November 2011, from the date of entry into force of the Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine on the Consideration of Cases by the Supreme Court of Ukraine" of 20 October 2011 № 3932-VI. By this law all procedural codes of Ukraine were amended and supplemented with the following provision: "to decide what legal norm should be applied in regard to particular legal matters, court is obliged to take into the consideration the conclusions of the SCU, set in the decisions, issued as the result of the judicial review of statements requesting the review of the court decision"[15].

First of all, these legislative amendments were caused by public criticism of the previous law on the judiciary and the status of judges and aimed at demonstrating the restoration and enhancement of the status of the SCU in the judicial system.

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[15] *Pro vnesennia zmin do deiakykh zakonodavchykh aktiv Ukrainy shchodo rozghliadu sprav Verkhovnym Sudom Ukrainy* [*On Amendments to Certain Legislative Acts of Ukraine on the Consideration of Cases by the Supreme Court of Ukraine*], zakon Ukrainy vid 20 zhovtnia 2011 № 3932-VI, Ofitsiinyi visnyk Ukrainy 2011, № 89, stor. 11, http://zakon3.rada.gov.ua/laws/show/3932-17 http://zakon5.rada.gov.ua/laws/show/2453-17 (accessed: 1.07.2018).

It is noteworthy that this legislative provision concretised the addressee and the subject of the case law of the SCU. So, if in the earlier provision the legislator has established the addressees of the case law to all subjects of power, in this legislative provision the addressee is detailed and more attention is already accentuated on the judicial authorities.

Also, if, in accordance with the previous provision, a whole decision of the SCU was established as binding, then, after the amendments introduced, the "conclusion, set in the decision" became binding.

In this regard, it should be noted that the subject of bindingness of precedent is the ground for resolving a complex case, its problem of legal uncertainty. Such a basis in the legal doctrine in different legal systems is called differentlyIn common law doctrine, it is named as the "ratio decidendi", in Ukrainian legal doctrine it is generally called as a "legal position", and less often as a "legal statement". From where and why the legislator decided to establish the term "legal conclusion" is unknown, since this notion in Ukrainian legal science was not used at that time.

We believe that the term "legal position" is stable and habitual for legal science and is more in line with the nature of case law. Although the subject of the case law of the SCU had to be detalised, the introduction of the term "legal conclusion" seems unsuccessful.

Also, in accordance with this law, the publishing of decisions of the SCU was improved. They were to be published on the official website of the SCU no later than ten days after their adoption. Thus, on the official website of the SCU, there were introduced sections "Supreme Court decisions of Ukraine" and "Legal conclusions of the Supreme Court of Ukraine"[16].

Thus, at the official website of the SCU during this period, 2942 decisions were published in various types of court cases, 657 of them – in civil cases, 1790 of them – in administrative cases, 367 of them – in comercial cases and 128 of them – in criminal cases. Since not all of these court decisions were of a precedental nature, in its separate section "Legal Conclusions of the Supreme Court of Ukraine" during this period, 107 legal conclusions were posted.

It should be noted that in this period of the development of case law of the SCU, the argumentation of its legal positions (legal conclusions) was mainly limited to a formal reference to the current legislation without the involvement of non-legal arguments.

For example, in one of civil cases, the SCU, justifying its legal position, as arguments only mentions the current legislation. This civil case concerned the refusal of the consumer of communal services to conclude an agreement

[16] *Pravovi vysnovky Verkhovnoho Sudu Ukrainy* [*Legal Conclusions of the Supreme Court of Ukraine*], Ofitsiinyi veb-sait Verkhovnoho Sudu Ukrainy, http://www.scourt.gov.ua/clients/vsu/vsu.nsf/(documents)/A041E3E563C3DF0DC2257B09003D4F29?OpenDocument&Type=2012& (accessed: 1.07.2018).

on the grounds that its concluding is the subject to the principle of freedom of contract. The provider of communal services has appealed to the court about the obligation of the defendant to conclude the relevant contract. In court practice, there was a misunderstanding, in some cases – the courts refused to satisfy such a claim, justifying its contradiction with the principle of freedom of contract, while others – satisfied, referring to the fact that there are special acts of legislation, according to which the consumer has a duty to conclude such a contract.

The SCU on 10 October 2012 in the case № 6-110cc12 formed the legal position according to which "the conclusion of a contract for the provision of housing and communal services is the obligation of the consumer, provided the contract proposed by the executor is in line with the model contract. The consumer's rejection from the conclusion of the contract of the service in this case is contrary to the requirements of the legislation"[17]. However, the argumentation in this case was limited only to the citation of the legislation without doctrinal justification of this problem of legal uncertainty.

It is should be noted that, as in the first and in the second period of the introduction and development of the case law of the SCU, the nature of the formulation of the mandatory case law was established absolutely (rigidly) without the possibility of departing from previous decisions, as by the SCU itself, and by lower courts.

In the legal doctrine, attention is drawn to such a lack of case law, as opposed to legislation, as the complexity of finding the necessary positions in a large number of court decisions. Therefore, at a certain stage of the development of case law, there is an objective need for its systematic ordering for effective use and application.

Therefore, in the Ukrainian legal system the first attempts were made to systematize the legal conclusions of the SCU. Such systematization of legal conclusions was initiated by the Office for the Study and Analysis of Judicial Practice by type of jurisdiction, chronological and subject criteria. For example, legal conclusions in civil cases were organised in half a year from 2010 to 2017, herewith their incorporation was carried out under various institutes of civil law[18]. In each of the legal conclusions, the details of the relevant judicial decision were indicated. Such systematization of legal conclusions greatly facilitated the search for case law and was positively evaluated in legal practice.

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[17] Postanova Verkhovnoho Sudu Ukrainy vid 10 zhovtnia 2012 u spravi № 6-110tss12, Yedynyi derzhavnyi reiestr sudovykh rishen, http://reyestr.court.gov.ua/Review/26497408 (accessed: 1.07.2018).

[18] Vysnovky Verkhovnoho Sudu Ukrainy u tsyvilnykh spravakh [Conclusions of the Supreme Court of Ukraine in civil cases], Ofitsiinyi veb-sait Verkhovnoho Sudu Ukrainy, http://www.scourt.gov.ua/clients/vsu/vsu.nsf/(documents)/B3BAA698A76892E0C2257B7B004B2029 (accessed: 1.07.2018).

3.3. IIIRD STAGE – CHANGE OF CASE LAW FROM ABSOLUTE (RIGID) TO RELATIVE (SOFT). POSSIBILITY OF DEPART FROM PREVIOUS CASE LAW. INTRODUCTION OF THE NOTION OF "LEGAL POSITION"

This period of the development of case law practice starts on 28 March 2015, from the moment of coming into force the Law of Ukraine "On Ensuring the Right to a Fair Trial" of 12 February 2015 № 192-VIII, and then the adoption of the new Law of Ukraine "On the Judiciary and Status of Judges" of 2 June 2016 № 1402-VIII.

By these new laws restored the possibility for the SCU to review the decisions of the courts of cassation in the event of the unequal application of not only substantive, but also procedural legal norms.

It also provided for such an additional ground for reviewing the decisions of the cassational courts as their non-compliance with the conclusion set forth in the decision of the SCU. Such an additional ground was to ensure the implementation of the legal conclusions of the SCU.

The previous SCU during this period continued to exercise its powers and adopted a total of 3234 resolutions, of which 1193 – in civil, 1455 – in administrative, 125 – in criminal, 461 – in comercial cases. At the same time, only 30 legal opinions are posted on the official web site during this period.

The legislative novelty regarding case law was a the following provision "the court has the right to depart from the legal position set forth in the conclusions of the SCU, with simultaneous indications of the appropriate motives"[19].

In this regard, we note that according to the legal doctrine, the "vertical" precedent can be as absolute ("rigid"), that is, the court, under no circumstances and exceptions, can not adopt another decision, and relative ("soft"), that is, under certain circumstances, the court may adopt another, different decision in a similar case.

However, in legal literature, the issue of the admissibility of the relative ("soft") kind of the "vertical" precedent is discussed, because such relativeness of precedent depreciate the classic English doctrine of the precedent. This gives rise to many scholars to doubt in the precedental nature of court decisions that may not be binding for lower courts. According to this position, such court decisions can not be precedents, because they do not correspond to the strict doctrine of precedent – "stare decisis" which clearly means stand on resolved.

We believe that the nature of the precedent, which was formed primarily in English law, and which had absolute force, in modern conditions, is changing and should correspond to modern legal realities. In modern legal realities, the precedent acts not only in common law countries, but also in civil law countries,

[19] *Pro zabezpechennia prava na spravedlyvyi sud* [*On ensuring the right to a fair trial*], zakon Ukrainy vid 12 liutoho 2015 r. № 192-VIII, Ofitsiinyi visnyk Ukrainy 2015, № 17, stor. 24, http://zakon2.rada.gov.ua/laws/show/192-19 (accessed: 1.07.2018).

and therefore its doctrine must take into account the current needs and demands of judicial practice. And modern needs and demands of the judicial practice require the flexibility of the precedent, which implies the possibility and the admissibility of its change and development under certain conditions not only by higher courts, but also by lower ones. Therefore, in modern conditions, the doctrine of "stare decisis" is not so rigid, but more flexible, and in the legislation of some post-soviet countries it is established that the court decisions of the supreme courts are not so binding, as are to be taken into account.

It should be noted that after the amendments and supplements to the procedural codes, there is a certain diversity in the use of some terms related to the functioning of case law, in particular "binding", "taken into account", "legal conclusion" and "legal position".

For example, concerning the nature of legal conclusions, the legislator used several terms – "binding" and "take into account". For all subjects of power, the conclusion of the SCU was established as a "binding", and in relation to other courts of general jurisdiction, "to be taken into account". Such a diversity in the use of terms in relation to the nature of legal conclusions can make ambiguity in understanding their nature.

It should be noted that the legislator also used the term "legal position" along with the term "legal conclusion". Thus, the previous provision used the construction "conclusion contained in the decision of the Supreme Court of Ukraine", and in this statement – "the legal position contained in the conclusions of the Supreme Court of Ukraine".

From these formulations, it follows that the legal conclusion and legal position are different notions, while the legal conclusion is a broader notion, since it includes a legal position. We believe that the notions of "legal conclusion" and "legal position" are identical notions, since they denote the same legal phenomenon – the content of the court decision, on the basis of which solves the problem of legal uncertainty in a complex court case. This plurality of terms makes some ambiguity and confusion, since it makes unnecessary complication of legal terminology. Therefore, we consider it more expedient to use only the term "legal position".

3.4. IVTH STAGE – FORMATION OF CASE LAW OF NEW SUPREME COURT. RETURN TO THE ABSOLUTE (RIGID) CASE LAW. INTRODUCTION OF ADDITIONAL CASE LAW MECHANISMS

The last period of the development of case law in Ukraine begins on 15 December 2017, since the entry into force of certain provisions of the Law of Ukraine "On the Judiciary and Status of Judges" of 2 June 2016 № 1402-VIII and the Law of Ukraine "On Amendments to the Commercial Procedural Code of Ukraine, the Civil Procedural Code of Ukraine, the Code of Administrative Legal Proceedings of Ukraine and other legislative acts" of 10 October 2017 № 2147-VIII.

The adoption of these laws was caused by the need for normative ensuring of the newly formed Supreme Court (in the official name without the word "Ukraine", here and after – SC) and they introduced significant changes in the procedural codes of Ukraine and other legislative acts. Thus, the new SC began to work as the supreme court in the Ukrainian judicial system, which ensures consistency and unity of judicial practice. The changed composition of the SC now includes the Grand Chamber, the Administrative Cassational Court, the Civil Cassational Court, the Comercial Cassational Court and the Criminal Cassational Court.

In connection with such a new composition of the SC, the scope of his case law will now include not only the decisions of the Grand Chamber, which is essentially the equivalent of the former SCU, but also the decisions of the cassation courts in its composition. In such condotions, the scope of the case law of the new SC is greatly increased and will require proper unifying and systematization.

In the current versions of the Law of Ukraine "On the Judiciary and Status of Judges" and all procedural codes, the wording of the case law of the SC does not allow the possibility to depart from the case law, as was at previous versions. These provisions are formulated in the final form as follows: "the conclusions on the application of the legal norms, set forth in the decisions of the Supreme Court, are binding on all subjects of power, which apply in their activities a legal act containing the relevant legal norms" and "the conclusions regarding the application of the legal norms, set forth in the decisions of the Supreme Court, are taken into account by other courts in the application of such legal norms"[20].

It is also necessary to note that the Plenum to the SC has been reinstated to adopt explanations of the recommendatory nature by the results of the analysis of judicial statistics and the summarizing of judicial practice of the application of legislation.

The impossibility of departing of lower courts from the legal position of the new SC and returning him the power to explain the legisltaion on the basis of the summarizing of judicial practice is primarily due to the efforts of the new SC to eliminate corruption risks in the judicial system and an attempt to discipline lower courts. However, we believe that this goal should be achieved by other measures, and not by violating the principle of the independence of judges, which may indicate a return to the practice of the Soviet period.

[20] *Pro sudoustrii i status suddiv* [*On the Judiciary and Status of Judges*], zakon Ukrainy vid 02 chervnia 2016 № 1402-VIII, Ofitsiinyi visnyk Ukrainy 2016, № 56, stor. 9, http://zakon3.rada.gov.ua/laws/show/1402-19 (accessed: 1.07.2018); *Pro vnesennia zmin do Hospodarskoho protsesualnoho kodeksu Ukrainy*, *Tsyvilnoho protsesualnoho kodeksu Ukrainy*, *Kodeksu administratyvnoho sudochynstva Ukrainy ta inshykh zakonodavchykh aktiv* [*On Amendments to the Commercial Procedural Code of Ukraine, the Civil Procedural Code of Ukraine, the Code of Administrative Legal Proceedings of Ukraine and other legislative acts*], zakon Ukrainy vid 3 zhovtnia 2017 № 2147-VIII, Ofitsiinyi visnyk Ukrainy 2017, № 96, stor. 11, http://zakon5.rada.gov.ua/laws/show/2147-19 (accessed: 1.07.2018).

However, if the new legislation excludes the possibility of departing from the legal conclusions of the SC by other courts, then in relation to the departure from the legal conclusions by SC itself, such a possibility is foreseen. In particular, the court hearing the case in cassation as a member of the panel of judges, the chamber or the joint chamber shall refer the case to the Grand Chamber of the SC, if such a panel (chamber, the joint chamber) considers it necessary to deviate from the conclusion on the application of the legal norm in similar legal relations, set forth in the previously adopted decision of the Grand Chamber.

And in the practice of the Grand Chamber of the SC there are already court cases in which it departed from the previous legal position of the SCU. Thus, in a number of cases, the Grand Chamber of the SC has already adopted decisionsad, in which it departed from the previous conclusions. For example, in the decisions of the previous SCU, there was a legal position according to which the consumer was to pay a fee for lodging an appeal and was exempted from payment of court fees only for filing a claim to the court of first instance.

Instead, the Grand Chamber of the SC changed this legal position and substantiated that the consumer is also exempted from court fees for lodging a claim to the court of appeals, noted that "departing from the practice of the Supreme Court of Ukraine, the panel of judges of the Grand Chamber of the Supreme Court holds that the violated rights could be protected as by court of first instance (upon filing a claim), and as at subsequent stages of the civil proceeding, namely during an appeal review. These stages of judicial protection are the only civil proceeding, the task of which is the fair consideration and resolving of civil cases in order to protect the violated right"[21].

One of the introduced novelties is also the introduction of the term "exceptional legal problem". Thus, the reason for the transfer of the case to the Grand Chamber is the fact that it is an exceptional legal problem and if such a transfer is necessary for the development of law and the formation of an unified judicial practice. Although in the vast majority of cases the Grand Chamber is still refusing to review the case on the grounds of the absence of an exceptional legal problem, yet in several cases, such problem was revealed and overcome.

For example, in court practice, there was a misunderstanding about the possibility of appealing against the decisions of an investigator-judge, if is not explicitly provided for in the Criminal Procedure Code. Some appellate courts were refusing to open an appellate proceeding, referring to Part 4 of Art. 399 of the CPC, while others, were opening, substantiating by the general principles of procedural law and the right to appeal (point 17 part 1 of Article 7, and Part 1 of Article 24 of the CPC). In this regard, the Grand Chamber in its decision of 23 May 2018, No. 13-19x18, stating the existence of an exclusive legal problem, decided that,

[21] Postanova Verkhovnoho Sudu vid 21 bereznia 2018 roku u spravi № 14-57tss18, Yedynyi derzhavnyi reiestr sudovykh rishen, http://reyestr.court.gov.ua/Review/73054749 (accessed: 1.07.2018).

in the case of the adopting by a investigator-judge of decision, which is not foreseen by the criminal procedural rules, referred to in part 3 Art. 309 of the CPC, the court of appeal has no right to refuse to verify its legality, referring to the requirements of Part 4 of Art. 399 CPC. The right to appeal against such a court decision shall be secured on the basis of point 17, part 1, Article 7 and part 1 of Art. 24 CPC that guarantee it[22].

It is worth paying attention to the fact that the structure of decisions of the Grand Chamber of the SC has qualitatively changed. The clear placement of the text of the decisions, in which the clearly structured statements on the history of the case, the arguments of the participants in the case, the position of the SC, in particular, the assessment of the arguments of the participants in the case and the conclusions of the courts of the first and appellate instances, conclusions on the results of consideration of the cassation complaint, conclusions about the correct application of the law, etc., the legal analysis of the legal positions of the SC greatly facilitates.

Also worth paying attention to the improving the quality of the argumentation of legal positions, which is not only limited to indicating legislation provisions, but also involves the use of the principles of law and legal doctrine. Thus, in the review of the case in which the court of first instance adopted an extra-judicial decision in the absence of the defendant, and then in the appeal review he was refused to apply the claim limitations, the Grand Chamber of the Supreme Court used not only the legislative provisions. The Grand Chamber argued in particular that "the creation of equal opportunities for the participants in the proceeding for access to the courts and to realize and protect of their rights is part of the guarantees of fair justice, in particular the principles of equality and competition of the parties. A defendant who was not properly informed (in accordance with the requirements of the procedural law) of the time and place of the trial in the court of first instance has no equal opportunities with the claimant to submit evidence, to investigate and prove to the court their convictions, and can not equalize with the claimant to prove in the court of first instance those circumstances which he refers to as grounds for his objections"[23].

Also, the abovementioned laws introduced a number of novelties concerning the functioning of the case law of the Supreme Court, in particular, the plenum of the Supreme Court was given powers to systematize and promulgate legal positions, and in the administrative procedure, the institute of exemplary and typical cases was introduced.

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[22] Postanova Verkhovnoho Sudu Ukrainy vid 23 travnia 2018 roku № 13-19ks18, Yedynyi derzhavnyi reiestr sudovykh rishen, http://www.reyestr.court.gov.ua/Review/74475877 (accessed: 1.07.2018).

[23] Postanova Verkhovnoho Sudu Ukrainy vid 17 kvitnia 2018 roku № 14-59tss18, Yedynyi derzhavnyi reiestr sudovykh rishen, http://reyestr.court.gov.ua/Review/74963810 (accessed: 1.07.2018).

4. CONCLUSIONS

Summarizing the study and analysis of the introduction and development of the case law of the Supreme Court in Ukraine, it is worth noting some conclusions.

The issues of case law in the legal doctrine of Ukraine remain insufficiently developed. Traditional doctrinal delimitation and contrasting case law and judicial practice leads to refuse of taking into account the positive experience of the functioning of case law in common law countries. Taking into account such experience would help to satisfy the demands of the court practice in raising the significance of the decisions of supreme courts in similar cases.

In Ukraine, as in many post-Soviet countries, there is a tendency to refuse explanations of legislation on the basis of summarizing of judicial practice and in this connection increasing the importance and role of decisions of the supreme courts in specific cases for unifying judicial practice. This tendency in Ukraine was manifested in the formalization and official recognition of the binding and normative nature of the decisions of the supreme courts in specific cases.

Both the positive and the negative aspects are observed in the introducing and development of the case law of the Supreme Court in Ukraine.

Positive aspects include the official recognition of the actual impact of the decisions of the Supreme Courts on similar cases and, in this connection, the gradual development of a mechanism for the ensuring of case law. Means of its ensuring are gradually improving, in particular means of accessibility (publishing), of consistency (systematization), of realization and of development etc. All this effectively contributes to the unifying judicial practice in Ukraine.

Negative moments are observed in the spontaneity and inconsistency of the introduction and development of case law, which is manifested in particular in the frequent opposing amendments and supplements to the nature of case law (first rigid, then soft, and now rigid again), in the use of ambiguous terminology ("legal conclusion" and "legal position", "taking into account" and "obligatory"), low quality of argumentation of legal positions etc.

