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LAWMAKING AND LEGISLATION

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GOOD LAW-MAKING IN POLAND: PROBLEMS AND CHALLENGES

Dear Readers,

It is with great pleasure that we present a new issue of the Studia Iuridica journal, a product of research coordinated by the Regulatory Impact Assessment Centre, established in 2022 at the Faculty of Law and Administration of the University of Warsaw.

The Centre is financed under the 'Science for Society' Programme of the Ministry of Science and Higher Education.[1]

The Centre provides scientific and expert support of scholars affiliated with the University of Warsaw who, collaborating within interdisciplinary research groups, conduct studies comprising regulatory impact assessments, where they undertake to anticipate the consequences of the adoption of particular legislative solutions and identify their social and economic costs and benefits. A regulatory impact assessment understood this way is to be equated with the 'legal policy'[2] ideal postulated a hundred years ago by one of the leading Polish lawyers, Leon Petrażycki. Furthermore, it is an apt and fitting response to the demands of the economic analysis of law (also called law and economics) trend,[3] the recommendations of international organizations (e.g. OECD, European Union, World Bank) and the experience of Anglo-Saxon and Western European countries that have invested in improving the quality of legislation and implemented the policy of 'better regulation'. The Centre cooperates closely with the Department of Law and Economics of the University of Warsaw.

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[1] The Regulatory Impact Assessment Centre is financed from public funds by the State Treasury as part of the 'Science for Society' Programme of the Ministry of Science and Higher Education of the Republic of Poland, project no NdS/529182/2021/2021, the total cost of the project being PLN 1,723,965.00.

[2] Leon Petrażycki, *Wstęp do teorii prawa i moralności* (Warszawa 1930) 3.

[3] Małgorzata E Stefaniuk, 'The Category of Efficiency of Law in Leon Petrażycki's Views' (2019) 62(2) 246 Zeszyty Naukowe KUL 7.

The objectives of the Centre are: to foster the improvement of the national law-making process by elevating and bolstering the substantive component and, in particular, assessment of the effects of regulations; to develop new areas of cooperation in a three-way scenario between the government (public authorities and state institutions), the University and business (entrepreneurs, companies, economic/industry organizations); to implement policies conducive to better regulations, evidence-based regulatory policy and reduction of regulatory burdens; to involve the University of Warsaw in closer cooperation with external stakeholders (non-governmental organizations, entrepreneurs, trade unions, business organizations, etc.); to provide a new scientific stimulus in the fields of research devoted to legisprudence (the theory and practice of law-making), economic analysis of law, assessment of the effects of regulations, public choice theory and behavioural analysis.

The Centre engages a group of close to 30 experts who collaborate on a permanent basis – both lawyers practicing and theorizing in various fields of law (including criminal, civil, tax, banking, constitutional, administrative, commercial and family law) as well as researchers representing other social sciences (including economics, sociology, psychology, political science) and quantitative sciences (like mathematics, computer science, physics).

In addition, the Centre has established international contacts with other analytical centres conducting regulatory impact assessment (including: the Regulatory Policy Committee in London, the Regulatory Scrutiny Board of the European Commission in Brussels, public authorities in Belgium, the Netherlands and Israel) and has concluded cooperation agreements with domestic entities, agencies and authorities involved in the law-making process (including ministries, the Government Legislation Centre, the District Medical Chamber in Warsaw, NGOs, business organizations and employers' associations).

The efforts of the Regulatory Impact Assessment Centre of the University of Warsaw are a response to the problems and shortcomings of Polish legislation as described below.

I. GOOD LAW-MAKING IN POLAND: HOPES, INSPIRATIONS AND DISAPPOINTMENTS

It has been more than thirty years since principles of a democratic-liberal state started to find their way into the Polish legal system. These are, in particular, separation of powers, free parliamentary elections, local self-government, freedom of economic activity and civil society. The fall of communism inspired hope not only for the actualization of civil liberties, political freedoms, economic rights, integration with international organizations of the free world, but also for

improving the quality of state governance, in particular with regard to better public services, fair and objective courts, effective administration and better law.

Although there is no single universal definition of good law, it is generally associated with, inter alia, good legislation reflected in stability, predictability, respect for principles and constitutional axiology, as well as the legislative technique and rational solutions expressed in a proper and clear legal language.[4] Ideally, laws should be enacted in a bespoke procedure, without haste, in consideration of the voice of stakeholders and experts, but with respect for the common good and the interests of various social groups, taking into account many economic and social circumstances.[5]

Notwithstanding the practice of the Polish People's Republic (1945–1989), which was permeated with undemocratic procedures, lack of scrutiny of the constitutionality of law, and new bureaucratic obligations continuously imposed by state authorities, a belief persisted that the postulates and directives of Polish legal theory relating to legislation would be implemented successfully. These entailed, inter alia, academic achievements in the field of logical and linguistic research of the Lviv–Warsaw School,[6] the 'legal policy' concept of Leon Petrażycki,[7] a long analytical tradition of domestic legal theory,[8] the assumption (axiom) of a rational legislator and the rationality of the legislative process (which is one of the most frequently discussed topics in Polish academic legal literature),[9] findings on the influence of pressure groups in a pluralistic society

[4] On 'good law' and 'good regulation"' see: Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation. Theory, Strategy and Practice* (Oxford University Press 2012) 26; Stanisław Kasiewicz, 'Spór wokół kategorii "dobra regulacja"' (2016) 98 Studia Prawno-Ekonomiczne 237, 242; Jadwiga Potrzeszcz, *Bezpieczeństwo prawne z perspektywy filozofii prawa* (Wydawnictwo KUL 2013) 276.

[5] Irena Lipowicz, 'Dobro wspólne' (2017) 3 Ruch Prawniczy, Ekonomiczny i Socjologiczny 17–31.

[6] See: Zygmunt Ziembiński, 'The Methodological Problems of Theory and Philosophy of Law: A Survey' in Zygmunt Ziembiński (ed), *Polish Contributions to the Theory and Philosophy of Law* (Amsterdam 1987) 40; Kazimierz Opałek, 'Normativism against the Background of Methodological Inquiries in Polish Legal Thought' in Zygmunt Ziembiński (ed), *Polish Contributions to the Theory and Philosophy of Law* (Amsterdam 1987) 16; Zygmunt Ziembiński, 'Two Concepts of Rationality in Legislation' (1985) 8 Rechtstheorie Beiheft 139, 140.

[7] See: Andrzej Kojder, 'Legal Policy: The Contribution of Leon Petrażycki' (1994) 106 Polish Sociological Review 155–63; Radosław Zyzik, 'Czy Leon Petrażycki był prekursorem behawioralnej ekonomicznej analizy prawa?' (2017) 1(39) Forum Prawnicze 21–33; Marek Zubik, Krzysztof Koźmiński and Krzysztof Szczucki (eds), *Leon Petrażycki i jego dzieło* (2018) 74 Studia Iuridica.

[8] Robert Alexy, 'Aleksander Peczenik: In Memoriam' (June 2006) 19(2) Ratio Juris 245, 246.

[9] Urszula Kosielińska-Grabowska and Andrzej Grabowski, 'Logic and the Directives of Legislative Technique: Some Logical Remarks on the Polish "Principles of Legislative Technique"' in Michał Araszkiewicz and Krzysztof Płeszka (eds), *Logic in the Theory and Practice of Lawmaking* (Springer 2015) 205.

and the possibilities of limiting them.[10] The hope was that the legislation of post-communist Poland would repeat the success of interwar Poland (the Second Polish Republic of 1918–1939), when national codifications were assessed as a model worth imitating also by foreign lawyers (including French, Austrian and German).[11]

However, this has not come to fruition, and from the perspective of 2023 and in hindsight, i.e. given the record of ten terms of the Sejm (parliament), various governments and many ongoing reforms of the law-making system, Poland continues to be plagued by problems known to other Western European countries and the Anglo-Saxon common law culture in the form of legislative inflation.[12] One must come to terms with the fact that two decades after the 'political transformation', we are still experiencing a state of legal overregulation, juridification of social life and the statization of the national economy – dysfunctions typical of the socialist regime.[13] Attendant and related problems had manifested themselves

[10] Stanislaw Ehrlich, *Pluralism on and off Course* (Pergamon Press 1982); Stanisław Ehrlich, *Grupy nacisku w strukturze politycznej kapitalizmu* (PWN 1962); Stanisław Ehrlich, *Władza i interesy: Studium struktury politycznej kapitalizmu* (PWN 1974).

[11] Kazimierz Grzybowski, 'Reform and Codification of Polish Laws' (1958) 3 The American Journal of Comparative Law 393–402; Fryderyk Zoll, 'A Civil Code outside of Reality: The Polish Codification of the Year 1964, its Origin, Development and Future' in Wen Y Wang (ed), *Codification in International Perspective* (Springer 2014) 125–37; Wojciech Dajczak, 'The Polish Way to a Unified Law of Contract: Local Curiosity or Contribution to the European Debate Today?' in Christian Bar and Arkadiusz Wudarski (eds), *Deutschland und Polen in der europäischen Rechtsgemeinschaft* (Otto Schmidt/De Gruyter 2012); Krzysztof Koźmiński, 'Polish Legislative Technique against the European Background: Tradition and Experiences' in Franciszek Longchamps de Berier, Piotr Grzebyk and Su Chen (eds), *Theory and Practice of Codification: The Chinese and Polish Perspective* (Social Sciences Academic Press 2019) 58–79.

[12] On legislative inflation see: René Savatier, 'L'inflation législative et l'indigestion du corps social' (1977) 100 Il Foro Italiano 173–84; Philippe Gérard, Michel van de Kerchove and François Ost (eds), *Fonction de juger et pouvoir judiciaire: Transformations et déplacements* (PUSL 1983) 471; Svein Eng, 'Legislative Inflation and the Quality of Law' in Luc Wintgens (ed), *Legisprudence: A New Theoretical Approach to Legislation* (Hart Publishing 2002) 65; François Ost and Michel van de Kerchove, 'Constructing the Complexity of the Law: Towards a Dialectic Theory' in Luc Wintgens (ed), *The Law in Philosophical Perspectives* (Springer 1999) 146; Jean-Pierre Duprat and Helen Xanthaki, 'Legislative Drafting Techniques' in Ulrich Karpen and Helen Xanthaki (eds), *Legislation in Europe: A Comprehensive Guide for Scholars and Practitioners* (Bloomsbury 2017) 112; Łukasz Folak, 'Zasada proporcjonalności w tworzeniu prawa administracyjnego' (2017) 79(4) Ruch Prawniczy, Ekonomiczny i Socjologiczny 57, 66; Sylwester Zawadzki, 'Inflacja prawa oraz problemy podnoszenia jego jakości' (1989) 2–3 Studia Prawnicze 347, 349; Dariusz Kijowski and Patrycja Suwaj (eds), *Kryzys prawa administracyjnego? Tom II: Inflacja prawa administracyjnego* (1st edn, Wolters Kluwer Polska 2012).

[13] Elżbieta Łojko and Anna Turska, 'Kryzys prawa i spadek jego prestiżu' in Bolesław Banaszkiewicz and others, *Kultura prawna i dysfunkcjonalność prawa*, vol 2 (Uniwersytet Warszawski 1988).

long before the COVID-19 epidemic.[14] Similarly to other countries affected, also in Poland corrective actions were taken to prevent the deterioration of the quality of laws with regulatory impact assessment procedures being a primary and especially efficient instrument to this end.

II. LEGISLATIVE CRISIS IN POLAND: EXPERIENCE OF THE THIRD POLISH REPUBLIC

By and large, the following have been the impediments faced by Polish legislation and law-making for many years:

- adoption of regulations inconsistent with the Constitution, including such that violate individual rights and freedoms guaranteed at the constitutional level (including property rights, personal data, secrecy of correspondence, the right of free movement, the right to a fair hearing as well as the principles of equality before the law, proportionality, freedom of economic activity and social market economy);
- enactment of provisions inconsistent or contradictory with European Union law (or other international obligations of the Republic of Poland);
- poor quality of legalese (linguistic errors, faulty definitions, inconsistent terminology, unintelligible wording);
- a deficit of legal stability and long-term legislative planning[15] (constant short-lived amendments, episodic and fleeting ad hoc regulations, sometimes hastily changed or repealed after merely several days of being in force, an increasing spate of special acts, i.e. legislative interventions aimed at resolving one pressing problem at the expense of the completeness and cohesion of the legal system);
- deterioration of the role of codes and other general laws (*leges generales*) in favour of specific provisions (*leges speciales*), termed as the phenomenon of decodification;[16]

[14] Krzysztof Koźmiński and Jan Rudnicki, 'The COVID Crisis as a Sample Tube with Contemporary Legal Phenomena' (2020) 1(2) Central European Journal of Comparative Law 105–21.

[15] Janusz Kochanowski, 'Deregulacja jako pierwszy etap reformy systemu tworzenia prawa' (2005) 3(1) Ius et Lex 216.

[16] Susanne Genner, *Dekodifikation: Zur Auflösung der kodifikatorischen Einheit im schweizerischen Zivilrecht* (Helbing & Lichtenhahn 2006); Reinhard Zimmermann, 'Codification: History and Present Significance of an Idea' (1995) 3(1) European Review of Private Law 95, 98ff; Maria Luisa Murillo, 'The Evolution of Codification in the Civil Law Legal Systems: Towards Decodification and Recodification' (2001) 11(1) Journal of Transnational Law and Policy 163ff; Franciszek Longchamps de Bérier (ed), *Dekodyfikacja prawa prywatnego* (Wydawnictwo

- scarce discussion between decision-makers, on the one hand, and society and stakeholders on the other: consultations reduced to mere fiction, expert opinions being ignored or overlooked, ostensible social dialogue, declining position of expert bodies and representatives of the business community;[17]
- loopholes[18] in the legal system;
- excessive politicization of the law-making process and instrumentalization of legislation, i.e. hyperactivity of politicians in the decision-making process, paucity of social trust, the objective of changes in law steering away from solving real socio-economic problems in favour of maintaining the support of the electorate and achieving the current purely political goals;[19]
- adoption of regulations which are impossible to implement and enforce, irrational, transgressing the limits of statutes, adoption of regulations in isolation from the costs associated therewith, without regard to any assessment of their effects;
- the assessment of the effects of regulations treated as a 'propaganda tube' (i.e. designed solely to produce a persuasive effect[20]) for the government's concepts, instead of serving an actual, reliable prediction of the socio-economic consequences of changes in the legal status of a given area;
- neglect for the pre-legislative work on a bill;[21]
- defective lobbying regulations, the effect of which is the dearth of open involvement of interest groups in the legislative process;[22]
- 'wild lobbying', the collapse of public ethics, corruption-prone regulatory environment: influence on law-making exerted by informal groups close to the ruling party, the importance of behind-the-scenes efforts to influence decision-makers, the role of 'unofficial back channels' and contacts with representatives of the ruling party;

Sejmowe 2017); Jan Rudnicki, *Dekodyfikacja prawa cywilnego w Polsce* (Od Nowa 2018); Jacek Kaczor, 'Koniec ery kodeksów?' (2020) 120(1) Acta Universitatis Wratislaviensis 55.

[17] *Polski Bezład Legislacyjny. Rządowy i parlamentarny proces legislacyjny w pierwszych dwóch latach IX kadencji (15 listopada 2019–15 listopada 2021). XIV raport Obywatelskiego Forum Legislacji* (Fundacja im. Stefana Batorego 2022) 8.

[18] Ewa Skorczyńska, *Luka w prawie: Istota zjawiska oraz jego znaczenie dla prawa administracyjnego* (CH Beck 2017).

[19] Maciej Borski, 'O potrzebie reformy polskiego systemu stanowienia prawa' (2016) 4(32) Przegląd Prawa Konstytucyjnego 223, 225.

[20] Krzysztof Koźmiński and Mateusz Ciechomski, 'Ocena skutków regulacji: Instrument racjonalnej polityki prawa czy manipulacja projektodawcy?' in Piotr Grzebyk (ed), *Prawo w epoce populizmu* (Scholar 2023) 219ff.

[21] Jarosław Szymanek, 'Udział czynnika eksperckiego w procesie ustawodawczym' in Wojciech Brzozowski and Adam Krzywoń (eds), *Leges ab omnibus intellegi debent: Księga XV-lecia Rządowego Centrum Legislacji* (Wydawnictwo Sejmowe 2015) 425.

[22] Michał Jabłoński and Krzysztof Koźmiński, '10 Years of the Polish Act on Lobbying Activity – 10 Years of Disappointments' (2019) 68 Studia Iuridica 105–23.

- violation of the *lex retro non agit* principle ('the law does not apply retroactively', i.e. the prohibition of retroactivity of law);
- flouting or ignoring the *vacatio legis* standard, i.e. the time lapse from the date of promulgation of a legal act until its entry into force: provisions coming into force on the day of promulgation or on the following day (too short *vacatio legis* or absence thereof altogether in respect of newly passed regulations);
- violation of protected acquired rights and respect for interests in progress;
- contravention and ignoring of the principles of legislative technique;
- introduction of excessive administrative and bureaucratic burdens stifling initiative, the market and economic potential;[23]
- inconsistency, coupled with excessive stringency and inflexibility of regulations;[24]
- drafting of regulations with the view to solving short-term problems without taking into account long-term effects and a wider context;[25]
- the problem of 'gold-plating',[26] i.e. a faulty legislative technique used in connection with the transposition of EU directives, which sidesteps, inter alia, the principle of subsidiarity, and is partly due to errors of the Polish legislator;[27]
- introduction of ineffective regulations, questionable in light of their declared goals and needs indicated by the draft initiator, resulting in negative socio-economic effects, with a negative balance of costs and benefits;[28]
- frequent, dynamic and unforeseen legal changes;[29]
- unclear reasons for proposed bills, which obscures the *ratio legis*;
- increased role of soft-law acts and other *fontes iuris novi*, sources of law unknown to the constitutional system, including interpretative CJEU judgments, which radically change the understanding of statutory provisions (including codes);

[23] On this topic see, e.g.: Aleksandra Jurkowska, 'Uwarunkowania regulacyjne prowadzenia działalności przez banki spółdzielcze w Polsce' (2018) 72(3) Bezpieczny Bank 54, 80.

[24] Ewa Miklaszewska and Krzysztof Kil, 'Skuteczność rozwiązań i mechanizmów stabilizujących banki systemowo ważne w krajach Unii Europejskiej w okresie pokryzysowym − próba oceny' (2019) 50(2) Bank i Kredyt 173.

[25] Stanisław Kasiewicz and Lech Kurkliński (eds), *Szok regulacyjny a konkurencyjność i rozwój sektora bankowego* (Warszawski Instytut Bankowości 2012) 14.

[26] Michał Jabłoński, 'The Danger of So-called Regulatory "Gold-Plating" in Transposition of EU Law – Lessons from Poland' (2017) 71 Studia Iuridica 73–90.

[27] See Kasiewicz and Kurkliński (n 25) 16. On gold-plating see more broadly, e.g.: Jabłoński, 'The Danger' (n 26) 73ff; Kevin Kaczor, 'Gold-plating – problem nadtranspozycji dyrektyw unijnych do krajowego porządku prawnego' (2022) 11(1) Folia Iuridica Universitatis Wratislaviensis 76–98.

[28] Kasiewicz and Kurkliński (n 25) 18.

[29] Lech Morawski, *Główne problemy współczesnej filozofii prawa: Prawo w toku przemian* (LexisNexis 2000) 65–66.

– abandoning of the 'limits of law' (external boundaries of law or legislative boundaries), such as morality, ethics, economics, and physics.[30]

The list of defects of the law-making process in Poland is long enough, however, it could be continued. Moreover, without doubt during the COVID-19 pandemic, the state of legislation deteriorated even further, and the aforementioned issues were only exacerbated. This has been met with pessimistic assessments, according to which Polish legislation has achieved the label of 'patholegislation' and was faced with an unprecedented legal crisis.

III. REGULATORY IMPACT ASSESSMENT (RIA) AS A STEP TOWARDS THE PRINCIPLE OF GOOD LAW

Despite its Anglo-Saxon origin[31] and roots in the law and economics trend, or so-called legisprudence,[32] the notion of rational law-making, implicating a balance of costs and benefits (cost-benefit analysis) as well as the selection of 'most appropriate solutions' by the legislator to tackle the social problem at issue (in accordance with the principle of proportionality), has long been at the forefront of attention of the Polish legal scholars. Some commentators have even go so far as to claim that law-making issues have been a peculiar 'specialty of Polish legal theory for many years'.[33] 'Is RIA a new legal institution in Poland? … When I recall university lectures, I can say that in the books of professors: Opałek, Wróblewski, Ziembiński and other experts in the theory of state and law, there were elements

[30] Wojciech Łączkowski, 'Granice prawa' (2015) 77(4) Ruch Prawniczy, Ekonomiczny i Socjologiczny 5–7.

[31] Edward P Fuchs and James E Anderson, 'The Institutionalization of Cost-Benefit Analysis' (1987) 10(4) Public Productivity Review 25–33; Thomas O McGarity, 'Regulatory Reform in the Reagan Era' (1986) 45(2) Maryland Law Review 253ff. In the Polish literature see, for example, Jarosław Adamowski, 'Instytucje oceny skutków regulacji w Stanach Zjednoczonych i Unii Europejskiej w kontekście negocjacji nad TTIP' (2015) 2 Stosunki Międzynarodowe 258–69.

[32] Krzysztof Koźmiński, *Technika prawodawcza II Rzeczypospolitej* (Scholar 2019) 8. See also: Luc Wintgens (ed), *Legisprudence: A New Theoretical Approach to Legislation* (Hart Publishing 2002); idem, 'Legisprudence as a New Theory of Legislation' (2006) 19(1) Ratio Juris 1–25; idem (ed), *The Theory and Practice of Legislation: Essays in Legisprudence* (Routledge 2005); Julius Cohen, 'Legisprudence: Problems and Agenda' (1983) 11(4) Hofstra Law Review 1163; Luc Wintgens, *Legisprudence: Practical Reason in Legislation* (Ashgate Publishing 2012); idem (ed), *Legislation in Context: Essays in Legisprudence* (Routledge 2016).

[33] Mateusz Pękala, *Pole decyzyjne ustawodawcy* (WAM 2016) 195.

attaching to the purpose, means, directives of legal policy and directives of legislative technique'.[34]

Polish discussions on improving the quality of law and reforming the law-making process date back to at least the 1970s. A large number of valuable publications from that time are noteworthy (especially by Jerzy Wróblewski, Zygmunt Ziembiński, Kazimierz Opałek, Adam Podgórecki, Stanisław Ehrlich, or Józef Nowacki). In the period of the Polish People's Republic, there was also a lively discussion on the need to adopt a statute governing the process of law-making.[35]

> In the second half of the 20th century, academic writers argued at length about the quality and method of drafting law. Research activity in this area was particularly intense during the period of academic dispute regarding the state of legislation of the Polish People's Republic and related works on the Law-Making Act. The abundant research on legislation encouraged the development of a theoretical model of a rational legislator and – most importantly – concepts of law-making principles closely related to this model. Due to the huge amount of research material on the issue of law-making accumulated during the period under analysis, it is not possible or advisable to characterize here all the theoretical views of that time on the shape of the principles of law-making … the research studies of theorists, along with the development of the rational legislator model, were discontinued and then resumed by many researchers.[36]

It should be emphasized that a legal basis and a framework for improving the economic analysis in the process of law application and law-making can be found in numerous laws currently in force, many of which have been a foundation of the legal order for many years, including the Constitution of the Republic of Poland,[37]

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[34] Włodzimierz Szpringer, 'Metodologia oceny skutków ekonomiczno-społecznych zmiany prawa' in *System stanowienia prawa w Polsce: Zielona Księga* (Kancelaria Prezydenta Rzeczypospolitej Polskiej 2013) 47.

[35] See, e.g.: Jerzy Wróblewski, 'Ustawa o tworzeniu prawa a pojęcie prawa i prawoznawstwa' (1977) 8–9 Państwo i Prawo 17ff; Sławomira Wronkowska and Jerzy Wróblewski, 'Projekt ustawy o tworzeniu prawa' (1987) 6 Państwo i Prawo 3ff; Sławomira Wronkowska, 'Z historii ustawy o tworzeniu prawa' in Maciej Kłodawski, Alicja Witorska and Mariusz Lachowski (eds), *Legislacja czasu przemian, przemiany w legislacji: Księga jubileuszowa na XX-lecie Polskiego Towarzystwa Legislacji* (Wydawnictwo Sejmowe 2016); Andrzej Bałaban, 'Ustawa o tworzeniu prawa' in Ryszard Balicki and Małgorzata Masternak-Kubiak (eds), *W służbie dobru wspólnemu: Księga jubileuszowa dedykowana Profesorowi Januszowi Trzcińskiemu* (Wydawnictwo Sejmowe 2012); Maciej Klonowski, 'O braku kompleksowej ustawy o tworzeniu prawa i wynikających z tego problemach związanych z pracami legislacyjnymi dotyczącymi kodeksów: Uwagi na przykładzie Kodeksu postępowania cywilnego' (2018) 3(105) Przegląd Legislacyjny 23–44.

[36] Tomasz Zalasiński, *Zasada prawidłowej legislacji w poglądach Trybunału Konstytucyjnego* (Wydawnictwo Sejmowe 2008) 27.

[37] See, for instance, the provision of Art 118(3) of the Constitution of the Republic of Poland of 2 April 1997, which formally requires that a bill be accompanied by reasons encompassing the financial consequences of its implementation.

the Standing Orders of the Sejm of the Republic of Poland,[38] the Principles of Legislative Technique [39] and the Bylaws of the Council of Ministers[40].

What is the cause of failure of applicable procedures and the legal framework expounded above? The question that can be asked is why the system of regulatory impact assessment in Poland 'functions defectively and the assessments made do not reach their goal'.[41] According to commentators:

> A weakness of the Polish law-making process is the assessment of the actual financial and organizational effects of legislation. Bill drafters can claim with impunity – despite evident facts to the contrary – that the draft in question will not bring about financial consequences. Parliament rarely questions such claims. The Chancellery of

[38] Article 34 of the Standing Orders of the Sejm of the Republic of Poland specifies obligations of the drafter, pointing out that the statement of reasons in favour of a bill should include, inter alia: an explanation of the need and purpose for the bill, a description of the actual situation in the field that is to be regulated, a presentation of the difference between the current and the proposed legal status, an account of the expected social, economic, financial and legal effects, an indication of sources of financing if the bill involves a burden on the state budget or the local government budgets.

[39] According to § 1 of the Polish Principles of Legislative Technique: 'The decision to prepare a bill is preceded in particular by ... determining and describing the state of social relations in the field requiring an intervention by public authorities and indicating the desired trajectory of change ... , the analysis of the current legal status ... , determining the plausibility of undertaking interventions by public authorities, an alternative to the adoption of a statute ... , ascertaining the expected social, economic, organizational, legal and financial effects of each of the solutions under consideration ... , seeking opinions of entities (persons) within the purview of public authorities' intervention .... Where a decision to draw up a bill has been reached, provided that it is not being prepared on the basis of a statement of purpose, it is necessary, in particular ... to determine the effects of the existing legal regulations in force in a given field ... , to specify the objectives that are to be achieved by adopting the statute.'

[40] § 28 of the Bylaws of the Council of Ministers:

'The RIA includes in particular:

1) an indication of entities (persons) affected by the proposed normative act;

2) information on consultations conducted before the development of the bill, as well as on the scope of public consultations and opinion gathered on the draft, including the obligation to seek the opinion of defined entities as mandated by specific laws;

2a) results of analyses concerning the plausibility of achieving the draft's objective using alternative means;

3) results of the analysis of the impact of the proposed normative act on entities (persons) referred to in para 1, and the impact of the bill on significant areas affected, in particular on:

a) the public finance sector, including the state budget and local government budgets,

b) the labour market,

c) the competitiveness of the economy and business, including the operation of entrepreneurs, especially micro, small and medium-sized entrepreneurs,

d) the economic and social situation of families, as well as of disabled and elderly people;

4) indication of sources of financing, especially if the draft imposes a burden on the state budget or local government budgets.'

[41] Wojciech Rogowski and Włodzimierz Szpringer (eds), *Ocena skutków regulacji – poradnik OSR*, *doświadczenia*, *perspektywy* (CH Beck 2007) 9.

> the Sejm is not at all supported by a professional analytical team capable of assessing the effects of a parliamentary bill.[42]

There are probably several reasons for the system's shortcomings, including circumstances that burden decision-makers as well as objective, universal weaknesses of RIA.