The activity of the new Supreme Court confirms the gradual increase in the efficiency of its case law, the structure and content of its precedental decisions become more qualitative, its legal positions begin to be well argumented and effectively applied by lower courts. At the same time, the problems encountered by the new Supreme Court are the consistency of its case law with the case law of the previous Supreme Court of Ukraine, as well as its consistency within the Supreme Court itself – its Grand Chamber and the relevant cassation courts.

TAB	INTRODUCING AND DEVELOPMENT OF CASE LAW IN THE ACTIVITY OF THE SUPREME COURT IN UKRAINE	
stages	**content of the legislative provision**	**features at the appropriate stages**
1st Stage from 3 August 2010	***Law of Ukraine "On the Judiciary and Status of Judges" of 7 July 2010 № 2453-VI***	
	"The decision of the Supreme Court of Ukraine, adopted on the basis of the results of consideration of the application for review of the court decision on grounds of unequal use by the court (courts) of the cassation instance of the same substantive legal norm in similar legal relations, is binding for all subjects of authority that apply in their activities normative legal act that contains the specified legal norm, and for all courts of Ukraine. Courts are obliged to bring their judicial practice in line with the decision of the Supreme Court of Ukraine".	– formalization of the bindingness and normativeness of the decisions of the Supreme Court in specific cases; – introduction of case law in all categories of court cases; – the addressee of the case law has been established all subjects of powers and all courts; – the subject of bindingness of case law was established the decision of the Supreme Court of Ukraine in general; – there was no possibility of a departure from case law.
2nd Stage from 13 November 2011	***Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine on the Consideration of Cases by the Supreme Court of Ukraine" of 20 October 2011 № 3932-VI***	
	"To decide what legal norm should be applied in regard to particular legal matters, court is obliged to take into the consideration the conclusions of the Supreme Court of Ukraine, set in the decisions, issued as the result of the judicial review of statements requesting the review of the court decision"	– concretization of the addressee of case law to the judicial authorities; – detailing of the subject of bindingness of case law to the "conclusions set forth in the decisions"; – the official publication of its decisions and legal conclusions on the website of the Supreme Court of Ukraine is foreseen; – initial systematization of legal conclusions.
3d Stage 28 March 2015	***Law of Ukraine "On Ensuring the Right to a Fair Trial" of 12 February 2015, № 192-VIII, Law of Ukraine "On the Judiciary and Status of Judges" of 2 June 2016 № 1402-VIII***	
	"The conclusion on the application of the legal norm set forth in the decision of the Supreme Court of Ukraine should be taken into account by other courts of general jurisdiction in the application of such legal norms. A court has the right to depart from the legal position set forth in the conclusions of the Supreme Court of Ukraine, with simultaneous indications of the appropriate motives"	– the possibility of departing from the case law in certain conditions is provided; – the term "legal position" is introduced; – the possibility of challenging and reviewing the decisions of the courts of cassation on the basis of their non compliance with the legal conclusions of the Supreme Court of Ukraine.

4th Stage 15 December 2017	***Law of Ukraine "On Amendments to the Commercial Procedural Code of Ukraine, the Civil Procedural Code of Ukraine, the Code of Administrative Legal Proceedings of Ukraine and other legislative acts" of 10 October 2017 № 2147-VIII***	
	"The conclusions on the application of the legal norms, set forth in the decisions of the Supreme Court, are binding on all subjects of power, which apply in their activities a legal act containing the relevant legal norms" *"The conclusions regarding the application of the legal norms, set forth in the decisions of the Supreme Court, are taken into account by other courts in the application of such legal norms"*	– the creation of the new Supreme Court consisting of the Grand Chamber and the relevant cassation courts; in this connection, the increasing of the extent of case law; – introduction of the notion of "exceptional legal problem" as the basis for the transfer of the case to the Grand Chamber of the Supreme Court; – the possibility of departing from the legal conclusions by the Supreme Court alone and the abolition of the possibility of departing from its legal conclusions from other judicial bodies; – the giving powers to the Plenum of the Supreme Court to systematize and publish legal positions; – the return to the Plenum of the Supreme Court of the power to explain legislation on the basis of summarizing of judicial practice; – the introduction in the administrative proceedings the institution of model and typical cases, similar to a case law practice.

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CASE LAW IN UKRAINE: ON THE ISSUES OF ITS INTRODUCTION AND DEVELOPMENT IN THE ACTIVITY OF SUPREME COURT

Summary

The article covers the doctrinal issues of judicial precedent and case law in the legal doctrine, substantiates the need for formalization and official recognition of the actual role of the decisions of the supreme courts in similar cases.

Traditional doctrinal delimitation and contrasting case law and judicial practice leads to refuse of taking into account the positive experience of the functioning of case law in common law countries. Taking into account such experience would help to satisfy the demands of the court practice in raising the significance of the decisions of the supreme courts in similar cases.

In Ukraine, as in many post-Soviet countries, there is a tendency to refuse explanations of legislation on the basis of summarizing of court practice, and at the same time formalization and official recognition of the bindiness and normativity of decisions of the supreme courts in specific cases.

In this regard, the peculiarities of the introducing and development of the case law of the Supreme Court in Ukraine at various stages are analyzed. Also highlighted their positive and negative aspects.

KEYWORDS

case law, precedent, judicial practise, supreme court of Ukraine, proceedings, unification of court practice, judicial reform in Ukraine

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orzecznictwo, precedens, praktyka sądowa, Sąd Najwyższy Ukrainy, postępowanie, ujednolicenie praktyki sądowej, reforma sądowa na Ukrainie

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STRICT LIABILITY REGIME IN POLAND

1. INTRODUCTION

The subject of this article will be the so-called (in literal translation) objective liability, which concept is in Poland applied to administrative offences (pol. *delikty administracyjne*) and various administrative monetary penalties (pol. *administracyjne kary pieniężne*). The form the liability takes in this regime is relatively similar to the concept of strict liability in common law states. Therefore, this term will be used in the main part of the article. The core of strict liability in Poland will be examined on the basis of the judgments of the Constitutional Tribunal and administrative courts; the new provisions added to the Code of Administrative Procedure[1] by the amendment of 7 April 2017[2] will also be taken into consideration. Moreover, I consider it necessary to compare the domestic regulations and the respective judgments with the system of the European Convention on Human Rights. It seems that the most significant role in discovering the precise shape of strict liability will be played by exculpatory circumstances.

It is stressed in the theory of administrative law that the liability for violating administrative law is of strict character, which means that the entity is held liable for such violation independently of *mens rea*. Accordingly, the offender's mental attitude to the violation is not relevant. The intent does not have to be confirmed in the course of the proceedings. The entity is held liable when the violation is ascertained and (even though this element is not widely accepted by jurists in Poland) can be ascribed to the perpetrator.[3]

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[1] Journal of Laws of 2017, No. 1257.

[2] Journal of Laws of 2017, No. 935.

[3] R. Zawłocki, *Pojęcie i istota deliktu administracyjnego*, „Monitor Prawniczy" 2018, issue 1, p. 13 and sub.

2. CASE-LAW OF THE CONSTITUTIONAL TRIBUNAL

First of all – if we want to begin a more serious reflection – the case-law of the Constitutional Tribunal must be taken into account because of its influence on administrative courts. The 'general part' of the administrative offences law was introduced into the Polish legal system only three years ago and, in addition, is not comprehensive. Moreover, no in-depth analysis of this regime of liability has been carried out by Polish jurists.[4] Therefore – for the purposes of non-Polish readers – the most important cases in translations into English will be quoted below.

In one of the latest judgments, the Constitutional Tribunal followed the prevailing view of jurists (who specialise in administrative law) and decided that 'The Constitutional Tribunal adopts in its judgments the distinction between criminal liability based on the principle of culpability[5] and administrative liability based on the objective violation of law. According to the well-established case-law of the Tribunal, administrative liability is of strict character; it is not based on the concept of *mens rea*. An administrative sanction is an effect of the state of unlawfulness and a criminal sanction is a consequence of committing a crime. In the case of administrative liability, the examination of the perpetrator's attitude to the act is not relevant. […] Strict liability excludes the possibility of differentiating between the sanctions according to the degree of culpability and makes it possible not to differentiate between on account of other circumstances'.[6]

In other judgments, the Constitutional Tribunal decided that '[administrative] penalty is not a consequence of committing a crime, but a consequence in the event of the state of unlawfulness, which excludes the perpetrator's attitude to the act from the strict liability regime'.[7]

The Constitutional Tribunal also decided that: 'In the case-law concerning administrative violations, the concept of objective culpability is applied, i.e. culpability based on the superiority of the objective fact of the violation of a sanc-

[4] R. Zawłocki, *Pojęcie i istota deliktu*..., p. 13; W. Radecki, *Odpowiedzialność za przestępstwa*, *wykroczenia i delikty administracyjne w prawie polskim*, *czeskim i słowackim*, „Prokuratura i Prawo" 2017, issue 10; W. Radecki, *Dezintegracja polskiego prawa penalnego*, „Prokuratura i Prawo" 2014, issue 9.

[5] It should be borne in mind that the term *wina* (*zawinienie*) can be translated as *guilt*, *culpability* or *mens rea*, depending on the context, and that none of those translations is perfect because of the subtleties of doctrine of the Polish criminal law.

[6] Judgment of the Constitutional Tribunal of 21.10.2015, No. P 32/12, OTK ZU 9A/2015, item 148.

[7] Judgment of the Constitutional Tribunal of 31.03.2008, No. SK 75/06, OTK ZU 2A/2008, item 130; exactly the same in judgment of the Constitutional Tribunal of 15.01.2007, No. P 19/06, OTK ZU 1A/2007, item 2.

tioned norm,[8] which *per se* justifies charging the entity of having failed to act with due care required in the relationships of a given kind'.[9,10]

The reflections on the nature of administrative liability made by the Polish constitutional court are not without purpose. The Constitutional Tribunal finds the strict character of liability one of the few criteria which justify the sanction in the form of an administrative monetary penalty, the other criteria being: the placement in the text of the statute (e.g. in the section called 'monetary penalty' rather than 'criminal provisions', which is characteristic of crimes), and the stipulation concerning whether the punishment should be obligatorily meted out by an administrative body, which, for its part, has no discretion to determine the amount of the penalty.[11] In other judgments, the criterion of the character or purpose of the sanction (preventive, protective or compensatory, but not punitive or retributive) is decisive[12] (but the Constitutional Tribunal also said that the fact that administrative sanctions are meted out automatically *ex lege* have, first of all, a preventive effect;[13] this 'presumption' is settled in the case-law of the Constitutional Tribunal). When those conditions are fulfilled, the Constitutional Tribunal finds that an administrative monetary penalty 'has no features or functions of punitive punishments, which means that a monetary penalty […] is not a punishment as this term is understood in criminal law; it is not a form of criminal responsibility in the meaning of article 42 of the Constitution'.[14] Therefore, the guarantees provided by article 42 of the Constitution (*nullum crimen sine lege*, *nullum crimen sine culpa*, *nulla poena sine lege*, the right to defend oneself, the presumption of innocence) are not – in light of this judgment – applied to administrative offences. For our purposes, especially the lack of the *nullum crimen sine culpa*

[8] The common-law reader might be unfamiliar with the concept of sanctioned (*sankcjonowana*) and sanctioning (*sankcjonująca*) norms. This concept is predominantly popular in countries under the influence of the German jurisprudence. To simplify the notion, a sanctioned norm creates an order or a prohibition and a sanctioning norm provides a sanction in the event of failure to follow a prohibition or an order.

[9] Judgment of the Constitutional Tribunal of 24.01.2006, No. SK 52/04, OTK ZU 1A/2006, item 6.

[10] In this part of the judgment, the Constitutional Tribunal in fact rewrote part of Article 355(2) of the Polish Civil Code (this provision stipulates the general obligation of the debtor). It is clear that the Constitutional Tribunal in many cases draws inspiration comes from civil law, not from criminal law.

[11] Judgment of the Constitutional Tribunal of 21.10.2015, No. P 32/12, OTK ZU 9A/2015, item 148.

[12] Judgment of the Constitutional Tribunal of 5.05.2009, No. P 64/07, OTK ZU 5A/2009, item 64.

[13] Judgment of the Constitutional Tribunal of 21.10.2015, No P 32/12, OTK ZU 9A/2015, item 148.

[14] Judgment of the Constitutional Tribunal of 21.10.2015, No. P 32/12, OTK ZU 9A/2015, item 148; similarly, judgment of the Constitutional Tribunal of 24.01.2006, No. SK 52/04, OTK ZU 1A/2006, item 6.

principle where administrative offences are concerned is essential. It seems that the Constitutional Tribunal creates circular reasoning here – the fact that liability is strict is one of the decisive criteria for stipulating that the *nullum crimen sine culpa* principle will not be applied to administrative monetary penalties.

When article 42 is not applied, it means that when the parliament creates a provision establishing an administrative offence, it is not limited by the 'criminal' guarantees of the Constitution, but only by the basic features and principles of the Polish legal system, such as the principles of the democratic state ruled by law, proportionality, equality and human rights (and, in the case of administrative monetary penalties, particularly the protection of property).[15] On the other hand, it must be observed that, in a different judgment, the Constitutional Tribunal adjudicated that the guarantees provided by article 42 of the Constitution shall apply *mutatis mutandis*[16] to the regimes of punitive liability other than criminal.

Back to the core of our reflections, there is a question to be asked, namely whether the Constitutional Tribunal developed a less restrictive approach, as well. It must be noted that the principle *nullum crimen sine culpa* was formulated in a judgment of the Constitutional Tribunal.[17] The essence of the norm is that the entity cannot be held liable when it had no possibility – in any way – to prevent itself from committing the offence. The principle was inferred from article 42 of the Constitution (and, apparently, article 2) and established on the basis of another regime of liability[18] (which is closer to criminal law in the strict sense); it was noted that the principle is applicable to punitive regimes of liability. Administrative monetary penalties – as mentioned above – are considered not to be punitive.

However, in one of its early judgments (of the 1990s, even before the Constitution of 1997 was passed), the Constitutional Tribunal stated that: 'There must be an element of culpability so as to mete out [an administrative penalty]. Thus, the entity which fails to fulfill an administrative obligation must have the possibility to defend itself and to prove that the failure was a consequence of a circumstance for which the entity was not responsible'.[19] It seems that this element of the decision was inferred from the rule of law (Article 1 of Constitution of 1952 as amended by the Act of 29th of December 1989,[20] which is the exact equivalent of Article 2 of the Constitution of 1997). For many subsequent years,

[15] Judgment of the Constitutional Tribunal of 15.01.2007, No. P 19/06, OTK ZU 1A/2007, item 2.

[16] Judgment of the Constitutional Tribunal of 4.07.2002, No. P 12/01, OTK ZU 4A/2002, item 50.

[17] Judgment of the Constitutional Tribunal of 3.11.2004, No. K 18/03, OTK ZU 10A/2004, item 103.

[18] To some extent similar to the one known in common law states' concept of corporate (vicarious) liability.

[19] Judgment of the Constitutional Tribunal of 1.03.1994, No. U 7/93, OTK ZU 1994, item 5.

[20] Journal of Laws of 1989, No. 75, item 444.

the problem of strict liability was not a subject of in-depth analysis in the Constitutional Tribunal's case-law. However, after a long period of silence, the Tribunal adjudicated that the administrative liability was not of absolute character and that the offender could be absolved from liability by claiming that he or she had done everything what could have been reasonably required from him/her in order not to allow the violation to arise.[21] This statement brought the strict liability of administrative character closer to the regime of civil law, in which the debtor is liable for the lack of due care (Article 472 of the Polish Civil Code), but, additionally, established the presumption of culpability (e.g. in Article 431 of the Polish Civil Code). This principle, established by the respective judgment, will from now on be referred to as the 'standard of diligence'.

In one of its latest judgments, the Constitutional Tribunal referred to the driver's licence suspension insofar as it concerns a lack of exculpatory situations connected with the state of necessity. The Constitutional Tribunal found that 'in administrative law – similarly to criminal law or petty offences law – the matter of collision of values and interests which justifies the entity failing to comply with legal orders or prohibitions should be examined'.[22] In another part of the judgment, the Tribunal explained that the principle of fair administrative procedure inferred from Article 2 of the Constitution means that a lack of the possibility of exculpation when the violation rises from necessity is considered contradictory to the principle of the rule of law.[23]

To summarise this part, it should be pointed out that the case-law of the Constitutional Tribunal appears to be inconsistent and that the synthesis of different approaches seems to be impossible. It is difficult to predict any tendencies in case-law still to come. However, it seems that the scope of guarantees is likely to be extended and that the view that justification or excuse clauses must be provided (rightly) prevails.

3. CASE-LAW OF ADMINISTRATIVE COURTS

Case-law of the Constitutional Tribunal influences administrative courts, which adjudicate upon cases in which the matter of strict liability is involved. Sometimes also the Constitutional Tribunal draws inspiration from the decisions of the administrative courts.

[21] Judgment of the Constitutional Tribunal of 7.07.2009, No. K 13/08, OTK ZU 7A/2009, item 105.

[22] Judgment of the Constitutional Tribunal of 11.10.2016, No. K 24/15, OTK ZU A/2016, item 77.

[23] *Ibidem*.

In the recent case-law, administrative courts have seemed to apply the more liberal decisions of the constitutional court. In one of its judgments, the Voivodship Administrative Court in Warsaw argued that 'strict administrative liability is not absolute, which means that the offender can be absolved from liability when he or she proves that he or she has done everything that could have been reasonably required from him or her in order not to allow the violation to arise. Rejecting this view would be contradictory to basic constitutional principles inferred from the clause of the rule of law (Article 2 of the Constitution), notably the principle of the protection of legitimate expectations and the principle of legal certainty. […] Regulating the legal situation of the entity automatically, rigorously and independently of the circumstances which led to the failure to fulfil the legal obligation cannot be reconciled with the principle of the rule of law. The entity which is punished by an administrative monetary penalty must have the right to defend itself in administrative law procedures as well as, which is exceptionally vital, the right to be absolved from administrative liability at least if it proves that it was sufficiently diligent when performing its duties and objectively had no possibility to act in any other way'.[24]

In another judgment, concerning competition law, it was decided that the entity may be absolved from liability if it proves that objective circumstances preclude the possibility to hold it liable because of it took precautionary and preventive actions.[25]

However, it should be noted that there is another view on the matter, expressed by the following words of the Voivodehip Administrative Court in Warsaw: 'The matter of culpability in the actions of the party to these proceedings is not relevant when establishing facts and issuing an administrative decision. The appeal body was thus justified to decide that the applicant could not be absolved from liability by proving that he or she had had no influence on whether this violation had arisen and had not agreed to it arising'.[26] Yet another judgment emphasized the restrictive interpretation of the provisions of an act and claimed that if the act (the norms of material law) did not provide for the state of necessity, the administrative body was obliged not to accept the necessity.[27]

[24] Judgment of the Voivodship Administrative Court in Warsaw of 20.06.2013, No. IV SA/Wa 600/13.

[25] Judgment of the Court of Appeals in Warsaw of 25.10.2012, No. VI ACa 750/12.

[26] Judgment of the Voivodship Administrative Court in Warsaw of 20.05.2011, No. VI SA/Wa 371/11.

[27] Judgment of the Voivodship Administrative Court in Łódź of 10.12.2010, No. II SA/Łd 1069/10.

4. THE IMPACT OF THE STATUTORY PROVISION ON THE SHAPE OF STRICT LIABILITY

In 2017, new provisions concerning administrative monetary penalties were introduced to the Polish legal system in the new part IVa of the Code of Administrative Procedure. It is noteworthy that almost all judgments quoted above were issued before those provisions entered into force. For these reasons, this amendment to the Code of Administrative Procedure might be considered a codification of case-law and a reaction to the demands expressed by jurists, but – as it is possible to prove – it is not complete. The insufficiency of these provisions is i.a. caused by the fact that material matters have been regulated in a procedural act, which, as some believe, resulted from the lack of a better idea, as no general act on administrative material law exists in Poland.[28] Furthermore, the deficiencies include the lack of application to tax matters (Article 3(1)(2) of the Code of Administrative Procedure) and the fact that they have no effect if the same matters are regulated in other provisions (Article 189a(2) of the Code of Administrative Procedure). It should be noted, however, that the provisions of part IVa apply to all 'additional fees' or similar instruments (a sanction for administrative violation is often called otherwise than 'administrative monetary penalty') – it is achieved by creating an autonomous definition of the administrative monetary penalty (article 189b of the Code of Administrative Procedure), something that merits appreciation. Let us proceed to the exact shape of strict liability established by part IVa of the Code of Administrative Procedure.

Pursuant to article 189e of the Code of Administrative Procedure, the party to administrative proceedings shall not be punished when the violation arose as a consequence of *force majeure*. It is noteworthy that *force majeure* is understood by the commentators of this provision in the same manner as by the doctrine of civil law: as an event of external character that is impossible to anticipate and prevent (in light of actions and experience of the properly functioning entity[29]). Some consider this provision superfluous, as there can be no administrative violation without perpetration, and thus, *force majeure* leads to a violation of law, but there is no perpetration[30] – there is no guilty person. This view, however, seems not to be obvious to jurists and to the Constitutional Tribunal itself. Nonetheless, this provision cannot be the legal basis for exculpation in every case when the entity claims it did everything reasonably required from it in order not to allow the violation to arise. There might be instances in which there was no *force majeure*, but

[28] W. Radecki, *Odpowiedzialność za przestępstwa*…, p. 41; R. Zawłocki, *Pojęcie i istota deliktu*..., p. 13 and sub.

[29] S. Gajewski, *Kodeks postępowania administracyjnego. Nowe instytucje. Komentarz do rozdziałów 5a*, *8a*, *14 oraz działów IV i VIIIa KPA*, Warszawa 2017, p. 107–108.

[30] R. Zawłocki, *Pojęcie i istota deliktu*..., p. 13 and sub.

the entity was sufficiently diligent – in such a case, there will be no exculpation under article 189e. For example, it is imaginable that an event could have been prevented by the obliged entity, but the entity chose a different method of prevention, which turned out to be ineffective, but was indeed reasonable and justified.

Article 189d stipulates that when meting out an administrative monetary penalty, the administrative body must take into consideration, *inter alia*, the degree to which the punished party contributed to the violation of law (article 189d(4)) and the actions voluntarily undertaken by the party in order to avoid the consequences of the violation (article 189d(5)). It seems that article 189d cannot be a legal basis for renouncing the imposition of a penalty (or absolving from liability). Firstly, that is because the very wording of article 189d ('when meting out an administrative monetary penalty') suggests so, and secondly, because the conditions of renouncing the imposition of an administrative penalty are regulated by article 189f. To conclude, even if the party did not participate in a violation of law by any means and did everything in order to avoid the consequences of the violation, it will only justify meting out a punishment on the lowest statutory level, presuming that the other circumstances which the administrative body must take into consideration (there are altogether seven points in the article) will be favourable for the party concerned. Notwithstanding the impression that this provision is the closest to the standard of diligence established by the Constitutional Tribunal, it should be treated as a defective implementation of this principle to statutory law. One may assume it is even doubly deleterious. That is because the administrative bodies and the courts can deny to apply the standard of diligence established by the Constitutional Tribunal, claiming that it can be considered as an interpretation *contra legem*, because article 189d and other articles clearly stipulate how and when an administrative monetary penalty may or may not be meted out. When there was no regulation of this matter at all, a liberal interpretation was easier, especially when upheld by the authority of the Constitutional Tribunal.

The possibility of exculpation as established in the case-law of the Constitutional Tribunal may be found in article 189b of the Code of Administrative Procedure, which stipulates that an administrative monetary penalty is meted out as a consequence of a violation of law which consisted in failing to fulfil an obligation or infringing a prohibition imposed on a natural person, a legal person or an organisation that has no legal personality. This provision seems to affirm the prevailing opinion of jurists. However, in light of the case-law of the Constitutional Tribunal, such wording of the provision might be (and, as a matter of fact, should be) interpreted in a way that enables the entity to absolve itself from liability when it did not fail to fulfil an administrative obligation or infringe a prohibition. This view is in conformity with the postulate of R. Zawłocki[31] that only an action (or omission) might be the basis of liability, but it must not be

[31] *Ibidem*.

understood as rigorously as in criminal law (which means that a legal person can commit an action or omission, as well). Indeed, two conditions should be distinguished in this provision: the perpetration (action or omission), i.e. a failure to fulfil an obligation or an infringement of a prohibition imposed on a natural person, a legal person or an organisational unit having no legal personality (1) and a violation of law (2). The wording of article 189e suggests that condition (2) can exist (as a fact, e.g. the sea is polluted) without the occurrence of condition (1), but then an administrative penalty shall not be meted out (thinking in a different way would mean that the liability is absolute, not strict). However, it appears that this finding goes far beyond the case of *force majeure.* It would not seem like a *contra legem* interpretation (although a very creative one) if one stated that doing everything that could be reasonably required from the entity in order not to allow the violation to arise can be considered to exclude the fulfilment of condition (1). It is not an omission and therefore there is no perpetrator to be held liable. It should be noted that under article 77 of the Code of Administrative Procedure, the burden of proof concerning perpetration is on the administrative body; nevertheless, it should be distinguished from the obligation to furnish the evidence, which lies with the party[32] which will have to bear the consequences of the lack of the evidence for its diligence. In this way, one may find harmony between the case-law of the Constitutional Tribunal and the new provisions, which, as it may seem, regulate rather different matters.

As stated above, the Constitutional Tribunal also explained that in a democratic state ruled by law, the entities shall have the possibility to argue that the violation of administrative law was a consequence of necessity and that this condition shall be an exculpatory one. It seems that none of the aforementioned provisions may serve as the basis of exculpation on the grounds of necessity. One may assume that *force majeure* does not entail the same measures as the state of necessity, which excludes the application of article 189e. As far as article 189b is concerned, one may try to apply the same creative mode of interpretation. I think it is justified in this case, at least when it comes to the collision of a more important interest with a less important one. It is accepted in doctrine of criminal law that such a collision (article 26(1) of the Polish Criminal Code[33]) is a justification, not an excuse,[34] i.e. it excludes the unlawfulness of the act. If we remember that unlawfulness is a contradiction to a legal norm which establishes an order or a prohibition[35] and that condition (1) indirectly stipulates unlawfulness as a necessary element of every administrative offence, it seems to be proven that – thanks to the creative interpretation – the state of necessity – if in any provision at all – can be found in

[32] R. Kędziora, *Kodeks postępowania administracyjnego. Komentarz*, Warszawa 2017, p. 477.

[33] Journal of Laws of 2017, No. 2204.

[34] Again, there is no direct equivalent of *kontratyp* and *wyłączenie winy* in the English legal system, but it is reasonable to use the words *justification* and *excuse*, respectively.

[35] W. Wróbel, A. Zoll, *Polskie prawo karne. Część ogólna*, Kraków 2013, p. 158.

article 189b. However, it would be desirable that the statute explicitly expressed the possibility to justify the state of unlawfulness. Although the judgment of the Constitutional Tribunal concerned a particular provision,[36] i.e. establishing a sanction for speeding (the suspension of driver's licence), the standard of necessity established by the Constitutional Tribunal seems to apply to all systems of administrative law, notably to the administrative monetary penalty. Consequently, issuing an act[37] stipulating that speeding drivers in the state of necessity will not be deprived of the driver's licence is an inappropriate, fragmentary implementation of the judgment of the Constitutional Tribunal. The institution of exculpation by necessity should be regulated on the general level, applying to all cases of the administrative monetary penalty (and other punitive sanctions). Another problem is the collision between an interest which is not manifestly less important with another one (as in article 26(2) of the Polish Criminal Code), which is considered an excuse. The Constitutional Tribunal decided in the aforementioned case that the state of necessity in administrative law should not to be understood widely, which seems to mean that only the state of necessity which involves the collision of a more important interest with a less important one ought to be considered an exculpatory circumstance.

5. STRICT LIABILITY IN THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

One should also consider the standards of the European Convention on Human Rights. The deliberations on strict liability are made not only so as to examine its very nature, but, above all, in order to examine conformity of the Polish legal system with human rights. The case-law of the European Court of Human Rights might be helpful in creating a model of strict liability whose limits will conform with the standards of the Convention.

First of all, one should recall several basic facts. The Convention ensures with regard to 'criminal charges' or 'criminal matters' by virtue of articles 6 and 7 of the Convention as well as articles 2, 3 and 4 of Protocol No. 7. The definition of a 'criminal charge is autonomous on the grounds of the Convention. There are three criteria, called the 'Engel criteria', which are examined in order to verify whether a charge is criminal. Firstly, the belongingness to criminal law in a member-state legal order is examined. Secondly, the criminal character of the offence is considered (the deterrent and the punitive purpose of sanction is relevant in

[36] Article 102(1)(4) of the Act on Drivers of 5.01.2011 (Journal of Laws of 2017, No. 978).

[37] Article 2 of the Act amending the Road Traffic Code and he Act on Drivers of 12.04.2018 (Journal of Laws of 2018, No. 1099).

this criterion[38]). Thirdly, the severity of the penalty is examined.[39] In principle, the protection is granted when only one of these criteria is met.[40] It is accepted in the case-law that when the third criterion is considered, it is not relevant what punishment is actually meted out, but what penalty could be meted out according to law (the maximal statutory limit).[41] It seems that the guarantees of the Convention will apply in the majority of cases concerning administrative monetary penalties existing in the Polish legal system. These penalties are severe sanctions and, even if not, their purpose seems to be punitive and deterrent as it is understood in the case-law of the ECtHR. In search of the standard of the Convention, one should look at the case-law and the matter of application of article 6(2) of the Convention, which stipulates the presumption of innocence.

It is stressed in the case-law of the European Court of Human Rights that the Convention does not prohibit the presumptions of law, but as far as criminal matters are concerned, a member state is obliged to act within reasonable limits.[42] The penalisation of a simple or an objective fact regardless of intent or negligence is considered a presumption of a fact and liability,[43] which is permitted as long as it is rebuttable. In this landmark judgment, the ECtHR found that this presumption was not irrebuttable, because exculpation was possible by *force majeure* or an error.[44] In another case, the ECtHR ruled that even if the burden of proof was on the party to administrative proceedings concerning tax surcharges, the presumption was difficult to rebut and the decision was enforced before the final judgment of the court, there was no violation of article 6(2), because the presumption was within reasonable limits in comparison to the legitimate aim.[45]

It seems that article 6(2) is applicable only to proving guilt, not to adjudicating upon other matters which are to be examined, e.g. meting out a punishment.[46] For the ECtHR, 'innocence' seems to entail the lack of perpetration. Therefore, it is

[38] Judgment of the European Court of Human Rights of 24.02.1994, *Bendenoun v. France*, No. 12547/86, section 47.

[39] Judgment of the European Court of Human Rights of 8.06.1976, *Engel and Others v. Netherlands*, No. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, section 82.

[40] Judgment of the European Court of Human Rights of 23.07.2002, *Janosevic v. Sweden*, No. 34619/97, section 67.

[41] Judgment of the European Court of Human Rights of 27.08.1991, *Demicoli v. Malta*, No. 13057/87, section 34.

[42] Judgment of the European Court of Human Rights of 07.10.1988, *Salabiaku v. France*, No. 10519/83, section 28.

[43] *Ibidem*, section 26.

[44] *Ibidem*, section 29; Judgment of the European Court of Human Rights of 28.06.2018, *G.I.E.M. S.R.L. and Others v. Italy*, No. 1828/06, 34163/07, 19029/11, section 243.

[45] Judgment of the European Court of Human Rights of 23.07.2002, *Janosevic v. Sweden*, No. 34619/97, sections 103–108; Judgment of the European Court of Human Rights of 23.07.2002, *Vastberga Taxi Aktiebolag and Vulic v. Sweden*, No. 36985/97, sections 113–116.

[46] Judgment of the European Court of Human Rights of 8.06.1976, *Engel and Others v. Netherlands*, No. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, section 90.

not prohibited to create the presumption of intent or negligence (i.e. strict liability regime) in an internal legal system, even though it is prohibited to create the presumption of guilt. It would be contradictory to article 7 of the Convention to mete out a punishment to a person who is not a perpetrator.[47]

To conclude, in proceedings, an administrative body or court is obliged to find the perpetrator; in the second stage, when the offender is known, the administrative body or court can apply the presumption of culpability (established by law), but the party to the proceedings has to have an opportunity to rebut this presumption (a possibility of defence). Only when the party fails to do so may it be held liable.

It seems that those minimal requirements established by the case-law of the European Court of Human Rights are fulfilled in Polish law relating to administrative monetary penalties. As mentioned above, there is no presumption of perpetration, because the burden of proof is on the administrative body pursuant to article 77 of the Code of Administrative Proceedings. As in the case of *Salabiaku*, exculpation is possible by *force majeure*; therefore, the presumption is rebuttable. However, one should not forget that the 'reasonable limits' are also connected with the principle of proportionality. It requires an in-depth analysis of the individual provisions establishing administrative monetary penalties (notably the most severe ones) – an analysis of whether it is justified to apply the strict liability regime in a particular case. On the other hand, one should also remember about the *Jussila* standard – the guarantees provided by the Convention do not have to be applied with full stringency[48] to cases that do not belong to the hard core of criminal law.

6. CONCLUSIONS

To sum up, the definition of administrative offence can be constructed as follows: it is an unlawful (condition (1) mentioned above) action or omission (as proven by R. Zawłocki, also condition (1) above) under administrative penalty resulting in an objective violation of law (condition (2) mentioned above). In cases of administrative violations, there are three (more or less recognised) exculpatory circumstances: *force majeure*, standard of diligence and necessity.

However, it should be noted that the process of evolution of the model of strict liability in Poland is yet to be finished. We find ourselves in the transitional

[47] Judgment of the European Court of Human Rights of 29.10.2013, *Varvara v. Italy*, No. 17475/09, section 71.

[48] Judgment of the European Court of Human Rights of 23.11.2006, *Jussila v. Finland*, No. 73053/01, section 43.

period and the principles of the strict liability regime are still not certain and well-grounded. It appears that it will change its shape, either by the provisions of the statute or by the case-law of the constitutional court or the European Court of Human Rights. The tendency is towards a regime with more possibilities of exculpation, but it is unclear which justifications or excuses fully recognised in the Polish criminal law (e.g. *error iuris*, *error facti*, experiment, self-defence) will be applicable to administrative violations. It is up to jurists to reflect on postulates *de lege ferenda*. It is necessary to take the standard and methods accepted in the doctrine of criminal law into consideration, because administrative monetary penalties belong, in fact, to criminal law in its broad sense.

Strict liability (understood as a presumption of culpability) seems to be imperative in some cases,[49] when proving intent or recklessness would be too troublesome given the importance of the proceedings, i.e. in cases in which the punishment is low and the proceedings are simplified in order to provide efficiency. Nonetheless, the Polish legal system seems to create a paradox, because liability for petty offences (e.g. traffic offences like speeding) is not based on strict liability (in principle,[50] the maximum punishment is 5000 PLN or one month of restriction on freedom or thirty days of imprisonment[51]) and, on the other hand, very severe punishments might be meted out in the strict liability regime for some administrative violations, e.g. there exists a monetary penalty up to the equivalent of one million Special Drawing Rights,[52] which is approximately five million PLN. As shown by this example, one should always bear in mind that these presumptions ought to be proportionate and within reasonable limits (and that the consistency of law should be provided). A strict liability regime is very convenient for public authorities (proceedings are faster and cheaper), but it does not mean that there will be no guarantees characteristic for criminal law in strict sense in very serious cases (e.g. the aforementioned examples). Unfortunately, it seems that there is no intention to regulate these matters in such a way and there is no method to have it done so; the European Court of Human Rights and the Constitutional Tribunal established their standards on the minimal level and for these reasons my postulate is based not on actions that the legislature is obliged to take (by virtue of the Constitution or the Convention), but rather on actions that it should take (because it is *bonum et aequum*).

[49] D. Szumiło-Kulczycka, *Prawo administracyjno-karne*, Kraków 2004, p. 71.

[50] Article 1(1) and articles 18–27 of Code of Petty Offences (Journal of Laws of 2018, No. 618).

[51] J. Jakubowska-Hara, (in): P. Daniluk (ed.), *Kodeks wykroczeń. Komentarz*, Warszawa 2016, p. 131 mentions that according to the official statistics, imprisonment without suspension is imposed only in 0.5% of convictions. We must remember that those statistics cover only judgments and not every punishment imposed on the entity, because a punishment for a petty offence in Poland may be as well (and most frequently is) imposed by other law enforcement services, notably by the police.

[52] Article 36 of the Act of 18.08.2011 on Maritime Safety (Journal of Laws of 2018, No. 181).

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STRICT LIABILITY REGIME IN POLAND

Summary

The article focuses on administrative violations, which are considered to be based on strict (or objective) liability model. Due to the lack of in-depth scholarly analysis of administrative liability, its principles had to be developed in the case-law of the Constitutional Tribunal, which influences the decisions of administrative courts. The recently introduced provisions of the Code of Administrative Procedure concerning administrative monetary penalties are also analysed. The conformity of this model with the guarantees provided by the European Convention on Human Rights is examined, as well. The analysis leads to the conclusion that three exculpatory circumstances are recognized in this regime: force majeure, necessity and ensuring the standard of diligence established by the Constitutional Tribunal.

KEYWORDS

objective liability, administrative liability, administrative monetary penalty, administrative offence

SŁOWA KLUCZOWE

odpowiedzialność obiektywna, odpowiedzialność administracyjna, administracyjne kary pieniężne, delikty administracyjne

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SHATTERING MYTHS: THE CURIOUS HISTORY OF THE BULGARIAN LAW OF OBLIGATIONS[1]

The history of private law is intimately tied to the political history of a nation.[2] Common private law may symbolize unity and freedom.[3] Often, when building a new State, a key priority, after enacting a constitution, is to enact a civil code.[4] Reforms in private law may denote political changes and transitions within established States, too. In France, for instance, the *Code Civil* put an end to the excesses of the judges and curtailed corruption.[5] Countries, which change political regimes, usually alter their civil codes to reflect the new political values.[6]

In this light, it is not surprising that in many European countries, the history of private law is well documented and well researched.[7] That is why, when writing

[1] A version of this paper was presented at the 7th Annual Conference on Comparative Law dedicated to the 'Evolution of Law' hosted by the SWPS University of Social Sciences and Humanities in Warsaw in 2017; The paper draws on research I undertook for my doctoral thesis. See R. Vassileva, *Change of Economic Circumstances in Bulgarian and English Law. What Lessons for the Harmonization of Contract Law in the European Union?*, Doctoral Thesis, University College London 2016.

[2] Hesselink observes that civil codes are always 'the result of political urge.' See M. Hesselink, *The Politics of a European Civil Code*, "European Legal Journal" 2004, Vol. 10, pp. 675, 684.

[3] *Ibidem.*

[4] For example, Italian unification was marked by the adoption of a constitution in 1861 and, subsequently, the first Italian *Codice Civile* of 1865. For a historical account, see M. Collier, *Italian Unification: 1820–1871*, Oxford 2003.

[5] It has been noted that French codification finally freed citizens 'from the despotic and unaccountable discretion exercised by judges under the old system,' M. Ascheri, *Turning Point in the Civil-Law Tradition: From lus Commune to Code Napoléon*, "Tulane Law Review" 1996, Vol. 70, pp. 1041, 1043.

[6] The evolution of the Russian/Soviet civil codes is particularly revealing. See A. Ostroukh, *Russian Society and its Civil Codes: A Long Way to Civilian Civil Law*, "Journal of Civil Law Studies" 2013, Vol. 6, p. 373.

[7] For instance, there is ample literature dedicated to the history of the French *Code Civil*. See A. Levasseur, *Code Napoléon or Code Portalis?*, "Tulane Law Review" 1969, Vol. 43, p. 762, J. Gordley, *Myths of the French Civil Code*, "The American Journal of Comparative Law" 1994, Vol. 42, p. 459; F. Ewald, *Naissance du Code civil: la raison du législateur*, Paris 2004, J. Visick, *The Intellectual Influences on the Code Civil*, "UCL Jurisprudence Review" 2009, Vol. 15, p. 198.

my PhD in comparative private law,[8] I was puzzled by the mystery surrounding the Bulgarian Law of Obligations and Contracts (LOC) – the piece of legislation which governs the law of obligations in Bulgaria.[9] While it was enacted in 1950, shortly after Bulgaria became a communist State, and it is still in force following cosmetic changes in the early 1990s,[10] almost nothing is known about its authors and its source of inspiration.

Through archival and comparative research, however, I believe I discovered its 'dark' secret – the document is heavily based on the Italian *Codice Civile* of 1942. Yet, why would a jurisdiction supposedly building a communist legal system post-1944 seek inspiration in the civil code of a jurisdiction with a rival ideology (Fascism) – Italy? The answer to this question raises concern about the superficial labeling of legal systems by the traditional taxonomies of comparative law. It also reveals the intricacies and peculiar patterns of legal change in Bulgaria, including the hidden mechanisms of resistance of radical legal change.[11] Furthermore, it shows that comparative law could be a powerful tool in shattering myths in legal history.