First of all, the real effects of regulations are difficult to anticipate, and due to the numerous unknowns and variables as well as the dynamics of the attendant socio-economic reality, an attempt to estimate costs and benefits is more akin to drawing alternative possible scenarios (in pessimistic-moderate-optimistic variants) or even 'fortune-telling' rather than a prediction based on a rational and methodologically correct calculation model.[43]

'The incompleteness and often uncertainty of the information and predictions that an expert can provide in the law-making process means that his/her role as a representative of "exact and certain" knowledge can be relatively modest'.[44] On occasion, especially in the case of complex economic issues or long-term processes, cost-and-benefit calculations are simply impracticable, as it proves unreliable to try and predict the behaviour of people, entrepreneurs and future socio-economic situations. In practice, it appears that actors do not behave like a rational *homo oeconomicus* (an assumption often made in RIA), but are driven by impulses, their judgments and attitudes are malleable, and they are influenced by stereotypes and habits.[45] On a separate note, one should remember that RIA is not a source of certain, proven knowledge – expert analyses and interdisciplinary studies attempt to predict the future based on rigid patterns and assumptions. It is, therefore, necessary to avoid succumbing to the illusion that theoretical assumptions, scientific methodology, the competence and sincere intentions of experts guarantee an accurate estimate of the real consequences of normative solutions coming into force.[46]

Notwithstanding the above, it is sometimes the case that RIAs are implemented carelessly, only formally and superficially, and are treated as a necessary and onerous step in the law-making process, without the actual will to foresee the consequences of a new regulation. 'Today, in most cases, the body that proposes a new law does not properly prepare the relevant costs-and-benefits analysis. Such a mistake can be expensive'.[47] Currently, ex-ante RIAs, conducted at the begin-

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[42] Irena Lipowicz, 'Uwagi o polskim systemie stanowienia prawa' (2012) 67(7) Państwo i Prawo 5, 18.

[43] Krzysztof Koźmiński, 'Ograniczenie handlu w niedziele – przewidywanie skutków regulacji czy wróżenie z fusów?' (2018) 78 Studia Iuridica 212–31.

[44] Sławomira Wronkowska, 'Ekspert a proces tworzenia prawa' (2000) 9 Państwo i Prawo 3, 13.

[45] Robert Cooter and Thomas Ulen, *Ekonomiczna analiza prawa* (CH Beck 2011) 607.

[46] Koźmiński, 'Ograniczenie handlu' (n 43) 229.

[47] Marcin Matczak and Tomasz Zalasiński, '5 grzechów głównych procesu legislacji: Jak nie przegrać, wprowadzając nowe ustawy?' (2009) 1 Think-Tank Magazine 108.

ning of the legislative process when the legislation in question has not yet taken effect, are commonplace in Poland. Ex-post RIAs and implementation of RIA procedures at the local level, related to local law-making, are hampered by the absence of necessary institutions and infrastructure.[48]

Finally, one can note cases where regulations should not be 'recalculated' for various reasons. For example, changes in criminal law are difficult to justify with reference to the 'price' of a given crime (all the more so in the case of crimes such as murder or rape), because they are accompanied by too strong an emotional and moral burden.[49] Moreover, 'too much analysis' can lead to paralysis and waste of public resources.[50]

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Real-life experience gained during more-than-a-year operation of the Regulatory Impact Assessment Centre confirms that Polish RIAs are notoriously misleading, unreliable, and even have a populist-propagandist nature, for they aim to persuade the reader rather than present the results of objective studies, facts or doubts. It is also admittedly true that RIAs may rely on outdated figures, information selectively chosen and out of context, or with no regard to sociological, economic, or technological data. Instead of presenting evidence-based research conclusions, a proponent of a bill would make unsupported blanket assurances along the lines of 'the proposed regulation will not have an impact on the labour market', 'a positive effect on entrepreneurs is anticipated', 'the law is compliant with European law regulations', 'similar solutions are already in force in other European Union countries', etc.

To conclude, the Polish legal system does not provide for any institution whose task would be to verify the correctness of RIAs, which in practice means that the author of the RIA (who is unnamed and unknown to the public) does not bear any consequences and responsibility for its content.

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[48] Michał Dulak, 'Uwarunkowania w projektowaniu oceny skutków regulacji na poziomie lokalnym' in idem (ed), *Ocena skutków regulacji w gminach* (Klub Jagielloński 2020) 36.

[49] Szpringer (n 34) 48.

[50] Claudio M Radaelli, 'Regulatory Impact Assessment' in Phil Harris and others (eds), *The Palgrave Encyclopedia of Interest Groups, Lobbying and Public Affairs* (Palgrave Macmillan 2020) 7.

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THE THEORY OF WELFARE ECONOMICS AND TAX REGULATIONS: AN EMPIRICAL EXAMPLE OF PIGOUVIAN TAXES

Abstract

The aim of this paper is to present the impact of the economic theories and empirical studies on the contemporary tax laws and regulations in numerous jurisdictions, based on a case study of the economic concept of Pigouvian taxes which stems from the neoclassical theory of welfare economics. The author presents the theoretical concept of the Pigouvian taxation and its econometric verification and tries to demonstrate that the empirical examples of the implementation of such fiscal instruments have proved to be effective based on the quantitative assessment. However, serious deficiencies in the methodology of empirical studies on this phenomenon can also be identified, which affects the possibility of assessing the potential practical implications of introducing such mechanisms. Nevertheless, as the author demonstrates by referring to the World Bank data, the discussed concept significantly influences contemporary tax law in many countries and is a source of inspiration for many tax jurisdictions. The analysis carried out in this paper indicates that not every implementation and post-hoc evaluation of economic theory implemented into tax systems can be effectively studied with the use of economic analysis of law; when analysing regulations introduced to influence the behaviour of individuals, it is also necessary to take into account the research in other disciplines, for example psychology and sociology, even if the inspiration for the regulations in question was well-grounded and developed in economic theories. For this reason, it can be argued

that economic analysis of law, also referred to as law and economics, although a valuable cognitive approach, should never be the only basis of analysis, even if a regulation in question has a strictly economic origin.

KEYWORDS

Pigouvian tax, tax law, economic analysis of law/law and economics, welfare economics, sugar tax

SŁOWA KLUCZOWE

podatek Pigou, prawo podatkowe, ekonomiczna analiza prawa, ekonomia dobrobytu, podatek cukrowy

I. INTRODUCTION

The significant influence of economics on certain legal regulations, particularly in the field of tax law, is undeniable. The role of this field of study in shaping the economic reality in each period of history was discussed, although apparently overestimating it to some extent, by John M Keynes, who in his book *The General Theory of Employment, Interest and Money* claimed that it was not politicians and kings who ruled the world but economists' ideas.[1] Leaving aside the assessment whether the economists' ideas truly have such a powerful impact, a number of the concepts that economists have generated certainly continues to shape contemporary financial regulations.

When contributing to the development of regulations, however, economists not only have formulated the theory but also, starting with the emergence of econometrics, undertaken empirical verification of the economic environment, including the effectiveness of regulations and the economic analysis of law.[2] At the same time, the majority of concepts usually have their grounding in formal theories before being put into practice and subjected to subsequent verification. In reality, it appears that not only modern theories may be revived even many

[1] John M Keynes, *The General Theory of Employment, Interest and Money* (Macmillan 1936; *Ogólna teoria zatrudnienia, procentu i pieniądza*, Michał Kalecki and Stanisław Rączkowski trs, 3rd edn, Warszawa 2003) 350.

[2] Lewis Kornhauser, 'The Economic Analysis of Law', *The Stanford Encyclopedia of Philosophy* (January revised edn, 2022) <https://plato.stanford.edu/entries/legal-econanalysis> accessed 9 October 2023.

years after their introduction, but also theories that were developed centuries ago happen to significantly influence contemporary models governing economic phenomena, as is the case with the Pigouvian tax discussed in this paper.

As John K Galbraith rightly pointed out, particular economic concepts are the product of a specific time and place.[3] Such is the theory of welfare economics based on which the concept of Pigouvian taxation has been developed. Welfare economics is rooted in the neoclassical twentieth century economics. It draws on the work of such economists as Alfred Marshall, Arthur C Pigou, John Hicks, and Paul Samuelson, who built upon classical economic foundations and introduced new concepts and methodologies for analysing the well-being of individuals and society.[4] Welfare economics tries to explain how individuals satisfy their needs, in economic terms, hence in the language of mathematical equations. For the sake of this theory, William S Jevons expounded an original utility theory of value. According to this author, people satisfy their needs by consuming goods. Neoclassical economics was deeply rooted in the classical economic framework that sought to find the optimal allocation of resources (market equilibrium) based on the assumption that choices of the market players are rational. Neoclassical economics expanded on this model by adding individual preferences for consumption (depicted by the utility functions) that a person seeks to optimise to obtain the most utility (pleasure) possible. The higher the utility level the higher the welfare (well-being) of an individual. By aggregating welfare levels of each individual in the country or population one can obtain the count for the social welfare.[5] As already mentioned, welfare economics does not have a single inventor; on the contrary, it has been developed and refined by several generations of economists. Among the founders of this theory, a prominent place is held by the British economist Arthur C Pigou, working at the turn of the nineteenth century.

The studies of Pigou published in 1912 and 1920 are considered canonical works on welfare economics, in which this term was introduced. In his studies, he focused on the measure of well-being as the aggregated satisfaction (utility) obtained by the whole population from the income earned, i.e. the social utility. He argued that a priority objective of socio-economic policy should be to maximise economic well-being. This goal could be achieved by equalisation of the marginal social net product generated in various branches of economy. The marginal social net product was considered the stream of benefits that results from the marginal increase in socially available resources over a year. According to Pigou, increasing the marginal social net product could be fostered by shifting

[3] John K Galbraith, *Economics in Perspective: A Critical History* (Princeton University Press 2017) 57.

[4] Mirosław Bochenek, *Historia rozwoju ekonomii: Od keynesizmu do syntezy neoklasycznej*, vol 5 (1st edn, Wydawnictwo Naukowe Uniwersytetu Mikołaja Kopernika 2016) 139.

[5] Yew-Kwang Ng, 'Welfare Economics', *International Encyclopedia of the Social & Behavioral Sciences* (2nd edn, 2015) 497, 497–503.

part of the income from wealthy social groups to poorer individuals. The instruments that could be used for achieving this goal consisted of a variety of fiscal, social and income policy tools. Among these, Pigou suggested special corrective taxes, known as Pigouvian taxes, which were aimed at supporting the efficiency of allocated resources, at the same time increasing government revenues.[6] This tax is discussed in section II of this paper.

II. PIGOUVIAN TAXES AS A THEORETICAL CONCEPT

A Pigouvian tax is imposed on any activity or goods that generate negative externalities borne by the society. Its main objective is to correct the market inefficiencies, disequilibrium that has appeared due to the occurrence of such externality and can be interpreted as a deadweight loss (loss in welfare) that the society faces as a result of such inefficiency.[7] The deadweight loss occurs in two cases. Firstly, when market inefficiency is caused by the situation when the price of any product is not optimal from the economic point of view, i.e. the supply does not meet the demand.[8] Secondly, such loss may result from the ineffective allocation of resources, including public resources, which can be a side effect of the abovementioned externalities.[9]

How then to define the externalities that constitute a key conceptual category from the perspective of the Pigouvian taxes in question?

In the literature, externalities are regarded as side effects of an entity's activities, the (positive or negative) consequences of which are borne by a wider public, irrespective of their will. These effects arise when an economic actor carries out activities that have an impact on other actors, which are not adequately compensated, i.e. for example, included in the product price. Individuals bear the costs of such damaging behaviour, which globally contributes to social welfare losses for entire communities.[10] Empirical and most prominent examples of negative externalities are environmental pollution and costs of the public health services

[6] Arthur C Pigou*, Wealth and Welfare* (London 1912) 3; idem, *The Economics of Welfare* (London 1920) 23; idem, *The Economics of Stationary States* (London 1935) 19.

[7] ibid.

[8] Joseph E Stiglitz, *The Economics of the Public Sector* (3rd edn, New York 2000; *Ekonomia sektora publicznego*, Ryszard Rapacki tr, Warszawa 2004) 131–32.

[9] Peter Lorenzi, 'Sin Taxes' (2004) 41 Society 59, 59–60.

[10] Otto A Davis and Andrew B Whinston, *On Externalities, Information and the Government-Assisted Invisible Hand* (1966) 33(131) Economica 303, 310; Artur Bartoszewicz and Katarzyna Obłąkowska, 'Rynek i spożycie napojów alkoholowych w Polsce: podstawowe dane dla polityki społeczno-gospodarczej' (2021) 15 Zeszyty Naukowe Polskiego Towarzystwa Ekonomicznego w Zielonej Górze 61, 77–78.

that a community bears due to the excessive consumption of goods considered harmful, such as tobacco, alcohol or sugary drinks.

By identifying the contribution of individuals to the collective disadvantage of others, economic studies have undertaken an analysis of the problem of how such a loss could be mitigated. Various solutions are proposed in the literature that emphasize the importance of developing an appropriate legal framework, including licensing systems for harmful activities, quantitative restrictions on the production of selected goods, concessions or penalties and, above all, fiscal policy instruments, i.e. the discussed sin taxes or Pigouvian taxes imposed on citizens.[11] The primary justification for the taxation of harmful activities is that, according to economists, it can be a method of recouping social losses caused by citizens who choose to consume such goods. This compensation is done in two ways: firstly, by reducing the level of consumption of such goods (which reduces social costs), and secondly, by increasing the government revenue from the tax, which allows the costs to be covered by the persons who undertake the 'harmful' activity. The Pigouvian tax rate should reflect the value of the social loss incurred, which is calculated mathematically by means of equating the marginal abatement costs of the harmful agent with the marginal external costs of its occurrence.[12]

Apart from the Pigouvian taxes, one can also distinguish another similar taxation that aims at correcting market failures resulting from the socially undesirable, harmful consumer behaviour, which is referred to as sin taxes.[13] A sin tax is imposed on goods that cause negative externalities in the case of their consumption. Hence, unlike the Pigouvian tax, its model assumption is the desire to 'punish' the consumers by increasing the price of the harmful goods consumed and to discourage the end users from continuing to consume excessive amounts of such products. This is an example of the stimulatory function of taxation.[14] In the case of Pigouvian taxes, on the other hand, it is not the 'punitive' but the 'compensatory' aspect that plays a key role. The major purpose of introducing the Pigouvian tax is not to 'punish' the manufacturer but to obtain funds to finance the increased public needs arising in connection with their activities. The literature indicates that both Pigouvian taxes and sin taxes are subtypes of excise taxes due to their selective nature.[15] Importantly, the division between Pigouvian taxes and sin taxes is not disjunctive. Empirical examples of levies that exhibit characteristics of both

[11] Steffen Kallbekken, 'Public Acceptability of Incentive-Based Mechanisms', *Encyclopedia of Energy, Natural Resource, and Environmental Economics* (1st edn, Elsevier 2013) 306, 306–07.

[12] William J Baumol, 'On Taxation and the Control of Externalities' (1972) 62(3) The American Economic Review 307, 307–22.

[13] Lorenzi (n 9) 59–60.

[14] Ryszard Mastalski, *Prawo podatkowe* (Studia Prawnicze, 11th edn, CH Beck 2019) 35–42.

[15] Thomas A Barthold, 'Issues in the Design of Environmental Excise Taxes' (1994) 8(1) The Journal of Economic Perspectives 133, 135; Richard M Bird, 'Tobacco and Alcohol Excise Taxes for Improving Public Health and Revenue Outcomes: Marrying Sin and Virtue?' (2015) World Bank Policy Research Working Paper WPS7500, 2 <http://documents.worldbank.org/curated/

Pigouvian and sin taxes can be found in the tax systems of numerous countries. Such example is a sugar tax if its normative design assumes the transfer of fiscal revenue to health-promoting activities. Common to both types of taxation is their ultimate objective, which is to minimise public costs incurred as a result of consumption of harmful goods.

Pigouvian taxes, as a theoretical concept of neoclassical economics, quickly aroused the interest of public institutions. Attempts have, therefore, been made to introduce them into national tax legislation.[16] The evaluation of effectiveness of the adopted regulations has been performed by econometric, quantitative, empirical studies.[17] These studies frequently show that incorporating Pigouvian taxes into tax law systems may be highly effective as they lead to a decline in demand for goods that cause negative externalities, and thus result in the successive fall in supply as well as in the improvement in production processes that transform the detrimental factor into a more socially beneficial. It has been also proven that such taxes may increase tax revenues that are used to combat the negative side effects of a harmful product. On the other hand, there are studies that question the effectiveness of such tax measures.[18]

However, the general positive econometric assessment of the introduced regulations has prompted some countries to implement similar provisions in their legal systems. These regulations are usually subjected to a post-hoc analysis to assess their effectiveness, which contributes to the regular research in this field and the increasing popularity of imposing such taxes in those countries where the regulations have not been adopted. At this point, it should be noted that the economic analysis of the introduced regulations is a controversial issue, as considerable methodological criticism of these studies can be found in the literature. First and foremost, it is argued that most models designed for the final assessment of the price elasticity of demand, i.e. an indicator of the effectiveness of decline in demand in the event a policy is introduced, use an erroneous assumption of the static nature of demand, which has flaws that affect the validity and reliability of

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en/577831467986372982/Tobacco-and-alcohol-excise-taxes-for-improving-public-health-and-revenue-outcomes-marrying-sin-and-virtue> accessed 9 October 2023.

[16] The most popular are the carbon taxes and sugar taxes. See section III for an example of such regulations.

[17] See e.g.: J Wyatt Koma and others, 'Sugary Drink Consumption among Children by Supplemental Nutrition Assistance Program Status' (2020) 58(1) American Journal of Preventive Medicine 69, 69–78; Matthew Harding and Michael Lovenheim, 'The Effect of Prices on Nutrition: Comparing the Impact of Product- and Nutrient-Specific Taxes' (2017) 53 Journal of Health Economics 53, 53–71; Emily Y Wang, 'The Impact of Soda Taxes on Consumer Welfare: Implications of Storability and Taste Heterogeneity' (2015) 46(2) The RAND Journal of Economics 409, 411.

[18] Tatiana Andreyeva, Michael W Long and Kelly D Brownell, 'The Impact of Food Prices on Consumption: A Systematic Review of Research on the Price Elasticity of Demand for Food' (2010) 100(2) American Journal of Public Health 216, 216–22.

the obtained results.[19] For example, in the study by Tatiana Andreyeva, Michael W Long and Kelly D Brownell,[20] in which the authors analysed the issue of taxation of sweetened beverages, it is indicated that the main disadvantage of using the most popular methodology of the static nature of demand elasticity to predict consumer behaviour, in connection with the introduction of fiscal policy, is that sweetened beverages can be stored and do not have to be sold immediately, and that their price can be reduced through appropriate discounts and special offers. This example can be readily transferred to similar harmful goods. Furthermore, they argue that selected groups of consumers may demonstrate strong preferences for their dietary choices due to unobservable reasons (e.g. psychological conditions), which affects the relative stability of the choice of products they consume.[21] At the same time, the results of studies that used a dynamic method of analysing demand (taking into account beverage stock and public fixed preferences) indicate that static models of price elasticity of demand can overestimate this elasticity by as much as 60.8%, which also overestimates the potential fall in demand for selected products by 57.9%.[22] This fact has considerable implications for assessing the potential effectiveness of the use of fiscal regulations, such as taxes and fees, to influence the demand structure. Therefore, referring to the results of empirical studies as a basis for justifying the introduction of a given fiscal regulation may be subject to certain, in some cases significant, misestimation, of which the legislator should be aware. Thus, the ultimate behavioural effect obtained from the introduction of Pigouvian taxes can never be fully determined.

Nevertheless, Pigouvian taxes are an example of a particular kind of economic incentive that stimulates the implementation of certain legislation, which is subsequently further analysed using economic tools. Namely, the theoretical concept of Pigouvian taxation, which originates in neoclassical welfare economic theory, has resulted in the development of empirical research on the effectiveness of regulations, which in turn has led to the intensification of legislative processes in some other countries and the related comparative empirical studies. It is worth noting that although economics is a social science, the research methods, as well as the theory of Pigouvian tax and welfare economics, are deeply rooted in mathematics and have also been proven using methods familiar to mathematicians, in simple terms, calculations made by differentiating previously described and defined functions in systems of equations. Therefore, their initial implementation in legal systems was, so to speak, an independent economic experiment that made it possible to study the behavioural effects of such tax solutions. Following successful verification, a significant number of states started to adopt these policies.

[19] Wang (n 17) 411.
[20] Andreyeva, Long and Brownell (n 18) 216–22.
[21] ibid.
[22] Wang (n 17) 411.

III. PIGOUVIAN TAXES AS A CONTEMPORARY LEGAL PHENOMENON: AN EMPIRICAL EXAMPLE OF SUGAR TAXES

As indicated, various types of taxes, which can be identified with the theoretical Pigouvian tax model, have now been implemented into legal systems in numerous countries. The most effective method of demonstrating the scale of this phenomenon is to present data on one of such solutions. This paper presents a descriptive case study on sugar taxes, i.e. fiscal instruments which are increasingly applied in many jurisdictions. Incidentally, it is worth noting that these levies, which from an economic point of view fulfil all the tax characteristics, function under various names, most often either as 'taxes' or 'fees', depending on the individual interpretation of the tax definition in a given jurisdiction. Since 2021, this solution has also been implemented in Poland, under the name of 'sugar fee'.[23] This paper presents the general legal framework of such taxes that can be identified in modern jurisdictions. It aims to give a general overview of how such taxes are designed.

Sugar taxes meet, from a formal point of view, the requirements for both recognition as sin taxes and Pigouvian taxes. This peculiar duality is expressed in the purpose for which the taxes have been introduced. Namely, in the literature one can identify a significant problem of both social and economic nature which concerns developed societies: this is the increasing incidence of diseases of civilization, such as obesity and diabetes.[24] These conditions negatively affect the well-being of both individuals and society as a whole, contributing to personal tragedies and significant obstacles to the national economic development.[25] Hence, countries look for effective instruments to persuade citizens to undertake health-promoting actions, especially as regards proper nutrition.[26] Studies indicate that one of the major contributors to the incidence of this kind of diseases is a poor diet, including, in particular, excessive sugar consumption.[27] It is also reported that sugar-sweetened beverages (SSBs), which are often consumed without concern for the amount of sugar they contain, are a significant source of

[23] Public Health Act of 11 September 2015 (Ustawa z dnia 11 września 2015 r. o zdrowiu publicznym) [2022] JoL [Journal of Laws] 1608.

[24] WHO, 'Obesity and Overweight' (2021) <www.who.int/news-room/fact-sheets/detail/obesity-and-overweight> accessed 9 October 2023.

[25] WHO, 'Health Taxes: A Primer' (2016), 1–4 <www.who.int/publications-detail-redirect/WHO-UHC-HGF-PolicyBrief-19.7> accessed 9 October 2023; Ian Kudel, Joanna C Huang and Rahul Ganguly, 'Impact of Obesity on Work Productivity in Different US Occupations: Analysis of the National Health and Wellness Survey 2014 to 2015 (2018) 60(1) Journal of Occupational and Environmental Medicine 6, 6–7.

[26] Lorenzi (n 9) 59–65.

[27] WHO, 'Taxes on Sugary Drinks: Why do it? (2017), 1–4 <https://apps.who.int/iris/bitstream/handle/10665/260253/WHO-NMH-PND-16.5Rev.1-eng.pdf> accessed 9 October 2023.

risk, especially among children and adolescents. Hence, it can be concluded that sweetened beverages constitute harmful goods that negatively affect the society's well-being. This finding creates an incentive to the development of public policies aimed at combating such negative phenomena as excessive sugar consumption. Thus, in various international debates their participants have repeatedly raised the question of the potential for taxes to be used as instruments of fiscal nature that, on the one hand, reduce the level of demand for goods containing unhealthy ingredients and, on the other hand, provide a source of budgetary revenue that can be used to support education and health-promoting activities. A tax that would be both a sin tax (including the punitive element in the form of a higher price) and a Pigouvian tax (incorporating the specific allocation method of tax revenue for health-promoting activities and education) has been proposed as a solution to this problem.

The World Health Organization (WHO) holds a distinctive leadership position in promoting and creating such instruments in various jurisdictions.[28] In its recommendations, the WHO urges its member states to implement such models of sugar taxes so that the tax rate would depend on the amount of sugar added, for example, in a sweetened beverage. The organization has adopted a standpoint that the legitimacy of introducing solutions aimed at reducing the consumption of excess sugar should not be undermined in view of the negative impact of this substance on human health.[29] Furthermore, it takes the view that – given the argument that some section of the population will not give up the consumption of harmful goods on their own, despite their knowledge of the detrimental effects of excessive sugar intake – regulatory measures of fiscal nature are needed to influence citizens' behaviour or, at the very least, to mitigate the social damage associated with excessive exposure to substances harmful to health.

The arguments presented by the WHO seem to appeal to its member states. This is clearly indicated by data on the number of implementations of such solutions worldwide. The most reliable and frequently updated database of sugar taxes in force is maintained by the World Bank.[30] According to the February 2023 data, already 121 tax jurisdictions in the world have implemented solutions corresponding to taxes imposed on sugar-sweetened beverages; it is worth noting that this database includes not only taxes selectively imposed on sugar-sweetened beverages but also levies that are variously designed to make SSB consumption less

[28] WHO, *Global Action Plan for Prevention and Control of Non-communicable Diseases 2013–2020* (WHO 2013) <http://apps.who.int/iris/bitstream/handle/10665/94384/9789241506236_eng.pdf;jsessionid=C017212026651DEB1EE0D9BA9E1DE965?sequence=1> accessed 9 October 2023; WHO, *Taxes on Sugar-Sweetened Beverages as a Public Health Strategy: The Experience of Mexico* (WHO 2015) <https://iris.paho.org/bitstream/handle/10665.2/18391/9789275118719_eng.pdf?sequence=1&isAllowed=y> accessed 9 October 2023.

[29] WHO, *Global Action Plan* (n 28) 19–31.

[30] World Bank Group, 'Global SSB Tax Database' (last updated 2023) <https://ssbtax.worldbank.org> accessed 9 October 2023.

attractive (e.g. through increased rates of value-added taxes). According to the World Bank estimates, currently 52% of the world population is burdened by such taxes.[31] At the same time, a relatively small number of European WHO member states make use of such instruments, as only 10 of 53 European WHO member states included a tax on sweetened beverages in their tax systems by 2022. It is noteworthy that several countries imposed identical taxes on high-calorie products other than beverages, for example sweets, but have subsequently withdrawn these measures.[32] At the same time, taxes on sweetened beverages remain a relatively stable solution. In practice, levies on sweetened beverages in most countries are characterized by a fairly similar design, especially with regard to the object of taxation. Still, tax rates on sweetened beverages can be determined in various ways. A frequent solution is to use three thresholds for the sugar content per 100 ml of the finished product: 5, 6 and 8 grams. The sugar content influences the differentiation of rates, which increase to some extent along with this factor.[33] In most cases, the regulations on sugar taxes came into force between 2014 and 2021; this indicates that the idea of taxing sweetened beverages is still an international phenomenon.

IV. CONCLUSIONS

Economic concepts influence and will continue to influence public policy, including new regulations of fiscal nature. The example of the Pigouvian theoretical concept of taxation provides a vivid illustration of a situation in which the disciplines of law and economics merge and intertwine. In this case, the models of neoclassical economics encourage the emergence of laws aimed at providing appropriate instruments that would help the developed concepts come to fruition. Subsequently, the introduced regulations are subjected to economic verification, or precisely econometric verification, based on the assumptions of the economic analysis of law. When developing instruments of fiscal nature, it is therefore impossible to formulate provisions without first having an economic concept of how they should be shaped, and it is also impossible to maintain the status quo of such regulations without subjecting their effectiveness to cyclical, quantitative evaluation.

[31] ibid.

[32] Laura Cornelsen and others, 'Why Fat Taxes won't Make us Thin' (2015) 37(1) Journal of Public Health 18, 18–23.

[33] WHO, *WHO Manual on Sugar-Sweetened Beverage Taxation Policies to Promote Healthy Diets* (WHO 2022) 60.

However, in the case of legislative processes that lead to the implementation of solutions of economic nature, it is worth bearing in mind the sources based on which the potential effectiveness of the instruments in question should be assessed. A prominent example is the Pigouvian tax discussed in this paper, which is primarily and practically aimed at producing the desired behavioural effect. Indeed, the basis for the development of this framework of tax legislation are relatively historical mathematical, neoclassical models of the 19th and 20th centuries that are characterized by strict assumptions, the most specific of which is the rationality of consumers. Another source is empirical verification carried out using non-dynamic econometric models. Consequently, the economic analysis of law in the case of this type of fiscal instrument may not be an effective method to properly analyse the effects of the implemented regulations, which has been pointed out in this paper. Certainly, in such cases, the observation of external events and comparison of statistical data, for example, changes in turnover or in the amount of tax revenue, may help in a more reliable and consistent interpretation of the effectiveness of fiscal policies, although this will not allow one to examine the direct impact of these policies on the analysed phenomena. The conclusion that can be drawn is that there are economic assumptions which, if implemented in legal systems, cannot be effectively subjected to the economic analysis of law. At first glance, this conclusion may appear somewhat ambiguous. Indeed, it seems that regulations that find their justification in economic theory should allow the most reliable verification of their implementation.