1. CONVENIENTH MYTHS

Bulgarian textbooks seem to put forward convenient myths about the origin and history of the current LOC. One of the leading authorities in the law of obligations claims that the LOC is an original Bulgarian normative act created in accordance to the classical solutions of the continental (French-German) tradition'.[12] In turn, one of the leading authorities in legal history argues that the LOC is based on 'the principles of socialist law and planned economy'.[13]

[8] As I was working on a comparison between English and Bulgarian law, I felt compelled to attribute Bulgarian law to a legal family when phrasing my research question. However, I had ample reasons to believe that the traditional Bulgarian narrative about the history of Bulgarian law was an example of propaganda, as explained below.

[9] Note that Bulgaria never had a civil code. Bulgarian legislators have always opted for a piecemeal approach – enacting laws and codes governing the various branches of law.

[10] The reform was carried out in 1993 and 1996. It allegedly restored the dualism of Bulgarian private law because a Law on Commerce was enacted, too. However, in practice, the latter is underdeveloped, so even commercial transactions are largely governed by the LOC.

[11] Mitchell contends that understanding how and why legal change takes place is fundamental for the academic study of law. He also emphasizes that it is important to go beyond traditional evidence to adequately understand the process of change and its implications, P. Mitchell, *Patterns of Legal Change*, "Current Legal Problems" 2012, Vol. 65, pp. 177–201.

[12] A. Kalaidjiev, *The Law of Obligations: General Part*, Sibi 2010, p. 26.

[13] D. Tokushev, *History of the New Bulgarian State and Law 1878–1944*, Sibi 2008, p. 182.

These assertions always struck me as unconvincing, or at least, as half-truths. Firstly, the 1950 LOC was drafted and passed shortly after communism's arrival and there was insufficient time to create original Bulgarian solutions. Secondly, if the LOC contains 'classical continental solutions,' it is strange that the wording of its provisions neither resembles provisions of the French *Code Civil* nor of the German *Bürgerliches Gesetzbuch*. Thirdly, on a pan-communist scale, ideological socialist law was developed much after LOC's enactment. The first Soviet Civil Code was enacted in 1922, but it was primarily based on German, Swiss, and French law. Subsequent Soviet codes were substantially more ideologized, but they were passed after the LOC.[14] Also, when one compares the 1922 Soviet code with the LOC, there is little resemblance – they have similar structures, but the content is different and the LOC is noticeably longer. Essentially, while the LOC referred to certain socialist principles like the State economic plan and socialist coexistence, its authors did not follow any available socialist model.

Most of all, however, I refused to believe that Bulgaria's rich and complex legal tradition as well as its propensity to borrow foreign legal principles and to rely on comparative law as a vehicle of legal development could disappear immediately after communism was established. To clarify, the modern history of Bulgarian law can roughly be divided into three periods – re-establishment and development of the Bulgarian State after the Liberation from the Ottoman Empire (1878–1944), communism (1944–1989), and democracy (post-1989). Despite the major challenges it presented, the first period seems relatively well documented. The first Bulgarian constitution was adopted in 1879. Laws regulating the various branches of law were progressively enacted.[15] The composition of the working groups and their sources of inspiration are known.

For historic reasons beyond the scope of this paper,[16] the first Bulgarians with university degrees all studied abroad – the first jurists were no exception.[17] As a result, there was ample comparative dialogue at the drafting stage of these various pieces of legislation. For instance, the first Bulgarian LOC of 1892 was

[14] The second Soviet Civil Code was enacted in 1964. On the Soviet codes' history and ideology, see A. Ostroukh, *Russian Society…*, pp. 388–390; Poland also enacted a new civil code in 1964, but adopted a more 'Western' approach, which is why it was only necessary to amend it after communism ended. On the code's philosophy, see A. Rudzinski, *New Communist Civil Codes of Czechoslovakia and Poland: A General Appraisal*, "Indiana Law Journal" 1964, Vol. 41, p. 33; Hungary enacted a communist civil code in 1959.

[15] Law on Acquisition of Uninhabited Land (1880), Laws on the Court System (1880 and 1883), Law on Inheritance (1890), Law on Obligations and Contracts (1892), Law on Commerce (1897), etc.; For the most important legal initiatives, see D. Tokushev, *History of the New Bulgarian State…*

[16] As mentioned above, Bulgaria was under Ottoman rule, which was oppressive, until 1878. The first Bulgarian university – Sofia University – where students could study in Bulgarian was founded in 1888. Its Law Faculty opened doors only in 1892.

[17] Traditional destinations included France, Germany, Austria-Hungary, Switzerland, Romania, Russia, etc.

developed by three experts who had degrees from Russia and Germany.[18] The document, nonetheless, copied verbatim provisions on contracts and obligations of the *Codice Civile* of 1865. It borrowed Titles IV to XXI of Book III with the exception of Titles V and VIII which regulated marriage contracts and long-term leases.[19]

The name of the Law – Law on Obligations and Contracts – came from the name of Title IV of the *Codice Civile*. Some provisions, however, were copied from *Código Civil*, particularly the ones on contracts of insurance.[20] Both the Italian and the Spanish code of that time largely replicated the French *Code Civil*. The Bulgarian committee justified their choice by indicating that the laws of Italy and France contain everything that theory and practice have deemed most just and rational in resolving personal and property disputes.[21] It is also interesting that the committee did not choose to replicate the provisions of the *Code Civil* directly, but worked with Italian and Spanish versions – it has been suggested that the small changes that Italian and Spanish lawmakers made when replicating the *Code Civil* were significant.[22]

Moreover, it is helpful to note that the first Bulgarian law professors were comparativists by nurture. As noted above, they all earned their education abroad – some of them felt at home in several jurisdictions. This, in turn, explains their research interests and expertise. To illustrate, one of the first tenured professors at the Law Faculty – Mihail Popoviliev – had earned his PhD at the Sorbonne. His thesis[23] studies an institute related to the inheritance of gifts, but what is striking is that he examines not only Roman law and French law prior to codification, but also the equivalents of this institute in twenty additional jurisdictions. The work of Yosif Fadenhecht,[24] the author of the first Bulgarian textbook on civil law, is also revealing. In his monograph *A Comparative Study on the Law of Obligations*,[25] for example, he compares the provisions of the 1933 Polish Code of Obligations with the laws of Bulgaria, France, Italy, Germany, Austria, and Switzerland. Lyuben Dikov, another leading authority in civil and commercial law prior to communism, had defended

[18] D. Tokushev, *History of the New Bulgarian State*..., p. 173.

[19] I. Apostolov, *The Law of Obligations: General Part*, Sofia 1947, p. 15.

[20] *Ibidem*.

[21] D. Tokushev, *History of the New Bulgarian State*..., p. 177.

[22] I. Apostolov, *The Law of Obligations*..., p. 16.

[23] See *Du rapport à succession des Libéralités*, *en droit civil français et européen et au point de vue du droit international privé*, Paris 1897.

[24] He had earned his law degree and defended a thesis at the University of Leipzig. See Y. Fadenhecht, *Das Selbstvertheidigungsrecht des Rechtsbesitzers gegen den Sachbesitzer: mit einem Excurs über das Selbstvertheidigungsrecht des Sachbesitzers*, Leipzig 1897.

[25] Sofia 1936.

his PhD at the University of Göttingen[26] and published extensively abroad about the challenges in contract law at the time.[27]

Overall, I was under the impression that a key part of the puzzle was missing. Who wrote the LOC? What source did they draw on? Why is the history of the LOC blurred in mystery?

2. LOOKING FOR ANSWERS

The first step in my quest for answers was a visit to the archives of the Bulgarian Parliament. Ironically, examining the verbatim report of the sitting of 3 November 1950, at which the LOC was enacted, only raised further questions. Notably, from the report it is visible that the law was voted on unanimously without any discussion. The sitting lasted 5 hours and 23 minutes and only involved a general overview of the law by the Parliament's secretary and ideological speeches by the Minister of Justice and two Members of Parliament. The presentation of the law discloses that it was inspired by the Soviet Civil Code of 1922, Poland's Draft of a Bill on the General Part of Civil Law (1947) and Soviet doctrine.[28] The speech of the Minister of Justice reveals that the law was drafted by the Ministry of Justice in the span of two years in collaboration with academics and the working class represented by factory workers organized by the Communist Party.[29]

The speeches provide ample illustration of communist propaganda: the origin of any positive development was traditionally attributed to the Party and the masses. However, it is unlikely that factory workers without high school education could participate in the drafting of a sophisticated instrument like the LOC, or speak fluent Russian to understand Soviet philosophy and the Soviet Civil Code. Furthermore, as noted above, there is little resemblance between the Soviet code and the LOC. The general part of Polish law could not serve as the basis of the law of obligations either. It was obvious to me that LOC's authors drew inspiration from an undisclosed source.

The second step in my quest for answers was to contact established Bulgarian scholars in the hope of learning more about LOC's origin. In 2013 I met with Pro-

[26] *Das Institut des Strohmannes (die vorgeschobene Person) im bürgerlichen Rechte*, Göttingen 1922.

[27] *Il Diritto civile dell'avvenire*, "Rivista internazionale di filosofia del diritto" 1931, Vol. 11, pp. 153–180; *Norma giuridica e volontà privata*, "Rivista internazionale di filosofia del diritto" 1934, Vol. 14, pp. 681–706; *L'évolution de la notion de contrat*, (in:) *Etudes de droit civil à la mémoire de Henri Capitant*, Dalloz 1939, pp. 201–218; *Die Abänderung von Verträgen den Richter*, (in:) *Hedemann-Festschrift*, Jena 1938.

[28] Stenographical Diary of the Plenary Sitting on 3 November 1950.

[29] *Ibidem.*

fessor Sarafov from Sofia University who had been struggling with this question for years.[30] He told me that it was probable that the LOC was written by leading Bulgarian scholars whose names were not revealed because it would have been shameful for the Party to admit that communist law was written by capitalist scholars. He suspects Apostolov, Vassilev, and Kozhuharov as they wrote treatises on the law of obligations shortly prior and after LOC's enactment.[31] Sarafov emphasized that it was likely that the LOC was inspired by the *Codice Civile* of 1942 – a fact that could not be disclosed because it would have been discreditable for the Party to admit that the communist LOC is partly based on the law of a Fascist country. Indeed, developing a new *Codice Civile* was one of Mussolini's goals after he rose to power – as explained below, following relatively minor amendments, it is still in force today.[32]

Sarafov further stressed that while during communism research on LOC's origin and influences was avoided for these 'shameful' reasons, current research on the topic is missing because it is generally accepted as a statement of fact that the LOC is an original Bulgarian legal text. Moreover, Italian is not a common foreign language for contemporary Bulgarian lawyers and research would be challenging.

Following the interview, I decided it was indispensable to delve into the *Codice Civile* of 1942 all the more that my research also showed that Apostolov was fluent in Italian[33] – a fact which made a connection between the 1950 LOC and the 1942 *Codice Civile* probable because the drafting committee could have had access to the original text. Also, one of the most influential professors in the period before communism, Lyuben Dikov, had written an article explaining why the *Codice Civile* was the greatest achievement of codification.[34]

3. THE 'DARK' SECRET

My analysis shows that the LOC bears a striking resemblance to Book IV and partially Book II of the *Codice Civile* of 1942, which is still in force fol-

[30] Interview with Pavel Sarafov, Professor of Law, Law Faculty, Sofia University (Sofia, Bulgaria, 12 November 2013).

[31] I. Apostolov, *The Law of Obligations*...; L. Vassilev, *Civil Law: General Part*, Sofia 1951; A. Kozhuharov, *The Law of Obligations*, Sofia 1954; L. Vassilev, *The Law of Obligations*, Sofia 1954.

[32] Even prior to Mussolini's rule scholars were considering the need to implement new legislation. There was even a French-Italian project for a new code of obligations. For an account of the project and its merits, see S. G. Vesey-FitzGerald, *The Franco-Italian Draft Code of Obligations, 1927*, "Journal of Comparative Legislation and International Law" 1934, Vol. 14, p. 1.

[33] In his younger years he was teaching Italian at the Italian Lyceum in Sofia.

[34] L. Dikov, *The New Italian Civil Code*, "Annuaire de l'Université de Sofia" 1942, Vol. 27, p. 57.

lowing amendments. Numerous provisions of the LOC resemble closely provisions in the *Codice Civile*. Many articles were copied almost verbatim.[35] LOC's drafters, nonetheless, changed the order of articles to follow the structure of the 1922 Soviet Civil Code. Other provisions borrowed from the *Codice Civile* were slightly modified to suit communist ideology – compare, for instance, article 266, paragraph 2 of the LOC[36] with article 1664 of the *Codice Civile*.[37] The main difference is that the Bulgarian provision does not stipulate a threshold of change as under communism, the economy is planned and prices are fixed by the government. It should be noted that this is one of the most peculiar and characteristic articles of the Italian code – the *Codice Civile* is one of the first European civil codes to contain an explicit provision on economic impossibility.[38]

Yet, how can this paradox be explained – why would a country building the foundation of its 'socialist' law of obligations seek inspiration in a country supporting a rival ideology? One can only make conjectures regarding why the authors of the LOC decided to use the *Codice Civile* as a model for the Bulgarian law of obligations because of years of censorship. As mentioned above, Bulgaria was the first socialist country out of the Soviet Union to modify its law of obligations to reflect communist values and it had no proper example to follow. In addition, as explained above, Bulgaria's legal tradition was open to borrowing and had developed a culture of exchange with many jurisdictions, including Italy – not only the first LOC of 1892 was based on the 1865 *Codice Civile*, but

[35] Article 94 (LOC): 'Arrangements which *a priori* rule out or reduce the promisor's liability for deliberate actions or gross negligence shall be null and void.' This provision seems inspired by Article 1229, paragraph 1 of the current *Codice Civile*: 'Null is any agreement which excludes or limits the liability of the debtor for willful misconduct or gross negligence.'; Article 81, paragraph 1 (LOC): 'A promisor shall not be liable if the impossibility to perform an obligation is due to a reason for which he cannot be found to be at fault.' Compare this provision with Article 1218 (*Codice Civile*): 'The promisor who does not perform exactly his due obligation owes compensation for damages if he does not prove that his default or delay is due to an impossibility of performance which cannot be attributed to him.'

[36] 'If in the course of the performance of the contract the duly determined prices of materials or labor change, the compensation shall be adjusted accordingly, even where it was agreed upon as a total sum.'

[37] 'If, by reason of unforeseeable circumstances have occurred increases or decreases in the cost of materials or labor, such as to cause an increase or decrease greater than one-tenth of the total agreed price, any contractor may request a review of the same price. The review may be granted only for the difference that exceeds the tenth...'

[38] While in modern times German judges were the first in Europe to relieve parties from extremely burdensome performance following supervening events, the concept was codified in the *Bürgerliches Gesetzbuch* as its Section 313 in 2001. See J. Dawson, *Effects of Inflation on Private Contracts: Germany, 1914–1924*, "Michigan Law Review" 1934, Vol. 33, pp. 171–238. See also A. Janssen, R. Schultze, *Legal Cultures and Legal Transplants in Germany*, "European Review of Private Law" 2011, Vol. 2, pp. 225, 232.

Bulgarian and Italian scholars were in constant dialogue at the beginning of the 20th century.[39]

Furthermore, examining Bulgarian scholarly writing prior to communism reveals that prominent authors, notably Lyuben Dikov mentioned above, were fascinated with organic social theory which they viewed as a viable alternative to liberal individualism which underlay the French *Code Civil* and the 1865 *Codice Civile* whose rules on obligations Bulgaria had initially borrowed in its 1892 LOC.[40] Dikov published numerous articles in Bulgaria, Italy, France, and Germany on how organic theory has redefined contract and the purpose of contract law.[41] As noted above, he also dedicated an article to the merits of the 1942 *Codice Civile*, which he praised as the most successful example of codification.[42] Considering this, it seems important to emphasize that while the Communist Party did not reveal the names of the authors of the LOC, it seems likely that the piece of legislation was drafted by adherents of Dikov who were well aware of his work and may have shared his values – Apostolov, Vassilev, and Kozhuharov, who Professor Sarafov mentioned, were all his students and/or colleagues.[43]

In that light, it is worth mentioning that the 1942 *Codice Civile* was heavily influenced by organic social theory, and in particular by Italian corporatism.[44] Mattei and di Robilant, for example, have underlined the 'social orientation' and 'collective dimension' of Italian doctrine and case law which carried 'the seeds of corporate ideology that played a major role in the genesis of the code'.[45] Moreover, Filippo Vassalli, one of the fathers of the *Codice Civile*, has emphasized its organic dimension:

The regime of obligations and individual rights is constantly adapted to the needs of the national economy either by regulatory action of the corporate

[39] Tzeko Torbov translated many works by the jurist-philosopher del Vecchio who also came to Bulgaria to give lectures. Furthermore, del Vecchio taught Venelin Ganev's theories (a Bulgarian authority) in his classes in Italy, N. Nenovski, *The Political Philosophy of Giorgio del Vecchio*, "Yuridicheski svyat" 1999, Vol. 1, p. 226.

[40] For an analytical summary of his views, see R. Vassileva, *Contract Law and the Social Contract: Rethinking Law Reform in the Field of Contract Law from the Perspective of Social Contract Theory*, "Pravni život" 2016, Vol. III, issue 11, Year LXV, pp. 267–286.

[41] See footnote 27.

[42] L. Dikov, *The New Italian...*, p. 57.

[43] The Bulgarian academic legal community was relatively small as the country had one Law Faculty – the one at Sofia University.

[44] On the development and current state of corporatism in Italy, see M. Salvati, *The Long History of Corporatism in Italy: A Question of Culture or Economics?*, "Contemporary European History" 2006, Vol. 15, p. 223; See also C. Spinsante, *Il corporativismo fascista: Il dibattito italiano sulla riforma corporativa dello Stato durante gli anni Venti e la sua recezione da parte del conservatorismo tedesco nella Repubblica di Weimar*, Doctoral Thesis, University of Macerata 2012.

[45] U. Mattei, A. di Robilant, *Les longs adieux. La codification italienne et le code Napoléon dans le déclin du positivisme étatiste*, "Revue internationale de droit comparé" 2004, Vol. 4, pp. 847, 851.

order expressly referred to in the [civil] code, *or by a number of criteria*, *such as the protection of production…the duty to act honestly and in good faith*, *the duty of corporate solidarity*, *which…tend to place the rights of individuals in an organic link with the economic life and morality of the nation*.[46]

The organic influence has translated into numerous provisions providing for greater State regulation and judicial intervention in agreements. It has been emphasized that the first version of the 1942 *Codice Civile* reflected the strong accent on the productivity of the enterprise, economic solidarity and the superior interest of the nation, which was a feature of the Italian Fascist notion of contract.[47] These features of the Italian civil code must have appealed to the authors of the LOC. Their main challenge was to transform the 'rightist' organic dimension into a 'leftist' one, which must not have been too difficult having in mind that a 'socialist' economy has similar priorities – emphasis on productivity, social solidarity, and the primacy of State interests over private ones.

In principle, the *Codice Civile* itself had relatively few provisions which directly referred to ideology. That is why it was relatively easy to 'defascize' it after the fall of Mussolini in 1943.[48] Merryman, one of the Western scholars who has researched the history of the *Codice Civile*, has stressed:

The more substantial part of the governmental program of revision was not Fascist in origin. It consisted of a desire to reform the private law in the interests of increased national production, *more adequate distribution of wealth*, *and greater social justice*, *all to be achieved through expansion of the role of the state. This was not a purely Italian tendency…*[49]

In addition, he has noted:

In fact, *the 1942 Code is not a Fascist document. Once a certain amount of superstructure was cleared away*, *a solid juristic accomplishment remained*, *built on the foundations laid in the nineteenth century codes and incorporating some of the more prominent trends in the thought of the twentieth century.*[50]

In other words, all the Bulgarian drafters had to do was to rethink the few ideological provisions in the *Codice Civile* from the perspective of Marxian terminology and keep the rest intact.

When one compares some of the most ideologically charged articles from the original version of the 1942 *Codice Civile* and the original 1950 LOC, one sees differences in ideological terminology but not in function. For example,

[46] F. Vassalli, *Studi Giuridici. Volume III*, Giuffrè 1960, p. 615.

[47] P. G. Monateri, A. Somma, *The Fascist Theory of Contract: A Comparative and Historical Inquiry into the Darker Side of Contract Law*, "Cardozo Electronic Law Bulletin" 2009, p. 1.

[48] It was 'defascized' by the same working group which drafted it.

[49] J. H. Merryman, *The Italian Style II: Law*, "Stanford Law Review" 1966, Vol. 18, pp. 396, 412.

[50] *Ibidem*, p. 413.