However, it appears that there are numerous phenomena of economic nature for which economic thought has not yet found the most reliable verification. For example, to verify the effectiveness of an imposed tax, one would like to determine whether the tax has truly had a significant impact on the decline in demand for the taxed product or whether other factors, for example non-fiscal determinants, have had a stronger influence on this trend. To answer this question, it is necessary to study not only the economic indicators but also the behavioural effect of a regulation. As is the case with the described sugar taxes on SSBs, the economic empirical evidence has proven the policy effectiveness: the decline in demand together with the increase of the government revenue due to the implementation of these taxes that was additionally spent on the health-promoting activities. However, the main issue, i.e. the social problem connected with the excessive consumption of sugar in the overall population, remained unresolved.[34] Therefore, the major goal of the implemented regulation, in fact, was not achieved, despite the proper, from the theoretical point of view, design of the respective fiscal instrument. Such phenomenon can be explained only by the behavioural nature of the consumption decisions made by individuals. Every person exhibits specific preferences for a particular lifestyle, including dietary habits, that are influenced by numerous

[34] Cornelsen and others (n 32) 18–23.

factors, not only those specifically regulated by law and based on mathematical and theoretical assumptions. An attempt to calculate them mathematically may prove to be an oversimplification in the description of realities in which general and abstract legal rules are intended to operate. Phenomena of a behavioural and non-obvious nature must, therefore, be interpreted in a broader context than in a strictly economic sense in order to explain them correctly. Therefore, when analysing regulations introduced to influence the behaviour of individuals, it is also necessary to take into account the output of other disciplines, for example psychology and sociology, even if the inspiration for the regulations in question is well grounded in and drawn from economic theories. For this reason, it can be argued that the economic analysis of law, although itself a valuable cognitive method, should never be the only component of the analysis of a regulation, even if it has a strictly economic basis.

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STRUCTURAL DEPTH IN REFORMS INDUCED BY IMF PROGRAMS: INSIGHTS FROM THE FUND'S MAJOR DEBTORS

Abstract

This paper investigates the evolution of IMF structural conditionality, with a specific focus on non-core policy areas, across the Fund's top debtors from 1984 to 2023. The author builds on the concept of structural depth as defined by the IMF's Independent Evaluation Office (IEO), categorizing it into high, medium, and low levels, guided by legal-economic perspectives. Analysing 1,233 conditions, she reveals nuanced patterns. The biggest borrowers often faced more policy prescriptions with significant share of non-core areas, while conditionality depth varies across countries and periods. Argentina's unique case exhibits fewer and shallower conditions, despite significant challenges. Greece and Ukraine stand out with deep programs, attributed to the European influence. Recent agreements blend Washington Consensus-inspired and non-conventional measures, including social buffers and transparency. These developments, while positive, raise questions about their ability to transform borrowers into more resilient welfare states.

KEYWORDS

structural conditionality, structural depth, IMF, major debtors

SŁOWA KLUCZOWE

warunkowość strukturalna, głębokość strukturalna, MFW, główni dłużnicy

I. INTRODUCTION

Structural conditionality, involving reforms requested by the International Monetary Fund (IMF or Fund) in return for its financial assistance, has a controversial history and has carried stigma for the institution. In response to mounting criticism, the Fund initiated an internal reform process in the early 2000s aimed at streamlining this practice. While scholars have extensively analysed the effects of IMF-prescribed reforms using methods such as counting the total number of conditions and categorizing them by policy area, these approaches do not fully capture the complexity and potential intrusiveness of these measures into borrowers' legal systems.

This paper introduces the concept of structural depth, building upon the initial definition by the IMF's Independent Evaluation Office (IEO)[1] and adopting a legal-economic perspective. I categorize condition depth into three levels: high (involving legislative and systemic changes), medium (encompassing regulatory, administrative, and operational shifts), and low (including initial steps and information sharing). The analysis covers 1,233 conditions assessing changes and continuities among the largest debtors since 1984 to the present day. This group has not yet been systematically studied in the literature. I argue that conditionality and its depth within this group are distinctive, given the significant financial and reputational risks associated with the IMF's dual role as a lender and supervisor of structural adjustments.

The paper is structured as follows: section II below briefly explains the definition and historical evolution of IMF structural conditionality. Section III outlines the rationale for the case studies. Section IV details the methods and how I classify and refine the definition of structural depth. Section V presents the results, and finally, in section VI, I draw the conclusions.

[1] IEO, *Structural Conditionality in IMF-Supported Programs* (Evaluation Report, Washington 2007) 1–21.

II. IMF CONDITIONAL PROGRAMS AND STRUCTURAL ADJUSTMENT

IMF conditionality has been a focal point of extensive discussions within scholarly literature and public deliberations. In contrast to 'softer' activities, such as technical assistance and supervision, the Fund's conditions serve as one of the most contentious 'hard' mechanisms for intervening in domestic policies.[2] These conditions are integral to widely used IMF lending instruments, including Standby Arrangements (SBA) and Extended Fund Facilities (EFF). They require borrowers to implement certain policies in exchange for financial support, usually amid deep crises and when access to other funding sources is limited. The execution of the prescribed reforms is evaluated through periodic reviews, affecting the release of funds.

The legal controversy surrounding conditionality arises because it was not initially included in the original *Articles of Agreement* (AOA). However, from the outset, the IMF's statute has emphasized the paramount importance of addressing balance of payments (BOP) problems while safeguarding its own resources. Serving these dual objectives, the legal foundation for the Fund's conditionality was introduced by the Executive Board and incorporated into the first amendment of the AOA in 1969, specifically in Article I(v) and Article V section 3(a). These provisions mandate the adoption of policies to assist members in resolving their BOP problems and consider them 'adequate safeguards for the temporary use of the Fund's general resources'.[3] In contrast, Article V section 4 outlines the waiver mechanism for unfulfilled conditions. However, the AOA lacks specificity regarding the design of conditions and the policy areas under scrutiny, thereby allowing room for interpretation and debate, and leaving the door open for potential expansion. The specific prescriptions have been defined over time through the approval of formal Guidelines and Guidance Notes to the Staff by the IMF's Executive Board. The initial objective of simply serving as collateral has evolved, in the context of free markets, to also have a presumed catalytic effect on private financial flows, effectively acting as a 'seal of approval' of the Fund.[4] Technically, two types of conditions are distinguished: quantitative and structural.[5] Quantitative conditions, including mandatory Quantitative Performance Criteria (QPC)

[2] Bessma Momani, 'Limits on Streamlining Fund Conditionality: The International Monetary Fund's Organizational Culture' (2005) 8 Journal of International Relations and Development 142, 159.

[3] IMF, *Articles of Agreement of the International Monetary Fund* (IMF, Washington 2020), Art V s 3(a).

[4] Marco Committeri and others, 'Conditionality and Design of IMF-Supported Programmes' (2019) 235 ECB Occasional Paper Series, 10.

[5] Alexandros E Kentikelenis, Thomas H Stubbs and Lawrence P King, 'IMF Conditionality and Development Policy Space, 1985–2014' (2016) 23(4) Review of International Political Economy 543, 555.

and non-binding Indicative Benchmarks (IB), are short-term prescriptions aimed at addressing imbalances. These involve measurable targets – usually in the form of ceilings or floors – on fiscal and monetary indicators, debt, credit, international reserves, and occasionally inflation, wages, and privatization profits. Apart from social spending floors, these conditions generally centre on procyclical fiscal austerity and restrictive monetary policies, placing excessive focus (and perhaps hope) on the proper functioning of the market mechanism, and entrusting the short-term crisis resolution to supposedly rational investors and market confidence.

On the other hand, structural conditions – which are the primary focus of this paper and comprise mandatory Prior Actions (PA), Structural Performance Criteria (SPC), and non-binding Structural Benchmarks (SB) – clearly specify the means and, as such, limit the borrowers' policy space.[6] Since their implementation involves complex and longer policy processes, they are not meant for immediate crisis resolution but to foster macroeconomic stability over the medium and long term.

While quantitative conditions had accompanied IMF loans from their inception, the late 1980s and 1990s witnessed a significant increase in structural adjustments and an expansion of policy areas under consideration, a trend often termed 'mission creep'.[7] The number of structural conditions surged from an average of one per year in the mid-1980s to a peak of approximately 16 measures in the late 1990s.[8] This increase can be partly attributed to the IMF's redefinition following the end of the Bretton Woods era and the abandonment of the gold-parity system, which left the Fund's mandate void, alongside with the dissolution of the USSR and the pivotal role of Washington-based financial institutions in guiding post-Soviet states towards market-oriented economies. The expanding conditionality scope was influenced by the principles of the Washington Consensus (WC). Originally designed to address debt crises in Latin America in the 1980s, the WC introduced several guiding rules, including a fiscal discipline, reallocating public expenditure towards a leaner state, broadening tax bases, encouraging privatization, implementing economic deregulation, and liberalizing trade, foreign investment, prices, interest and exchange rates.

However, despite the intended goals of assisting countries in achieving stability, the application of the WC-inspired structural adjustment consistently exacerbated crises, worsened economic and social indicators, and weakened the core functions of the states.[9] These challenges led to heightened criticism of the IMF

[6] ibid 555.

[7] Sarah Babb and Ariel Buira, 'Mission Creep, Mission Push and Discretion in Sociological Perspective: The Case of IMF Conditionality' (XVIII G24 Technical Group Meeting, Geneva, 8–9 March 2004).

[8] Alexandros E Kentikelenis and Thomas Stubbs, *A Thousand Cuts: Social Protection in the Age of Austerity* (Oxford University Press 2023) 31.

[9] Numerous studies have extensively examined the adverse effects of the IMF structural conditionality. This body of literature is broadly discussed in Kentikelenis and Stubbs (n 8) 41–73.

in the early 2000s, further aggravated by its mishandling of crises in Asia, Russia, Brazil, and Argentina.[10] In response, the Fund embarked on an internal reform process and a streamlining initiative.[11] The reassessment of conditionality was imperative for two main reasons. Firstly, the documented adverse effects of IMF programs appeared to contradict the essence of Article I(v) AOA, which aimed for the Fund's programs to rectify BOP maladjustments 'without resorting to destructive measures of national or international prosperity'.[12] Secondly, the initiative addressed the issue of conditions expanding into areas with little or no direct relevance to resolving BOP problems, thereby falling outside the Fund's mandate. This shift in approach was formalized in 2000 through the Managing Director Interim Guidance Note, which specified that conditionality should exclusively cover structural reforms relevant to macroeconomic objectives within the Fund's core responsibilities.[13] These principles were further detailed in the 2002 'Guidelines on Conditionality', which still represent current pillars of the institution's policy prescriptions and are grounded in five principles: ownership, parsimony, tailoring, coordination with other multilateral institutions, and clarity.[14] The streamlining initiative culminated in the removal of binding SPC in 2009. Since then, the structural adjustment process has relied on PA and non-binding SB, reviewed at the IMF Staff discretion. The average number of structural conditions has decreased but remained at around 11 per year.[15] However, several non-core policy areas still remain on the conditionality agenda. The IMF's rebranding also led to changes in the coverage of structural conditionality, with a shift towards less conventional measures, often referred to as the Post-Washington Consensus. This gradual extension of the paradigm, which deepened further during the 2008 Global Financial Crisis (GFC) and the recent pandemic, involved expanding structural conditionality to include strengthening safety nets, increasing targeted social assistance, improving governance, promoting gender equality, and introducing conditions to enhance resilience to climate change risks, among other measures.[16] However, many scholars remain sceptical of the recent changes in structural conditionality. They perceive the increased flexibility and the inclusion of socially oriented measures as a discursive layer intended to soften the IMF's

[10] Ricardo J Caballero, 'The Future of the IMF' (2003) 93(2) American Economic Review 31–38.

[11] Graham Bird, 'Reforming IMF Conditionality' (2009) 10(3) World Economics 81–104.

[12] IMF, *Articles of Agreement* (n 3) Article 1(v).

[13] IMF, 'Streamlining Structural Conditionality in Fund-Supported Programs' (Interim Guidance Note, Inter-Departmental Working Group, Washington 2000).

[14] IMF, 'Guidelines on Conditionality' (IMF Decision No I, Legal and Policy Development and Review Departments, Washington 2002).

[15] Kentikelenis and Stubbs (n 8) 32.

[16] Ali B Güven, 'Whither the Post-Washington Consensus? International Financial Institutions and Development Policy before and after the Crisis' (2018) 25(3) Review of International Political Economy 392–417.

image rather than a substantial alteration in its operational practices and policy guidance.[17]

III. COUNTRY CASE SELECTION

When studying conditions attached to loans provided to the IMF's major debtors, a key observation emerges: these significant borrowers are rarely studied as a distinct group. Research has primarily focused on global conditionality trends[18] or individual country analyses, with some comparisons made.[19] The Fund's IEO has explored conditions in cases of a prolonged IMF resource use, but major debtors have not been studied as a distinct group.[20]

This research gap is significant, considering the financial risks for both debtors and the IMF. The Fund has historically directed a substantial portion of its disbursements to a limited group of countries. This concentration, which has increased over time, has implications for the IMF's reputation, given its dual role as creditor and supervisor, and for its financial exposure and risk management strategies, potentially influencing how these countries are treated.

Table 1. Evolution of top 15 IMF debtors (1984–2023)

		Share of disbursements (as % of the total)				
	Top 15 debtors (1984–2023)	1984–2023	1984–1999	2000–2009	2010–2019	2020–2023
1	Argentina	**15.5**	6.7	12.6	19.6	25.2
2	Brazil	**7.9**	7.7	23.6	0	0
3	Turkey	**6.2**	0.9	23.5	0	0
4	Ukraine	**5.8**	2.0	5.8	7.6	7.8
5	Greece	**5.5**	0	0	17.0	0
6	Portugal	**4.6**	0.1	0	14.1	0
7	Ireland	**3.9**	0	0	11.9	0
8	Pakistan	**3.6**	1.8	4.3	4.0	4.6
9	Mexico	**3.4**	13.0	0.7	0	0
10	Russian Federation	**3.1**	12.4	0	0	0

[17] See André Broome, 'Back to Basics: The Great Recession and the Narrowing of IMF Policy Advice' (2015) 28(2) Governance 147–65; Kentikelenis and Stubbs (n 8).

[18] Kentikelenis, Stubbs and King (n 5) 552–61.

[19] The IEO conducts special ex-post assessments of programs that exceed normal access quotas, which applies to many major debtors. There are numerous studies focusing on the specific relationships between each major debtor and the IMF, and some comparisons; see Fernanda Nechio, 'The Greek Crisis: Argentina Revisited?' (2010) 33 FRBSF Economic Letter.

[20] IEO, *Evaluation of Prolonged Use of IMF Resources* (Evaluation Report, Washington 2002) 1–222.

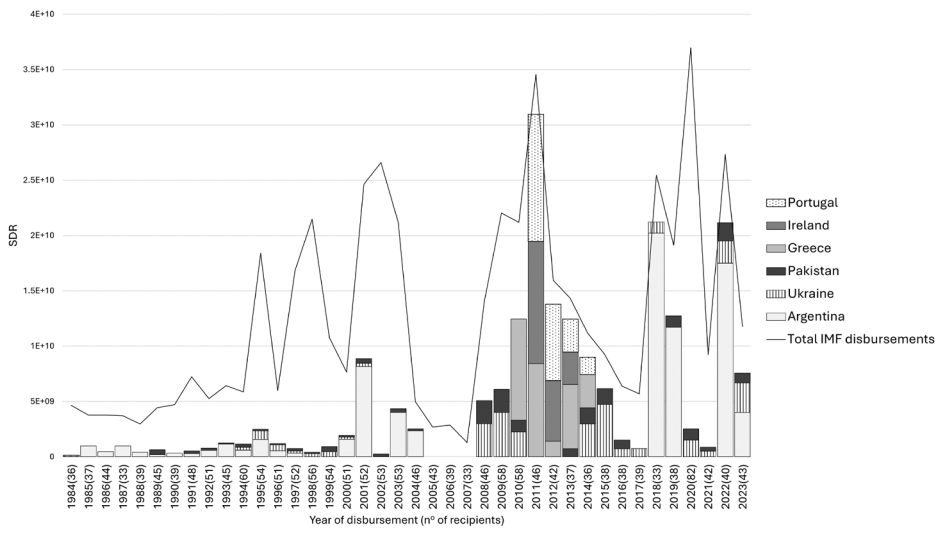
11	Korea	**3.0**	12.0	0	0	0
12	Egypt	**3.0**	0.2	0	5.3	7.1
13	Romania	**2.5**	1.0	5.1	2.7	0
14	Indonesia	**2.3**	6.3	2.8	0	0
15	Hungary	**1.8**	1.2	6.0	0	0

Note: The group of selected countries, chronic debtors, highlighted in grey, Eurozone debtors in light grey. Throughout the 1984–2023 period, each debtor received at least one IMF disbursement. Data presented up to July 2023.
Source: Elaborated by Agata Breczko based on IMF financial data

In the selection of borrowers (Table 1), I highlight the top 15 debtors over the extensive 1984–2023 period, based on their individual shares of total IMF disbursements during this timeframe. This analysis identifies four distinct subperiods, each reflecting different phases in the Fund's evolving approach to conditionality.

Among the top debtors, Argentina, Ukraine, and Pakistan have consistently maintained their prominence across all four subperiods and throughout the entire 1984–2023 period. Notably, Argentina, currently the Fund's biggest debtor, has received 15.5%, Ukraine 5.8%, and Pakistan 3.6% of total IMF disbursements from 1984 up to the present. Despite being shaped by their unique contexts, these three cases serve as quintessential examples of traditional middle-income clients of the Fund, marked by their prolonged and often tumultuous historical interactions.

Figure 1. IMF disbursements in selected debtor countries



Source: Elaborated by Agata Breczko based on IMF financial data (up to July 2023)

The second group of interest stands out as a 'unique anomaly' in the Fund's portfolio history (Figure 1). This group consists of high-income Eurozone economies, which introduced a new dimension to IMF involvement, implying close collaboration with other supranational entities (European Central Bank and European Commission) and foraying into nations with reserve currencies.

In this context, Greece, Portugal, and Ireland emerge as notable recipients of total IMF disbursements. They hold the fifth, sixth, and seventh positions, respectively, among the top debtors for the period from 1984 to 2032. What is intriguing, their influence was observed over a relatively short span of time, just five years from 2010 to 2014, limited to only four arrangements. This sharply contrasts with the prolonged engagement experienced by the first group of countries, spanning a total of 34 years and encompassing 41 conditional programs since 1984. It is noteworthy that both Argentina and Pakistan had undergone several arrangements also prior to 1984, with the Fund's interventions often tied to controversial financing of their military dictatorships.[21]

The chosen countries provide a valuable opportunity to compare the IMF engagement and reform depth in advanced economies with middle-income major clients. This analysis explores whether the reforms in both scenarios align with the IMF trends or differ due to significant financial stakes and reputational implications.

IV. METHODS, DATA AND CODING OF STRUCTURAL DEPTH

Studies on conditionality employ various methodologies, with two prevalent approaches. One assesses conditions based on their total number, sometimes classifying them by the stringency level (binding or non-binding) or implementation status. The other approach focuses on the scope by examining the total policy areas subject to conditionality.[22] When categorized into specific policy domains, measures are typically divided into core and non-core to the Fund's expertise.[23] While these methods enable detailed analysis and modelling, they may not fully capture the complexity of each condition.

[21] Paul Cooney, 'Argentina's Quarter Century Experiment with Neoliberalism: From Dictatorship to Depression' (2007) 11 Revista de economia contemporanea 7–37.

[22] Detailed review of these methods in the literature is presented in Kentikelenis and Stubbs (n 8) 41–73.

[23] In Kentikelenis and Stubbs (n 8) 32, core-related conditions include debt, financial and monetary policies, fiscal and revenue measures, and external sector issues. Non-core measures are associated with institutional reforms, labour and pensions, SOEs and subsidies, and poverty reduction.

For instance, in the case of conditions both related to the same category, like social security, such as 'Parliamentary approval of pension legislation' (2016-EFF, Ukraine) and 'Submission to congress of draft law on pension reform' (2000-SBA, Argentina), they would be treated indistinguishably. However, while the first requires the completion of a legislative process, the other represents only its initial stage. This distinction highlights a major limitation of previous approaches, as they often fail to adequately account for the extent to which a given condition is expected to permeate the borrower's legal system and institutions.

To address this gap, I focus on the concept of structural depth, initially introduced and further developed by the Fund's IEO in its special reports on conditionality.[24] The IEO defines depth as the degree and durability of structural change that a specific condition would bring about if implemented. However, this definition raises challenges related to manually coding conditions to accommodate the diverse characteristics of IMF borrowers. Alexandros E Kentikelenis and Thomas Stubbs argue that such general criteria applied to different institutional environments across countries can become arbitrary, potentially resulting in an unacceptable degree of subjectivity in the coding process.[25] To overcome these coding limitations, I provide a much more detailed and nuanced definition of the three different levels of structural depth, based on a legal-economic perspective.

While acknowledging the differences among all borrowers, it is important to note that within democratic contexts, a differentiation exists between legislation and regulation. I draw on the work of Nir Kosti, David Levi-Faur and Guy Mor to define this distinction in virtue of its source, asserting that legislation originates from legislatures (Parliament, Congress, National Assembly) as primary legislation, laws, bills, or acts, while regulation is enacted by the executive branch and/or bureaucracy as secondary or enabling legislation, decrees, among others.[26] In essence, the legislative process involves the formulation of overarching principles of public policy, while regulation is the instrumental implementation of these principles, often bringing legislation into effect. This straightforward differentiation forms the foundational framework for the depth classification.

The high-depth category (1) encompasses extensive systemic and legislative modifications, including the enactment and amendment of laws by parliamentary bodies. It also involves comprehensive overhauls of entire systems, such as labour or pension reforms, and enduring changes in ownership, like the privatization and sale of shares.

[24] IEO, *Structural Conditionality* (2007, n 1) 1–21. This methodology has also been used in the IEO's report update and the 'Review of Program Design and Conditionality' updates and applied in ex-post evaluations (2015 program in Ukraine).

[25] Kentikelenis and Stubbs (n 8) 32.

[26] Nir Kosti, David Levi-Faur and Guy Mor, 'Legislation and Regulation: Three Analytical Distinctions' (2019) 7(3) The Theory and Practice of Legislation 169–78.

Conversely, the medium-depth category (2) is regulatory in nature and primarily relates to the implementation stage, involving procedural, administrative, and operational adjustments. It also includes one-off measures, such as specific targets on revenues, wages, employees, tariffs, prices, lifting restrictions, and one-year budget approval (by the Parliament).

Finally, the low-depth (3) classification covers preliminary stages of future high- and medium-depth changes. These stages involve preparation, announcement, and the submission of plans, reforms, draft laws to government bodies. It also includes transparency-enhancing measures, like sharing data and information.

To analyse the structural depth of IMF conditionality within the selected groups of countries, I have utilized the IMF Monitoring of Fund Arrangements (MONA) database and the MONA archives, which combined, contain condition data spanning from the 1990s to the present. Given that the MONA database frequently includes repeated conditions due to multiple reviews within the same programs, data cleaning has been necessary to refine the analysis. The final dataset comprises 1,233 structural conditions across a total of 36 programs. Within this dataset, 239 measures pertain to the Eurozone countries' group, while the remaining 994 are associated with the chronic debtors' group.

V. RESULTS

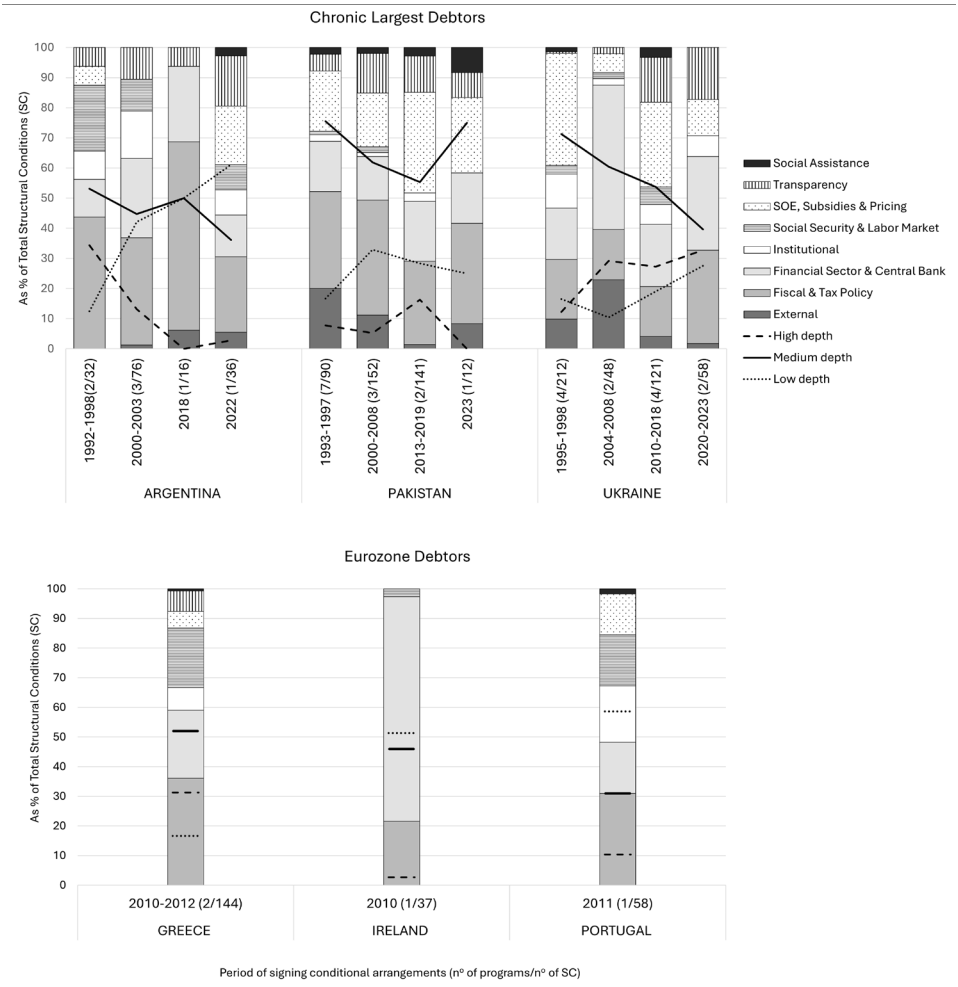
The largest debtors analysed in this study consistently exceeded the global averages of structural conditions assessed by the IEO for different periods. For instance, during the 2003–2007 period, countries averaged 17 structural conditions per year. From 2010 to 2017, this average dropped to 6 per completed review.[27] Specifically, Argentina, Pakistan, and Ukraine maintained respective averages of 23, 30, and 37 measures per program throughout the examined timeframe. In contrast, Greece, Ireland, and Portugal had even higher averages of 72, 37, and 58 conditions per arrangement, respectively.

Figure 2 reveals that conditions related to the core competencies of the Fund generally only hold a slight advantage. In turn, despite the streamlining initiative's aim to limit them, non-core conditions still make up a significant portion of many programs across different periods, including both chronic debtors and Greece and Portugal in the Eurozone. These non-core measures can range from approximately 30% to well over 50% of the total conditionality. Throughout the study period, only a few programs primarily focused on fiscal and financial con-

[27] IEO, *Structural Conditionality* (2007, n 1) 1; IEO, *Structural Conditionality in IMF-Supported Programs* (Evaluation Update, Washington 2018) 1.

cerns, such as the 2018-SBA in Argentina, Ukraine's programs in 2004 and 2008, and the fully core-related 2010 Irish EFF.[28]

Figure 2. Composition and depth of IMF structural conditionality over time



Source: Elaborated by Agata Breczko based on MONA

The content of non-core measures varies across countries and timeframes. Pakistan and Ukraine consistently incorporated conditions related to State-

[28] This contrasts with the global findings presented by Kentikelenis and Stubbs (n 8) 34, where they indicate that non-core conditions reached their peak at 20% of total conditions in 1999 and remained below this threshold in subsequent periods.

Owned Enterprises (SOEs), subsidies, and prices in all their programs, while such measures gained importance in Argentina up until 2022. Greece and Portugal also included SOE-related conditions. Broader institutional reforms, including those targeting the judiciary system, sectorial reforms, and competitiveness, were a common feature in most programs. Social security and labour market measures were prominent in Argentina's experience and later repeated in Greece and Portugal. Furthermore, there has also been a growing trend toward including Post-Washington Consensus measures, encompassing good governance and social assistance.