Article 1322 of the original 1942 *Codice Civile* stipulated: 'Parties are free to determine the content of the contract within the limits imposed by law and by *corporate rules*. Parties may enter agreements which are non-standard as long as they aim at realizing an interest that deserves protection by the law.' Article 9 of the communist LOC stated: 'Parties may freely determine the content of their agreement as long as it does not contravene the law, the people's economic plan, and the rules of socialist coexistence.' Furthermore, Article 1175 of the original 1942 *Codice Civile* stipulated: 'The promisor and the promisee should behave according to the rules of decency in relation to the *principles of corporate solidarity*.' Article 63 of the communist Law on Obligations and Contracts stated: 'The promisee and the promisor should abide in their relations by the *rules of socialist coexistence*, *socialist good faith*, *and the State economic plan*.' In both documents, societal norms considerably restricted private will and subjected the content and performance of the contract to moral and economic judicial review. Moreover, in both instruments there was no reference to universal human morality, but to the specific moral rules and economic objectives embraced by the State.

4. BEYOND THE DARKNESS

One can draw both positive and negative conclusions based on the discussion above, which can inform further work in comparative law, especially comparisons between East and West European jurisdictions:

4.1. THE POLITICAL TAINT OF LAW

The fascinating discovery that a communist country sought inspiration in a Fascist model raises concern about the 'political taint of law.'[51] For years, Bulgarian law has been labeled somewhat unjustly for political reasons, which have relatively little to do with its substance.

For instance, the theory of legal families, primarily associated[52] with the work of René David[53] and Zweigert and Kötz,[54] continues to inform comparative

[51] Credit should be given to Professor Paul Mitchell from UCL who used this term at my PhD defense and encouraged me to explore the question further.

[52] The idea of legal families existed before David's and Zweigert and Kötz's works were published. Yet the books of these authors have come to be regarded as a staple of reference. For a historical overview of the development of the theory, see M. Pargendler, *The Rise and Decline of Legal Families*, "The American Journal of Comparative Law" 2012, Vol. 60, pp. 1043–1074.

[53] See R. David, *Traité élémentaire de droit civile comparé*, Paris 1950.

[54] See K. Zweigert, H. Kötz, *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts*, Mohr 1969.

research[55] in the law of obligations as well as the teaching of comparative law.[56] Despite ample differences between the criteria they used to classify legal systems,[57] David, on the one hand, and Zweigert and Kötz, on the other, recognized the existence of a socialist legal family.[58] While subsequently there was debate over whether these jurisdictions indeed constituted a separate family[59] or were merely a sub-branch of the civil tradition as they shared common features,[60] one could note a propensity to group these jurisdictions together and to focus on the presumed similarities between them – same ideology, lack of separation between public and private law, etc.

Certainly, the similarities between communist legal systems cannot be denied, but there seem to be important substantive differences, which have been ignored because of the political label. Bulgaria, for instance, is one of the few former-communist countries that did not carry out a major reform of its law of obligations post-1989. The main reason for this is that Bulgaria's LOC had very little ideological language in it, which necessitated only cosmetic changes. As mentioned above, after the fall of Mussolini, it was relatively easy to 'defascize' the *Codice Civile*, which is still in force, for the same reasons. Hence, from a Bulgarian perspective, it seems ironic that Zweigert and Kötz pronounced socialist

[55] Comparative methodological literature traditionally refers to the theory of legal families. See, for instance, M. Graziadei, *Comparative Law as the Study of Transplants and Receptions*, (in:) R. Zimmermann, M. Reimann (eds.), *The Oxford Handbook of Comparative Law*, Oxford 2006, pp. 442–474; See also E. Örücü, *A General View of "Legal Families" and of "Mixing Systems"*, (in:) E. Örücü, D. Nelken (eds.), *Comparative Law: A Handbook*, Hart 2007, pp. 169–189.

[56] Traditionally, comparative law classes in Western Europe focus on the so-called 'parent' jurisdictions – England, France, and Germany.

[57] For David the main criterion was ideology while Zweigert and Kötz took four additional factors into consideration – history, the characteristic mode of thought, distinctive institutions, and legal sources. See K. Zweigert, H. Kötz, *Introduction to Comparative Law*, Clarendon 1998, p. 68.

[58] David divided legal systems into Western, Socialist, Islamic, Hindu and Chinese. He divided Western law into French and Anglo-American; Zweigert and Kötz divided legal systems into Romanistic, Germanic, Common law, Nordic, Socialist, Far Eastern, and Hindu.

[59] Merryman recognized socialist law as one of the three major legal traditions together with the civil law and the common law. See J. H. Merryman, *The Civil Law Tradition*, Stanford 1969; In their treatise on comparative law, Gambaro and Sacco dedicate a separate chapter to *Eastern Europe and the Socialist Model*, (in:) A. Gambaro, R. Sacco, *Sistemi Giuridici Comparati*, UTET 1996, pp. 411–459.

[60] Quigley admitted that 'socialist law contains features that distinguish it from the legal systems of other countries of the civil law family,' but those features have not removed it from the civil law tradition, J. Quigley, *Socialist Law and the Civil Tradition*, "The American Journal of Comparative Law" 1989, Vol. 37, pp. 781, 808; Ajani asserts: 'During the Socialist era, despite declamations on the "originality of socialist law," Western models were borrowed, even if a careful scholarship disguised them, or judges were unaware of their origin,' G. Ajani, *By Chance and Prestige: Legal Transplants in Russia and Eastern Europe*, "The American Journal of Comparative Law" 1998, Vol. 43, p. 93, 94.

law dead in the late 1990s as the same LOC is still in force and pretty much alive following relatively cosmetic changes.[61]

Modern taxonomies of comparative law seem equally biased. Ugo Mattei has argued that there are three main patterns of law – the rule of professional law, the rule of political law, and the rule of traditional law.[62] The first pattern encompasses the Western legal tradition, the second – the law of development and transition, and the third – law with an Oriental view. Mattei includes 'the majority of the ex-Socialist legal family, with the possible exception of those countries (perhaps Poland, Hungary, and the Czech Republic) where Socialist law had to face a highly sophisticated civilian heritage and whose impact has been therefore less deep' in the second group.[63]

It is certainly commendable that Mattei goes beyond purely formalistic requirements and focuses on the process behind lawmaking and adjudication instead to justify his taxonomy. Nonetheless, Mattei's scheme seems to blur the differences between East European jurisdictions and, to a certain extent, to exaggerate the differences between East European jurisdictions and the Western tradition. In his scheme, Bulgaria and Italy would fall into two different groups, which is misleading, considering the substantive similarities between Bulgarian and Italian law referred to above. It should be noted that he put forward this classification in 1997 after the fall of communism and after Bulgaria had removed the ideological language from the LOC. Notwithstanding that the same principles of obligations were and probably still are applied differently because of the legal cultural context and heritage, it seems that Mattei exaggerated the role of the 'political' to merely fit a label.

Moreover, it should be remembered that communism took over East European countries for different reasons and was not homogeneous. In other words, the 'political' permeated lawmaking and adjudication to a different degree in the various socialist States during communism, which, in turn, explains the diverging roles of the 'political' after the end of communism, too.

4.2. THE LEGAL SCHOLAR AS AN AGENT OF CHANGE OR RESISTANCE

Scholars seem to forget that legal change is often induced or prevented by people like them. Legislation is usually drafted by very small working groups

[61] The preface to the 1998 edition of their famous book states: 'The socialist legal family is dead and buried, and although it will take a long time to erase the traces of more than forty years of total subjection to political ideology, it seemed right to discard the chapters on socialist law.' K. Zweigert, H. Kötz, *Introduction to Comparative Law…*, p. V.

[62] U. Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, "The American Journal of Comparative Law" 1997, Vol. 45, pp. 5–44.

[63] *Ibidem*, p. 30.

composed of scholars or experts in a given field.[64] Hence, it is inevitably informed by the personal views of those who contributed to it. The system of enacting legislation in communist Bulgaria is not much different from the current system. Bills are passed without much discussion and voted on by Members of Parliament who either have not read the Bill or do not have the expertise to evaluate its merits. They inform their opinion based on advice from their political party, the expert opinion of the competent parliamentary committee, etc. In other words, even today, the drafters have much leeway in promoting their ideas without too much scrutiny.

In Bulgaria, communism gave power to people without education who did not have the capacity to build the communist legislative framework by themselves. Inasmuch as they disliked the 'bourgeois,' they had to rely on former 'bourgeois' scholars to draft the Bills they wanted to implement. At the time the LOC was drafted, Bulgaria had few experts on obligations, so it seems logical to assume the Communist Party had to use their knowledge and abilities. Moreover, it seems reasonable to suspect that these experts could sell any myth to the Communist Party about their methodology and sources of inspiration just because the Party leadership did not have the sophistication to engage in fact-checking. Maybe that is why the 'trick' of promoting a law of obligations, which was based on Italian law, as law 'inspired from Soviet doctrine' worked.

If one digs deeper, one may even see a story of rebellion, a story of scholarly resistance or even continuity of Bulgaria's legal tradition. Professor Mattei, who I cited above, did not recognize Bulgaria as a country with a sophisticated civilian heritage, but I vehemently disagree with him. Following the Liberation from the Ottoman Empire in 1878, Bulgaria was in a unique position. It had to rebuild its State literally from 'scratch' very quickly,[65] but it had internationally qualified experts that established comparative dialogue as the staple for legislative drafting and scholarship. The solutions they put forward were research-informed 'patchworks' of what they deemed most pertinent. This particularity of Bulgaria's legal culture remained up to communism.

In other words, the scholars who wrote the 1950 LOC seem to have stuck to their beliefs and methods despite the political pressures they were most likely subjected to. As mentioned above, for various reasons, Bulgarian scholars were fond of the Italian legal culture in the period before communism, so they made sure to curate the provisions of the *Codice Civile* they considered most relevant in the circumstances. Furthermore, they prevented Bulgaria from having a highly ideologized LOC, which probably they were capable of drafting if they were truly

[64] As mentioned above, the first Bulgarian LOC was drafted by a group of three experts; The working groups on important European Union initiatives are also rather small: the working group on European contract law had 17 members who were mostly scholars.

[65] This explains its piecemeal, hectic approach to legislating, which has remained to this day.

committed. They managed to bow to the communist regime, and yet promote their own views of law reform at the end.

4.3. THE POWER OF COMPARATIVE LAW

Why do we compare? This is arguably one of the questions, which has disturbed the sleep of many comparative scholars.[66] The motivation behind a given angle of comparison can be personal – the intellectual interests and curiosity of the author. It can also be very pragmatic – examining the legal solutions in foreign jurisdictions may provide insights for national law reform. Important harmonizing initiatives on an international scale have been inspired by comparative scholars, too.[67]

My query into the origin and influences of the Bulgarian law of obligations, however, demonstrates another key strength of comparative law – it could be a powerful tool for shattering myths in legal history. The discovery that the Bulgarian LOC is inspired from the *Codice Civile* is certainly surprising. Yet, more surprising is the fact that leading contemporary Bulgarian authorities fell victim to Bulgarian communist propaganda. A lie has gone almost unnoticed for nearly 70 years because of the lack of substantive comparative research.

In many ways this is unfortunate because, as explained above, Bulgaria had a vibrant comparative tradition prior to communism, which has faded away. Years of censorship, lack of funding, and the docile form of scholarship, which has been encouraged,[68] may shed light on this development. My personal observation is that in the end communism managed to tame the critical spirit and curiosity of scholarship – much of modern Bulgarian doctrinal writing appears descriptive and lacks zeal.[69]

On a brighter note, it is never too late to shatter myths because, to paraphrase a famous quote by Michael Crichton from his novel *Timeline*, '[if] you [don't] know history, then you [don't] know anything. You [are] a leaf that [doesn't] know it [is] part of a tree.'[70] Carrying out further archival and comparative research is not only indispensable for the sake of historical accuracy, but also for the enrich-

[66] On the major debates regarding the discipline's name, scope, and methodology, see E. Örücü, *Developing Comparative Law*, (in:) E. Örücü, D. Nelken (eds.), *Comparative Law: A Handbook*, Hart 2007, pp. 43–65.

[67] For example, the project for the harmonization of contract law in the EU. See M. Hesselink, *The Politics…*, p. 685.

[68] In totalitarian societies, scholars have to bow to the regime and justify its policies rather than criticize them or exercise independent thinking.

[69] See my discussion in Chapter 2 of R. Vassileva, *Change of Economic Circumstances…*

[70] The original quote is: 'Professor Johnston often said that if you didn't know history, you didn't know anything. You were a leaf that didn't know it was part of a tree,' Michael Crichton, *Timeline*, Alfred Knopf 1999, p. 73.

ment of our understanding of the stage Bulgaria is at and the problems it needs to solve in the future.

This is not merely a Bulgarian matter. These questions are relevant for all scholars interested in the patterns of legal change as well as those putting forward taxonomies of comparative law. Any label put on a legal system based on assumptions rather than substantive research is not justified: it simply propagates stereotypes, biases future research, and compromises the understanding of other legal cultures.

Ultimately, there is also a need for more international comparative dialogue. As an East European scholar with a West European educational background, I have always been stunned by the lack of 'Western' interest in the particularities of East European jurisdictions.[71] Beyond prosaic reasons, such as linguistic difficulties or the timing, which are always a diplomatic excuse,[72] one can see the ghost of superiority – East European jurisdictions are treated as students that should learn and take example from the West rather than jurisdictions which have their own path of historical development and experience, positive or negative, which can be valuable. It seems convenient to assume that they have nothing new or interesting to tell – yet another myth we need to shatter.

A more meaningful East-West comparative dialogue can open new venues for research and give new impetus to comparative law. It can tell us more about the limits of the discipline, too. For years, West European comparativists were looking forward to developing common principles of contract in the European Union.[73] At one point, a European Civil Code was even envisaged.[74] Yet, it turns out that the Bulgarian and Italian principles of obligations have been harmonized since the 1950s, which by itself may provide a fascinating case study about the differences in application of the very same rules because of the diverging legal cultural context. Such a study may also shed light on the (im)possibility of harmonization and the factors which play a role.

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[71] The disinterest in East European systems is particularly visible in the debate concerning the harmonization of contract law in the European Union. Even publications aiming to identify the common principles of 'European' contract law ignore East European jurisdictions altogether. See S. Whittaker, R. Zimmermann (eds.), *Good Faith in European Contract* Law, Cambridge 2000; J. Cartwright, M. Hesselink (eds.), *Precontractual Liability in European Private Law*, Cambridge 2011.

[72] Many East European scholars speak foreign languages, so collaborations can easily be envisaged. Whereas during communism collaborations were not feasible, many East European countries are now members of the European Union, so the lack of substantive dialogue is difficult to excuse.

[73] For an overview of the initiative, see L. Miller, *The Emergence of EU Contract Law: Exploring Europeanization*, Oxford 2012.

[74] In 2010, the Commission published a green paper proposing seven options for future of the Draft Common Frame of Reference among which a regulation on a European Civil Code, a regulation on European Contract Law, a toolbox, etc.: COM(2010)348 final; Because of the negative response, the Draft Common Frame of Reference remained an academic undertaking.

5. CONCLUSION: KEEP SHATTERING MYTHS

Contrary to the mainstream narrative, archival and comparative research demonstrates that Bulgaria's LOC, which was enacted during communism, is heavily based on the Italian *Codice Civile* of 1942. Exploring the reasons behind this legislative choice as well as the reasons why this 'dark' secret was buried for so long challenges the traditional taxonomies of comparative law, reveals the peculiar patterns of legal change, including the key role of the legal scholar in the process, and demonstrates the power of comparative law in shattering myths in legal history.

The lessons I drew left me with a bitter taste. It appears that sometimes we have to question the obvious because well-known facts may turn out to be mantras of lies. Surely, authorities have different incentives why they spread myths. For the authors of the LOC, the motivation may have been to spare themselves the anger of the Communist Party. For contemporary scholars spreading myths about the LOC, the reason may be their trust in prior authority, which made them victims of propaganda. While we may be sympathetic to both groups, we should not forget that as scholars we have a duty to question. Keep shattering myths!

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SHATTERING MYTHS: THE CURIOUS HISTORY OF THE BULGARIAN LAW OF OBLIGATIONS

Summary

While Bulgarian scholars concur that Bulgaria's Law of Obligations and Contracts, which was enacted in 1950 and which is still in force today following cosmetic changes in the early 1990s, is an original Bulgarian legal text, archival and comparative research

shows that it is heavily based on the Italian *Codice Civile* of 1942. Why would a communist country seek inspiration in a country with a Fascist ideology? Exploring the reasons behind this legislative choice as well as the reasons why this 'dark' secret was buried for so long challenges traditional taxonomies of comparative law, reveals the peculiar patterns of legal change, including the key role of the legal scholar in the process, and demonstrates the power of comparative law in shattering myths in legal history.

KEYWORDS

Bulgarian Law of Obligations and Contracts, history of Bulgarian law, history of the Bulgarian law of obligations, influences of Bulgarian law, Italian *Codice Civile*, comparative legal history, patterns of legal change, myths in legal history, communist law of contract, Fascist law of contract

SŁOWA KLUCZOWE

Bułgarskie prawo o zobowiązaniach i umowach, historia prawa bułgarskiego, historia bułgarskiego prawa zobowiązań, wpływy na prawo bułgarskie, włoski *Codice Civile*, porównawcza historia prawa, uwarunkowania zmian prawa, mity w historii prawa, komunistyczne prawo umów, faszystowskie prawo umów

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THE CONVERGENCE OF THE BASIS OF RESPONSIBILITY FOR A CRIME (AN OFFENSE) AND FOR AN ADMINISTRATIVE DELICT AND THE *NE BIS IN IDEM* PRINCIPLE IN THE POLISH LAW

The growing number of administrative delicts and criminal (offense) rules means that the possibility of convergence of both criminal and administrative responsibility becomes more frequent.

This issue applies to both natural persons and legal persons as well as to organizational units without legal personality. In the case of collective entities, the Polish law system provides the possibility of imposing a financial penalty on such entities (on the basis of the Act of 28 October 2002 on Liability of Collective Entities for Criminal Acts[1]) for the criminal conduct of a related natural person and also an administrative fine for the committed delict.

1. THE *NE BIS IN IDEM* PRINCIPLE

The *ne bis in idem*[2] principle is expressed in the acts of international human rights law. Article 14, paragraph No. 7 of International Covenant on Civil and Political Rights (ICCRP) of 19 December 1966 states that "no one shall be prosecuted or punished for a crime for which he has already been validly convicted or acquitted in accordance with the law and criminal procedure of the country concerned". Also, in Article 4, paragraph No. 7 of Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms of 22 November 1984 it was pointed out that "no one may be tried or punished in proceedings before the same State for an offense for which he or she was previously convicted by a final judgment or acquitted in accordance with the law and rules of criminal proceedings of that State." The *ne bis in idem* principle is also included in

[1] Dz.U. [Journal of Laws] of 2018, pos. 703.

[2] I.e., the prohibition of repeated punishment of the same person for committing the same act.

Article 50 of the Charter of Fundamental Rights of the European Union[3] and in Article 54 of the Convention Implementing the Schengen Agreement.[4]

However, this principle was not explicitly included in the Constitution of the Republic of Poland of April 2, 1997. The problem of duplication of responsibility was repeatedly the subject of examination by the Constitutional Tribunal, which derives the *ne bis in idem* principle from the rule of law expressed in Article 2 of the Constitution and the principle of fair trial pursuant to Article 45 of the Constitution.

2. THE JUDICIAL PRACTICE OF THE POLISH CONSTITUTIONAL TRIBUNAL

In many rulings, the Constitutional Tribunal (CT) emphasized that the *ne bis in idem* principle applies only to criminal provisions, but of a criminal nature in the constitutional meaning, i.e. provisions of a repressive nature, i.e. the purpose of which is to subject a citizen to some form of punishment[5] without restricting this understanding only to formal qualification of the behavior as a crime or an offense by the legislator.

However, if two repressive provisions do not coincide, in such a case the CT points out that the admissibility of using two sanctions should be examined not in the context of the *ne bis in idem* principle but on the basis of the principle of proportionality.[6]

In recent years, there was a number of very interesting rulings made by the CT concerning the issue of duplication of administrative sanctions and sanctions for crimes (tax crimes, offenses).

In the verdict of 12 April 2011 (P 90/08) the CT did not recognize the possibility of imposing a 75% tax on undisclosed income as a repressive (punitive) penalty indicating that the taxation of undisclosed revenues or revenues unex-

[3] No one shall be liable to be tried or punished again in criminal proceedings for an offense for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.

[4] Convention of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders. Article 54 states: „A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party."

[5] See: CT rulings of March 1, 1994 (U 7/93), of April 12, 2011 (P 90/08), of July 8, 2003 (P 10/02, OTK-A 2003, No. 6, pos. 62), of November 3, 2004 (K 18/03, OTK-A 2004, No. 10, pos. 103), of November 18, 2010 (P 29/09, OTK-A 2010, No. 9, pos. 104).