External policies, classified as core-related by Kentikelenis and Stubbs[29] but considered non-core by the Fund's IEO,[30] primarily involved medium-depth regulatory and operational changes, such as lifting specific restrictions. These measures played a crucial role in shaping the economic landscapes of Pakistan and Ukraine in the 1990s and early 2000s (and even sooner in Argentina[31]) as they transitioned to open-market economies. Although not explicitly mandating legislative changes, these medium-depth conditions had a significant structural and economic impact, affecting both economic integration and vulnerability to global markets.

The overall depth of conditionality varies significantly among chronic debtors: in Argentina, high-depth measures have dwindled from 34% of conditions to just 3% in the most recent arrangement. In the current program, low-depth prescriptions constitute the largest share at 61%, followed by medium-depth measures at 36%. Pakistan has historically had a smaller share of high-depth conditions, with a predominance of medium-depth measures. In contrast, Ukraine has seen historical growth in high-depth conditionality, reaching 33% (from 12% in the 1990s) of the total in the current arrangement, along with 40% of medium-depth measures. This trend may be attributed to Ukraine's aspiration to join the EU and the consequent need to align with its standards, proposing ambitious reforms despite the challenging backdrop of the war with Russia. In the Eurozone, the Greek program is characterized by its notably profound nature, accounting for 31% of high- and 52% of limited-depth measures. In contrast, structural adjustments in Portugal and Ireland rely mostly on low- and medium-depth conditionality.

Figure 3 offers a detailed picture of structural depth in selected non-core policy areas – related to SOEs and labour market – that have historically been sources of controversy and yet remain part of the conditionality menu. The figure also facilitates a comparison between the depth of these conventional measures

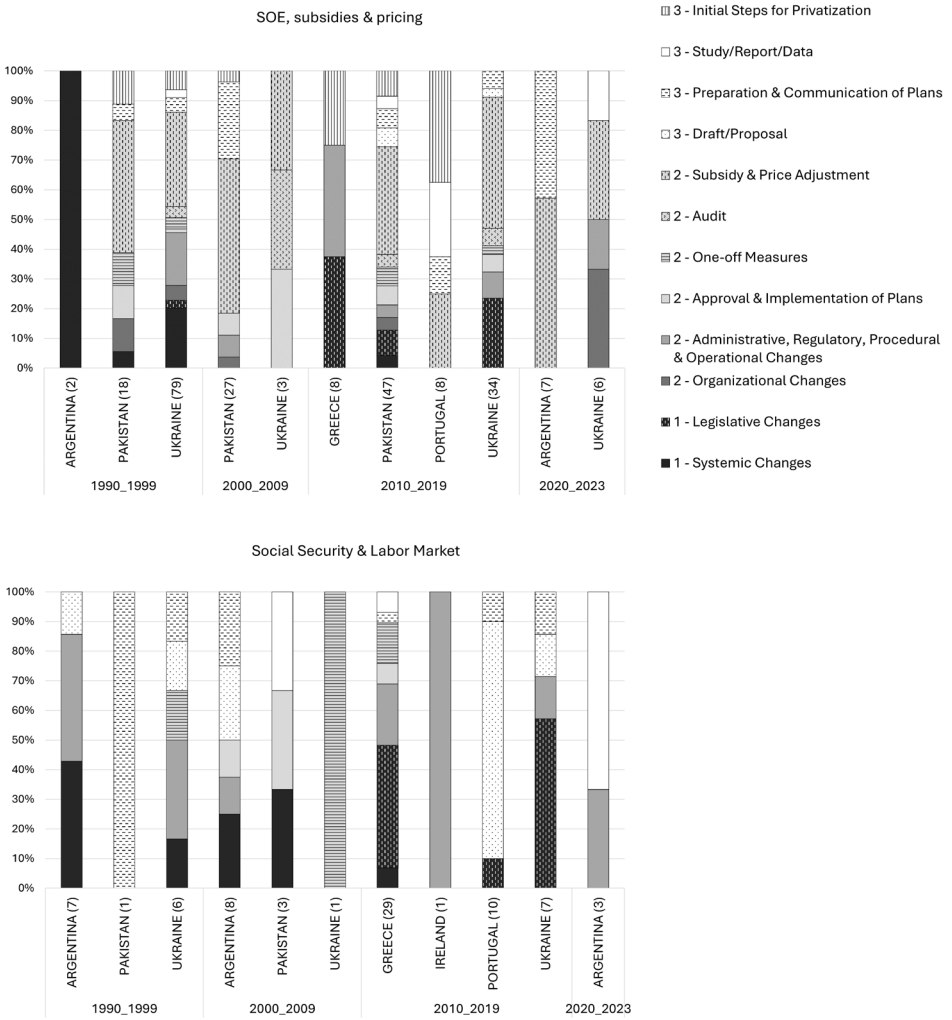
[29] Kentikelenis and Stubbs (n 8) 34.

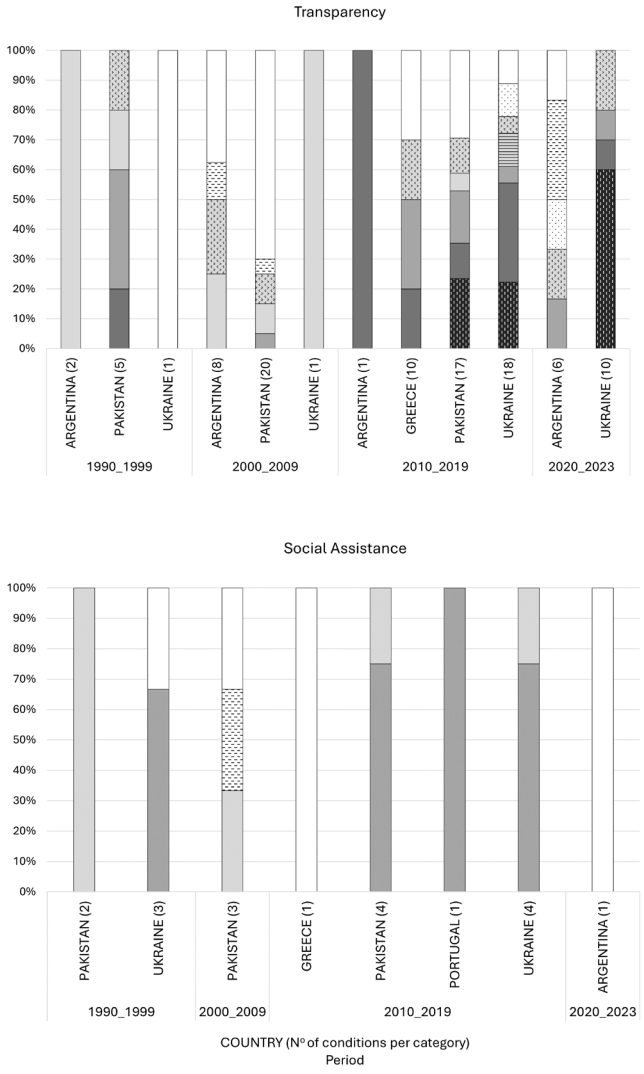
[30] IEO, *Structural Conditionality* (2018, n 27) 11. IEO considers trade policy to be non-core, and exchange system to be core.

[31] Judith A Teichman, *The Politics of Freeing Markets in Latin America: Chile, Argentina, and Mexico* (The University of North Carolina Press 2001) 24.

and non-conventional (Post-Washington Consensus) conditions aimed at expanding social assistance and advancing good governance.

Figure 3. Structural depth of selected IMF non-core policy categories





Note: '1' refers to high-depth, '2' to medium-depth, and '3' to low-depth measures. Values are expressed as a percentage of the total conditions in each category.
Source: Elaborated by Agata Breczko based on MONA

In the realm of SOEs, subsidies, and pricing, high-depth measures primarily revolve around completing privatizations, constituting about 71% of high-depth SOE-related measures. Historically, the imposition of conditions requiring privatization was a common practice among chronic debtors in the 1990s, resulting in significant ownership changes in telecommunication, banking, and nuclear plants in Argentina, in the agricultural sector in Ukraine, and sale of industrial plants

in Pakistan. The high-depth privatization approach resurfaced in Greece, requiring legislative approval for the execution of comprehensive privatization plans. However, recent agreements (with Ukraine and Pakistan) have seen high-depth SOE-related measures shift away from privatization, instead emphasizing legislative changes related to SOEs' institutional framework and the functioning of gas and energy markets.

Moreover, Figure 3 illustrates that, in addition to privatization, SOE-related measures predominantly employ medium-depth strategies. These strategies often focus on executing specific plans and organizational changes to enhance the efficiency and sustainability of specific enterprises, primarily within the energy and water sectors. However, most of SOE-related measures involve specific requirements linked to price and subsidy adjustments which can range from one-off changes to more permanent alterations, like the installation of automatic price mechanisms. Additionally, these measures frequently lead to increases in domestic prices for consumers, particularly in gas, energy, electricity, and housing. Except for Argentina, adjustments in prices and subsidies have been a common feature in past and current IMF interventions with all chronic debtors, including Greece and Portugal. The content of these conditions has seen little substantial change over time.

Argentina, however, stands out as an exception. Firstly, the country only introduced subsidy adjustments in its most recent 2022-IMF program. This deviation is attributed to Argentina's unique circumstances, as the issue of subsidizing energy became a significant problem after a decade under the Kirchner administration.[32] Interestingly, in the 2018-agreement, the problem was mentioned but not included as conditionality, probably due to its high electoral cost. Secondly, there are noteworthy differences in the content of the price-related conditions for Argentina. In this case, the IMF has allowed a more gradual and progressive approach to phasing out subsidies. This involves completely removing subsidies for consumers with the highest payment capacity, significantly reducing them for the middle class once they reach a specific level of consumption and retaining subsidies for the most vulnerable sectors while linking them to average wage growth.[33] This approach marks a slight departure from the conventional practice, where subsidy cuts are typically applied uniformly across all sectors.

During the 1990s and early 2000s, chronic debtor countries were also required to undertake comprehensive structural reforms of their entire social security systems (Argentina, Ukraine, and Pakistan) and labour markets (Argentina). These high-depth systemic changes were often accompanied by medium-depth measures, including the issuance of implementing regulations and specific one-off actions aimed at gradual reduction in salaries, wage/non-wage benefits, raising

[32] ASAP, *Los subsidios energéticos en Argentina* (ASAP, Buenos Aires 2015).

[33] IMF, *Argentina: Third Review under the Extended Arrangement under the Extended Fund Facility* (Country Report No 2022/388, Washington 2022) 76.

the retirement age, and tightening eligibility criteria for early retirement. Despite the significant adverse impact of these measures on workers and pensioners in chronic debtor countries, contributing to austerity fatigue and leading to IMF-riots,[34] similar labour market and social security reforms have resurfaced within the context of Eurozone adjustments.

The Greek case is particularly noteworthy, where nearly half of the measures related to labour and pensions were enforced and legitimized through legislative process. The Parliament was not only expected to adopt pension reform but also to pass specific legislation to reduce minimum wages, expedite disciplinary procedures, remove restrictions on personnel placement in the mobility scheme, and reform the collective bargaining legal framework. The reintroduction of such measures led to renewed criticism of the IMF and sparked mass protests.

It is important to highlight that while Pakistan and Ukraine, currently under IMF programs, lack conditions related to the social security and labour market, the latest agreement with Argentina 'timidly' introduces three new prescriptions in this area. These conditions, comprising two low-depth and one medium-depth measures, aim to address the long-term fiscal sustainability of Argentina's pension system. The limited-depth measure proposes specific regulatory actions refining access to pensions. Significantly, there has been an adjustment to the low-depth condition during subsequent reviews. Originally, it called for 'conducting and publication of a study outlining strategies to enhance … long-term sustainability of the pension system … and mechanisms to encourage individuals to extend their working lives'.[35] However, this condition has been modified to emphasize only conducting such study, with the publication aspect omitted due to its politically sensitive nature. The IMF staff even openly acknowledged its significant electoral costs and postponed proposing further pension-related measures until after the election.[36]

These traditional labour and SOE reforms – particularly medium-depth price adjustments and employment cuts – are well-documented to have a substantial inflationary and stagnation impact. This raises the question of whether the increase in Post-Washington Consensus measures, such as governance and expanded social assistance, can effectively compensate for the adverse effects of these historically harmful policies that persist in the conditionality menu, even in the most recent agreements.

Social assistance measures are among the least profound conditions in all the analysed policy areas, with no proposed legislative changes or systemic reforms to the social protection system. Across all the studied programs, there are only a total of 19 such conditions, with 14 falling into the medium-depth category and

[34] Lesley J Wood, 'Anti-World Bank and IMF Riots', *The Wiley-Blackwell Encyclopedia of Social and Political Movements* (1st edn, 2013) 1–3.

[35] IMF, *Argentina* (2022, n 33) 78.

[36] ibid 14.

the remaining 5 categorized as low depth. Generally, low-depth conditions focus on studying how to improve social safety nets, while medium-depth measures revolve around targeted increases in beneficiaries or cash transfers, and updates to beneficiary databases. Only one condition, proposed for Ukraine (1997-SBA), mentioned extending maternity/childbirth benefits to unemployed women. In Pakistan, the 2019-EFF agreement included measures aimed at launching a financial inclusion strategy for women and updating the benefit structure to narrow the educational gender gap.

In the most recent agreement with Argentina – a country already grappling with a deepening economic crisis worsened by extreme drought, with 43% of its population living below the poverty line and experiencing a daily reduction in their purchasing power due to combined currency devaluation and inflation[37] – the proposed poverty reduction condition appears insufficient. This low-depth measure aims solely to conduct and publish a comprehensive evaluation of social support programs and potential improvements. Surprisingly, this seemingly straightforward condition was not met. Although the study was completed, it remained unpublished due to concerns over confidentiality, reflecting the potential high electoral cost associated with its findings.[38] In this sense, the depth and scope of the changes proposed for social safety nets are likely to have a limited structural impact in creating a more resilient social support structure.

With regard to transparency, in the 1990s and early 2000s, these measures were primarily linked to fiscal monitoring, accountability, and statistical improvement through audits, plan implementation, and organizational changes (such as establishing tax investigation units). Since the mid-2010s, there has been an increasing focus on good governance and the fight against corruption, further bolstered by the COVID-19-related rhetoric to 'spend whatever is needed and keep receipts'. This resulted in a growing number of conditions in this area. In the framework of the recent agreements, countries like Ukraine and Pakistan have enacted deep legislative changes to create laws against corruption and money laundering. In 2023, Ukraine committed to additional legislative steps, including amending the Specialized Anti-Corruption Prosecutor's Office Law and its Budget Code. Transparency is fundamental for the proper functioning of democracies and markets. In this regard, related measures complement rather than compensate for the traditional WC policies. However, more transparent, and well-governed institutions can lead to significant gains, reduced corruption, and improved living standards.

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[37] Juan I Bonfiglio, Julieta Vera and Augustín Salvia (eds), *Privaciones sociales y desigualdades estructurales: condiciones materiales de los hogares en un escenario de estancamiento económico (2010–2022)* (Educa 2023).

[38] IMF, *Argentina: Fifth and Sixth Reviews under the Extended Arrangement under the Extended Fund Facility* (Country Report No 2023/312, Washington 2023) 93.

VI. CONCLUSIONS

The foregoing analysis reveals a nuanced landscape of IMF structural conditionality across major chronic debtors and 'unusual' Eurozone clients. In general, the largest borrowers have experienced a greater number of structural conditions, with a notably high proportion of measures in non-core areas, compared to the general trends previously examined in the literature. Nevertheless, the depth of conditionality exhibits significant variation across countries and time periods.

Argentina's recent reengagement with the IMF stands as an intriguing case. It presents a unique set of challenges, including unprecedented financial commitments, escalating political tensions with the Fund in the run-up to elections amidst economic and social crisis, and the government's strategic efforts to garner international support on the global stage through initiatives like extended Bilateral Swap Agreements with China, pursuing BRICS membership, and seeking regional leaders' backing. Against this backdrop, one might anticipate heightened IMF demands to safeguard its interests, resulting in heavier conditionality. Surprisingly, Argentina exhibits a lower count of conditions compared to other major debtors. Moreover, these conditions tend to lack depth, raising questions about the perceived leniency of the IMF in the face of notably high risks. Greece and Ukraine, on the other hand, emerge as distinctive cases due to the unusually high depth of their programs. This can be attributed to various factors, including the influence of European institutions and Western partners pressing for alignment with European standards, including through the IMF conditionality channel.

In terms of the content and depth of conditionality in the most recent agreements with chronic debtors, one can observe a blend of traditional Washington Consensus-inspired measures and the incorporation of social buffers and transparency provisions. While the latter reveal some degree of heterodox change at the IMF policy guidance and have the potential to improve program ownership and results,[39] they may not go far enough to fundamentally transform borrowing countries into more resilient welfare states, which is a pressing need underscored by the COVID-19 pandemic.

Finally, this analysis has also introduced a more detailed definition of structural depth, differentiating between legislation (high depth indicating systemic change) and regulation (medium depth of operative and implementing nature). Future research could delve further into how structural depth affects compliance and compare the experiences of major debtors with other groups of countries. These avenues could contribute to a deeper understanding of the complexities,

[39] James Boughton, 'Who's in Charge? Ownership and Conditionality in IMF-Supported Programs' (2003) IMF Working Paper 2003/191, 1–24; Graham Bird and Thomas D Willett, 'IMF Conditionality, Implementation and the New Political Economy of Ownership' (2004) 46 Comparative Economic Studies 423–50.

implications, and intrusiveness of the IMF conditionality from a legal and institutional perspective.

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BEYOND THE COURTROOM: THE EVOLUTION OF RIGHTS-BASED CLIMATE LITIGATION FROM *URGENDA* TO *HELD* AND ITS POLICY IMPACT

Abstract

This paper examines the growing trend of employing international and human rights law in domestic climate change lawsuits as a strategic tool for legal action. Using a qualitative and comparative analysis of seminal case law, such as *Urgenda Foundation v the Netherlands* and *R (Friends of the Earth and others) v Heathrow Airport Ltd* and *Held v State*, this paper aims to explain the juridical trajectories and methodologies employed in rights-based climate litigation. The primary objective is to critically evaluate the potential regulatory impact of this emergent jurisprudential paradigm on both domestic legislation and international climate change treaties. The study posits that when traditional enforcement mechanisms enshrined in international environmental law treaties prove ineffective, domestic litigation grounded in human rights claims serve as a catalyst for transformative jurisprudence. This, in turn, can exert substantial pressure on state and non-state actors, compelling them to adopt more strict regulatory measures to mitigate the effects of climate change. The aim of this paper is twofold: first, to elucidate the effectiveness and development of rights-based jurisprudence in climate litigation, and second, to assess its potential for influencing the creation of stronger regulatory mechanisms at both state and international levels. The paper argues that when international treaties fail to take adequate climate change action, domestic lawsuits based on human rights claims start to serve as a lever of change, pressuring both state and non-

state actors into adopting more ambitious measures. The study underscores the importance of this rights-based approach not merely as a legal strategy but as a multifaceted tool for effectuating systemic regulatory advancements and fostering climate justice.

KEYWORDS

rights-based climate litigation, state responsibility in international law, climate change mitigation, judicial activism, regulation through litigation, Paris Agreement

SŁOWA KLUCZOWE

spory klimatyczne, odpowiedzialność państwa w prawie międzynarodowym, łagodzenie zmian klimatu, aktywizm sędziowski, regulacja poprzez postępowanie sądowe, Porozumienie paryskie

I. INTRODUCTION

While most current domestic lawsuits address climate change violations through statutory law, the recent cases based on claims of rights infringement represent a major turn away from these more conventional models. The use of human rights law as a tool which fills the gaps to enforce states' standards and obligations more effectively is not new in the international environmental context.[1] In recent years, this method has become increasingly popular to redress the impact of climate change and to put pressure on state and non-state actors to take more ambitious actions to tackle climate change problems. While relatively few cases have been brought on human rights grounds, the trend is continuing and accelerating with some promising results for the future.

Litigation has arguably never been a more important legal mechanism to influence policymakers and market players to develop and implement effective means of climate change mitigation and adaptation than it is today. Standards and mechanisms of international treaties find their way into domestic climate change jurisprudence providing interpretation and guidance, thereby becoming significant indirect drivers of litigation.

The paper methodology revolves around a qualitative and comparative analysis of key climate litigation cases, and the use of international human rights law

[1] See John H Knox, 'Constructing the Human Right to a Healthy Environment' (2020) 16 Annual Review of Law and Social Science 79, 81–82.

as a strategic tool in legal action against climate change. This approach involves a detailed examination of the legal arguments and judicial decisions in these cases, assessing how they align with and are influenced by international human rights standards and climate change treaties, like the Paris Agreement. The paper is designed so as to critically evaluate a potential regulatory impact of this emerging jurisprudential paradigm on both domestic legislation and international climate law. It provides insights into how domestic courts increasingly make use of international human rights frameworks to address climate change, thereby contributing to the development of global legal and policy responses to this critical issue.

The emerging case law, including the *Urgenda*, *Held v State* or *Heathrow* cases, reveals an observable model for petitioners to employ international human rights claims in climate change lawsuits, as well as a growing receptivity of courts to this framing. By analysing domestic human rights litigation trends based on climate claims it is possible to capture law in action on different levels that allow for the mutual supportiveness and complementarity of legal tools. The selection of cases is strategic, as these are high-profile cases from the US, the UK, and the Netherlands underpinned by their representation of developed countries in the Global North, dependent on industries driven by fossil fuels, such as petroleum, natural gas, and coal. These nations are either among the top current emitters globally or have significant industrial histories with historical emissions registered, but they are also relevant actors in setting precedents in environmental policies and legal frameworks. Notably, all the three countries are making strides in diversifying their energy sources with increasing investments in renewable energy.

Each case represents a different approach and proposed reasoning incorporating human rights and environmental concerns into legal decisions. The *Urgenda* case is pivotal for establishing a government's legal obligation to reduce emissions based on the human rights regime of protecting its citizens from the imminent dangers posed by climate change, thus aligning with the Paris Agreement objectives. The *Heathrow* case is significant for its initial incorporation of international commitments pledged by the British government in the form of, e.g. nationally determined contributions (NDCs) under the Paris Agreement into national policy decisions. The *Held v Montana* case recognizes a constitutional right to a stable climate by emphasizing the state's responsibility to protect the environment and combat climate change for future generations.

The selected cases demonstrate how legal actions in these countries can directly influence major industrial sectors. By taking a closer look at their reasoning, scholars may predict how these jurisdictions may have far-reaching effects, potentially leading to global shifts in industry practices, also by inspiring similar actions in other developed countries, and creating a domino effect in strengthening climate-related legal frameworks globally. Thus, the case selection illustrates the current state of climate litigation but also reflects a strategic approach to

influencing global climate policy and industry practices from a legal standpoint. This paper analyses the development and effectiveness of the emerging case law based on the selected examples of courts' decisions and assesses their possible impact in the development of human rights and constitutional mechanisms, as well as remedies in climate change litigation.

As a result, this study tries to show that, when sanctioning mechanisms cannot be sufficiently established by international environmental legal treaties, non-state actors' petitions employing international human rights claims in climate change lawsuits in domestic courts may influence case law of tribunals, and thus pressure state and non-state actors into adopting more ambitious regulatory action to tackle climate change problems.

II. CATALYSING CLIMATE ADAPTIVE MEASURES

1. THE CHARACTER OF THE PARIS AGREEMENT

The climate change regime is a major environmental challenge facing the world today and has increasingly become a complex issue in the spotlight of international relations. From a technical point of view, the 1997 Kyoto Protocol[2] remains in force, but the Paris Agreement has, in effect, superseded it as the major regulatory instrument governing the global response to climate change. These two key legally binding agreements have relied on voluntary arrangements, with insufficient enforcement and liability instruments that would enable an effective and fast response to tackle climate issues.[3]

To be more precise in calibrating its legal validity, the Paris Agreement – like the 1997 Kyoto Protocol and unlike the 2009 Copenhagen Accord – is unquestionably a treaty within the meaning of international law, but not all its provisions establish legal obligations, which vary widely. Some provisions create legal obligations (for example, Article 4.2, which requires that each party *shall* submit their

[2] The Kyoto Protocol operationalizes the United Nations Framework Convention on Climate Change (UNFCCC) by committing industrialized countries to limit and reduce greenhouse gases (GHG) emissions in accordance with agreed individual targets. The Convention only requires those countries to adopt policies and measures on mitigation and to report periodically (Kyoto Protocol to the United Nations Framework Convention on Climate Change, 11 December 1997, 2303 UNTS 162).

[3] See e.g. Richard J Millar and others, 'Emission Budgets and Pathways Consistent with Limiting Warming to 1.5 °C' (2017) 10 Nature Geoscience 741; Luke Kemp, 'A Systems Critique of the 2015 Paris Agreement on Climate' in Moazzem Hossain, Robert Hales and Tapan Sarker (eds), *Pathways to a Sustainable Economy* (Springer 2017); AP Schurer and others, 'Interpretations of the Paris Climate Target' (2018) 11 Nature Geoscience 220; Joeri Rogelj and others, 'Paris Agreement Climate Proposals Need a Boost to Keep Warming Well below 2 °C' (2016) 534 Nature 631.

NDCs every five years) whereas others express general normative expectations, for instance, Article 4.3, which provides that successive NDCs *will* represent a progression and reflect a party's highest possible ambition.[4] As a result, parties do not have an obligation to achieve their NDCs to address climate change; thus, in this respect, the substance of the provided NDCs is not legally binding.[5]

The Paris Agreement[6] aimed at keeping the increase in the global average temperature to well below 2 °C above pre-industrial levels (Article 2 PA) as states' shared common commitments, which will be based on NDCs that allow autonomy and flexibility for governments in self-differentiation of emission reductions in accordance with varying national capacities and circumstances (Articles 4.4 and 4.6 PA).[7] Although there is a compliance procedure (Article 15 PA) with incentives of transfer of technology, cooperation and financial resources provided by developed countries (Articles 8.4, 9, 10, 11 PA), the agreement does not cover enforcement mechanisms as there are no penalties if countries withdraw or fail to meet their commitments. Therefore, it is reasonable to believe that the Paris Agreement effectiveness depends on the interpretation, structure, and enforcement of substantive measurements at the national level.

2. A POTENTIAL ROLE OF THE PARIS AGREEMENT IN CLIMATE CHANGE LITIGATION

Although the Paris Agreement seems to be a challenging framework that lacks enforcement mechanisms and the willingness of states to implement its objectives, it may have an important impact on the development of domestic case law as a novel anchorage for lawsuits based on governments' legislative and policy commitments.

Firstly, even though the Paris Agreement does not directly mention information on measures to safeguard human rights in the nationally determined contributions, the preamble links the obligations and efforts of states to potentially affected individual legal positions, which implicitly promotes access to a review of impact on individuals under existing rights mechanisms.[8]

Secondly, the previously mentioned NDCs do not specify how countries need to allocate carbon budgets but irreversibly shape the governments' national com-

[4] Daniel Bodansky, 'Paris Agreement' Introductory Note (United Nations Audiovisual Library of International Law 2021).

[5] ibid.

[6] Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) UNFCCC, COP 21, UN Doc FCCC/CP/2015/10/Add.1 (Paris Agreement or PA).

[7] Rogelj and others (n 3) 631.

[8] Lennart Wegener, 'Can the Paris Agreement Help Climate Change Litigation and Vice Versa?' (2020) 9(1) Transnational Environmental Law 17, 31.

mitments, no matter how vaguely they are defined.[9] This shows that the Paris Agreement is a central legal management tool for global climate efforts in its mitigation and adaptation, but the management of substantive obligations relies on the self-commitments of signatories. The Paris Agreement goals are highly relevant guidance for judicial interpretation and domestic law-making, where the envisaged model still needs to be assessed on how it is reflected in actual national contributions.[10] Hence, the functional interlinkage and interactions between global and domestic governance are essential in determining the development in climate change law.[11]

Lastly, the Paris Agreement calls on all parties to undertake and communicate ambitious efforts while defining their mitigation commitments that will represent a progression beyond the states' current NDCs.[12] This means the governments will make their NDCs incrementally ever more stringent compared to their previous national policies. Thus, even if a national government claims that it has never specified or directly implemented the Paris Agreement objectives into domestic law, it cannot argue that its commitments allow backsliding in national climate adaptive and mitigatory policies.[13]

Whenever international climate change law has been invoked by domestic courts, it has been usually addressed indirectly as a means of interpretation or guidance for general principles that have been incorporated into case law by re-interpreting them within the framework of national law.[14] For example, *Urgenda* relied on the 2 °C target negotiated by the Conferences of the Parties under the UNFCCC.[15] On the other hand, the Paris Agreement was the basis of scientific reference and legal constraint in both *Heathrow* and other European cases, including *Greenpeace Nordic Association v Norway Ministry of Petroleum and Energy* or *PUSH Sweden v Government of Sweden*, in which the Paris Agreement is perceived as the international law obligation binding their governments.[16]

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[9] ibid 27.