[6] For example, ruling of September 4, 2007, P 43/06, OTK-A 2007, No. 8, pos. 95.

plained by revealed sources is an institution meant to assess the unpaid income tax in the absence of such an assessment by the taxpayer himself. According to the Tribunal, such solution has mainly a restitution function, which is aimed at supplementing or compensating for possible losses of the state resulting from unreliable taxpayers not fulfilling their obligations. The CT stressed that the legislator adopted such tax model because the amount of losses incurred by the state resulting from taxpayers failing to meet their tax obligations is impossible to determine. In the opinion of the Tribunal, the tax liability increased to 75% for undisclosed sources of income also plays a preventive role, since the possibility of using it should induce all obliged taxpayers to voluntarily fulfill the tax obligation. Due to the negation of the criminal nature of the provision introducing the 75% tax rate, the CT concluded that the admissibility of running two proceedings, namely the administrative one for the imposition of the tax and the penal tax proceeding, cannot be analyzed in the context of the *ne bis in idem* principle. Such analysis should be based on the principle of proportionality. According to the CT, this principle was not violated.

The CT in the verdict of 12 October 2014 (P 50/13) refused to characterize the provision of Article 57, paragraph 1 of the Energy Law Act[7] as a criminal sanction, which introduces a high fee imposed in case of illegal electricity consumption. The Tribunal decided that this fee is, in fact, primarily of compensatory character. The amount of such fee results from the tariff because, as a rule of thumb, it is not possible to precisely calculate the actual amount of energy consumed in the event of illegal connection to the power grid. Therefore, this fee is intended to guarantee the energy company full restitution of damage, both for the electricity used and for the unpaid interest resulting from the delay.

It is also possible to impose an offense penalty for illegal energy consumption under Article 278 paragraph 5 of the Criminal Code. The Tribunal stated that since the fee charged pursuant to Article 57 of the Energy Law Act has, first of all, a compensatory function, the *ne bis in idem* principle was not violated. The CT emphasized, however, that the application of different measures to the same person for the same act must not go beyond the acceptable level of punishment set by the proportionality principle. Thus, a criminal court deciding on the scope of the penalty for the crime should take into account the fact that the given person was previously charged the fee based on the Energy Law Act.

In the opinion of the CT, also Article 89 of the Gambling Act[8] is not a criminal sanction.[9] During the examination of constitutionality of this provision, the rule provided for a fine of PLN 12,000 for each slot machine used to organize gambling games outside a casino. The CT decided that this sanction has all the features characteristic of administrative sanctions: it is imposed for a violation

[7] Ustawa prawo energetyczne, Act of April 10, 1997, Journal of Laws of 2018, pos. 755.

[8] Ustawa o grach hazardowych, Act of November 19, 2009, Journal of Laws of 2018, pos. 165.

[9] Ruling of October 21, 2015, P 32/12.

of the statutory prohibition, the condition of liability is not fault itself, punishment is obligatory and punishment is imposed in a fixed amount. The Tribunal stated that the purpose of this penalty is not to repay for the illegal activity, but to compensate for unpaid tax on games and other debts that are paid by legally operating entities. This sanction is, therefore, a reaction to profiting from illegal gambling activities without paying taxes and other fees. Recognizing the financial penalty under Article 89 of the Gambling Act as non-criminal in nature, the CT could only consider the issue of conducting two proceedings – an administrative one to impose the fee and a penal tax punishment under Article 107 of the Tax Penal Code – not in the context of the *ne bis in idem* principle but in the context of the principle of proportionality. The Tribunal decided that the principle of proportionality was not broken because in the penal tax proceedings, the court can review the fine and take into account the fact of previously imposing the administrative penalty. Therefore, the criminal court is the guardian of compliance with the principle of proportionality.

According to the CT also the sanction indicated in Article 102, paragraph 1, point 4 and paragraph 1c of the Act on Drivers of Vehicles,[10] which make it possible to issue an administrative decision on confiscating the driving license for exceeding the speed limit in a built-up area by more than 50 km/h, is not a criminal sanction.[11] In the opinion of the CT, it mainly performs a preventive function, since its immediacy and obligatory application is to act as a deterrent to drivers, thus discouraging them from excessive speeding. Also, the severity of this sanction, in the opinion of the CT, does not mean that it is considered a criminal sanction. This is a less severe sanction than sanctions for offenses, because it has a clearly shorter period of application (3 or 6 months) than the penalty prohibiting driving resulting from an offense (from 6 months to 3 years).

On the other hand, the Tribunal decided that we are dealing with an administrative sanction of a repressive nature in the case of an additional charge imposed pursuant to Article 24 paragraph 1 of the Act on the Social Insurance System[12] for not paying social security contributions.[13] The CT stressed that this fee is not a compensation, because accrued interest on unpaid contributions serves this purpose already. This fee may or may not be imposed by ZUS (Social Security Administration, pol. *Zakład Ubezpieczeń Społecznych*), which has the freedom of decision to impose this fee and set its amount (the act only specifies the maximum amount of 100% of unpaid contributions). CT also took into account that in the case law of the Supreme Court and common courts it is assumed that the individual circumstances of each case, including the fault of the payer, are decisive

[10] Ustawa o kierujących pojazdami, Act of January 5, 2011, Journal of Laws of 2017, pos. 978.

[11] Ruling of October 11, 2016, K 24/15.

[12] Ustawa o systemie ubezpieczeń społecznych, Act of October 13, 1998, Journal of Laws of 2017, pos. 1778.

[13] Ruling of November 18, 2010, P 29/09.

for the application of the penalty. All these premises determined that the Constitutional Tribunal recognized the additional fee as a repressive sanction.

The same behavior for which an additional fee may be charged pursuant to Article 24 paragraph 1 of the Act on the Social Insurance System, may also be considered an offense under Article 218 paragraph 1 of the Criminal Code and also under Article 98 paragraph 1 and 2 of the Act on the Social Insurance System.

Therefore, in accordance with the above and with the opinion of the CT we are looking at two repressive proceedings, and thus at a violation of the *ne bis in idem* principle. In the conclusion of the justification of the ruling, the Tribunal stated that if the provisions were to be assessed separately, they would be consistent with the Constitution. Combined, however, they create a legal mechanism that can cause unconstitutional effects. In view of the above, CT considers all these provisions in violation with Article 2 of the Constitution of the Republic of Poland, Article 4 paragraph 1 of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 14 paragraph 7 of the International Covenant on Civil and Political Rights.

Also in the ruling of 20 June 2017, P 124/15, the CT considered an administrative sanction to be of a criminal nature. The case concerned Article 92a paragraph 1 of the Road Transport Act,[14] which enables imposing a financial penalty for violation of obligations or conditions of road transport set out in Annex No. 3 to this Act. Among them point 3.9 was highlighted, which states "placing in the consignment note and other documents data and information inconsistent with the facts", and such behavior may also fulfill the characteristics of Article 271 paragraph 1 of the Criminal Code.

The Tribunal pointed out that the punitive nature of this fee is shown by, firstly, its name "financial penalty" already indicating that the sanction is a form of punishment. Secondly, these sanctions are not intended to enforce a change in behavior on the person, but are a repayment for breach of duties. They are not subject to remission (refund) in the event of stopping the violation by the person involved and thus the restoration of the lawful state. Thirdly, in the opinion of the Tribunal, the mechanism of imposing these penalties shows a lot of similarities to the regulations contained in the Criminal Code, as the legislator provided for exoneration conditions, limitation periods and specific blurring of the imposition of the fine. In addition, the CT pointed out that the legislator already introduced a regulation aimed at preventing double punishment (included in Article 92a paragraph 5 of this Act) but this provision only covers the coincidence of a financial penalty with an offense, and does not cover the situation of convergence with the responsibility for crime.[15]

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[14] Ustawa o transporcie drogowym, Act of September 6, 2001, Journal of Laws of 2017, pos. 2200.

[15] Article 92a, paragraph 5 states: "if an act which is a violation of the provisions referred to in paragraph 1, simultaneously exhausts the characteristics of an offense, only the provisions on administrative responsibility apply in relation to the entity being a natural person."

A new view emerged in that ruling stating that the recognition of financial penalties provided for in Article 92a paragraph 1 of the Road Transport Act as punishments in the constitutional sense, could not yet constitute a sufficient basis for the Tribunal's ruling on the inconsistency of the examined regulation with the constitutional prohibition of double (multiple) punishment of the same person for the same act. The Tribunal held that it was also necessary to determine whether cumulative legal remedies would serve the same purposes, i.e. the protection of identical legal goods. Thus, the ruling introduced the premise of the identity of the legally protected good as a condition of the inadmissibility of cumulation of proceedings in the light of the *ne bis in idem* principle. In previous Tribunal's rulings, such notion did not appear.

The Tribunal decided that the sanction in the form of a financial penalty imposed on the basis of the Road Transport Act in connection with point No. 3.9 of Annex No. 3 to this Act is intended to protect the truthfulness of information, i.e. has the same purpose as that of Article 271 of the Criminal Code.

In view of the above, the CT concluded that there was a violation of the constitutional prohibition of double (multiple) punishment (*ne bis in idem* principle), and thus Article 2 of the Constitution. Double (multiple) punishment of the same person for the same act is at the same time a violation of the principle of proportionality of the state's response to the violation of the law by the individual (for example in rulings reference No. K 24/15, part III, point 6.1 and reference No. K 45/14, part III, point 4.1). It is an expression of excessive repressiveness, incompatible with the requirements of a democratic state ruled by law (Article 2 of the Constitution).

In the case law of the CT, unlike the case law of the European Court of Human Rights, uniform criteria for a categorizing a case as a criminal case were not developed,[16] while the Constitutional Tribunal uses the term 'repressive responsibility'. The use of such term has been criticized by the judge of the CT, prof. A. Rzepliński. In a separate opinion to the ruling of October 21, 2014 (P 50/13), he stated that according to the meaning of the word "repression" indicated in the dictionary, it cannot be used as a term equivalent to a sanction. A. Rzepliński rightly pointed out that repression is a cruel, humiliating and inhuman punishment, so there is no place for it in a democratic state of law.

[16] Regarding the criteria for the classification by the Constitutional Tribunal of sanctions of repressive type, see for example A. Błachnio-Parzych, *Sankcja administracyjna a sankcja karna w orzecznictwie Trybunału Konstytucyjnego oraz Europejskiego Trybunału Praw Człowieka*, (in:) M. Stahl, R. Lewicka, M. Lewicki (eds.), *Sankcje administracyjne*, Warszawa 2011; A. Błachnio-Parzych, *Zbieg odpowiedzialności karnej i administracyjno-karnej jako zbieg reżimów odpowiedzialności represyjnej*, Warszawa 2016, pp. 51–66; M. Sławiński, *Pojęcie tzw. przepisów o charakterze represyjnym – uwagi na tle dotychczasowego orzecznictwa Trybunału Konstytucyjnego*, „Przegląd Sejmowy" 2013, issue 5.

In the judicial practice of the CT, the most frequent indication is that we are dealing with repressive responsibility (understood as punitive in nature) when the purpose of a provision is to subject a citizen to some form of punishment.[17] Thus, the provision is repressive if it is intended to make the citizen pay for the act committed. Recognizing the liability as repressive excludes the compensatory objective of the imposed fee.[18] According to the CT, an administrative sanction (and not a repressive one) is one that has primarily a preventive function, although at the same time, the Tribunal notes that an administrative, and even a civil sanction,[19] may have repressive character,[20] but it is not the foreground of the sanction. The purpose of an administrative sanction is, therefore, not the repayment itself but forcing the adoption of a specific behavior.[21] The administrative nature of the sanction is also supported by the goal of restoring the lawful state.[22] The features supporting the recognition of sanctions as administrative rather than repressive indicated in the case law of the CT also include: marking a penalty at a fixed rate (no possibility of adjusting it depending on the case); obligatory imposition; finding guilt is not a condition for punishment.[23] According to the CT, the severity of the sanction may also define the sanction as repressive and not administrative.[24]

3. ARTICLE 4 OF THE PROTOCOL NO. 7 TO EUROPEAN CONVENTION ON HUMAN RIGHTS (ECTHR) AND EUROPEAN COURT OF HUMAN RIGHTS (ECHR) CASE LAW

Article 4 of Protocol No. 7 to the ECtHR also indicates that the principle of *ne bis in idem* concerns criminal cases. On the basis of the ECtHR, the term "criminal case" also has broader understanding, not only as behavior directly recognized by the legislator. In the judgment of 8 June 1976 in the case of Engel and Others v. The Netherlands,[25] the ECHR indicated three criteria that allow a given case to be considered as a criminal one, namely:

[17] See case-law cited in footnote No. 5.

[18] Compare the ruling P 50/13, P 32/12, discussed above.

[19] See considerations contained in the above-mentioned ruling of October 12, 2014, P 50/13.

[20] See for example, ruling of April 18, 2000, K 23/99 regarding the nature of imposed payments by the decision of the Insurance Guarantee Fund (*Ubezpieczeniowy Fundusz Gwarancyjny*).

[21] See TC ruling of June 20, 2017, P 124/15.

[22] See ruling of March 26, 2002, SK 2/01 regarding sanctions in the form of demolition under construction law.

[23] Compare, for example, ruling of October 21, 2015 (P 32/12).

[24] Compare ruling of October 14, 2009, Kp 4/09, regarding the imposition of penalty points on drivers and the ruling of October 11, 2016, K 24/15 discussed above.

[25] Complaint No. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72. Considerations regarding the criteria are in point 82.

1) the formal nature of the act – if it is a crime in domestic legislation, then the case is criminal,

2) nature of the violation (the content of the charges against the person is examined),

3) the severity of the punishment threatening this behavior.

If it is enough to meet one of these criteria, we are dealing with a criminal case.

The second and third criteria should be considered separately, but a cumulative analysis of both of these criteria is possible, if a separate analysis of each of them does not allow to reach a clear conclusion as to the existence of a criminal charge. When assessing the severity of punishment as the third criterion, the maximum allowed penalty for this act is taken into account, not the penalty ultimately imposed on the given person for the act.[26]

The ECHR derives three prohibitions from the *ne bis in idem* principle contained in Article 4 of Protocol No. 7 to the European Convention on Human Rights – no one shall be:

1) liable to be tried,

2) tried,

3) punished,

for an act for which he or she was previously convicted by a final judgment or acquitted.[27]

In the judicial practice of the ECHR the term *"idem"* (that is when we deal with proceedings concerning the same act) has been differently understood for a long time. In the judgment of 10 February 2009 in the case of Sergey Zolotukhin v. Russia,[28] the ECHR analyzed its previous verdicts and recognized that Article 4 of Protocol No. 7 must be understood as one prohibiting the conduct for the second criminal act, if it arises from identical facts or from facts which are substantially the same.[29]

The ECHR has repeatedly emphasized that it is inconsistent with the principle of *ne bis in idem* when two identical and independent proceedings concerning the same act are conducted against the same person.[30] The ECHR case law, however, allows for two proceedings if the ruling in one of these cases is based on a decision issued in the second proceeding, for example in the case of taking away a driving license after imposing a penalty for driving under the influence

[26] ECHR ruling in the Case of Engel, point 82, ECHR ruling of March 4, 2014 in the Case of Grande Stevens v. Italy, application No. 18640/10, point 98, ruling of February 10, 2009, case of Sergey Zolotukhin v. Russia, 14939/03, paragraph 56.

[27] Ruling of February 20, 2004 Nikitin v. Russia, 50178/99 point 37, ruling of February 10, 2009 Sergey Zolotukhin v. Russia, 14939/03, paragraph 110, ruling of May 20, 2014 Nykanen v. Finland, 11828/11, point 47.

[28] 14939/03.

[29] Point 82 of the ruling.

[30] ECHR rulings of May 20, 2014 Nykanen v. Finland 11828/11, January 27, 2015 Rinas v. Finland 17039/13, February 17, 2015 Boman v. Finland 41604/11.

of alcohol.[31] In such a situation, in the subsequent proceedings, the circumstances of the act committed are not examined again.

In the case A and B v. Norway,[32] the ECHR stated that there is no breach of the *ne bis in idem* principle if two proceedings conducted against the same person are closely related in substance and time, are integrated and form a coherent whole, i.e.:

1) the proceedings pursued complementary objectives and thus dealt with different aspects of the misconduct,

2) the initiation of two proceedings was foreseeable,

3) repeats were avoided in the collection and evaluation of evidence (factual findings from one proceeding were adopted in the second proceeding),

4) the penalty imposed in one proceeding was included in the second.

The three criteria indicated by the ECHR in the Engel case were applied by the Court of Justice of the European Union. The CJEU used these criteria for the assessment of the nature of the sanctions in the judgment of 26 February 2013, case C-617/10 of Åklagaren v. Hans Åkerberg Fransson, in the judgment of 5 June 2012, case C-489/10 concerning Łukasz Bonda and in the judgments of 20 March 2018 case C-537/16, of Garlsson Real Estate SA, in liquidation, Stefano Ricucci, Magiste International SA against the Commissione Nazionale per le Società e la Borsa (Consob) and case C-524/15 against Luce Mencie.

The Polish Constitutional Tribunal also referred to these three criteria in the judgment of October 11, 2016, case No. K 24/15.

4. REGULATIONS LIMITING DOUBLE PENALTIES IN THE EVENT OF A CONFLICT OF CRIMINAL AND ADMINISTRATIVE-CRIMINAL LIABILITY IN THE POLISH LEGAL SYSTEM

On the basis of a narrowly understood criminal law covering liability for crimes and offenses, there are adequate provisions to ensure respecting of the *ne bis in idem* principle. The final conclusion of criminal proceedings to the same act of the same person or the conduction of a proceeding initiated earlier to such an act constitutes a negative procedural condition under Article 17 paragraph 1

[31] R.T. v. Switzerland 31982/96, May 30, 2000 and Nilsson v. Sweden, 73661/01, December 13, 2005.

[32] Ruling of November 15, 2016, 24130/11. The case concerned criminal liability of a person for tax irregularities and administrative measures to offset the tax amounting to 30% of tax due. The presented considerations on the admissibility of conducting two proceedings can be found in paragraph 132 of the reasoning of the verdict.

point 7 of the Code of Criminal Procedure and Article 5 paragraph 1 point 8 of the Offenses Procedure Code.

Appropriate regulations are also found in substantive criminal law. Article 11 paragraph 1 of the Criminal Code and Article 6 paragraph 1 of the Tax Penal Code indicate that the same act can only constitute one crime. In case when an act is a crime and also exhausts the signs of an offense, Article 10 of the Offenses Code orders to adjudicate both for the crime and for the offense, but if the subject had already been convicted for the crime and for the offense with a penalty or a punishment of the same type, a more severe penalty or punishment is imposed.[33] An analogous solution was also adopted in Article 8 of the Criminal Code in regard to the overlapping of provisions contained in the Tax Penal Code with the provisions of the Criminal Code or the Offenses Code.

So far, however, there was no system-wide solution to the convergence of criminal (offense) liability with administrative sanctions of criminal nature. The legislator has only concluded relevant regulations in several acts, for example in the Act on Road Transport. Article 92a paragraph 5 of this act indicates that if the action being a violation of the provisions referred to in paragraph 1 of this article simultaneously exhausts the characteristics of an offense, only the provisions on administrative responsibility apply to the entity being a natural person. However, the Constitutional Tribunal rightly stated in its ruling of 20 June 2017 (case P 124/15) that this regulation is not sufficient, because it omits the situation when such action fulfills the features of a crime.

Another example of the regulation of the confluence of two liability regimes is Article 38a of the Act on the Prevention of Pollution from Ships,[34] which indicates that a natural person is not subject to a financial penalty provided for in Article 36 paragraph 1 or Article 37 point 4 if the persons' behavior simultaneously carries the marks of an offense specified in Article 35a of this act, and the offense has been confirmed by a valid conviction.

It is also possible to indicate, as an example, the Act of August 18, 2011 on Maritime Safety,[35] of which Article 129 indicates that a natural person is not subject to the liability provided for in Article 127 paragraph 1 point 7 if the behavior simultaneously carries the marks of an offense specified in art. 178a paragraph 1 of the Criminal Code, and this offense was confirmed by a valid conviction. Article 127 paragraph 1 item 7 of this Act introduces a financial administrative penalty in the amount of twenty-fold the average monthly salary for the preceding year, for operating a ship or inland waterway vessel, sea or inland yacht, or performing duties in the scope of ship safety, ship protection or preventing pollution

[33] Article 10 of the Offenses Code was recognized by the CT in the ruling of December 1, 2016 (K 45/14) as compliant with Articles 2 and 45 of the Constitution, Article 4 paragraph 1 of Protocol No. 7 to the ECtHR and Article 14 paragraph 7 of the ICCPR.

[34] Ustawa o zapobieganiu zanieczyszczania morza przez statki.

[35] Ustawa o bezpieczeństwie morskim, Journal of Laws of 2018, position 181.

of the marine environment while intoxicated or under the influence of a narcotic. Also Article 178a paragraph 1 of the Criminal Code provides for criminal liability for driving a motor vehicle in a state of intoxication or under the influence of a narcotic.

However, the indicated regulations have significant drawbacks. The Act on the Prevention of Pollution from Ships and the Maritime Safety Act all prevent double punishment only when the criminal proceedings are concluded before the penalty from administrative proceedings is imposed. If the order is reversed, i.e. the administrative proceedings conclude before the criminal proceedings, then double punishment is possible.[36] In addition, administrative liability of a repressive nature is not blocked by a judgment previously issued by a criminal court that is not a conviction, i.e. the discontinuation of proceedings, conditional discontinuation of proceedings or acquittal.

Following the decision of the CT of 18 November 2010 (P 29/09), relevant regulations were also introduced to the Act on the Social Insurance System. Article 24, paragraph 1b provides that in relation to the contribution payer who is a natural person convicted by a valid sentence for non-payment of contributions or paying them at an insufficient rate, an additional charge for the same act shall not be imposed. However, if proceedings are initiated in the case of a crime or an offense regarding the failure to pay dues or paying them in an insufficient amount, proceedings for imposing a supplementary fee against the payer who is a natural person are not initiated for the same act, and the proceedings are suspended until the end of the proceedings for a crime or an offense (Article 24, paragraph 1c). In accordance with paragraph 1d, in the case of a final conviction of a payer who is a natural person for an offense involving failure to pay dues or paying them in undervalued amounts, the proceedings for additional payment for the same deed are canceled ex officio by court. Additionally, any issued decision to impose an additional fee for the same deed also becomes invalid ex officio and the collected fee is returned immediately with interest in the amount and under the terms stated in the civil law, counted from the day of collecting the additional fee. These regulations concern only the case of a conviction, they do not suspend punishment in administrative proceedings in case of conditional discontinuance of proceedings, which is a decision stating guilt and may be combined with imposing, for example, the obligation to pay a specific sum of money on the perpetrator (Article 67 paragraph 3 of the Criminal Code).[37]

There were also other cases where the legislator tried to avoid the possibility of double punishment of a natural person. One example is the introduction of the liability of a managing person for violating the prohibitions in Article 6

[36] A. Błachnio-Parzych, *Zbieg odpowiedzialności…*, pp. 225–230, 243–250.

[37] M. Król-Bogomilska, *Z problematyki zbiegu odpowiedzialności karnej i administracyjnej – w świetle orzecznictwa Trybunału Konstytucyjnego*, „Studia Iuridica. Wina i kara. Księga pamięci Profesor Genewefy Rejman" 2012, issue 55, pp. 74–75.

paragraph 1 of this Act (unlawful agreements limiting competition)[38] into the Act on Competition and Consumer Protection.[39] Only points 1 to 6 of this provision are indicated as the basis of such liability, omitting point 7 concerning the bid-rigging. This solution was applied because bid-rigging behavior is also a crime under Article 305 of the Criminal Code. This was to ensure the lack of double punishment of the managing person for participation in bid-rigging – once on the basis of Act on Competition and Consumer Protection and the second time for the crime addressed in the Criminal Code.[40]

In Polish law we can also find an Act in which the legislator directly authorized the use of two sanctions: administrative (including punitive) and criminal. This takes place in the Act on the Liability of Collective Entities for Criminal Acts, in which Article 6 states that "the liability or lack of liability of a collective entity under the terms specified in this Act shall not exclude civil liability for damage caused, administrative liability or individual legal liability of the perpetrator of the prohibited act." The responsibility of collective entities under this act is repressive in nature, which was decided by the CT in the ruling of 3 November 2004 (case No. K 18/03). Therefore, there will be a doubling of two liabilities of repressive nature.

An important change in the scope of a statutory solution to the convergence of criminal and administrative (and repressive in nature) liabilities was introduced by the amendment to the Code of Administrative Procedure,[41] which added Section IVa to it. In this section Article 189f paragraph 1 point 2 stipulates that the public administration body, by way of a decision, waives the imposition of an administrative fine and issues only an admonishment if a legally binding decision for the same behavior has been previously made by another authorized administrative body to impose an administrative fee on the party or the party received a valid punishment for a misconduct or a fiscal offense or a final conviction for a crime or for a fiscal crime and the previous penalty meets the purposes

[38] The amendment of the Act on Competition and Consumer Protection (UOKiK) made by the Act of June 10, 2014 Amending the Act on Competition and Consumer Protection and the Civil Code Act (Journal of Laws of 2014, pos. 945).

[39] Ustawa o ochronie konkurencji i konsumentów, Act of February 16, 2007, Journal of Laws of 2018, pos. 798, further known as "Act on Competition and Consumer Protection" (UOKiK).

[40] However, this is not a solution that fully prevents double punishment of a natural person. Some bid-rigging agreements may be classified as agreements prohibited under other categories than those from point 7 of prohibited agreements types under Article 6 paragraph 1 of UOKiK and also indicated as the basis of liability of managing persons. This issue was discussed in detail in my study entitled: A. Zientara, *Odpowiedzialność karna i administracyjna za udział w zmowie przetargowej – możliwość podwójnego ukarania*", (in:) M. Błachucki (ed.), *Administracyjne kary pieniężne w demokratycznym państwie prawa*, Warszawa 2015. See also: G. Materna, A. Zawłocka-Turno, *Materialne i procesowe zmiany w zakresie praktyk ograniczających konkurencję i naruszających zbiorowe interesy konsumentów*, „IKAR" 2015, issue 2(4), pp. 19–20.

[41] Act of April 7, 2017 Amending the Act – The Code of Administrative Procedure and Other Chosen Acts (Journal of Laws of 2017, pos. 935).

for which an administrative fine would be decided. Withdrawal from the imposition of a fine is, therefore, dependent on the assessment of the purposes of this fine. Therefore, it seems that if we are faced with an administrative punishment of a repressive nature, there should be a waiver of its imposition. However, as with the already discussed solutions to the convergence issue described in the Act on Preventing Pollution from Ships, also the Code of Administrative Procedure does not provide the protection of the entity against double punishment in the event of first imposing a financial penalty and then a criminal penalty in criminal proceedings. The Code of Administrative Procedure does not offer a solution similar to that contained in the Act on the Social Insurance System under which, in the event of a subsequent conviction, the fine is refunded. Also on the grounds of the Code of Administrative Procedure only a valid conviction for a crime can prevent the imposition of a fine, but not a conditional sentence that discontinues the proceedings, which should also be assessed as a punitive sanction because of the possibility of declaring the measures indicated in Article 67 paragraph 3 of the Criminal Code. Meanwhile, the ECHR document pointed out that the protection provided for in Article 4 of Protocol No. 7 also applies to situations where the first criminal trial does not result in conviction.[42] Such protection is currently not provided by the current provisions of the Code of Administrative Procedure.

In the event of the administrative penalty coming first and then the need to issue a ruling in criminal proceedings coming second, as emphasized by the CT, the courts' obligation to take into consideration the amount of the administrative penalty for the same act should be coming from the constitutional principle of proportionality.[43] This principle, however, was not explicitly included in the Criminal Code. The CT noticed this and said that the court is not bound only by the rules and directives of the scope of the punishment explicitly specified in the criminal law, but should also apply the principles and directives of the scope of the punishment that are not included *expressis verbis* in the Criminal Code but have their constitutional basis. One of such principles, resulting from the Constitution of the Republic of Poland, is the principle of court's reasonable consideration, during the process of choosing the means of reaction for a crime, of the fact that the perpetrator had already suffered from another type of sanction with a repressive nature for the same act.

[42] For example ruling of February 10, 2009, case of Sergey Zolotukhin v. Russia, 14939/03, point 110.

[43] Compare ruling of October 21, 2015, P 32/12 and ruling of October 12, 2014, P 50/13.

5. CONCLUSIONS

In the light of the *ne bis in idem* principle, it is unacceptable to impose two penalties, understood as punitive measures of repressive nature, on the same person for the same act. It is, therefore, forbidden to impose a punishment for a crime or an offense along with a repressive administrative penalty. The imposition of a penalty for a crime/offense together with a non-repressive administrative penalty may be considered in the context of the principle of proportionality, but not in the context of the *ne bis in idem* principle.

Currently available solutions to the confluence of the basis of criminal and administrative liability of a repressive nature should be considered as not fully satisfying. The most serious reservations are raised by Article 6 of the Act on Liability of Collective Entities, which directly indicates that the application of the sanctions provided for in this Act is independent of administrative responsibility. Additionally the amendment that introduced Article 189f to the Code of Administrative Procedure does not block the possibility of conducting two independent proceedings against the same person, and the only basis for cancellation of an administrative penalty is either a final conviction for a crime or a final punishment for an offense. If the order of decisions is reversed – that is when an administrative decision is issued first and followed by a crime or offense conviction, the person will be punished twice. In such situation, as it was emphasized in Constitutional Tribunal's rulings, a criminal court should take into consideration the administrative penalty imposed and adequately adjust the severity of the criminal penalty when deciding on the verdict.

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THE CONVERGENCE OF THE BASIS OF RESPONSIBILITY FOR A CRIME (AN OFFENSE) AND FOR AN ADMINISTRATIVE DELICT AND THE *NE BIS IN IDEM* PRINCIPLE IN THE POLISH LAW

Summary

This study presents the case law of the Polish Constitutional Tribunal referring to the *ne bis in idem* principle and the case law of the European Court of Human Rights issued on the basis of Article 4 of Protocol No. 7 to the European Convention on Human Rights. The work also includes the discussion of solutions adopted in Polish law in the case when a person meets both the signs of a crime/offense and the premises of administrative responsibility of a punitive (repressive) nature in a single unlawful act. For many years, a system-wide solution to this type of convergence was missing in Polish law. The situation changed last year with the introduction of Article 189f to the Code of Administrative Procedure. However, as indicated in the study, this provision does not fully implement the *ne bis in idem* standard developed by the European Court of Human Rights.

KEYWORDS

ne bis in idem, case law, Constitutional Tribunal, European Court of Human Rights

SŁOWA KLUCZOWE

ne bis in idem, orzecznictwo, Trybunał Konstytucyjny, Europejski Trybunał Praw Człowieka

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SOPHISTICATED TEXTUALISM AND SANCTIONS*

1. INTRODUCTION[1]

In a series of articles[2] and a recent book,[3] Marcin Matczak has developed a fascinating account (which he dubs "sophisticated textualism") of a number of phenomena related to legal practice. His central claim is that legal text, construed as a set of normative acts valid in a given place at a given time, is a *description* of a possible world. Accordingly, legal interpretation is the process of recovering the image of said possible world, whereas application of law is ensuring convergence between the actual world and the possible world stipulated by the legal text.

His theory deserves attention for at least two reasons. First, it provides insightful answers to some particularly persistent puzzles in the philosophy of law, including Jørgensen's dilemma[4] and the problem of aggregation of legislative intent. More importantly, however, Matczak takes significant effort to show the relevance of his theory for praxis. His theory thus provides valuable hints for officials, in particular judges, involved in the process of interpretation and application of law.

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[2] M. Matczak, *Interpretacja prawnicza w świetle semantyki Kripkego-Putnama*, „Państwo i Prawo" 2008, Vol. 6; *Does Legal Interpretation Need Paul Grice?: Reflections on Lepore and Stone's Imagination and Convention*, "Polish Journal of Philosophy" 2016, Vol. 10, No. 1; *Three Kinds of Intention in Lawmaking*, "Law and Philosophy" 2017, Vol. 36, No. 6; *On the Alleged Redundancy of the Rule of Recognition*, https://dx.doi.org/10.2139/ssrn.2990602, 2017; *Why Judicial Formalism Is Incompatible with the Rule of Law*, "Canadian Journal of Law & Jurisprudence" 2018, Vol. 31, No. 1.

[3] M. Matczak, *Imperium tekstu. Prawo jako postulowanie i urzeczywistnianie świata możliwego*, Warszawa 2019.

[4] J. Jørgensen, *Imperatives and Logic*, "Erkenntnis" 1937, Vol. 7, No. 1.

My goal in this paper is to offer a friendly critique of Matczak's account. I will discuss a difficulty faced by his theory and consequently suggest a modification which allows avoiding it. The difficulty is that Matczak's theory as it stands cannot account for sanctions, understood as negative consequences of citizens' actions imposed by the state.[5] On his account, if a statute prohibits ϕ-ing, then – other things being equal – it describes a possible world in which no one ϕ-s. Now, a sanction is plausibly seen as a reaction to a breach of duty, i.e. to ϕ-ing. But since no one ϕ-s in the possible world of law, Matczak's account provides the interpreters with no clue as to how to react to ϕ-ing. This is an unsettling conclusion, for there are no good reasons to deny that norms expressing directives for fixing sanctions are law, nor to claim that judges have full discretion when fixing sanctions.

Therefore, I suggest a modification of Matczak's theory which allows for avoiding this undesired consequence. Namely, I believe that Matczak should abandon the assumption that the legal text describes a *single* possible world. I show that doing so enables him to analyze sanctions in a fashion parallel to Lewis-Stalnaker analysis of counterfactuals, i.e. conditional statements with false antecedents.

In the first section, I introduce major characteristics of Matczak's theory. In the second section, I raise the objection that the theory has difficulties with accounting for sanctions. In the third section, I discuss and reject two unsatisfactory replies: one that appeals to the accessibility relation, and one, Matczak's own, that appeals to the distinction between the world of text and the world of discourse. In the fourth section, I argue that the appropriate response is to drop the assumption that the legal text describes a *single* possible world.

2. SOPHISTICATED TEXTUALISM

Matczak classifies his theory as *textualism* because of the special role it ascribes to the legal text, understood, following Maciej Zieliński,[6] as an aggregate of all normative acts in force in a given territory at a given time. On this account a legal text is a complex artifact which lies at the center of a peculiar social practice, namely *law*. According to Matczak the legal text has a *descriptive* character; it describes a possible world postulated by the legislature, the bringing about of which is the task of law's addressees. Henceforth I will refer to this possible world as "PWL" (the possible world of law).

[5] I have been informed by Marcin Matczak that Tomasz Gizbert-Studnicki independently expressed an objection that questioned whether Matczak's account can accommodate sanctions.

[6] M. Zieliński, *Wykładnia prawa. Zasady, reguły, wskazówki*, Warszawa 2012.

The *sophistication* of Matczak's account signals the fact that its author distances himself from a formalistic approach to legal interpretation, which is typically associated with more orthodox forms of textualism. In particular, he rejects semantic internalism, i.e. the view on which the meaning of an utterance is determined by the mental states of its utterer. Semantic internalism is deeply ingrained in how we think about language. All in all, it is intuitively unobjectionable to say that the meaning of our interlocutor's words depends on what she *intended* to say. This approach is also manifested in our thinking about the law – consider, for instance, the popularity of the view that legal interpretation is tantamount to discovering *legislative intent*.[7] Matczak appeals to the works of American philosophers of language, including Peirce,[8] Millikan,[9] Putnam,[10] Kripke,[11] and Devitt,[12] to argue that we should stop thinking about law in an internalistic fashion. Instead we should embrace semantic *externalism*, on which the utterer has only limited impact on the meaning of her words, for it is also dependent on (i) features of the actual world and (ii) existing social practice of uttering equimorphous signs (or sounds).

An important advantage of Matczak's account is that it enables elegant solutions to numerous theoretical puzzles within the philosophy of law, such as Jørgensen's dilemma or the problem of aggregation of legislative intent. What is more important, however, from the perspective of the current paper, is that his theory provides conceptual tools well suited to describing numerous phenomena central to legal practice, such as law enactment, interpretation of the legal text, and application of/abiding by the law. They are defined as follows:

(i) **Law enactment** is the designing of future by describing or changing a description of a possible world, by using the legal text, understood as an aggregate of all normative acts in force at a given time.

(ii) **Interpretation of the legal text** is the recovery of a picture of the possible world from the legal text, which ought to be brought about by a given society.

(iii) **Application of/abiding by the law** is the adjustment of the actual world to the picture of the possible world described in the legal text or the punishment for the lack of such adjustment.[13]

It should be clear from these definitions that the notion of a possible world plays a crucial role in Matczak's account. Some readers may find this a bit unserious, due to the connotations with science fiction evoked by the phrase. Yet,

[7] Z. Tobor, *W poszukiwaniu intencji prawodawcy*, Warszawa 2013.

[8] C. S. Peirce, *C. S. Peirce Collected Papers*, Cambridge, 1933–1936.

[9] R. G. Millikan, *Language*, *Thought*, *and Other Biological Categories: New Foundations for Realism*, Cambridge 1984.

[10] H. Putnam, *The Meaning of 'Meaning'*, "Minnesota Studies in the Philosophy of Science" 1975, Vol. 7.

[11] S. Kripke, *Naming and Necessity*, Cambrige 1980.

[12] M. Devitt, *Designation*, New York 1981.

[13] M. Matczak, *Imperium tekstu*..., p. 159, translation mine.

such a judgement would be entirely unwarranted. The notion of a possible world has proven extremely helpful in analyzing multiple troublesome concepts and has thus earned its keep in analytic philosophy.[14] It has also found applications in other disciplines, such as linguistics, literary theory, and computer science. Moreover, there have already been attempts to employ possible worlds in the analysis of legal phenomena.[15] Due to the variety of uses to which the notion of possible worlds is put, it shall not surprise that different authors understand it in differing ways. On Matczak's account, a possible world is a mental representation that arises upon a lawyer's contact with the legal text. A possible world thus construed has three crucial features: unity, accessibility from the actual world, and underdetermination by the legal text.[16] These characteristics are meant to capture the deep structure of legal thinking.[17]

First, the assumption pertaining to the unity of PWL is meant to explain the systematicity of law. Since multiple legal provisions can refer to the same state of affairs, it is possible that they could prescribe conflicting behaviors in a particular situation. Thus lawyers ought to come up with an interpretation that realizes as many of them as possible to the highest possible degree. Further, the assumption enables us to capture the relation between higher order general norms and lower order norms of a more local character. According to Matczak, realization of the former is a result of the realization of the latter. Finally, the assumption of unity helps us understand the arbitrariness of dividing the law into branches (e.g. civil, criminal, administrative). Ultimately, when a lay person asks a legal counsel for advice, she is primarily interested in ensuring that she will act in accordance with *the* law, not just with, say, criminal law.

Second, the assumption of PWL's accessibility from the actual world operationalizes the principle *impossibilia nulla obligatio est*. In doing so, it is meant to capture the elementary intuition that the law is created for real people (as opposed to, say, robots or archangels). Therefore, it should take into account their real capabilities if it is to successfully fulfil its function of coordinating human behavior. A possible world can be inaccessible in various ways. On the most general level it can be inaccessible *logically*, due to containing a contradiction. An instance of such a world is one in which people drive *simultaneously* on the right and on the left side of the road. Matczak's theory aptly instructs lawyers to reject

[14] For an overview of some applications, see chapter 2 of D. Lewis, *On the Plurality of Worlds*, Oxford 1986.

[15] See e.g. J. Woleński, *Logiczne problemy wykładni prawa*, Kraków 1972; R. Sarkowicz, *Poziomowa interpretacja tekstu prawnego*, Kraków 1995; J. Hage, *Separating Rules from Normativity*, (in:) M. Araszkiewicz, P. Banaś, T. Gizbert-Studnicki, K. Płeszka (eds.), *Problems of Normativity, Rules and Rule-Following*, Heildelberg–New York–Dordrecht–London 2015; M. Jakubiec, *Davida Lewisa koncepcja fikcyjnego stanu rzeczy jako opisu świata możliwego a problem statusu norm prawnych*, „Semina Scientiarum" 2016, Vol. 15.

[16] M. Matczak, *Imperium tekstu*..., pp. 203–217.

[17] L. Nowak, *Interpretacja prawnicza*, Warszawa 1973.

any interpretation of law that results in such a PWL. The same goes for *physical* inaccessibility. A PWL in which cars move with the speed of light cannot be plausibly used as a model for the actual world. Clearly, it would be rather difficult to find a lawyer who would seriously put forward one of the two interpretations just sketched. However, inaccessibility can take a subtler form. In particular it seems that it can be relativized to the features of a given society. For instance, we would deem a PWL in which a liquor license fee exceeds the income of any liquor vendor in the country *economically* inaccessible.