[10] Patricia Galvão Ferreira, '"Common but Differentiated Responsibilities" in the National Courts: Lessons from *Urgenda v the Netherlands*' (2016) 5(2) Transnational Environmental Law 329, 351.

[11] Jerry Patchell and Roger Hayter, 'How Big Business can Save the Climate' *Foreign Affairs* (92(5) September/October 2013) <www.foreignaffairs.com/articles/commons/2013-08-12/how-big-business-can-save-climate> accessed 8 March 2024.

[12] Paris Agreement, Art 3 and Art 4 para 3.

[13] United Nations Environment Programme and Columbia University Sabin Center for Climate Change Law, *The Status of Climate Change Litigation: A Global Review* (UN Environment and Columbia Law School 2017) 17 <https://wedocs.unep.org/20.500.11822/20767> accessed 8 March 2024.

[14] Wegener (n 8) 25.

[15] *Urgenda v the Netherlands*, ECLI:NL:RBDHA:2015:7196 (24 June 2015) (*Urgenda I*), paras 4.84–4.86.

[16] *Greenpeace Nordic Ass'n and Nature and Youth v Ministry of Petroleum and Energy*, 16-166674TVI-OTIR/06, Oslo District Court (1 April 2018), paras 18–19; *PUSH Sverige,*

This transposition of international law into domestic systems allows courts to synchronize national policy goals with the ambitious and general objectives of the Paris Agreement. More precisely, it makes judicature perform a crucial role in defining the scope of executive or legislative discretion based on the up-to-date scientific research and evolving international environmental agreements.[17] Still, the absence of specified rules of determining individual shares of the global carbon budget creates a significant barrier for courts which are to determine the extent to which international commitments constrain domestic discretion in defining NDCs.[18]

In the domestic litigation associated with the Paris Agreement a different approach may be developed, which will focus on cross-level interactions of climate regime rather than the legal normativity of a single instrument as well as on the identification of international and domestic synergies in legislation and case law.[19] As a consequence, litigation may become a transnational feature and influence and shape climate change governance.[20]

III. THE ROLE OF RIGHTS-BASED CASE LAW IN SHAPING CLIMATE LAW

1. JUDICIAL ROLE IN DEFINING LEGAL OBLIGATIONS TO ADDRESS CLIMATE CHANGE BASED ON HUMAN RIGHTS

It must be stated that climate change litigation on the grounds of human rights is nothing new but in recent years its sudden exponential increase across the globe has been observed.[21]

Overall, international environmental law is compiled as a set of agreements between states that regulate their relations with other states as well as between the states and their citizens. Thus, litigation serves as a tool which enables citizens to

Fältbiologerna och andra v Sverige regering, T 11594-16, Stockholm District Court (30 June 2017), paras 26 or 33.

[17] Wegener (n 8) 26.

[18] ibid 27.

[19] ibid 18.

[20] Joyeeta Gupta, 'Legal Steps outside the Climate Convention: Litigation as a Tool to Address Climate Change' (2007) 16(1) Review of European Community & International Environmental Law 76.

[21] The Sabin Center for Climate Change Law at Columbia Law School has gathered already 144 non-US climate change litigation cases against government on the grounds of human rights, with the biggest number of suits related to the right to a healthy environment. The database is available online <https://climatecasechart.com/non-us-case-category/human-rights> accessed 8 March 2024.

check whether national actions or lack of action are compatible with those agreements.[22] More precisely, it may help to turn commitments articulated in international agreements into domestic actions and regulations by allowing the domestic courts to interpret their application. Consequently, even if the Paris Agreement does not provide for specific enforcement mechanisms on the emission reduction goals set by NDCs, it offers signatories' citizens a ground for defining a carbon budget as part of national government commitments. Some of the examples mentioned below illustrate this process and show how judicial reasoning differs in responding to them globally.

2. SELECTED CASES OF CLIMATE CHANGE LITIGATION

The judicial advancements and landmark rulings, such as the cases of *Heathrow*, *Urgenda Foundation v State of the Netherlands*, and *Held v Montana*, may be perceived as important contributors to the ongoing discussions on the shape of the future international climate law. These cases, each with a distinct judgment, collectively reflect a transnational shift in the debate of the Global North towards recognizing and operationalizing the symbiosis between human rights, environmental protection, and climate governance within the international legal paradigm.

a) The United Kingdom

In February 2020, the global news broke that the Court of Appeal of England and Wales stopped Heathrow Airport expansion based on climate change grounds, which included the Paris Agreement.[23] For environmental supporters, this was a ground-breaking ruling as it inspired challenges against other high-carbon projects globally. Nevertheless, the impact of the *Heathrow* ruling should not be overestimated, especially after the Supreme Court's revision of the decision. Undoubtedly, at first it was perceived as a possible game-changer that would overcome political differences as well as governments' inaction. Although public sentiments are quite understandable, it is crucial to analyse what is the actual outcome of this judgment.

R (Friends of the Earth) v Secretary of State for Transport and others case[24] concerned the proposed expansion of Heathrow Airport by adding the third runway under the policy set out in the 2018 'Airports National Policy Statement'

[22] Jacqueline Peel and Hari M Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7(1) Transnational Environmental Law 37, 39.

[23] Tom Espiner, 'Climate Campaigners Win Heathrow Expansion Case' *BBC News* (London, 27 February 2020) <www.bbc.com/news/business-51658693> accessed 8 March 2024.

[24] *R (on the application of Friends of the Earth Ltd and others) v Heathrow Airport Ltd* [2020] EWCA Civ 214 (27 February 2020) (*Heathrow I*).

(ANPS).[25] This document, designated by the Secretary of State for Transport in office at the time, is a national policy statement prepared under section 5(1) of the Planning Act 2008.[26] The Court produced two judgments, in which the latter, concerning a judicial review of whether the Divisional Court was wrong to conclude that the ANPS was produced lawfully, is a focus of further analysis.[27]

In conclusions, the Court of Appeal pointed out that the ANPS was not produced as the law requires as it failed to comply with the statutory regime imposed by the Parliament in the Planning Act for the formulation of government policy in a national policy statement. In particular, it corresponds to section 5(8) of the Planning Act, under which the reasons for the policy set out in the ANPS 'must … include an explanation of how the policy set out in the statement takes account of Government policy relating to the mitigation of, and adaptation to, climate change'.[28] The Court explains that section 5(8) requires to explain in the ANPS how the Secretary of State has 'taken into account' government policy, meaning it should also consider government's commitment to the Paris Agreement.[29] The Court of Appeal pointed to a considerable amount of evidence that proved how the Paris Agreement plays an important role in shaping government policy on the climate change regime.[30] For example, among statements given on behalf of the government officials, the one striking evidence was mentioned in the 'The Clean Growth Strategy (CGS)' (2017), in which the Secretary of State for Energy and Industrial Strategy stated that 'The UK played a central role in securing the 2015 Paris Agreement'.[31] Consequently, the Court concluded that the designation of the ANPS was unlawful by reason of failure to consider the government's commitment to the provisions of the Paris Agreement on climate change, ratified by the UK in November 2016.[32]

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[25] The UK Department of Transport, 'Airports National Policy Statement: New Runway Capacity and Infrastructure at Airports in the South East of England' presented to Parliament pursuant to section 9(8) of the Planning Act 2008 (June 2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/858533/airports-nps-new-runway-capacity-and-infrastructure-at-airports-in-the-south-east-of-england-web-version.pdf> accessed 8 March 2024.

[26] The Planning Act is discussed in paras 37–44 of the *Heathrow* decision. It defines procedural steps that must be taken before a national policy statement can be formally 'designated' by the Secretary of State. The Planning Act obliges the Secretary of State to take into consideration any relevant national policy statement while deciding on an application for development consent.

[27] See *Heathrow I*, paras 135–37.

[28] Section 5(8) of the Planning Act and *Heathrow I*, para 38.

[29] *Heathrow I*, paras 222–23.

[30] See *Heathrow I*, paras 196–216.

[31] *Heathrow I* para 209. Based on the CGS, the Secretary also stated that '[t]he actions and investments that will be needed to meet the Paris commitments will ensure the shift to clean growth will be at the forefront of policy and economic decisions made by governments and businesses in the coming decades.'

[32] *Heathrow I*, para 238. For the whole reasoning, see paras 222–38 and 242–61.

Nevertheless, the Supreme Court overturned the decision of the Court of Appeal in full in December 2020. Contrary to the previous reasoning, the Supreme Court stated that the Secretary of State had acted lawfully, and to the extent that he needed, to consider the Paris Agreement, through consideration of the emission reduction commitments in the Climate Change Act 2008.[33] Secondly, the Court determined that environmental assessment was conducted lawfully, and did not need to expressly refer to the Paris Agreement itself and it was already sufficiently considered.[34] In relation to Plan B Earth's ground of challenge, the Supreme Court held that the government's commitment to the Paris Agreement was not a part of 'government policy' for the purpose of section 5(8) of the Planning Act 2008. It disagreed with the Court of Appeal's conclusion and held that a 'relatively narrow meaning' should be applied while referring to 'carefully formulated written statements of policy'.[35]

Importantly, the Supreme Court's judgment did not endorse the expansion of Heathrow Airport, nor give Heathrow the 'green light' to start building; it made it clear that all climate considerations remain to be addressed and resolved, though at the moment at the planning permission stage.[36] According to the judgment, built on the reasoning of the Court of Appeal, the National Policy Statement (NPS) has not irrevocably predetermined the approval of Heathrow expansion. Absent these judicial proceedings, there might have been a presumption that the runway obtained approval concerning environmental implications via the NPS designation. However, the litigation unequivocally dispels such presumption: to proceed, the developer is compelled to align its proposals with the most current evaluation of environmental impact at the time when the application is determined.

b) The Netherlands

When analysing *Heathrow*, parallels should be drawn with other cases of climate change litigation, including the landmark *Urgenda Foundation v State of the Netherlands* case. The issue in *Urgenda* was whether the Dutch state was obliged to reduce the emission of greenhouse gases originating from Dutch soil by at least 25% by the end of 2020, instead of the pledged 19%, in order to comply with its legal obligations and whether the courts could order the state to do so.[37] In December 2019, the Dutch Supreme Court in its final decision affirmed the lower

[33] *R (on the application of Friends of the Earth Ltd and others) v Heathrow Airport Ltd* [2020] UKSC 52 (16 December 2020) (*Heathrow II*).

[34] *Heathrow II*, para 149.

[35] *Heathrow II*, para 105.

[36] *Heathrow II*, para 143.

[37] *Urgenda v the Netherlands*, ECLI:NL:RBDHA:2015:7196 (24 June 2015) (*Urgenda I*), para 4.85.

courts' rulings[38] by stating that the Netherlands had a positive obligation under Articles 2 and 8 of the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR) to take protective human rights measures for the prevention of climate change impact, which meant that the state was required to reduce national GHG emissions by at least 25% by 2020 compared with 1990 ('*Urgenda* target').[39] It was the Supreme Court which substituted tort law with human rights law as the legal basis for the state's obligation to achieve that target. What is more, the judgment was pivotal as it demonstrated that courts could determine responsibilities of individual states and order legal remedies against a violation or imminent violation of the rights that are safeguarded by the ECHR.[40]

Both *Heathrow* and *Urgenda* cases show a range of important similarities. First and foremost, both represent high-profile climate lawsuits, which may increase public awareness and lead to a growing receptivity of domestic courts to this framing. They include stakeholders from both public and private sectors: a coalition of environmental non-governmental organizations or private individuals as claimants and public authorities as defendants. Last but not least, the goal for both claims was to protect a broader set of values of common interest, including environmental protection or public health, rather than merely personal interests.

Nevertheless, we can observe striking differences between these two cases, in which reasoning sometimes seems contradictory. In *Urgenda* cases, the Dutch Court unequivocally stated that the government of the Netherlands had to comply with its international legal obligations established in the ECHR and that the risks caused by climate change were sufficiently real and immediate to bring them within the scope of Articles 2 and 8 ECHR. By interpreting the ECHR case law on Article 2 (e.g. *Öneryildiz v Turkey*)[41] and Article 8 (e.g. *Tătar v Romania*), the Court concluded that these provisions obliged the state to take measures against the risk of dangerous climate change.[42] It means that the Court recognized the obligation of the Netherlands to take preventive action to reduce its GHG emissions as a part of positive human rights obligation. As a consequence, the Dutch Court advanced the argument that climate change is a human rights issue, which was previously articulated by many other international bodies, includ-

[38] *Urgenda I* and *Urgenda v the Netherlands*, ECLI:NL:GHDHA:2018:2591 (9 October 2018) (*Urgenda II*).

[39] *Urgenda v the Netherlands*, ECLI:NL:HR:2019:2007 (20 December 2019) (*Urgenda III*), paras 5.2.1–5.5.3.

[40] *Urgenda III*, paras 8.1–8.3.

[41] *Urgenda III*, para 5.2.2.

[42] *Urgenda III*, para 5.2.3. As the Court concluded, 'The obligation to take measures exists if there is a risk that serious environmental contamination may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely. That risk need not exist in the short term'.

ing the UN Special Rapporteur on Human Rights and the Environment[43] and the Human Rights Council, in the 2018 Advisory Opinion of the Inter-American Court of Human Rights (IACtHR)[44] or other relevant domestic court cases[45]. Undoubtedly, this ground-breaking judicial approach may lead to an important change and a surge in much more climate litigation based on human rights obligations of states towards their citizens.

In contrast with *Urgenda*, where the Dutch government was held accountable for its nationwide climate change policy and its mitigation target, *Heathrow* is project-based litigation. It focuses entirely on the legality of the ANPS and not the governmental climate policy per se or its positive human rights obligations towards British citizens. The above-mentioned argument corresponds also to another vital difference: whereas *Urgenda* was won on substantive grounds (the state did not comply with its obligation to avert dangerous effects of climate change), *Heathrow* was decided on procedural grounds. Consequently, the British Court's judgment does not prohibit the government from building the third runway but requires that state officials redefine and rewrite the airport policy statement in line with the UK's climate commitments.

Furthermore, the ruling in *Urgenda* states that the national courts can order the state to comply with its international legal obligations as national law must provide an effective legal protection (remedy) against a violation or imminent violation of the rights that are safeguarded by the ECHR (Article 13 ECHR).[46] The question arises of how this decision can be implemented without interfering with the separation of powers, the unconstitutionality of which was raised in the Dutch state's arguments. According to the Dutch government, the separation of powers should not be interfered with because it is the democratically legitimized government that is the appropriate body to take the relevant policy decisions.[47] The Dutch Court rejected this argument, claiming that in this case as the state violated human rights, which called for the appropriate measures to be introduced by the judiciary, and the requirement to reduce emissions gave the state sufficient space to decide how to comply with and implement the new measures.[48]

It is noteworthy that the *Urgenda* target has been achieved. According to the National Inventory Report on the state's 2020 emissions, communicated to the

[43] See Special Rapporteur resolutions on human rights and the environment <www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/Resolutions.aspx> accessed 8 March 2024.

[44] For example, the Advisory Opinion OC-23/17, *The Environment and Human Rights*, Requested by the Republic of Colombia, Inter-American Court of Human Rights (15 November 2017) <www.corteidh.or.cr/docs/opiniones/resumen_seriea_23_eng.pdf> accessed 8 March 2024.

[45] For example, *Maria Khan et al. v Federation of Pakistan et al*., Writ Petition 8960/2019 (15 February 2019) <http://climatecasechart.com/non-us-case/maria-khan-et-al-v-federation-of-pakistan-et-al> accessed 23 September 2023.

[46] *Urgenda III*, para 5.5.2.

[47] *Urgenda III*, para. 2.3.2.

[48] ibid.

UNFCCC Secretariat in 2023, the Netherlands secured a reduction in national emissions by around 26% (from 228.9 to 168.9 MtCO2eq), with a small increase by 1.8%, due to a rise in heating means in winter 2021.[49] Nevertheless, scholars claim that it was not the new policy measures but rather 'extraneous circumstances', e.g. displacing sources of emissions to other countries or introducing tax on the disposal of foreign waste, which allowed fulfilment of the *Urgenda* target. Thus, it cannot be explicitly decided whether *Urgenda* has led to an enhanced political support for mitigation action as it would be expected.[50] Still, it shows that future 'target-setting' cases will include structural impediments as their effective enforcement will rely upon designing comprehensive mitigation strategies together with monitoring and compliance measures on emission reduction targets.

At the same time, in *Heathrow* judges were more reluctant to confirm findings of the *Urgenda* decision. They underscored that they did not want to take part in political debate about climate change and would not assess whether the British government was obligated under the Paris Agreement to impose its reduction limits but only deliberated on the legality of the ANPS in accordance with the clear statutory requirements of the Parliament, based on which national policy on climate change should be taken into account. Suffice it is to say, the Court gently discussed a possible lack of consideration by the British government aligning with the Paris Agreement's commitments in domestic planning, which they strongly supported in their official statements.

The reasoning of both the Court of Appeal and the Supreme Court emphasized that their role was neither to interfere with the government's national policy and engage to political debates nor to decide for the government which international obligations they should comply with. Therefore, the courts did not decide whether the Paris Agreement binds the UK government to act in accordance with its provisions. 'That is none of the court's business'[51] and the courts' only role was to answer a legal question of whether the ANPS was produced lawfully. Therefore, the courts' intention was not to challenge the government's climate policy, as it was underscored in the *Urgenda* decision; instead, the British courts focused on judicial review of legality of a single project of expanding Heathrow Airport confirmed in the ANPS.

It must be underlined that the *Heathrow* decision still plays an important role as a precedent in climate change litigation and potential shaping of the future international climate legal framework. Although it is much more judicially conservative and restrained than *Urgenda* seems to be, it still raises a lot of climate

[49] *Greenhouse Gas Emissions in the Netherlands 1990–2021*, National Inventory Report: RIVM report 2023-0052 (National Institute for Public Health and the Environment, the Netherlands 2023) 17.

[50] Benoit Mayer, 'The Contribution of *Urgenda* to the Mitigation of Climate Change' (2023) 35(2) Journal of Environmental Law 167, 169.

[51] *Heathrow I*, para 281.

issues. Without doubt, the British government is held accountable for their climate commitments expressed in a public forum, and therefore it will be undeniably harder to ignore the state's environmental responsibilities. Still, as the time has shown, the growing body of climate litigation is yet to find consistent and predictable treatment in English courts. Undoubtedly, the possible global impact will prevail, as other courts around the world follow the example of *Heathrow* and are more willing to draw directly upon the international environmental commitments undertaken by governments as part of their national policies.

c) The United States

The introductory note on the US climate change litigation should refer to the *Juliana v the United States* case (2019), which for many scholars remains a starting point in both judicial and legislative climate discourse. *Juliana* was brought in 2015 by a group of young plaintiffs who filed a constitutional climate lawsuit, asserting that the US government, by enabling the proliferation of fossil fuels, violated the youngest generation's constitutional rights to life, liberty, and property, and failed to fulfil its duty to protect natural resources for the public use and benefit, according to the Public Trust doctrine.[52] Despite relentless determination of plaintiffs, there has been a continuous resistance of the US federal court in addressing remedies[53] based on constitutional climate claims against the federal government, due to the separation of powers clause, which deters courts from interfering in matters reserved for political branches, like climate change policy, that are not suitable for judicial resolution.[54] This resembles the reasoning provided in the *Heathrow* case.

It remains uncertain whether the US federal courts will reconsider this decision yet, no matter what the outcome will be, it still remains a pivotal precedent, in which the federal court acknowledges the seriousness of climate change and clearly agrees that the federal government promoted fossil fuel use despite its

[52] Climate Change Litigation Database: *Juliana v the United States* (Sabin Center for Climate Change Law, Columbia Law School) <https://climatecasechart.com/case/juliana-v-united-states> accessed 8 March 2024.

[53] Madeleine Carlisle, 'A Federal Court Threw out a High Profile Climate Lawsuit. Here's What it Might Mean for the Future of Climate Litigation' *Time* (New York, 17 January 2020) <https://time.com/5767438/climate-lawsuit-kids> accessed 8 March 2024.

[54] See the action launched against the US government in the US District Court for the District of Oregon in 2015 (*Juliana v the United States*, Case 18-36082, 9th Cir. 2020), in which plaintiffs argued that the government actions that cause climate change violated the Fifth Amendment, i.e. the youngest generation's rights to life, liberty, and property, and that the government failed to protect essential public trust resources. On 17 January 2020, a divided Ninth Circuit Court issued an order on the interlocutory appeal and decided that Juliana Plaintiffs lacked standing to press constitutional climate claims against the federal government. In October 2021, the Ninth Circuit Court refused rehearing the young plaintiffs' constitutional climate case against federal defendants.

effect on the environment.[55] The case initiated extensive legal debate around the justiciability of climate change issues, the role of courts in addressing such global and political matters, and the interpretation of constitutional and public trust doctrines in the context of environmental harm. This proves that not only the results of current cases but also pending and appealed lawsuits suggest that the trend may change and will gain an even greater support in the future.[56] It provoked discussions on the role, abilities, and responsibilities of the legislative and executive branches in addressing climate change, environmental protection, and sustainable development, which is the nexus in the Preamble to the Paris Agreement.[57]

Despite all impediments and the court's decision on lack of standing, *Juliana* plaintiffs continue to pursue their case[58] and can proceed to trial, which may result in key changes in judicial reasoning thanks to the recent decision in the *Held v State* case, in which the Montana Trial Court ruled that state law restriction on considering climate change impact violated young plaintiffs' constitutional rights.[59] In August 2023, the Montana Trial Court affirmed the plaintiffs' claim that stable climate is included in the state constitutional right to a healthy environment. More accurately, in this lawsuit brought by 16 young plaintiffs, the Montana Court ruled that a provision of the Montana Environmental Policy Act (MEPA) that prohibits considering GHG emissions and corresponding climate change impact in environmental reviews (the MEPA Limitation) violated the plaintiffs' right to a clean and healthful environment under the Montana Constitution.[60] The court held that the plaintiffs had a fundamental right to a clean and healthful environment, 'which includes climate as part of the environmental life-support system'.[61] What is more, the court also held that a statutory provision limiting the remedies available to the MEPA litigants violated the Montana Constitution because 'it removes the only preventative, equitable relief available to the public and MEPA litigants'.[62]

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[55] Carlisle (n 53).

[56] See e.g. the *Torres Strait Islanders* case, in which plaintiffs took their complaint in 2019 to the United Nations Human Rights Committee in Geneva, aiming at forcing the government for a greater climate action as well as more funds for coastal defenses. For more information see <www.clientearth.org/latest/news/torres-strait-islanders-fight-to-hold-australia-accountable-for-climate-change> accessed 8 March 2024.

[57] 'Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights …'; see Paris Agreement available online <https://unfccc.int/sites/default/files/english_paris_agreement.pdf> accessed 8 March 2024.

[58] The plaintiffs have filed an amended complaint to rectify deficiency identified in the Ninth Circuit Court's decision, which was allowed by the Oregon Federal Court in January 2023.

[59] *Held v State,* CDV-2020-307, Mont. Dist. Ct., Montana (14 September 2023).

[60] *Held v State*, para 6.

[61] *Held v State*, para 7.

[62] *Held v State*, para 8.

Thus, the *Held* case resembles judicial reasoning provided by the Dutch court in *Urgenda* by linking the right to the stable climate to constitutional protection of citizens of the Montana state. According to the court, the constitutional right to a clean and healthful environment requires 'enhancement' of Montana's environment and 'is complemented by an affirmative duty upon [the] government to take active steps to realize' this right, which was affirmed as one of the unalienable rights included in the Bill of Rights passed by a large majority of members of the Montana's Constitutional Convention.[63] The importance of this ruling lies in the fact that the court – relying on the extensive scientific record presented at trial – affirms climate science after the trial and paves a way for acknowledging a direct link between the constitutional right to a clean environment and the consequences of climate change.

As a result, the decision established a clear causal relationship between the state's approval of fossil fuel projects and actual injuries suffered by the plaintiffs. It demonstrated that injuries suffered by individuals were linked to global emissions, and that significant share of those emissions were caused by Montana's fossil fuel production.[64] The MEPA Limitation's role in potentially increasing Montana's emissions further aggravated these injuries. The analysis of this entire causal chain allowed illustrating that the plaintiffs' injuries were redressable, in contrast with the situation in the *Juliana* case.[65] It should be underlined that the Montana attorney general's office indicated the state would appeal to the Montana Supreme Court. Undoubtedly, *Held* will serve as an example and bolster cases in other states with similar environmental protections in their constitutions.

Therefore, *Held* represents the first judicial decision directly tying climate change to constitutional rights in the US that is primarily important for its recognition of the harms caused by climate change. This reasoning can be widely applied in future environmental litigation both at the state and federal levels. Firstly, the ruling provides a framework for litigants in addressing standing and causation issues, showing a direct link between state-sanctioned fossil fuel activities and the plaintiffs' injuries. Secondly, it underscores the effectiveness of narrowly targeted challenges against specific laws – limited in the scope of the court's remedial authority – that increased the likelihood of the court's acceptance of the claim and granting the requested remedy. In contrast to *Held*, the *Juliana* case has a much broader scope of remedial claim by seeking comprehensive federal action against fossil fuel reliance by creating a 'remedial plan', which would involve complex policy decisions with difficult trade-offs and without clear manageable standards that could be supervised by the Court within its mandate. The *Held*

[63] *Held v State*, para 287.

[64] *Held v State*, paras 66–70.

[65] Sam Bookman, '*Held v Montana*: A Win for Young Climate Advocates and What it Means for Future Litigation' (Harvard Law School EELP, 30 August 2023) <https://eelp.law.harvard.edu/2023/08/held-v-montana/#_ftn19> accessed 8 March 2024.

litigation had a narrower focus on state-level legislation – in comparison with *Juliana* – and therefore significantly raised the likelihood of judicial acceptance and remedy provision.

Lastly, the case demonstrates the potential of state constitutional law, particularly in states with environmental rights provisions, as a basis for climate lawsuits.[66] The success of *Held* is deeply anchored in the Montana Constitution, which guarantees citizens a 'right to a clean and healthful environment'.[67] Comparable constitutional provisions exist in five other states: Hawai'i, Illinois, Pennsylvania, New York, and Massachusetts.[68] Notably, three of these states rank among the top ten in terms of carbon dioxide emissions.[69] Should the judiciary in other states find the rationale of *Held v State* pertinent to their similar constitutional clauses, and consequently impose restrictions on potential greenhouse gas emissions, the *Held* decision could exert immediate, substantive environmental impact, also on federal lawsuits, especially the famous *Juliana* case. In fact, the Hawai'i Supreme Court took a progressive lead in its 2023 decision in the *In re Hawai'i Electric Light Co.* case, declaring an affirmative right to a life-sustaining climate system under the Hawai'i constitution's right to a clean and healthful environment, with Justice Wilson's concurring opinion deriving the right also from the due process clause and the public trust doctrine.[70]

Therefore, both *Held* and *Juliana,* as two US landmark litigation cases, unveil a twofold approach. On the state level, with *Held* as an example, the argumentation resembles that in *Urgenda* by proposing human rights law as the legal basis for environmental protection (including climate) clauses derived from either the constitutional or international legal system that requires the government to act progressively in establishing its climate policies. On the federal level, exemplified by *Juliana*, the judicial reasoning favours that adopted in *Heathrow* and employs the separation of powers clause as the rationale for the judicial branch's non-interference in the governmental climate policy.

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[66] Especially *Pennsylvania* (see *Pa. Env't Def. Found. v Commonwealth*, A.3d 911 (Pa. 2017)) and *Hawai'i* (see in *Re Hawai'i Elec. Light Co.*, 152 Haw. 352 (Haw. 2023)).

[67] Mont. Const. art. II, § 3; Mont. Const. art. IX, § 2.

[68] Haw. Const. art. XI, § 9; Ill. Const. art. XI, § 2; Mass. Const. art. 97; N.Y. Const. art. I, § 19; Pa. Const. art. I, § 27.

[69] US Energy Information Administration, State Carbon Dioxide Emissions Data <www.eia.gov/environment/emissions/state> accessed 8 March 2024.

[70] *In re Hawai'i Electric Light Co.*,152 Haw 352 (SC Haw) (13 March 2023) with concurring opinion of Justice Wilson available online <https://climatecasechart.com/wp-content/uploads/case-documents/2023/20230313_docket-SCOT-22-0000418_opinion-2.pdf> accessed 8 March 2024.

IV. CONCLUSIONS

In the process of negotiating international climate change law, state actors seem reluctant to address global regulations and unified, just distribution of such substantive obligations. Consequently, they prefer building a climate change regime based on self-commitment and self-differentiation.

Therefore, the current and future role of international climate change law lies in the promotion and management of initiatives at both national, regional and international levels. These include the UN human rights instruments in the climate framework, used either in complaint procedures under Convention Protocols or in concluding observations made by treaty monitoring bodies. Still, domestic litigation based on international environmental and human rights law will continue to play a pivotal role in strengthening mechanisms of the international climate change regime.