Finally, Matczak invokes Ingarden's concept of places of indeterminacy to argue that legal text alone does not fully determine the PWL. This observation is used to show that an interpreter's creative input is not only justified but also indispensable in practice. Indeed, Matczak embraces antirealism with respect to law.[18] It is therefore in principle possible that while interpreting the very same legal text, two perfectly informed interpreters acting in good faith come up with inconsistent interpretations. However, Matczak believes that this does not pose a threat to the certainty of law. In particular, he argues that the common biological make-up and cultural background of lawyers functioning within a legal system significantly reduce the divergence of admissible interpretations.

In his book, Matczak uses the apparatus described above to provide insightful analyses of multiple concepts related to legal interpretation. His discussion warrants the belief that his theory can be put to an even broader use in the future. However, instead of trying to use the theory to shed light on some rather obscure theoretical concept, I will try to show that it faces difficulties accommodating a relatively unproblematic phenomenon, namely sanctions. The discussion in the following section will provide reasons for amending Matczak's account in a way that stands to further increase its explanatory potential.

3. OBJECTION: SANCTIONS

One of the theoretical advantages of Matczak's account is that it provides a straightforward solution to a puzzle made famous by Jørgensen, according to which imperatives cannot be premises or conclusions of valid inferences. This is widely taken to be a serious problem for jurisprudence, for on the dominant view imperatives permeate positive law, e.g., as in Austin's claim that law is a sovereign's order backed by a threat. Matczak's theory is immune to the famous objection because it takes legal language to be descriptive rather than normative. However, this theoretical maneuver combined with the assumption of PWL's unity

[18] M. Matczak, *Imperium tekstu*..., p. 380.

leads to difficulties concerning the analysis of sanctions. In order to see this, let us first have a closer look at Jørgensen's puzzle and Matczak's solution thereto.

The first horn of the dilemma is that imperatives cannot be premises or conclusions of valid inferences. This conclusion follows from the observation that imperative statements, like "close the door", are not truth-apt, i.e. they are logically incapable of being true or false. Now, it is quite intuitive to think of an inference as something that takes us from true premises to a true conclusion. Since imperatives are not truth-apt, they are logically not suited to being premises nor conclusions of inferences.

The other horn of the dilemma has it that we intuitively consider valid some of the inferences which are partly constituted by imperatives. For instance, the following set of statements seems to constitute a valid inference in any legal system whose positive law introduces a property tax.

(P1) If you own a house, pay the property tax.

(P2) You own a house

(C) Pay the property tax.

Aside from the intuitive sense in which the arguments like this appear to be correct, it is quite plausible that they are in fact an indispensable part of legal practice. One such robust example is a court's verdict that orders X to pay amends to Y due to the damage X incurred to Y. In a rule of law, such a verdict should be supported by a justification that includes a mixture of factual and legal premises. It is quite plausible to think of the court's verdict as a conclusion, formulated in the imperative mood, that follows from both descriptive (factual) and imperative (legal) premises. Yet, according to the first horn, we cannot think of this as a valid inference. This is a grave difficulty for legal theory, for if judges are necessarily unable to pinpoint the logical basis of their verdicts, then their decisions are prone to the charge of arbitrariness. Ultimately, we care about valid inferences precisely because they guarantee that the truth of the premises is preserved in the conclusion. If judges use invalid inferences, it is perfectly possible that they reach wrong conclusions, even assuming that they got all the relevant facts right and applied the right legal provisions.

Prima facie, the most tempting way out of this difficulty for a legal theorist is to deny that positive law expresses any imperatives. However, this solution comes at a price. Namely, a major reason why so many legal philosophers think that positive law includes imperatives is that the law is thought to enjoy certain authority, a feature that distinguishes a legal text from, for instance, a novel. A natural reply to this latter challenge is to say that the difference is reflected on a linguistic level; whereas literary or scientific texts are descriptive, legal text is (at least partly) normative. However, this claim flies in the face of the lesson we have just drawn from Jørgensen's dilemma.

Thus, legal theorists face another dilemma. *Either* they claim legal language to consist exclusively of descriptive statements *or* they admit that legal language

involves some imperative statements. Proponents of the first horn have at their disposal an uncontroversial account of legal inference. However, they face difficulties explaining law's normativity. In turn, grabbing the second horn does not incur any *additional* problem for the normativity of law (i.e. on their account law's normativity is no more mysterious than normativity in general). Yet, this maneuver comes at the price of obscuring the nature of legal inferences. In short, it is either legal inferences or normativity.

Matczak offers an interesting solution that attempts to fulfill both of the allegedly conflicting desiderata. On the one hand, he believes that legal language is descriptive in the sense that each legal norm describes a state of affairs, whereas legal text taken as a whole describes a single PWL. On the other hand, he explains law's normativity by claiming that law is the command of a sovereign to adjust the actual world to the PWL. What distinguishes his account from those of other proponents of the first horn of the descriptive/normative dilemma is his holistic approach to law. For instance, on Shapiro's planning theory of law,[19] each legal norm *describes* a plan.[20] By contrast, on Matczak's account it is strictly speaking false that a single legal norm, or indeed a group of them, considered in isolation from the rest of the legal text, imposes duties or confers obligations on individuals. Indeed, according to sophisticated textualism the sole duty of the citizens is to ensure the convergence between the actual world and the PWL.

Now, my claim is that Matczak's account fails to accommodate legal norms that express directives on fixing legal sanctions. I will introduce it by entertaining a fictional case and analyzing the relevant provisions of Polish law within Matczak's framework.

Chopin's home. Maria owns a building in Warsaw which, between 1823 and 1829, had been home to the famous Polish composer and pianist Frederic Chopin. There is reliable historical evidence that during that period Chopin had composed some of his most influential works. The building is registered as a historic monument. On July 2, 2018, the building caught fire. Maria called the fire department right away. Thanks to their quick intervention, the outer façade remained untouched. However, the chambers once occupied by the famous pianist were completely destroyed. On August 14, 2018, a third party informed the Mazovian voivodship monuments conservator about the fire.

Let us take a closer look at the authority's interpretation and application of law in Maria's case. Their first step is to locate the relevant fragment of the PWL. According to 28.1.1 of the Polish law on the conservation of monuments,[21] the owner of a registered monument informs the relevant voivodship monument

[19] S. Shapiro, *Legality*, Cambridge 2011.

[20] It is worth noting that Shapiro's account has also been criticized for downplaying the role of sanctions. See F. Schauer, *The Best Laid Plans*, "Yale Law Journal" 2010, Vol. 120, issue 3.

[21] Ustawa o ochronie zabytków i opiece nad zabytkami, Act of Juli 23, 2003, Journal of Laws of 2017, pos. 2187, as amended.

conservator about the destruction, loss, or theft of a monument no later than 14 days since finding out about of the occurrence. On Matczak's account, this provision describes a state of affairs in which someone owns a registered monument and that monument is destroyed. Furthermore, such a person informs the competent authority about the destruction, loss, or theft of the monument within 14 days of acquiring knowledge about the occurrence. Other things being equal, the discussed provision's contribution to the PWL is that in the PWL the owners of registered monuments always inform the relevant authorities about the destruction of their monuments within 14 days of acquiring knowledge of the destruction.

The next step is to reconstruct a relevant fragment of the actual world. This is typically done by gathering evidence. Let us assume that the evidence collected by the monument conservator provides more or less the same picture as one emerging from my description of the case.

Now it remains to compare the actual world with the PWL. It is straightforward that the two diverge, hence the law has been broken. Unless we are dealing with a *lex imperfecta*, the authority should impose a sanction on Maria for her failure to comply with the model of behavior provided by the PWL. In fact, the norm expressed by the discussed provision does not express a *lex imperfecta*, for art. 107a.1.1 foresees an administrative fine between 500 and 2000 zlotys for violation of the monument owner's duty to inform the relevant authority within 14 days about the destruction of the monument. According to art. 107a.1.2, the fine is to be imposed in an administrative decision issued by the authority whom the monument's owner was obliged to inform about the destruction of the monument. This is the point at which Matczak's account falls short of the resources necessary to explicate the reasoning behind the authority's decision.

The heart of the problem is that the legal text describes the fine as a *consequence* of a violation of a legal duty. It is hard to see how this relation between the violation and the sanction is to be reflected in the PWL, for the PWL is such that no one fails to inform the relevant authority if their monument is destroyed. The difficulty becomes especially vivid if we consider legal provisions that describe factors the authorities have to take into account when establishing the degree of the penalty. For our hypothetical scenario, the relevant provision would be art. 189d of the Polish administrative procedure code.[22] According to the norm expressed by this provision, the monument conservator should determine the height of the fine by considering *inter alia* such factors as seriousness and circumstances of the violation or the person's contribution to the violation. Yet, it is in principle impossible for the monument conservator to reconstruct a PWL in which such factors are taken into account due to the fact that they make an essential reference to the violation of the norm, whereas – as we have already

[22] Ustawa – Kodeks postępowania administracyjnego, Act of June 14, 1960, Journal of Laws of 2017, pos. 1257, as amended.

established – the PWL described by the Polish legal text is a possible world in which the owners of the monuments always fulfil their informational duties. Including sanctions in the PWL of Polish law would lead to a logical inconsistency – it would be a possible world in which monument owners both inform and fail to inform the relevant authorities about the destruction of monuments.[23]

The upshot of the preceding discussion is that Matczak's account is incapable of accommodating some important types of provisions related to imposing sanctions by competent authorities. In order to show that, I invoked some specific Polish regulations. However, the argument generalizes easily, for nothing in it rests on the peculiarity of the norms invoked in the example; they were merely instances of institutions that are found in many legal systems across the world. In fact, all that is needed to mount my objection against sophisticated textualism is to make a case that a token of sanctioning is a reaction to a violation of a duty. This is a dominant view among legal theorists.[24]

4. TWO UNSATISFYING REPLIES

Before presenting my own solution to the problem of sanctions, I will first discuss two replies which do not require a modification of Matczak's account. The first one appeals to the accessibility relation, the other one invokes a distinction between the text world and the discourse world. I will argue that neither of them succeeds.

The accessibility solution runs as follows. We are an imperfect society. Even though most us typically obey the law, it systematically happens that some individuals break it. Indeed, this is why we need sanctions in our legal systems. A PWL in which everyone fulfils their duties is too distant from the actual world to effectively serve as a model for our society.[25] We should therefore deem it an inappropriate interpretation of the legal text, due to its inaccessibility from the actual

[23] The argument was inspired by the so-called Chisholm's paradox. See R. Chisholm, *Contrary-to-Duty Imperatives and Deontic Logic*, "Analysis" 1963, Vol. 24, issue 2.

[24] Some theorists oppose this orthodoxy by arguing that sanctions should not be conceived of as reactions to *duty violations* but rather to *wrongdoings*. See in particular R A. Duff, *Rule-Violations and Wrongdoings*, (in:) A.P. Simester, S. Shute (eds.), *Criminal Law Theory. Doctrines of the General Part.*, Oxford 2002. However, his arguments focus exclusively on the criminal sanctions. Moreover, it is not clear whether the *normative* notion of a wrongdoing can be accommodated within Matczak's descriptive account of legal language. For a recent discussion see L. Miotto, *Sanctioning*, "Jurisprudence" 2017.

[25] K. Brownlee, *What's Virtuous About the Law?*, "Legal Theory" 2015, Vol. 21, issue 1, pp. 3–4.

world. The right interpretation is one in which most but not all people fulfil their duties and those who fail to do so are subject to sanctions.

This reply may seem very appealing because it captures pragmatic considerations that are known to underpin the legislative process. No member of the legislative who voted in favor of imposing stricter fines for speeding believes that this novelization would reduce the amount of traffic offences to zero. Indeed, it is not uncommon for the budget acts to foresee incomes from administrative fines (notice that there is no principled reason to deny that on Matczak's account the budget act also describes a part of the PWL). Notwithstanding the sociological appeal of this suggestion, it fails on legal dogmatic grounds. If the PWL is such that some people violate their duty to ϕ, then in any particular case it is unclear whether a person involved should have ϕ-ed. In order to see this more clearly, consider cases in which the law imposes a disjunctive obligation, as in "one is required to pay the fee in cash or via bank transfer." Such a norm is clearly different from the pair of norms: "do ϕ" and "if you do not ϕ, then you pay the fine." However, the proposal under consideration interprets both of the norms in the same fashion. In the first case, the PWL is such that some people pay the fee in cash, others via bank transfer. In the second case, the PWL is such that some people ϕ, others pay the fine for not ϕ-ing. The reason why the two norms should be treated differently is that our theory of law should capture the way in which the law guides Hartian puzzled man.[26] In the first case we intuitively expect the law to instruct the puzzled citizen to pay the fee, while remaining indifferent as to the payment method. By contrast, in the second case the law is not indifferent between fulfilling the duty and paying the fine for failing to do so. Rather, the law unequivocally instructs puzzled citizens to fulfill their duties. Moreover, it is untenable to say that in, say, 9 out of 10 cases the law instructs the citizens to fulfill the duties and in the remaining case it instructs them to pay the fine. Of course, it may so happen that as a matter of fact they sometimes fail to fulfill their duties but their reasons for doing so are non-legal reasons. The legal text *always* requires them to fulfill their duties, full stop. Thus the appeal to accessibility fails to block the objection that Matczak's account cannot accommodate sanctions.

The second reply, suggested by Matczak, appeals to a distinction between the *text world* and the *discourse world*. The distinction has been introduced by Joanna Gavins,[27] whose work in literary theory significantly influenced Matczak's core idea that the legal text describes a possible world.[28] The text world is the world described by a given text. In our case it corresponds to the PWL. The discourse world, in turn, is a world in which we talk about the text, i.e. the actual world. Matczak believes that whereas Hartian primary rules describe the text

[26] H. L. A. Hart, *The Concept of Law. Second Edition*, Oxford 1994, p. 40.

[27] J. Gavins, *Text World Theory: An Introduction*, Edinburgh 2007.

[28] M. Matczak, *Imperium tekstu*..., p. 145.

world, secondary rules describe the discourse world.[29] He goes on to argue that norms foreseeing sanctions, as rules of adjudication, describe the discourse world, not the text world:

"It should be emphasized that the manner of application of means of adjusting the actual world to the postulated world (restitutive sanctions), as well as the manner of application of means of preventing the future divergences (repressive sanctions) is also described by the relevant elements of the legal text. This description, like the description from which Hartian secondary rules are decoded, is a description of the discourse world, not the legal text world. Once those means have been applied, i.e. when their application becomes an element of the actual world, they can be evaluated as compatible or incompatible with the model postulated by the legal text."[30]

There are at least four reasons why this reply is unsatisfying. First, the notion of the discourse world is underspecified on Matczak's account – there is a number of open questions that prevent it from being serviceable to jurists involved in actual legal interpretation. What is its relation to the text world? Does it fulfill the three necessary features of the text world, i.e. unity, accessibility, impossibility of full determination? Finally, what does it mean for the authorities to abide by the law? (The actual world is necessarily compatible with the actual world). Second, it is not uncontroversial that the norms expressive of factors to be taken into account when determining the measure of sanction are to be classified as secondary rules.[31] Thirdly, and most importantly, by admitting that the authority competent to review the decision imposing a sanction entertains the text world, Matczak only relocates the problem. All in all, the higher court/administrative authority reviewing a decision has to consider the very same legal provisions as the authority that issued the decision. In order to assess whether the applied sanction was proportional, e.g., to the seriousness of duty violation she needs to recover the PWL in which there is both a violation and a corresponding sanction and compare such PWL with the actual world. However, as I have already shown in the previous section, such a PWL is inconsistent and cannot therefore be the right interpretation of the legal text within Matczak's framework. Finally, Matczak's solution entails that the first instance authority interprets the law in a different way than the second instance authority. There seems to be no principled reason to stick to such an asymmetry. Therefore, we should conclude that Matczak's reply fails to provide a satisfactory account of some norms related to sanctions. Nonetheless, in the following section I will try do justice to his intuition that

[29] *Ibidem*, pp. 166–167, 183–185.

[30] *Ibidem*, p. 325, translation mine.

[31] For instance, the 2017 novelization of Polish administrative procedure code that introduced an entire section pertaining to administrative fines has been criticized on the grounds that provisions of substantive law should not be included in a procedural code.

such norms describe a possible world different from the one described by norms expressive of primary rules.

5. REJECTING THE UNITY ASSUMPTION

The upshot of the argument presented in section 3 was that norms related to fixing sanctions do not describe the PWL. Now, my thesis is that they describe a possible world that is as close as possible to the PWL, such that the relevant legally required behavior, e.g. informing the monument conservator about the damaging of the monument, is legally indifferent (henceforth: "PWL*"). Such PWL* does not *logically* exclude the possibility of someone's violating their duty. It can therefore be used to determine what sort of consequences the violation entails.

Although the closeness relations between possible worlds is a notoriously puzzling concept, I believe we can provide a satisfying approximation of how to identify the PWL* in each particular case. Our primary cue is the principle of minimal change. Other things being equal, if we consider two possible worlds, one of which is exactly like the PWL, save for the fact that the monument owners do not fulfil their informational duties, whereas the other is such that the monument owners do not fulfil their informational duties *and* people do not pay their taxes, then the former is closer to the PWL, for there are numerically less differences between them. Of course, it may often so happen that the principle of minimal change fails to uniquely determine the PWL*. In such a case, the interpreter should settle the indeterminacy by appealing to the values of the legal system.

The solution just proposed offers a straightforward account of the interpretation of norms related to fixing sanctions. In fact, it parallels the orthodox account of counterfactuals (conditional statements with false antecedents) within the framework of possible world semantics, championed by Robert Stalnaker and David Lewis.[32] However, it requires dropping one of Matczak's central assumptions – that the legal text describes a single possible world. In spite of this, I believe Matczak should bite the bullet. All in all, my solution does not affect in any way Matczak's account of the interpretation of norms expressing primary rules. As for the norms related to fixing sanctions, Matczak himself readily admits that they are interpreted in a peculiar way.

Furthermore, there is an independent reason to claim that judges entertain more than one possible world when interpreting any legal provision. It has to do with the desideratum of legal certainty and the phenomenon of legal gaps. On Matczak's antirealist approach to law, each of the judges creates their own PWL

[32] R. Stalnaker, *A Theory of Conditionals*, (in:) N. Rescher (ed.), *Studies in Logical Theory*, Oxford 1968; D. Lewis, *Counterfactuals*, Oxford 1973.

upon the contact with the legal text. Those PWLs converge most of the time but sometimes they do not. Now, I believe it is plausible to claim that even though any particular judge is in principle capable of providing a determinate answer to any legal question, in some cases they are aware that if their mental states had been slightly different, they would have come up with a different answer to the very same question. What is more, this instability of their judgment need not stem from moral considerations. For instance, it may so happen that a society has two equally widespread conventions of usage of a certain word, each of which would lead to a different decision. Now, I believe that judges often conduct the thought experiments of entertaining the interpretations they would have reached, had they slightly different mental makeup. Thereby they represent possible worlds close to their own. If in all the closest possible worlds to the PWL they reach the same verdict, we can say that the law is determinate. Conversely, if some of the closest possible worlds lead them to diverging verdicts, then we speak of a *legal gap*. This process is of utmost importance for formulating *de lege ferenda* postulates.[33]

6. CONCLUSIONS

In this paper I have argued that Matczak's theory in its current form cannot provide a satisfactory account of interpretation of norms pertaining to fixing the sanctions. Consequently, I have suggested that the best reaction to this difficulty is to drop the assumption about the unity of the possible world stipulated by the legal text. This enables us to analyze sanctions in terms of the closest possible world in which the forbidden behavior is legally indifferent. On a more general level I believe that this paper fits in the recent tendency of restoring the importance of sanctions in the philosophy of law.[34]

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[33] For instance, the President of the Polish Supreme Court annually publishes a report on the detected legal gaps that obstruct the application of law, http://www.sn.pl/osadzienajwyzszym/SitePages/Wystapienia_Pierwszego_Prezesa_SN.aspx (accessed: 10.08.2018).

[34] In particular, see F. Schauer, *The Force of Law*, Cambridge 2015.

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SOPHISTICATED TEXTUALISM AND SANCTIONS

Summary

In this paper I present a difficulty for Matczak's sophisticated textualism. I argue that, due to his claims about the descriptive character of legal language and the unity of the possible world postulated by the legal text, his theory cannot successfully account for norms that express factors that an authority should take into account when determining the measure of sanction. I reject two replies to this objection that do not require a modification of Matczak's account. The upshot of my argument is that in order to accommodate norms pertaining to sanctions, Matczak should drop the assumption of unity of the possible world described by the legal text.

KEYWORDS

possible worlds, legal interpretation, sanctions, sophisticated textualism, Matczak, contrary-to-duty-obligations

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światy możliwe, interpretacja prawnicza, sankcje, tekstualizm wyrafinowany