The *Heathrow* case stopped a major airport extension on climate grounds by invoking international climate commitments, like the Paris Agreement, and by setting a precedent for integrating international environmental obligations with national policies. The ground-breaking ruling sparked renewed global interest, potentially influencing legal challenges against other high-carbon projects worldwide. However, its impact is nuanced, serving more as an obligation to align declared national policies with international commitments rather than establishing a mandatory framework for particular climate action compliance, thereby avoiding any political debate on climate policy.

In contrast, the *Urgenda* case was explicit in its verdict, imposing a definite obligation on the Dutch government to adhere to the emissions reduction targets under international law, including the Paris Agreement and the ECHR, highlighting the immediate and real risks posed by climate change, and bringing them within the purview of legal scrutiny and accountability. This stark difference in judicial approaches exemplifies the dynamic and evolving nature of climate litigation, where courts navigate the intricate balance between legal mandate, governmental policy and international obligations. Although the *Urgenda* target set by the Court was achieved, scholars argue that it was not a result of newly proposed mitigation policy measures but rather counter-effective strategies, which sheds light on practical limitations of court-imposed emission-reduction targets, due to lack of proposed compliance and monitoring mechanisms as well as specialized knowledge of the judicial branch to design climate mitigation tools.

Further, the *Held v State* ruling in Montana affirmed the constitutional right to a clean and healthful environment, linking it directly to climate stability and opening avenues for substantive legal recourse and preventive relief against environmental degradation. This decision stands as a testament to the expanding jurisprudential acknowledgment of environmental protection as a fundamental

right. More specifically, it could potentially influence other state jurisdictions with similar constitutional provisions, which could result in reshaping the trajectory of climate litigation at the federal level, especially in the renowned *Juliana* case that included in its claim a direct reference to the Paris Agreement. Thus, this judicial precedent may be a significant tool and persuasive leverage for state agencies, legislative bodies, and the broader public.

These cases collectively symbolize a progressive stride that will impact international climate law, elucidating the intricate weave of national policies, international commitments, and human rights. They also serve as potential harbingers for a more cohesive and robust international legal framework addressing climate change, bridging the dichotomies between legal interpretations and catalysing a more harmonized approach to environmental governance and climate justice at a global scale. Their ramifications extend beyond legal precedents, influencing legislative discourse, public awareness, and international diplomatic dialogues on climate commitments and sustainable development.

Nevertheless, there are limits to what can be achieved by this type of litigation while encouraging both legal and policy changes. Firstly, human rights base its litigation on the 'violations approach', which e.g. seeks clear evidence of a causal link between the purportedly violating conduct and the non-fulfilment of the human right in question. Because of the political and scientific complexity of attributing causes to climate change, legal claims to vindicate human rights in this context cannot easily be sustained but prove to be more effective in more targeted and narrowed remedial claims as was seen in the *Held* case. Secondly, the future of 'target setting' cases will face significant challenges related to the judiciary's lack of specialized expertise in formulating climate mitigation tools, whose success hinges on the monitoring and compliance mechanisms that should instead remain in the scope of expertise of executive and legislative branches.

The dynamic interaction between domestic litigation and the Paris Agreement may positively impact the overall efficacy of both. It has been shown that the Paris Agreement architecture reveals pathways and provisions already being used or that can be explored further in litigation. On the other hand, litigation can assist and complement the Paris Agreement in its implementation, effective enforcement, and progress toward achieving its general goals.

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'BETTER REGULATION PROGRAMME' IN THE EUROPEAN UNION: PROS AND CONS

Abstract

The aim of this paper is to present the concept of Better Regulation (BetReg), in particular its implementation mechanisms in light of the latest documents of EU bodies and its application in the European Union legislative procedures. It will illustrate both viable aspects and shortcomings of this initiative. The authors argue that the better regulation postulate has a horizontal nature. It is an initiative that brings tangible and noticeable effects; however, it must be applied as an EU legislative standard for the whole EU law: not only for that being designed or amended but also for assessing the existing law in all EU law-making institutions and countries implementing European legislation. A question is raised whether BetReg has a real impact on legislative practice or whether it remains predominantly a postulate. The hypothesis is that BetReg is already a mature project and may significantly improve the legislative environment in the EU. It should be noted that the paper covers only a fraction of the problems, the comprehensive examination of which would allow verification of the hypothesis.

KEYWORDS

law-making, better regulation, impact assessment, European law, good legislation, European Commission, effectiveness of law

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I. INTRODUCTION

Considering the law-making process in the EU, not only a wide range of entities participating in it and varying political influence exerted but also each country's dynamic national context must be considered when assessing BetReg successes and failures to date. Additionally, the usual lack of sufficient data and time needed to examine specific solutions comprehensively makes BetReg a challenging initiative.

In the literature on the subject, the following BetReg goals have been distinguished: (1) to improve the quality of EU legislation; (2) to reduce the quantity of EU legislation; (3) to increase public participation in the legislative process; (4) to promote science-based governance; and (5) to enforce the subsidiarity and proportionality principles.[1] Therefore, the main objectives of BetReg are to improve EU legislation (rationales nos 1–2) and to refine the drafting process (rationales nos 3–5).

At the same time, it is a challenge to point out BetReg's practical effects. The broadly understood EU law-making process (i.e. the Commission shaping legislative solutions, the European Parliament and the Council adopting new and introducing changes to the existing law) is based on the already developed instruments and mechanisms. More and more documents of various kinds specify the scope of the policy, methods and objectives of its implementation. With the current volume of existing and emerging legislation and its (substantive, territorial, and temporal) application levels, it is impossible to assess BetReg holistically; this relates to its effectiveness and overall impact on the quality of legislation and law adopted under the objectives of this initiative.

[1] Sacha Garben and Inge Govaere, 'The Multi-faceted Nature of Better Regulation' in Sacha Garben and Inge Govaere (eds), *The EU Better Regulation Agenda: A Critical Assessment* (Bloomsbury Publishing 2018) 9.

BetReg has been known for quite some time, although under various manifestations. At the same time, the Better Regulation Agenda is not a static institution but a recurring phenomenon that develops dynamically over time, making it a challenging subject of study. It is in many ways a 'moving target': a fluid phenomenon that adapts to evolving political circumstances and powers.[2]

With the development of its integration processes, the EU has become a 'regulatory state' which, with its relatively small budget and without executive apparatus, engages primarily in regulatory activity, which translates later into national law.[3] On the one hand, regulations should, among other things, lead to balanced and expected protection of fundamental rights, such as the right to privacy, the protection of bigger goals, e.g. consumer and competition protection, while on the other hand, they should leave room for further innovation. As for future-proof legislation, initiatives such as BetReg are deemed necessary. However, they must be subjected to constant examination and improvement – their development should never end.[4] This is (and will be) particularly apparent in widely discussed legislation, such as the Digital Services Act,[5] the Digital Markets Act,[6] and the Artificial Intelligence Act,[7] where possible deviation from prescriptive legislation may be required towards increased guidance, delegated acts, or technical standardization.[8]

II. GENERAL PRINCIPLES OF BETTER REGULATION

The paper interchangeably uses terms such as BetReg package, BetReg programme, BetReg policies or BetReg agenda. Each of these has a meaning behind Policies of Better Regulation originated from the Reagan and Thatcher governments in the early 1980s, whose small government agendas concerned a tendency

[2] ibid 3.

[3] Giandomenico Majone, 'The Regulatory State and its Legitimacy Problems' (1999) 22(1) West European Politics 1.

[4] See exemplary recommendations towards the 'Embracing the resilience agenda' in Andrea Renda, *Assessment of Current Initiatives of the European Commission on Better Regulation* (EU Parliament's Policy Department for Citizens' Rights and Constitutional Affairs, Brussels 2022) 26 <www.europarl.europa.eu/supporting-analyses> accessed 21 October 2023.

[5] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L277/1.

[6] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L265/1.

[7] European Commission, 'The proposal for a regulation of the European Parliament and of the Council on laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts' COM (2021) 206 final.

[8] Renda, *Assessment* (n 4) 43.

to ratchet up the obligations and costs on businesses associated with regulation, while there were hardly any countervailing mechanisms to curb the urge to increase regulatory burdens. Early policies on both sides of the Atlantic set the objectives of lifting regulatory obligations and deregulation, but the language and ethos changed over time.[9]

Since the 1990s, attempts have been made to develop 'better regulation'.[10] This is about ensuring that the law meets business and social needs and does not introduce bureaucratic regulations that cost more than they bring profit.

Recently, among the vital ongoing trends in the EU are, inter alia: a transition from the use of cost-benefit analysis towards multi-criteria analysis; a move from pure evidence-based towards evidence-informed and foresight-based policies; the completion of the policy cycle with the introduction of, for instance, ex-post evaluations and fitness checks; the emergence of a regulatory oversight body; the growing role of the European Parliament in the better regulation domain; and the slow and partial development of the better regulation agenda in Member States.[11]

Therefore, the paper poses a research question of whether the ongoing implementation of the BetReg initiative is solely a manifestation of image changes or an active instrument in the EU legislative practice. The flurry of recent activity in the EU over BetReg has important constitutional implications, particularly for the Union's institutional balance.[12]

The BetReg programme has been successfully developed through different programmes, instruments, and mechanisms. Although it is a comprehensive and heterogeneous programme, a continuous process of adding new instruments leads to the inflation of solutions. This results in a peculiar paradox. The BetReg agenda, which is based on non-binding (such as communications, guidelines, or staff-working documents) or semi-binding (inter-institutional agreements) instruments, is to indicate how the European Commission is going to prepare its proposals, including the consultation process and the impact assessment. To illustrate, the BetReg package contains the Better Regulation Guidelines (BRG), the Regulatory Fitness and Performance Programme Platform (REFIT Platform),[13]

[9] Colin Scott, 'Integrating Regulatory Governance and Better Regulation as Reflexive Governance' in Sacha Garben and Inge Govaere (eds), *The EU Better Regulation Agenda: A Critical Assessment* (Bloomsbury Publishing 2018) 13.

[10] For more information on the evolution of the EU's BetReg agenda, see Helen Xanthaki, 'Improving the Quality of EU Legislation Limits and Opportunities?' in Sacha Garben and Inge Govaere (eds), *The EU Better Regulation Agenda: A Critical Assessment* (Bloomsbury Publishing 2018) 40, 40–44.

[11] Renda, *Assessment* (n 4) 5.

[12] Mark Dawson, 'Better Regulation and the Future of EU Regulatory Law and Politics' (2016) 53(5) Common Market Law Review 1209.

[13] The REFIT Platform allows national authorities, citizens, and other stakeholders to get involved in improving EU legislation. They can make suggestions on how to reduce the regulatory and administrative burdens of EU laws, which are then analysed by the REFIT Platform and the

the structure of the Regulatory Scrutiny Board (RSB),[14] the draft of the Interinstitutional Agreement on Better Law-Making (IAB)[15] and Better Regulation 'Toolbox' (BRT)[16]. These communications and staff working documents accompany the general paper: Better Regulation for Better Results.[17] An important step was the development of a new instrument: Regulatory Fitness and Performance Programme (REFIT),[18] established in 2012 to simplify EU law and reduce regulation costs while still obtaining benefits. The Commission is strengthening REFIT by offering more possibilities for stakeholders and EU countries to contribute.[19] The EU's approach to regulatory policy has been refined over the years as subsequent Commissions attempt to improve the existing framework by amending various solutions included in the better regulation agenda. Consequently, the Commission published a Communication on Better Regulation in April 2021,[20] new Better Regulation Guidelines, and an updated Better Regulation Toolbox in 2023[21]. The Commission also established the Regulatory Scrutiny Board, an independent group of Commission officials and experts from outside the Commission. Its role is to check the quality of all impact assessments and significant evaluations that inform EU decision-making.[22] The Committee of the Regions, involved in the law

Commission; see <https://ec.europa.eu/info/law/law-making-process/evaluating-and-improving-existing-laws/refit-making-eu-law-simpler-and-less-costly_en> accessed 22 October 2023.

[14] See more about the Members of the Regulatory Scrutiny Board at <https://ec.europa.eu/info/law/law-making-process/regulatory-scrutiny-board/members-regulatory-scrutiny-board-0_en> accessed 23 October 2023.

[15] Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making (Interinstitutional Agreement of 13 April 2016 on Better Law-Making) OJ L123/1; see <https://eur-lex.europa.eu/legal content/EN/TXT/?uri=CELEX%3A32016Q0512%2801%29> accessed 21 October 2023.

[16] For more see European Commission, 'Better Regulation: Guidelines and Toolbox' <https://ec.europa.eu/info/better-regulation-toolbox_en> accessed 23 October 2023.

[17] European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Better Regulation for Better Results – An EU Agenda' COM (2015) 215 final.

[18] More information about REFIT is available at <https://ec.europa.eu/info/law/law-making-process/evaluating-and-improving-existing-laws/refit-making-eu-law-simpler-and-less-costly/refit-platform_en> accessed 23 October 2023.

[19] For a comprehensive and critical analysis of the instruments presented here see Éric Van den Abeele, '"Better Regulation": A Bureaucratic Simplification with a Political Agenda', Working Paper April 2015 <www.etui.org/content/download/20728/173892/file/15+WP+2015+04+Better+Regulation+EN+Web+version.pdf> accessed 20 July 2019.

[20] For more see European Commission, 'Questions and Answers on the Better Regulation Communication' <https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_1902> accessed 21 October 2023.

[21] Commission Staff Working Document, 'Better Regulation Guidelines' SWD (2021) 305 final; see <https://commission.europa.eu/law/law-making-process/planning-and-proposing-law/better-regulation/better-regulation-guidelines-and-toolbox_en> accessed 23 October 2023.

[22] Regulatory Scrutiny Board <https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/impact-assessments_en> accessed 21 October 2023.

improvement process as the body that gives opinions on EU legislative proposals, launched an increasingly important pilot project on a regional hubs network to collect local and regional data on policy implementation in the EU using questionnaires (RegHub).[23]

The Communication 'Better Regulation: Joining Forces to Make Better Laws' announced that the Commission would 'strengthen the burden reduction effort further through a "one in, one out" [OIOO] approach whereby, when introducing new burdens, we systematically and proactively seek to reduce burdens imposed by existing legislation'.[24] The OIOO approach will complement the REFIT programme by helping the European Commission pay special attention to cumulative costs for individuals and businesses in a given policy area and covering new initiatives. The OIOO approach presented by the Commission is still somewhat vague. However, the following features are already defined: for every new legislative industry generating administrative burdens, the Commission services must identify one or more provisions to be modified or repealed to offset the cost increase.[25]

The instruments provided for by the better regulation agenda address all elements of the EU policy, beginning with legislative negotiations between the Parliament and the Council, and ending with transposition and implementation by Member States and the Commission.[26] Therefore, achieving 'better regulation' is not the sole responsibility of the European Commission; it is a joint endeavour of the European Parliament, the Council, and Member States, as each has roles and responsibilities to fulfil.

The programme is intended to simplify the law and make it more user-friendly, but the proliferation of its structure makes it simultaneously more and more opaque and complex. The problems of efficiency, effectiveness, and usefulness, as well as making the law subject to evaluation and evidence-based legislative initiatives, have become the subject of the EU agenda for improving legal regulations. The European Commission captures the heart of good law: 'Legislation is

[23] European Commission, European Committee of the Regions, 'Network of Regional Hubs: Assessing EU Law from the Ground' <https://cor.europa.eu/en/our-work/Pages/network-of-regional-hubs.aspx> accessed 23 October 2023.

[24] European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Better Regulation: Joining Forces to Make Better Laws' COM (2021) 219 final, para 5 (note added); on OIOO see also Andrea Renda and others, *Feasibility Study: Introducing 'One-In-One-Out' in the European Commission* (Final Report for the German Government, Centre for European Policy Studies 2019) <www.ceps.eu/ceps-publications/feasibility-study-introducing-one-in-one-out-in-the-european-commission> accessed 21 October 2023.

[25] Renda, *Assessment* (n 4) 20.

[26] Robert Grzeszczak, 'Making Sure European Laws are Fit for Purpose – the Better Regulation Principles in the European Union' (2019) 1(6) Proceedings of the International Scientific Conference 'Social Changes in the Global World' 465, 466.

not an end to itself – it is a means to deliver tangible benefits for EU's citizens and address the common challenges Europe faces. Well-targeted, evidence-based and simply written regulation is more likely to be properly implemented and achieve its goals on the ground, whether these are economic, societal or environmental'.[27] It is even claimed that better regulation should be perceived as the meta-regulation which 'is a fluid and rapidly changing discourse that enables political leaders to address changing priorities in their regulatory reform agenda'.[28]

To properly understand the application of the BetReg programme, its potential for improving the law, and the limitations that result from the specificity of a legal system to which it applies, it is necessary to pay attention to the model according to which EU law is developed.

III. THE MODEL OF LAW-MAKING IN THE EUROPEAN UNION

The EU has developed its original decision-making regime, which, as Bruno de Witte notes, involves the engagement of various EU bodies, often beyond the control of Member States (this applies especially to the European Commission and the European Parliament), and resorting to majority voting in the Council and the EU controlled by the states.[29]

European law is created as a result of the interaction between private and public entities, EU institutions and Member States, and specialist (expert) groups, leading to what is known as European governance. A distinguishing feature of EU legislation is the tendency for the continuous increase in the law-making activity of the administration, which creates particular legal subsystems.

The legislative model adopted in the EU, taking the ordinary and extraordinary legislative procedures as a point of reference, shares many features with the conception of negotiating the legal system, which assumes that such system is constituted by rules shaped on the basis of negotiating procedures intended to

[27] 'Introduction' in European Commission, 'Communication from the Commission. Better Regulation: Delivering Better Results for a Stronger Union' COM (2016) 615 final, 3 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016DC0615> accessed 10 October 2023.

[28] Jędrzej Maśnicki, 'Good Governance through Better Regulation: Looking for the Impact Analysis Approach to the Proportionality Principle' in Robert Grzeszczak (ed), *Challenges of Good Governance in the European Union* (vol 5, Nomos 2016) 201, and quoted there Claudio M Radaelli, 'Whither Better Regulation for the Lisbon Agenda?' (2007) 14(2) Journal of European Public Policy 197.

[29] Bruno de Witte, 'The European Union as an International Legal Experiment' in Gráinne de Búrca and Joseph Halevi Horovitz Weiler (eds), *The Worlds of European Constitutionalism* (Cambridge University Press 2011) 41.

guarantee the influence of addressees of the law on the content of defined norms and to ensure a possible consensus on values.[30] It is a legalistic type, characterized, among other things, by the proceduralization of law-making processes, the institutional forms of influence of social groups on the content of law, the moderate decentralization of the actual legislative initiative, and the institutional scrutiny of the law-making process and governance of its results.[31]

In addition – as is the case with Member States' systems – EU legislation is secondary to decisions of political nature. The practice of the European Council meetings and conclusions reached there, i.e. political agreements that guide further legislative action in the EU, points to this aspect. This is a broader problem of the political initiation of top-down and bottom-up legislative procedures and mixed ('hybrid') procedures.[32]

The EU legislation model exhibits several peculiarities, among other things, in terms of procedure, actors involved in creating and initiating a proposal for a law, in its subsequent shaping, and the procedural and judicial supervision of the law thus made.[33] The competencies of EU bodies and state authorities intertwine. In addition, the European law is made in line with a particular axiological dynamic and, to some extent, depending on the EU (exclusive, shared or complementary) competence and in highly fragmented areas of law (e.g. electoral or labour law).[34] It is crucial to consider these peculiarities of EU legislation, i.e. its hybridity, the intertwining joint (EU) and national interests pursued in separate institutional fora (Commission and European Parliament and both Councils). All of these factors highlight the difficulties in implementing the BetReg initiative.

A primary characteristic of the EU decision-making process is the fact that the existing legislation is subject to constant evaluation and revision.[35] Due to this, some directives and decisions are replaced with regulations, and numerous other acts are replaced with a single piece of legislation.[36] These tendencies appear to

[30] On the conception of negotiating the legal system see Wiesław Staśkiewicz, 'Stare i nowe modele legislacji' in Michał Araszkiewicz and others, *Dyskrecjonalność w prawie* (LexisNexis 2010) 195ff.

[31] Robert Grzeszczak, 'Model procesu legislacyjnego w Unii Europejskiej' in Wojciech Brzozowski and Adam Krzywoń (eds), *Leges ab omnibus intellegi debent. Księga XV-lecia Rządowego Centrum Legislacji* (Wydawnictwo Sejmowe 2015) 69.

[32] Jan Barcz and others, 'Praworządność a unijne fundusze (prawne i praktyczne aspekty interpretacji ustaleń Rady Europejskiej z 11.12.2020 r.)' (2021) 11 Państwo i Prawo 140; Giacinto D Cananea, 'The European Union's Mixed Administrative Proceedings' (2004) 68(1) Law and Contemporary Problems 197, 199 <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1303&context=lcp> accessed 12 October 2023.

[33] Grzeszczak, 'Model procesu legislacyjnego' (n 31) 67.

[34] ibid 68.

[35] Giacomo Luchetta, 'Impact Assessment and the Policy Cycle in the EU' (2012) 3(4) European Journal of Risk Regulation 561, 561–62.

[36] Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) [2010] OJ L334/17.

be additionally justified in light of the already adopted Better Regulation agenda.[37] Moreover, EU legislation is further developed by means of highly detailed sectoral packages, such as the recently published Clean Energy for all Europeans Package, the Banking Package, or the already adopted Clean Air Policy Package. This package method of providing proposals is a result of the implementation of legislative action plans, which constitute the most critical part of the Commission's political agenda.[38] The examples illustrate various forms of deficits in the broadly understood law-making procedures in the EU.

Additionally, it should be emphasized that the law created in the conditions mentioned above is affected by similar flaws to those in national legal systems, even though it is a non-state legal system. The phenomenon of legal inflation (overregulation) causes a legal crisis and occurs both in states and the EU. The problems of overregulation and poor quality of the law had already been known, and their severity increased as the processes were further developed and common in EU domains, such as economy, legal and human rights, were shaped.

The most troublesome shortcomings are excessive legal regulations (legislative inflation) related to, among others, the expansion of administrative structures and growing instability of the law (however, not that noticeable as in the case of many states), bureaucracy, unclear division of competences, mixing of governmental and EU (community) methods, persistently non-transparent comitology procedures, overregulation or archaization, and unjustified (too high) costs of the law made due to lack of prior assessment of the burdens of a given regulation.[39]

There is also an inconsistency of norms and their archaization, which in turn overburdens the addressees and results in enormous complexity of the law. The number of new laws of EU origin leads to the conviction that EU legislation is too bureaucratic.[40] Incidentally, however, bureaucracy is mentioned in relation to

[37] 'Better Regulation for Better Results – An EU Agenda' COM (2015) 215 final (n 17).

[38] Jędrzej Maśnicki, 'From Integration to Fragmentation? The Late and Incorrect Transposition of the EU Directives' in Robert Grzeszczak (ed), *Renationalisation of the Integration Process in the Internal Market of the European Union* (vol 8, Nomos 2018) 16.

[39] On the development of initiatives to improve the law in the EU and their critical assessment see Adriaan Schout, 'EU Agencies after 25 Years: A Missed Opportunity to Enhance EU Governance' (Clingendael Policy Brief 2018); Adriaan Schout and Davide Bevacqua, 'EU Added Value – Fact-Based Policy or Politicised Facts?' (Clingendael Policy Brief 2018); Adriaan Schout and Christian Schwieter, 'Two Decades of Better Regulation in the EU Commission – Towards Evidence-Based Policymaking?' (Clingendael Policy Brief 2018) <www.clingendael.org/publication/two-decades-better-regulation-eu-commission> and <www.clingendael.org/sites/default/files/2018-12/PB_Better_regulation.pdf> accessed 23 October 2023.

[40] For Better Regulation in numbers over 2015–2016 see <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52016DC0615&from=PL> accessed 23 October 2023; see also Eurobarometer 2017 in which 70% of businesses surveyed perceive EU legislation as increasing their paperwork and 67% as increasing administrative costs <www.europarl.europa.eu/news/en/headlines/priorities/eurobarometer-2017> accessed 23 October 2023; for public perception see Thomas Raines, Matthew Goodwin and David Cutts, *The Future of Europe: Comparing Public*

the areas that do not entirely fall within the competence of the EU but of Member States, such as taxation, labour law, social security (with the significant example of national pension systems), spatial planning, construction law and many others.[41]

IV. THE QUALITY AND EFFECTIVENESS OF LAW: GENERAL COMMENTS AND EXAMPLES

Traditionally, the quality of law is associated with the observance of law-making rules. Therefore, the legislative process, its content and effects on the addressees must all be evaluated. An excellent legal regulation is effective, i.e. good law delivers the intended result and achieves the intended positive objective or objectives. Law is, in principle, assessed cumulatively, usually from different perspectives, e.g. in terms of its effectiveness, applicability, efficiency, and usefulness.[42] The regulatory and legislative quality also includes (starting with minor ultimate goals) plain and gender-neutral language, clarity, precision, unambiguity, and cost-effectiveness.[43]

The ultimate goal of regulation is effectiveness, which is the extent to which regulators achieve their objective.[44] The evaluation of the effectiveness of a law, as an empirical feature, is related to statute law. In contrast, the application of the law is factual, the effectiveness of which results from the law.[45] Actions are practical when they lead to the intended effect (objective), in this case, to improving the quality of the law. The evaluation of effectiveness, in simple terms, boils down to the review of the effects of legal regulations. At the same time, the efficiency

and Elite Attitudes (Research Paper, the Royal Institute of International Affairs 2017), a survey in which bureaucracy and red tape are perceived by the public as the biggest failure of the EU; see also the comments of Elisabeth Goldberg, '"Better Regulation": European Union Style' (M-RCBG Associate Working Paper No 98, Mossavar-Rahmani Center for Business and Government, Harvard Kennedy School 2018) 5 <www.hks.harvard.edu/sites/default/files/centers/mrcbg/files/98_final2.pdf.pdf> accessed 11 October 2023.

[41] Grzeszczak, 'Making Sure' (n 26) 466.

[42] For more information see: Teresa Fitzpatrick, 'Evaluating Legislation: An Alternative Approach for Evaluating EU Internal Market and Services Law' (2012) 18(4) Evaluation 477; Peter Dahler-Larsen and Adiilah Boodhoo, 'Evaluation Culture and Good Governance: Is There a Link?' (2019) 25(3) Evaluation 277.

[43] See Figure 3.1. in Xanthaki (n 10) 29.

[44] ibid 29.

[45] For more on the evaluation of effectiveness of law see Krzysztof Koźmiński and Mateusz Ciechomski, 'Ocena skutków regulacji: instrument racjonalnej polityki prawa czy manipulacja projektodawcy?' in Piotr Grzebyk (ed), *Prawo w epoce populizmu* (1st edn, Wydawnictwo Naukowe Scholar 2023) 219ff.

of the law is assessed through the costs it generates, and the usefulness of the law is measured by looking at the amount of benefits offered by legal regulations. The principles of legal certainty and predictability, legality and proportionality are also paramount for claiming the legislation right.

Effectiveness, as a measure of legislation quality in achieving the desired objective, is a goal that the drafter must reach with assistance. An excellent draft may be capable of producing the desired regulatory effects, but its poor implementation and incorrect judicial application may interfere with its actual results. Certainly, one has to accept the fact that the margin of incorrect implementation and judicial application is directly linked to the draft law quality. Still, an error in the draft may be attributed to a fault in the content of the pursued policy. Within the umbrella of efficacy, the drafter seeks effectiveness in legislation. The term 'effectiveness' is used widely but often without a definition: the EU calls for accountability, effectiveness, and proportionality to achieve better law-making, but the term is not defined at all.[46] Generally speaking, the essence when assessing the effects of regulations can be reduced to an analytical procedure that allows one 'to determine as precisely as possible all the consequences – both benefits and costs – of the planned state intervention in the form of a new legal act or its amendment'.[47]

When evaluating regulations, it is possible to identify several different kinds of measures:

(1) Evaluation measures, which focus chiefly on assessing current or new provisions against such criteria as costs imposed relative to expected or actual benefits.
(2) Dialogic measures: processes that engage stakeholders in exchanges over such issues as appropriate instruments, targets or objectives within a regime.
(3) Oversight measures: processes that involve those who make or apply rules undergoing oversight or supervision by others, for example, in a central government unit.
(4) Information/communication measures: processes through which sharing information about a regime and other transparency measures contribute to better knowledge and involvement.

This method of categorizing different BetReg aspects may be coupled with an approach that looks at where innovative and reflexive approaches occur in the policy-making process.[48]

In practice, most of the Commission's impact assessments compare policy options through scorecard approaches, in which options are ranked in terms of their ability to achieve specific objectives and based on a quality-quantitative

[46] Xanthaki (n 10) 32.
[47] Koźmiński and Ciechomski (n 45) 220.
[48] Scott (n 9) 19.

evaluation of their associated costs.[49] Good transposition legislation is legislation that achieves effectiveness at two levels: the EU level and the national level. National drafters pursue the desired regulatory results introduced in the EU legislative text. Drafting transposition legislation is one of the most challenging legislative tasks because the drafter serves two masters: two sets of regulatory goals, two texts, two sets of legal concepts, two sets of standard and legal languages, and two drafting styles.[50]

Therefore, what has been described above is an instrumental evaluation of the law. However, it must be recognized that most evaluations of legal effectiveness are based on the analysis of legal texts. Notably, law regulation can be assessed not only in terms of its effect but also in terms of its axiology, which defines how the criterion of values is incorporated in the evaluation of law.

At the same time, taking into account the specificity of law-making in the EU, the effectiveness of EU provisions can also be assessed from the perspective of a body applying the law, i.e. by deciding to what extent the regulation allows it to achieve the goal provided for by EU law, to what extent it must be supported, for example, by the process of pro-EU interpretation of national law, and how much the standard does not fulfil its purpose (e.g. due to the gaps), or whether there are remaining interpretative doubts. These doubts may be measured by a number of preliminary questions pending before the Court of Justice of the European Union in the context of a specific issue.

V. BETREG IN THE EU POLICY AND LEGISLATIVE PROCESSES

Better regulation brings some positive effects but cannot be described as a revolution in changing the quality of law. There are many reasons for that, especially those resulting from the specific nature of the EU law-making process, as it has already been mentioned. Better Regulation covers the whole EU policy-making cycle: planning, design, adoption, implementation, evaluation, and revision. All EU interventions – legislative or non-legislative, policy initiatives or spending programmes – aim to achieve specific objectives through one or several means, in line with the goals and responsibilities set by the EU Treaty.[51]

However, for the already mentioned reasons, the law-making process in the European Union does not rest solely in the hands of the European Commission that plays a vital role in the BetReg agenda, the effects of which may be changed and distorted during the work of the European Parliament and the Council.

[49] Renda, *Assessment* (n 4) 7.

[50] Xanthaki (n 10) 44.

[51] Maśnicki, 'Good Governance' (n 28) 205; see also Luchetta (n 35) 561.

Against this backdrop, despite some attempts, the Council has yet to significantly step up its production of impact assessments or ex-post evaluations in support of the legislative process. As a result, the Commission's proposals are scrutinized along the way by the European Parliament. Still, as they are amended during the ordinary legislative procedure, their prospective impact needs to be updated to reflect the amendments tabled by the other institutions and those achieved during trilogies.[52] The Commission assesses the expected and actual impact of action at every stage of the decision-making process. Extensive planning and analysis are carried out before taking action, for instance, before proposing a new law or when evaluating how sound laws are performing. The Commission increases opportunities to contribute throughout the policy and law-making cycle.[53] Interested citizens and stakeholders can share their views on roadmaps and inception impact assessments, where the Commission outlines new ideas for policies and legislation or evaluations of existing policies and legislative proposals, once the Commission has agreed on them, draft acts that add or amend aspects of existing laws (delegated acts) or set out rules to make sure EU countries implement regulations in the same way (implementing actions).[54]

Significant disparities can be seen in the final stages of negotiations in the legislative procedure when agreement between the European Parliament and the Council is most often reached without full consideration of the direct and indirect effects that compromise amendments to proposals the Commission may have. Therefore, the Parliament and the Council should conduct impact assessments of any substantive amendments they propose during the law-making process. The emphasis on coherence and effectiveness became even more visible after 2010 when the Commission announced its intention to complete the policy cycle for the first time by performing ex-post evaluations of existing legislation alongside the ex-ante assessment of new proposals. The 'evaluate first' rule, regularly applied by the Commission, often obliges services to perform ex-post evaluations 'back to back' with the ex-ante assessments of future legislation. From a methodological point of view, ex-post evaluations are based on five criteria, i.e. effectiveness, efficiency, relevance, coherence, and EU-added value.[55]

[52] Renda, *Assessment* (n 4) 9.

[53] Andrea Renda, *Best Practices in Legislative and Regulatory Processes in a Constitutional Perspective: The Case of the European Union. In-depth Analysis* (European Parliament 2015) 5–30 <https://data.europa.eu/doi/10.2861/003194> accessed 21 October 2023.

[54] European Commission, 'Better Regulation: Why and How' <https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how_en> accessed 20 October 2023.

[55] Renda, *Assessment* (n 4) 8.

VI. A FEW CONCLUSIONS RESULTING FROM PRACTICAL APPLICATION OF BETREG

Examples where better regulation considerations have led to more proportionate approaches are, e.g.: new, stricter, and more transparent type-approval requirements for motor vehicles, including enhanced monitoring and surveillance provisions, which were presented by the following revelations about the use of 'defeat devices' preventing adequate control of harmful emissions from passenger cars; greater decentralization of the handling of state aid; new and more straightforward maritime safety rules developed building on the recommendations of the fitness check carried out under REFIT; the Commission guidance aimed at supporting consumers, businesses and public authorities to engage confidently in the fast-moving collaborative economy.[56]

Since 2018, the Commission's activities have so far produced the following outcome: (1) Value Added Tax (VAT) for small and medium-sized enterprises (SMEs): compliance costs for SMEs are expected to be reduced under this initiative to EUR 56.1 billion per year from EUR 68 billion per year at present; (2) explosives precursors: a decrease of around 10% (between EUR 25 million and EUR 75 million per year) in the current costs for companies complying with the Regulation; (3) Fisheries Control Regulation: Member States' authorities are expected to benefit from cost savings of EUR 157 million over five years; (4) single maritime window: the simplification elements are quantified at an estimated amount of EUR 22,015,025 million staff hours in the time period of 2020–2030, equivalent to a value of EUR 625–720 million for shipping operators; (5) service of documents: increase the speed of the cross-border service of documents; (6) decreasing the volume of default judgments by 10% in the EU would result in saving up to EUR 480 million per year, since citizens would have to spend less on judicial reliefs.[57]

The menu of instruments in the hands of the European Commission has significantly expanded over the past two decades. Besides ex-ante assessments and ex-post evaluations, the Commission has launched new types of measurements, moving from an analysis of the flow of legislation towards comprehensive measures of the stock. The most notable instruments in this respect are: the baseline measurement of administrative burdens, launched in 2007 and covering 43 EU directives considered to be most burdensome for businesses, and culminated in a reported (though highly criticized) 33% reduction of adminis-

[56] See 'Better Regulation: Delivering Better Results for a Stronger Union' COM (2016) 615 final (n 27).

[57] European Commission, 'The European Union's Efforts to Simplify Legislation: Annual Burden Survey 2018' 18 <https://commission.europa.eu/system/files/2018-11/2018-annual-burden-survey_en_0.pdf> accessed 21 October 2023.

trative burdens in 2012; the consultation on the top 10 most demanding pieces of EU legislation for small and medium-sized enterprises conducted between October and December 2021; the launch of 'fitness checks' to review the acquis in specific policy sectors; and a limited number of 'cumulative cost assessments' that looked at how different EU rules affected the costs of market operators in specific industrial sectors. This trend includes the 'one-in-one-out' rule, i.e. a form of regulatory offsetting that has been piloted since the second half of 2021, which may lead the European Commission to establish a systematic link between the flow (i.e. new proposals) and the stock of EU legislation (i.e. existing legislation).[58] Drawing upon the conclusions from the Annual Burden Survey 2022, 52 recommendations are expected to lighten the overall administrative burden by EUR 7.3 billion (net count of EUR 4.469 million in and EUR 11.780 million out per year).[59]

Alternative approaches to binding regulations are also used. This has resulted in a significant qualitative and quantitative change in how laws are drafted, both in form and manner. These alternative regulations are based on entrusting the task of achieving Treaty objectives to, for example, civil society partners or non-governmental organizations. This also applies to the so-called self-regulation, i.e. voluntary agreements concluded between authorities to solve specific problems.

To sum up, as a result of the actions taken, it has been proposed to remove about 2,000 legal acts. By 2018 alone, more than 8,000 pages of the Official Journal, representing more than 10% of the EU acquis, had been removed this way. Currently, the agenda focuses on better law-making on an ongoing basis rather than on removing archaic law (as this objective has already been achieved).[60]

VII. CONCLUSIONS AND CHALLENGES

The paper presents an overview of the concept of Better Regulation, particularly its implementation mechanisms, in light of the latest documents of EU bodies and the practical application of the European Union legislative procedures.

The main conclusion resulting from this analysis is that the BetReg initiative has both a symbolic aspect (the Union 'signalling' that certain values, like sim-

[58] Renda, *Assessment* (n 4) 8.

[59] European Commission, 'The European Union's Action to Simplify Legislation: Annual Burden Survey 2022' <https://commission.europa.eu/system/files/2023-09/ABS_20230912_0.pdf> accessed 22 October 2023.

[60] European Commission, 'Evaluating Laws, Policies and Funding Programmes' <https://ec.europa.eu/info/law/law-making-process/evaluating-and-improving-existing-laws/evaluating-laws_en> accessed 12 October 2023.

plification, citizen participation, or subsidiarity and proportionality, do 'matter') and some practical impact.

Indeed, as the analysis indicates, improving the European Union legislative environment is gaining importance. However, like every success, it has many authors. Numerous entities want to join the programme, creating new commodities, structures, and instruments. The inflation of the proposed additional entities and initiatives is a danger. The principle of good law is already a recognizable standard (or element) of the law-making system in the EU.

Most Member States alert domestic stakeholders to consultations organized by the European Commission. However, only around one-third systematically use the European Commission's analysis as input to their negotiating position. Additionally, the Commission often does not have information on how EU legislation works in Member States. EU Member States rely on the regulatory management tools used by the Commission more often during the negotiation phase than in the transposition phase. The exception is the use of the European Commission's ex-post evaluations, which generally do not appear to be applied much by EU Member States.[61] Identification of cross-cutting regulatory issues, coordination mechanisms, and inevitable unification of regulatory approaches at all levels of governance (both supranational and national) seem to demand further improvement. However, the hypothesis that BetReg is already a mature project and may significantly improve the legislative environment in the EU has been positively verified.

For most of the trends described above, from the more significant political salience to the focus on innovation, the involvement of other institutions and Member States still need to be completed. The Better Regulation agenda remains a challenge for the future, especially in light of technological advances and changes in the social and economic environment. Therefore, it is essential to ensure that the programme is upgraded. In addition, regarding the correct use of existing structures and solutions – given the often advocated new structures within BetReg and the fact that numerous instruments already accompany the programme without undermining their application value – the fundamental question arises whether the increasing number of such structures will not undermine the credibility of the whole process, especially as greater coordination is already required.

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POWERS OF THE NATIONAL REVENUE ADMINISTRATION WITH REGARD TO TEMPORARY ATTACHMENT OF MOVABLE PROPERTY: LEGISLATIVE ASPECTS

Abstract

The amendment of the Act on the National Revenue Administration, in force since 1 January 2022, gave officers the right to temporary seizure of movable property. As a part of the 'Polish Deal', amendments were made to the Act of 16 November 2016 on the National Revenue Administration and added in Section V Chapter 1c 'Temporary attachment of movable property', as well as Chapter 5a 'Approval of temporary attachment of movable property' was added in Section II of the Act of 17 June 1966 on Enforcement Proceedings in Administration. Under these changes, from the beginning of 2022, movable property may be temporarily attached by an officer who conducts customs and tax inspection. Seized movable property may include, for example, machines, computers, raw materials and means of transport. An authority may temporarily seize movable property even before the end of the customs and tax inspection. The new regulations are aimed at increasing the efficiency of public debt collection. The change in the regulations resulted from the recognition of the existing legal regulations as defective, i.a. due to the difficulty in searching for the debtor's assets. The aim of this paper is to assess the legislative correctness and operation of the construct of temporary attachment of movable property. The following problems have been identified: (1) whether the legislator has indicated the criteria for assessing if in a given situation temporary attachment will

increase the efficiency of enforcement; (2) whether the legislator has included a definition of the term 'efficiency' in the discussed provision; (3) whether a tax and customs officer is obliged to temporarily attach movable property or whether it may not be seized despite the conditions being met; (4) whether the provisions establishing temporary attachment of movable property lay down rules for estimating the value of the seized movable property. A formal and dogmatic method has been used to carry out the above analysis. This method involves a linguistic and logical analysis of legal texts. In response to the questions posed, it has been established that the legislator did not indicate the criteria according to which it would be assessed whether in a given situation temporary attachment would increase the efficiency of enforcement. Nor did the legislator define the concept of 'efficiency'. Interpretative doubts have also been raised as to whether the officer is obliged to temporarily seize movable property or whether it may not be attached despite the conditions being met. In addition, the provisions establishing temporary attachment of movable property do not lay down rules for estimating the movable property value.

KEYWORDS

administrative enforcement, customs and tax inspection, National Revenue Administration, temporary seizure/attachment of movable property, obligor

SŁOWA KLUCZOWE

egzekucja administracyjna, kontrola celno-skarbowa, Krajowa Administracja Skarbowa, tymczasowe zajęcie ruchomości, zobowiązany

I. INTRODUCTION

The provisions introducing temporary attachment of movable property into the Polish legal regime have been in force as from 1 January 2022. These provisions were added to the Act of 16 November 2016 on the National Revenue Administration (NRA Act)[1] and to the Act of 17 June 1966 on Enforcement Proceedings in Administration (EPA Act)[2]. The amendments were introduced by the Act of 29 October 2021 amending the Personal Income Tax Act, the Corporate

[1] (Ustawa z dnia 16 listopada 2016 r. o Krajowej Administracji Skarbowej) consolidated text [2022] JoL [Journal of Laws] 813 as amended.

[2] (Ustawa z dnia 17 czerwca 1966 r. o postępowaniu egzekucyjnym w administracji) consolidated text [2022] JoL 479 as amended.

Income Tax Act and some other acts.[3] From 2022 onwards, temporary attachment of movable property may be used during customs and tax inspection. This type of control, although its main purpose is to verify compliance of the taxpayer's activities with tax law, as in the case of tax inspection, is characterized by much broader powers of tax authorities. The far-reaching powers granted to officers of the National Revenue Administration (NRA) conducting customs and tax inspections result from the essence of customs and tax control. It is aimed at identifying taxpayers' shortcomings in the sphere of the tax law that significantly affect the state financial security system.[4]

Before the entry into force of the amendment introducing temporary attachment of movable property, the head of the tax office could, as an enforcement authority, seize movable property, but the regulations in force at that time provided for many restrictions in this respect. As a result, there was a need to redesign the regulations regarding tax authorities' enforcement competences. The newly established construct of temporary attachment of movable property adds a new, previously unknown customs and tax control right. Property is attached this way by the officer conducting the inspection if he/she finds that administrative enforcement is being carried out against the obligor. As a result, the head of the customs and tax office acquires a temporary right to take control of the movable property of the obligor. Under Article 94z s 2 NRA Act, such a seizure may not last longer than 96 hours from the moment of the officer's signing the relevant report.

In the opinion of the drafter, the actions of an officer of the Customs and Tax Service will be more effective than the search for the obligor's movable property by the tax collector. The rules for temporary attachment of real property are governed by Articles 94y–94dz NRA Act. They stipulate e.g. that in order to increase the efficiency of administrative recovery of monetary receivables, the officer, in the course of customs and tax inspection, has the right to temporarily seize the movable property of the obligor referred to in Article 1a EPA Act, against whom the enforcement authority being the head of the tax office conducts administrative enforcement on the basis of enforcement titles covering monetary claims exceeding PLN 10,000 in total (Article 94y s 1 NRA Act).

Article 94y s 1 NRA Act provides that the officer has the right to temporarily seize movable property in order to increase the efficiency of administrative enforcement, while Article 94y s 3 NRA Act indicates that movable property significantly exceeding the amount enforced is not subject to attachment, and Article 94za NRA Act provides for cases when the officer should not attach property

[3] (Ustawa z dnia 29 października 2021 r. o zmianie ustawy o podatku dochodowym od osób fizycznych, ustawy o podatku dochodowym od osób prawnych oraz niektórych innych ustaw) [2021] JoL 2105.

[4] <www.pitax.pl/wiedza/aktualnosci/polski-lad-tymczasowe-zajecie-ruchomosci> accessed 10 July 2023.

(i.e. the obligor has demonstrated non-enforceability of the obligation; movable property is excluded or exempt under the provisions of the EPA Act; animals or perishable goods would be subject to seizure).

According to the Constitutional Tribunal,[5] the presence of vague concepts in legal acts is common and unavoidable; they have significant advantages as they make the legal regime more flexible and adaptable to actual situations, and thus contribute to expressing, in the course of applying the law, the values which result from the rule of law. However, the Constitutional Tribunal points out that the principles of good legislation include, among other things, the requirement of sufficient precision of legal provisions, which should be formulated in an explicit, clear and linguistically correct manner.

Despite the introduction of temporary attachment of movable property, the scope of monetary receivables has not been limited to those which are exclusively specified in this Act[6] (taxes, duties, non-tax budget receivables).[7]

Article 94y NRA Act stipulates that temporary attachment of movable property concerns the administrative enforcement in recovery of monetary receivables without indicating their nature. As a consequence, these may also be, for example, administrative penalties, enforcement costs, social security contributions, fines[8] or subscription fees imposed for the use of radio and television sets[9]. Moreover, Article 94y s 3 NRA Act provides that movable property with a value significantly exceeding the amount needed to satisfy the enforced monetary claim should not be temporarily attached. Article 97 § 5 EPA Act also lays down the rule that movable property which value exceeds the amount needed to satisfy the enforced claims is not attached if the obligor has another movable property subject to enforcement with a value sufficient to satisfy these receivables, and the enforced sale of this movable property does not cause any difficulties.

As a result, during the analysis of the above issues, remarkable gaps have been noted, which are crucial for the correct application of the adopted regulations. The following problems have been identified:

(1) whether the legislator has indicated the criteria for assessing if in a given situation temporary attachment will increase the efficiency of enforcement;

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[5] Judgment in SK 40/12, 8 October 2013 Polish Constitutional Tribunal <https://trybunal.gov.pl/s/sk-4012> accessed 10 July 2023.

[6] Conversely and, in my opinion, erroneously in Joanna Zawiejska-Rataj and Jakub Sekulski, 'Polski Ład a ustawa o Krajowej Administracji Skarbowej w procesie zmian' (2022) 1 Przegląd Podatkowy 26, 28. Temporary attachment of movable property is understood as the possibility of temporary seizure, by an officer of the National Revenue Administration during customs and fiscal inspection, of movable property of the obligor who has tax arrears subject to enforcement by the head of the tax office.

[7] Art 2 s 1 para 1 NRA Act.

[8] Art 2 EPA Act.

[9] Art 7 s 3 of the Act of 21 April 2005 on Subscription Fees (Ustawa z dnia 21 kwietnia 2005 r. o opłatach abonamentowych) consolidated text [2020] JoL 1689 as amended.

(2) whether the legislator has included the definition of the concept of 'efficiency' in the provision;
(3) whether an officer is obliged to temporarily attach movable property or it may not be seized despite the conditions being met;
(4) whether the provisions establishing temporary attachment of movable property lay down rules for estimating the value of seized movable property.

Therefore, this paper is inspired by the issues that require clarification during further study. However, the key objective in what follows is to assess the legislative correctness and functionality of the solutions adopted by the legislator. In order to do so, an analysis has been carried out with the use of the formal and dogmatic method. The paper is based on the analysis of regulations and literature since, due to the relatively short time when the provisions in question have been in force, there has been no related case law.

II. *RATIO LEGIS* OF TEMPORARY ATTACHMENT OF MOVABLE PROPERTY

Administrative enforcement is a set of legally defined procedural actions undertaken by the subjects of enforcement proceedings in order to achieve a goal, which is the performance of the obligation incumbent on the obligor. These consist of legal and factual actions which, in light of the applicable law and in accordance with the nature of the obligation specified in the enforceable title, are to lead to the termination of the legal relationship in which it has arisen.[10] The importance of the objectives set for administrative enforcement, i.e. ensuring the performance of legal obligations by the obligors, prompts the legislator to seek measures to guarantee efficient administrative enforcement.

Article 94z s 1 NRA Act states that temporary attachment of movable property consists in depriving the obligor of the right to dispose of the attached movable property for some time. In the opinion of the drafter, the actions of an officer of the Customs and Tax Service will be more effective than the search for the obligor's movable property by the tax collector, therefore the regulation of temporary attachment of movable property is aimed at increasing the efficiency of enforcement in recovery of monetary receivables.[11] In the regulatory impact

[10] Marta Romańska, *Postępowanie egzekucyjne i zabezpieczające w administracji* (1st edn, Wolters Kluwer Polska 2021) 35.

[11] Government bill amending the Personal Income Tax Act, the Corporate Income Tax Act and some other acts (paper no 1532) 249.

assessment,[12] the drafter predicts that the revenues of the public finance sector in connection with the use of this solution in the years 2022–2031 will amount to PLN 500 million annually.[13]

By introducing the amendment, the legislator has extended the tasks of the National Revenue Administration unrelated to tax and customs duties. However, this is not an exceptional solution. NRA already has a number of similar powers, such as audit of the public funds spending. It can also be pointed out that the Act of 15 December 2022 amending the Act on the Commercial Quality of Agricultural and Food Products and the Act on the National Revenue Administration[14] adds further tasks for the NRA authorities unrelated to taxes or customs duties.

III. PROCEDURE FOR TEMPORARY ATTACHMENT OF MOVABLE PROPERTY

Pursuant to Article 28 s 1 para 4 NRA Act, administrative enforcement in recovery of monetary receivables is the exclusive competence of the head of the tax office from among the NRA authorities. Pursuant to Article 19 § 1 EPA Act, the head of the tax office is an enforcement body authorized to take all the measures provided for administrative enforcement in recovery of monetary receivables.[15] The head of the tax office is a special type of authority under the provisions of the Act on Enforcement Proceedings in Administration and the only authority that can take an enforcement measure in the form of execution against real property.[16]

Movable property is attached in the course of customs and tax inspection. The customs and tax inspection is a task performed by the head of the customs and tax

[12] The assessment of regulatory impact is understood as an analytical procedure that helps determine all the consequences – both benefits and costs – of the planned state intervention as precisely as possible; see Krzysztof Koźmiński, 'Ograniczenie handlu w niedziele – przewidywanie skutków regulacji czy wróżenie z fusów?' (2018) 78 Studia Iuridica 212.

[13] ibid 573. Income related to the application of temporary attachment of movable property is primarily the income of the state budget and local government units, due to the nature of the receivables to which the solution applies. In the regulatory impact assessment, the drafter has not indicated how it envisaged the distribution of revenues from the estimated sum of PLN 500 million per year. As part of the regulatory impact assessment, the economic analysis and social research methods are used; the fact that regulatory impact assessment is particularly important is emphasized in the economic analysis of law; see Koźmiński, 'Ograniczenie handlu' (n 12) 212–13.

[14] (Ustawa z dnia 15 grudnia 2022 r. o zmianie ustawy o jakości handlowej artykułów rolno-spożywczych oraz ustawy o Krajowej Administracji Skarbowej) [2023] JoL 177.

[15] The catalogue of enforcement measures for pecuniary claims is provided for in Art 1a paras (1)–(12)(a) EPA Act.

[16] Judgment in II FSK 1601/12, 28 May 2014 Polish Supreme Administrative Court, CBOSA.

office (Article 33 s 1 para 1 NRA Act). It may be carried out both by an officer of the Customs and Tax Service[17] and by employees of the tax administration who are civil servants. However, during customs and tax inspections, officers have broader powers than civil servants (Article 64 s 2 NRA Act). Movable property may be temporarily attached only by officers of the Customs and Tax Service. As a consequence of such decision made by the legislator, the use of this solution is excluded in the context of tax inspection.[18] During the inspection, the officers are authorized i.a. to: enter, stay and move on the ground and in the building, a room or other premises of the inspected person;[19] search the premises, including living quarters, other rooms and places and items, also with the use of technical devices and assistance dogs;[20] carry out an inspection of goods, products and means of transport, also with the use of technical devices and assistance dogs.[21] Article 139 NRA Act grants the Customs and Tax Service officers the right to use means of direct coercion specified by law, means intended to help overcome construction closures, and other means, excluding explosives.

Pursuant to Article 94y s 1 NRA Act, as a consequence of the adopted regulation, the enforcement in recovery of monetary receivables, e.g. social security contributions, administrative penalties or local taxes and fees, will not always be supported by temporary attachment of movable property, because it is not in every case that these receivables will be enforced by the head of a tax office. However, it seems that the legislator correctly provided for the right of temporary seizure of movable property only by the tax administration. It does not seem that the efficiency of enforcement would be greater if such powers were granted also to other authorities. It may be postulated *de lege lata* that the extension of the introduced legal construct should also be considered for tax inspection carried out on the basis of the Tax Ordinance. In the course of tax inspection, the powers of the inspectors are narrower, e.g. they have the right to secure factual evidence but not to conduct a search to find it.[22]

Paragraph 11 of the Principles of Legislative Technique[23] casts doubt on Article 94y s 1 NRA Act. This provision of the Principles of Legislative Technique stipulates that an act should not include statements that do not serve to express

[17] Pursuant to Art 1 s 3 NRA Act, the Customs and Tax Service is defined in the National Revenue Administration as a uniform and uniformed service composed of officers.

[18] Section VI of the Tax Ordinance Act of 29 August 1997 (Ustawa z dnia 29 sierpnia 1997 r. – Ordynacja podatkowa) [2022] JoL 2651 as amended.

[19] Art 64 s 1 para 2 NRA Act.

[20] Art 64 s 1 para 6 NRA Act.

[21] Art 64 s 2 para 1 NRA Act.

[22] Judgment in I FSK 2212/15, 26 September 2017 Polish Supreme Administrative Court, CBOSA.

[23] Annex to the Regulation of the Prime Minister of 20 June 2002 [2016] JoL 283. The principles of legislative technique are rules for formulating correct normative acts and making reliable changes in the system, which are binding on the government legislator (judgment in

legal norms, in particular, justifications for formulated norms. It is worth emphasizing that temporary attachment of movable property is intended to increase the efficiency of administrative enforcement, is non-normative, provides justification by the legislator for the introduced regulation and should be indicated only in the justification for draft laws.[24] Seemingly, the purpose of the construct in question is to allow the officer to temporarily attach movable property if administrative enforcement in recovery of monetary receivables is pending against the inspected person and not to assess whether temporary seizure of movable property will be efficient. The legislator has not laid down the criteria according to which it should be assessed whether temporary attachment would increase the efficiency of administrative enforcement in a given situation. In addition, the legislator has not defined the concept of efficiency. The said concept does not pertain to legal sciences; it is a notion applied in economics. Efficiency is understood as the best achievable output from a given input.[25] Economic efficiency is also a determinant of effective law in general. As Rafał Stroiński points out, effective law is the law that should not lead to waste and loss of economic value.[26]

In connection with the wording of the provision adopted by the legislator and the principle that every expression of a legal text is normative and in the process of interpretation the interpreter may not omit any expression,[27] it is necessary to assess the temporary seizure of movable property through the prism of efficiency. The legislator indicates a premise that provides a legal basis for the obligor to raise the objection that the use of temporary attachment of movable property in a given case will not contribute to increased efficiency of enforcement. It can be assumed that the seizure of movable property with, in the officer's opinion, low probability of sale should be considered inefficient.

There are also interpretative doubts as to whether an officer is obliged to temporarily seize movable property or whether the property may not be seized despite the conditions being met. In Article 94y s 1 NRA Act, the legislator states that an officer has the right to temporarily seize movable property. Article 94y s 3 NRA Act stipulates that the movable property value significantly exceeding

P 15/05, 12 December 2006 Polish Constitutional Tribunal <https://trybunal.gov.pl/s/p-1505> accessed 20 July 2023).

[24] In the explanatory memorandum and in the regulatory impact assessment, the drafter of the bill emphasizes that the amendment is aimed at increasing the efficiency of administrative enforcement.

[25] 'Efektywność' (Efficiency), *Encyklopedia Administracji Publicznej* <http://encyklopedia.uw.edu.pl/index.php/Efektywno%C5%9B%C4%87> accessed 20 March 2023; N Gregory Mankiw and Mark P Taylor, *Mikroekonomia* (Jarosław Sawicki tr, PWE 2009) 35.

[26] Rafał Stroiński, 'O kosztach transakcyjnych i potrzebie analizy ekonomicznej w prawie handlowym' (2004) 6 Przegląd Prawa Handlowego 36, 37; see also Krzysztof Koźmiński, 'Krytyka ekonomicznej analizy prawa' (2016) 1 Przegląd Prawniczy Uniwersytetu Warszawskiego 31, 39.

[27] Sławomira Wronkowska and Maciej Zieliński, *Komentarz do Zasad techniki prawodawczej* (Wydawnictwo Sejmowe 2021) 43.

the enforced amount is not subject to attachment, while Article 94za NRA Act provides for cases when an officer should not attach property (i.e. the obligor has demonstrated non-enforceability of the obligation; movable property is excluded or exempt in accordance with the provisions of the EPA Act; animals or perishable items would be seized). The wording of Article 94y ss 1 and 3 and of Article 94za NRA Act concludes that if temporary attachment of movable property increases the efficiency of administrative enforcement, it is obligatory, unless there are cases indicated in the aforementioned provisions. The obligatory application of the provision on temporary attachment of movable property is also supported by the principle of equality, which should exclude arbitrariness; if the legislator does not indicate the criteria to be adopted, in cases where the statutory conditions are met, it should be argued that temporary attachment of movable property is mandatory.

Article 94y s 3 NRA Act provides that movable property significantly exceeding the amount enforced is not subject to attachment. This provision should be assessed in relation to the principle of precision of the law derived by the Constitutional Tribunal. In light of the judgment of 10 October 2013,[28] the presence of vague concepts in legal acts is common and unavoidable; they have significant advantages as they make the legal regime more flexible and adaptable to the actual situations and thus contribute to expressing, in the course of the application of law, the values which result from the rule of law. However, the Constitutional Tribunal points out that the principles of good legislation include, among other things, the requirement of sufficient precision of provisions, which should be formulated in an explicit, clear and linguistically correct manner.[29]

On the basis of enforcement proceedings, the issue of the difference between the value of the enforced receivable and the value of movable property has been regulated in various ways. Article 97 § 5 EPA Act establishes the rule that movable property which value exceeds the amount needed to satisfy the enforced claim is not attached if the obligor has another movable property subject to enforcement with a value sufficient to satisfy these receivables and the enforced sale of this movable property does not cause any difficulties. As a consequence, the question arises about a situation where an officer of the Customs and Tax Service identifies relevant movables of the inspected person and seizes them contrary to Article 94y s 3 NRA Act. Article 96n EPA Act, when providing for the approval of temporary attachment of movable property, does not stipulate that the enforcement authority should examine whether the value of the seized movable property significantly exceeds the amount needed to satisfy the enforced monetary claim. It should also be noted that the provisions establishing temporary attachment of movable property do not specify the rules for estimating the value of movable property. It is

[28] Judgment in SK 40/12, October 2013 Polish Constitutional Tribunal (n 5).

[29] Judgment in Kp 5/08, 16 December 2009 Polish Constitutional Tribunal <https://trybunal.gov.pl/s/kp-508> accessed 10 July 2023.

not known how an officer of the Customs and Tax Service is to assess the value of the disclosed movables. The fact that the officer identifies movable property of the obligor, the value of which significantly exceeds the amount needed to satisfy the enforced claims, and does not temporarily seize it does not change the fact that these movables will be seized by the enforcement authority. Based on Article 94y s 1 NRA Act, the same applies to the situation when movable property is disclosed, but the debtor's receivables do not exceed PLN 10,000.

Article 96q § 3 EPA Act is equally important for the temporary attachment procedure as its wording is changed in the amendment. Currently, it provides that in the event temporary attachment of movable property is lifted or it is not performed for other reasons, the costs actually incurred by the head of the customs and tax office, under whose authorization the officer has performed the customs and tax inspection during which movable property has been temporarily seized, are considered enforcement expenses. That is, only in the case of refusal to approve of temporary seizure of movable property or failure to issue a decision approving its temporary seizure, the costs actually incurred by the head of the customs and tax office, under whose authority the officer has performed the customs and tax inspection during which movable property has been temporarily seized, are considered enforcement expenses. The wording of Article 96q § 3 EPA Act has been changed in order to avoid such interpretative doubts regarding the expenses incurred by the head of the customs and tax office in the event of approval of temporary seizure of movable property by the enforcement authority. The change consists in resigning from indicating cases in which the costs actually incurred by the head of the customs and tax office in connection with temporary attachment of movable property should be considered enforcement expenses. The amended provision excludes the need of authorization by the head of the customs and tax office. It provides that the costs actually incurred by the head of the customs and tax office (not only when the head of the customs and tax office has issued the authorization) in connection with temporary seizure of movable property are to be regarded as enforcement expenses.[30]

When assessing temporary seizure of movable property through the prism of the usefulness of this provision,[31] it can be stated that the provision has a clearly defined purpose (to increase administrative enforcement efficiency), but its proper operation is hindered by legislative errors, such as the lack of an unambiguous definition when it is applicable and the lack of rules for estimating the value of movable property.

[30] Bill amending the Act on Enforcement Proceedings in Administration and some other acts (paper no 2952) accessed 10 July 2023.

[31] When assessing the usefulness of given provisions, the impact of these provisions and their usefulness at the relevant moment of social development are taken into account; see Koźmiński, 'Krytyka' (n 26) 49.

IV. PROTECTION OF THE OBLIGOR DURING TEMPORARY ATTACHMENT PROCEDURE

Debtors may be protected against temporary attachment of their property if they prove that they have fulfilled their obligation or that the obligation claimed is not due, has been discharged, has expired for some other reason or does not exist. If they cannot produce such evidence, upon signing the temporary attachment report, they will lose the right to use the attached movable property and they cannot sell it. It is worth noting that property is temporarily seized based on a report not a decision, so the debtor is not able to challenge temporary attachment of movable property. The report of temporary attachment of movable property is served on the obligor and the supervisor. At the request of the obligor, and also if the officer deems it necessary, a witness may be called to be present during the attachment procedure.[32]

Pursuant to Article 96q § 1 EPA Act, if a decision is issued refusing to approve of temporary attachment of movable property or a decision approving its temporary attachment is not issued, temporary seizure of movable property is revoked by operation of law and temporarily seized movable property is returned immediately to the obligor. Doubts arise as to the legislator's stipulation that temporary attachment of movable property is revocable by operation of law. Revocation is an act performed by an administrative body or court,[33] hence the wording of the adopted provision should indicate that the authority is obliged to lift temporary attachment of movable property upon the occurrence of conditions specified in the regulations, or that the temporary seizure of movable property ceases to have legal effect when certain conditions are met. In this case, lifting of temporary attachment of movable property is not a required act, but after 96 hours such attachment of movable property ceases to have legal effect if it has not been approved.[34]

V. CONCLUSIONS

During the analysis of temporary attachment of movable property carried out in this paper, this newly established construct in the Polish legal regime should be

[32] Art 94zb NRA Act; Iwona Czauderna, 'Tymczasowe zajęcie ruchomości – nowe uprawnienia urzędów celno-skarbowych' (*legalis*, 13 April 2022) <https://biz.legalis.pl/tymczasowe-zajecie-ruchomosci-nowe-uprawnienia-urzedow-celno-skarbowych> accessed 7 July 2023.

[33] Cf. Art 138 of the Code of Administrative Procedure, Art 27h § 2 para 1, Art 42, Art 54 § 6 para 1, Art 54b § 1 EPA Act.

[34] Pursuant to Art 94z s 2 NRA Act, temporary attachment of movable property may not last longer than 96 hours from the moment the officer signs the report of temporary attachment of movable property.

assessed. The legislator, guided by the need to increase the efficiency of administrative enforcement in recovery of monetary receivables, has granted additional competences to the tax administration by amending the NRA Act. These competences are related to the basic tasks of the National Revenue Administration, i.e. collection of budget revenues from taxes and customs duties. The legislator has chosen the NRA from among other entities authorized to carry out inspections, recognizing that the tasks of officers of the Customs and Tax Service are related to the tasks of enforcement authorities. Officers of the Customs and Tax Service, when performing their duties, may identify assets belonging to obligors that have not been disclosed by the enforcement authority.

Having analysed the construct of temporary attachment of movable property, the following issues can be identified which are of particular relevance to its application, namely:

(1) The legislator does not specify what criteria an officer of the Customs and Tax Service should adopt when making an assessment whether the attachment will increase enforcement efficiency;
(2) The legislator does not specify what such assessment should consist of (efficiency is an economic concept);
(3) It is not clear whether, if the statutory conditions are met, temporary attachment of movable property is obligatory or optional;
(4) The provisions establishing temporary attachment of movable property do not lay down rules for estimating the value of movable property. It is not known how an officer of the Customs and Tax Service should estimate the value of the disclosed movable property, nor is there a legal basis for the enforcement authority to conduct such an analysis when approving temporary attachment of movable property. This is important from the point of view of the provision which states that movable property with a value significantly exceeding the amount needed to satisfy the enforced monetary claim is not subject to temporary attachment.

Therefore, the analysis of the solutions adopted by the legislator has led to the following conclusions. The analysis has shown that the provisions in the part determining the role of temporary attachment of movable property, which is supposed to increase the enforcement efficiency, should be repealed. In addition, it should be clearly stipulated whether temporary attachment of movable property is obligatory or optional; and if it is optional, it is necessary to specify the rules according to which the decision on its application is to be made. Regarding the principles of estimating property value, reference should also be made to the application of the provisions of the Act on Enforcement Proceedings in this respect.

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OBLIGATION TO COMPLY WITH ICJ DECISIONS: THE *JURISDICTIONAL IMMUNITIES* SAGA WITHIN THE ITALIAN LEGAL ORDER

Abstract

The 2012 judgment of the International Court of Justice in *Jurisdictional Immunities* concerned the application of state immunities in Italian courts and its failure to recognize the rights of Germany in this regard. Once the ICJ found Italy in violation of international customary law and ordered that relevant judicial decisions should cease to have effect, Article 94 of the UN Charter providing for the obligation to comply with ICJ decisions began to apply. The paper tracks down attempts to implement *Jurisdictional Immunities* in the Italian legal regime, analyses different – legislative and judicial – means of compliance, and presents general observations on the complexity associated with the fulfilment of the obligation to comply.

KEYWORDS

state immunity, International Court of Justice, war crimes, counter-limits doctrine, obligation to comply, UN Charter, domestic courts

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I. INTRODUCTION

World War II brought death and suffering to millions of people. Despite the passage of time – almost 85 years later – many wrongs have not been corrected, numerous victims and their families have not seen justice, and those responsible have not redressed the inflicted damage. The reasons are manifold – political, legal, logistical and others – some justified, other incomprehensible. But within the realm of public international law, the doctrine of state immunities plays here a key role. This rule of customary law derives from the principle of sovereign equality of states and provides protection to foreign states in a national jurisdiction from being sued or even subjected to legal proceedings before courts of a home state. Traditionally, international law did not provide any exceptions from placing a foreign state outside the jurisdiction of other states, but developments of international relations have led to relaxation of the restrictive approach to immunities and currently a limited doctrine is globally excepted, particularly in relation to economic activities of states.[1]

It is precisely at the intersection of issues relating to jurisdictional immunities of states and state responsibility for acts constituting international crimes committed during World War II that the German-Italian dispute arose. As the divergence of positions between these two European countries could not be resolved by diplomatic means, the case was brought to the International Court of Justice (ICJ) for settlement. It delivered its judgment in *Jurisdictional Immunities of the State*[2] in 2012 but the quest for compliance with the judicial decisions only started and continues to this day. Although the obligation to comply with the ICJ decision is clearly stipulated in Article 94 of the UN Charter,[3] the parties differ as to the measures adopted to secure such compliance. Furthermore, a close examination of the attempts to implement *Jurisdictional Immunities* clearly shows that it is a complex endeavour requiring a judgment-debtor to navigate through the norms

[1] Hazel Fox and Philippa Webb, *The Law of State Immunity* (3rd edn, Oxford University Press 2015).

[2] *Jurisdictional Immunities of the State* (*Germany v Italy*: Greece intervening) [2012] ICJ Rep. 99 (*Jurisdictional Immunities*).

[3] Charter of the United Nations, 26 June 1945 San Francisco (UN Charter).

of international law but also limitations and requirements of its domestic legal regime. This inevitably produces frictions between these two legal systems and poses a question about the nature and usefulness of traditional division between the monistic and dualistic approach of national laws to international norms.[4]

The paper discusses those tensions and their practical implications using as an example the inter-state dispute between Germany and Italy resolved by the ICJ. Firstly, the general considerations on the obligation to comply with ICJ decisions are presented. The next section discusses the background of the disagreement and provides a detailed introduction into the ICJ pronouncement in *Jurisdictional Immunities*. Subsequently, the paper examines judicial and legislative measures adopted by Italy to implement the ICJ judgment and offers its assessment. Finally, general conclusions are provided.

II. DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE AND THE OBLIGATION TO COMPLY THEREWITH

The International Court of Justice is 'the principal judicial organ of the United Nations',[5] an international tribunal *par excellence* with the seat in The Hague, operating under the UN Charter and its Statute, annexed to the former. It resolves only inter-state disputes and consequently only states have standing before its bench, but it may as well issue advisory opinions on request from UN organs and specialized agencies.[6] The ICJ is the only international tribunal with a large, general, and universal jurisdiction and its decisions are considered the most authoritative pronouncements on international law.[7] Its prominence is further reaffirmed by the fact that the ICJ is the longest functioning permanent international tribunal, a direct successor of the Permanent Court of International Justice,[8] which is

[4] Francesco Francioni, 'From Utopia to Disenchantment: The Ill Fate of "Moderate Monism" in the ICJ judgment on *The Jurisdictional Immunities of the State*' (2012) 23(4) European Journal of International Law 1125; Andreas von Arnauld, 'Deadlocked in Dualism: Negotiating for a Final Settlement' in Valentina Volpe, Anne Peters and Stefano Battini (eds), *Remedies against Immunity? Reconciling International and Domestic Law after the Italian Constitutional Court's Sentenza 238/2014* (Springer 2021).

[5] UN Charter, Art 92.

[6] ibid, Art 96.

[7] Mohamed SM Amr, *The Role of the International Court of Justice as the Principal Judicial Organ of the United Nations* (Kluwer Law International 2003) 119; Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law*, vol 1 (9th edn, Longman 1992) 41; *Restatement (Third) of Foreign Relations Law of the United States* (American Law Institute Publishers 1987) 371.

[8] UN Charter, Art 92; Statute of the International Court of Justice, 26 June 1945 San Francisco (ICJ Statute), Arts 36(5) and 37.

tasked with promoting peaceful settlement of international disputes and advancing the rule of law in international affairs. Its jurisprudence is a first point of reference in international legal controversies, but at the same time it significantly contributes to constant development of international law.

The ICJ Statute and the Rules of Court govern the proceedings before the ICJ in contentious and advisory cases in a rather detailed manner. Nevertheless, once a decision or an opinion is rendered, international law envisages rudimentary regulations as there is a qualitative separation between the adjudicative and post-adjudicative phase.[9] The actual involvement, with some minor exceptions,[10] of the judicial institution is limited on the international plane only to the first stage, leaving the latter for further political processes. Thus, the limited legal framework of the post-adjudicative phase of a dispute is restricted to Article 94 of the UN Charter, itself a political instrument rather than the ICJ Statute, which reads:

(1) Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.

(2) If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

Section (2) is the only enforcement mechanism of the ICJ judgments, though the United Nations codified it in a positive law. It is, however, ineffective and impractical, what is further confirmed by the practice of states and the UN itself. The enforcement regime from Article 94(2) is highly politicized already in its design, as it designates the political organ – the UN Security Council, where any of five big powers may utilize a veto power[11] – with the task. Also, the literal reading of the provision highlights that the mechanisms is discretionary as the Council may 'if it deems necessary' take action in situations of non-compliance. Furthermore, even if the Council decides to get involved, it may firstly make recommendations, which by their very nature are non-binding on a judgment-debtor. The next step leads to measures, but the UN Charter does not specify their contents in cases of non-compliance with the ICJ judgments. The only point of reference here could be a catalogue under Articles 41 and 42 of the UN Charter. This notwithstanding, the provisions aim at maintaining or restoring international peace and security, thus they are applicable to cases of larger calibre. Those challenges are a real problem, what is further reaffirmed by the fact that so far no positive action

[9] Constanze Schulte, *Compliance with Decisions of the International Court of Justice* (Oxford University Press 2004) 19.

[10] The ICJ is not involved in the enforcement of its decisions, nevertheless it might play some role through interpretation and revision proceedings regulated in Arts 60 and 61 of the ICJ Statute, respectively.

[11] UN Charter, Art 27(3).

has been taken by the Security Council, despite quite a few examples of flagrant non-compliance with ICJ decisions.[12]

In this situation, where no effective enforcement mechanism is envisaged in international instruments,[13] the voluntary compliance and legal commitments in this regard are of highest importance. Article 94(1) cited above is the primary source of states' obligation, which is further strengthened by other provisions of the UN Charter. In particular, Article 2(2) stipulates that all Member States are required to fulfil the 'obligations assumed by them in accordance with the present Charter' in good faith. Consequently, non-compliance with a decision of the International Court of Justice is not only an affront to the ICJ itself and another party to the proceedings, but foremost constitutes a violation of the UN Charter, the fundamental instrument of the international community and a 'constitution' of the modern international order. Furthermore, the obligation to 'give effect to the judgment of the Court'[14] seems to be not only of treaty character but also constituting a norm of customary international law,[15] deeply rooted in basic principles of good faith and *pacta sunt servanda*.

The obligation to comply under Article 94(1) of the UN Charter is directly linked with the principle of *res judicata* of ICJ decisions as stipulated in Articles 59 and 60 of the ICJ Statute. The latter underline that those rulings have a binding force between parties to a case and are 'final and without appeal'. Hence, the compliance and *res judicata* principles create together two obligations for a judgment-debtor, a negative and a positive one.[16] The first precludes the possibility of relitigating or deciding anew a case already settled. The other, though,

[12] For example, after (in)famous *Certain Activities Carried out by Nicaragua in the Border Area* (*Costa Rica v Nicaragua*), Compensation, Judgment [2018] ICJ Rep. 15, Nicaragua petitioned the Security Council, but no resolution was adopted due to the veto of the United States; see UN Security Council, Provisional Verbatim Record of 2704 Meeting, 31 July 1986, UN Doc. S/PV.2704.

[13] It needs to be mentioned that in fact the UN Charter or the ICJ Statute do not provide for any other mechanism of enforcement of the ICJ decisions. This, however, does not mean that no other methods exist or are used – with different results – by the international community, states concerned or even private parties. For a discussion of those methods, see Oktawian Kuc, *The International Court of Justice and Municipal Courts: An Inter-judicial Dialogue* (Routledge 2022) 90–100.

[14] *Gabčíkovo-Nagymaros Project* (*Hungary v Slovakia*), Judgment [1997] ICJ Rep. 7 [143].

[15] Shabtai Rosenne, *The Law and Practice of the International Court 1920–2005*, vol 1 (4th edn, Martinus Nijhoff Publishers 2006) 210; Oscar Schachter, 'The Enforcement of International Judicial and Arbitral Decisions' (1960) 54(1) American Journal of International Law 1, 2; CW Jenks, *The Prospects of International Adjudication* (Stevens & Sons Limited 1964) 663.

[16] Mutlaq M Al-Qahtani, *Enforcement of International Judicial Decisions of the International Court of Justice in Public International Law* (PhD thesis, University of Glasgow 2003) 67–68 <theses.gla.ac.uk/2487> accessed 14 September 2023.

entails that a judgment-debtor state is 'under an obligation fully to implement'[17] an ICJ's pronouncement.

As to the scope of the obligation to comply with decisions of the ICJ, their binding force *ratione personae* applies only to states, what is evident on the basis of Articles 3 and 4 of the UN Charter and Article 34(1) of the ICJ Statute. But Article 94(1) specifies that only states parties to a case undertake the relevant commitment. In this context, it is important to clarify the notion of state under international law. It is best explained by the traditional black-box theory of state,[18] which looks upon a state as a monad or a monolith, and disregards its internal structures and mechanisms. International law binds a state as a whole but does not speak directly to its organs or constituting parts. It requires certain outcomes from a monad but does not control processes leading to those outcomes. Although this concept is eroding in modern international law,[19] it is still relevant to the obligation to comply with rulings of the International Court of Justice as states are basically free to select adequate means and methods of compliance, according to their internal policies and domestic law as well as to designate their organs and institutions for this task. Also, the ICJ itself underlines this principle in its case law, when in prescribing in general terms an adequate reparation it specifies that the required actions of a judgment-debtor shall be achieved 'by means of its own choosing'.[20]

Notwithstanding the above, the *ratione materiae* scope of the obligation to comply, defining which parts of a decision of the International Court of Justice are to be implemented is more problematic. Undoubtedly, a disposition of a ruling is to be complied with, as per *Interhandel* case, '[t]he Court notes in the first place that to implement a decision is to apply its operative part'.[21] But limiting the scope of the obligation only to the operative clauses is a too restrictive approach as the motives and a *dispositif* are interdependent and closely interrelated. Already a predecessor of the International Court of Justice – the Permanent Court of International Justice – explained that 'all the parts of a judgment concerning the points in dispute explain and complete each other and are to be taken

[17] *Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals* (*Mexico v United States of America*), Judgment [2009] ICJ Rep. 3 [60].

[18] Ward Ferdinandusse, 'Out of the Black-Box? The International Obligation of State Organs' (2003–2004) 29 Brooklyn Journal of International Law 45.

[19] ibid.

[20] E.g. *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* (*Nicaragua v Colombia*), Judgment [2022] ICJ Rep. 266, para 261(6); *Avena and Other Mexican Nationals* (*Mexico v United States of America*), Judgment [2004] ICJ Rep. 12, para 153(9); *Arrest Warrant of 11 April 2000* (*Democratic Republic of the Congo v Belgium*), Judgment [2002] ICJ Rep. 3, para 78(3).

[21] *Interhandel* (*Switzerland v United States of America*), Preliminary Objections, Judgment [1959] ICJ Rep. 6 [28].

into account in order to determine the precise meaning and scope of the operative portion'.[22] Also, the practise of the ICJ confirms this constatation, as the Court sometimes refers in its operative clauses directly to motives of a decision[23] and in territorial and maritime disputes relevant coordinates, maps and delimitation details are only provided in *motifs*.[24] Accordingly, the obligation to comply covers the operative parts of a decision together with reasoning directly concerning the subject-matter of a dispute.

To sum up, the obligation to comply is an obligation of state parties to a dispute settled by the International Court of Justice. It is a treaty obligation deriving directly from the UN Charter but also a customary rule. It is a general norm that leaves means and methods of compliance to states concerned. Hence, international law is very concise in regulating compliance, but this does not mean that the matter of implementation of an ICJ decision is not a complex problem.

III. *FERRINI* CASE AND THE ICJ'S RESPONSE IN *JURISDICTIONAL IMMUNITIES*

The origins of the German-Italian dispute concerning state immunities can be traced back to 1998, when Luigi Ferrini instituted proceedings before the Court of Arezzo against Germany in relation to his deportation in August 1944 to Germany for forced labour in factories of Reimahg Werke and Messerschmitt. His claim for damages for material and moral injuries could not be heard due to jurisdictional immunity of the respondent, what was later upheld by the Court of Appeal of Florence. Only after lodging a cassation, the Italian Court of Cassation (Corte Suprema di Cassazione) in its landmark judgment of 11 March 2004 decided that his claim should proceed on merits by refusing to acknowledge the immunity of Germany.[25] It stressed that:

> There can be no doubt that the actions carried out by Germany on which Ferrini's claim is based were an expression of its sovereign power since they were conducted during war operations. However, the problem in question is to ascertain whether immunity from jurisdiction can be granted in the case of conduct which … is of an extremely serious nature, and which on the basis of customary international law con-

[22] *Polish Postal Service in Danzig*, Advisory Opinion [1925] PCIJ Series B No 11 [29]–[30].

[23] E.g. *Jadhav* (*India v Pakistan*), Judgment [2019] ICJ Rep. 418, para 149(7).

[24] E.g. *Maritime Delimitation in the Indian Ocean* (*Somalia v Kenya*), Judgment [2021] ICJ Rep. 206, para 214(1) and (3); *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean* (*Costa Rica v Nicaragua*) and *Land Boundary in the Northern Part of Isla Portillos* (*Costa Rica v Nicaragua*), Judgment [2018] ICJ Rep. 139, para 205(2), (4) and (5).

[25] *Ferrini v Germany*, Case no 5044/4, 11 March 2004 Court of Cassation of Italy, ILDC 19 (IT 2004).

> stitutes an international crime in that it violates universal values that transcend the interests of individual states.[26]

The Court of Cassation concentrated in its judgment on developments in international law which, in its opinion, indicated that the traditional approach to immunities was disintegrating. It concluded:

> Respect for inviolable human rights has by now attained the status of a fundamental principle of the international legal system … And the emergence of this principle cannot but influence the scope of the other principles that traditionally inform this legal system, particularly that of the 'sovereign equality' of States, which constitutes the rationale for the recognition of state immunity from foreign civil jurisdiction.[27]

Consequently, the case was remanded to the lower court for consideration. Only in 2011, did the Court of Appeal of Florence award Mr Ferrini damages by acknowledging the limitations of jurisdictional immunities under international law. But much more important consequence of the ruling was that the *Ferrini* case opened doors for other claimants seeking compensation against the Federal Republic of Germany for crimes committed by its armed forces during World War II, especially that the Court of Cassation developed a consistent jurisprudence in regard to war-related damage lawsuits.[28]

Faced with a considerable number of court proceedings, on 23 December 2008 Germany submitted its dispute[29] with Italy to the International Court of Justice for resolution by lodging an application. The ICJ judgment was delivered on 3 February 2012,[30] which in essence sided with the German position on the matter. The ICJ basically declared for a restrictive and traditional approach to state immunities without acknowledging certain developments in the area in recent decades. The ICJ rejected arguments of the respondent that the territorial tort principle applies to 'torts allegedly committed on the territory of another State by its armed forces and other organs of State in the course of conducting an armed conflict'.[31] Furthermore, it affirmed that even the gravity of the unlawful acts did not justify the denial of immunity and it was irrelevant whether they constituted war crimes and crimes against humanity or a breach of a peremptory rule (*jus cogens*). Finally, Italy presented the 'last resort' argument indicating that

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[26] ibid, para 7.

[27] ibid, para 9.2.

[28] E.g. *Germany v Mantelli and ors*, Case no 14201/2008, 29 May 2008 Court of Cassation of Italy, ILDC 1037 (IT 2008) and *Germany v Milde*, Case no 1072/2009, 13 January 2009 Court of Cassation of Italy, ILDC 1224 (IT 2009).

[29] An important aspect of the dispute concerns as well foreign judgments rendered against Germany – particularly in Greece relating to the Distomo massacre – which subsequently was recognized and enforced in Italy. It was also considered by the ICJ in the *Jurisdictional Immunities* decision. But for the sake of brevity, this thread is not presented in this paper.

[30] *Jurisdictional Immunities* (n 2).

[31] ibid [78].

Italian courts denied Germany its immunity as Italian victims had attempted to secure compensation relating to German war crimes and crimes against humanity through other means, but with no avail, what left them with no alternative means of redress. In this context, the ICJ expressed its 'surprise and regret'[32] that Germany excluded from the compensation scheme military internees from Italy deported for forced labour. The applicant justified the exclusion by stressing that prisoners of war had not been entitled to any compensation, despite the fact that during World War II the Third Reich denied Italian deportees the status of prisoners of war and adequate treatment. The ICJ stressed the unreasonable character of this position as a state cannot refuse to recognize a certain status of a particular group protected under international law (e.g. prisoners of war) then to claim that this exact status prevents any payment of compensation (e.g. for forced labour). Notwithstanding those shortcomings, the ICJ emphasized the procedural character of immunities under international law, which is separate from substantive norms of state responsibility, including an obligation to make reparations. Consequently, international customary law still requires recognition of jurisdictional immunities for acts committed by armed forces of the Third Reich resulting in death, injury, and damage to property.

This stance of the International Court of Justice met with criticism from the international academia[33] as it neglects the victims, recognition of their suffering and their need for justice. In this regard, the ICJ in the judgment acknowledged that its application of international law on state immunities may have an effect of precluding judicial redress for the Italian nationals concerned,[34] but firstly, it did not delve into possible legal implication of this constatation – also under international law and particularly human rights standards, and secondly, it only recommended further negotiations between Germany and Italy on claims of individuals mistreated by German armed forces. This suggests a diplomatic approach to a long-lasting and complex dispute that has clear legal connotations and which the parties decided to settle through judicial means. Such negotiations, even after more than ten years, have not yielded any results as developments of the dispute described on following pages illustrate.

Yet another interesting aspect of the decision in *Jurisdictional Immunities* is that it was based almost entirely on international customary law. To reconstruct relevant norms on state immunities, the ICJ primarily examined practice

[32] ibid [99].

[33] See the dissenting opinion of Judge Cançado Trindade; Anogika Souresh, 'Jurisdictional Immunities of the State: Why the ICJ got it Wrong' (2017) 9(2) European Journal of Legal Studies 15; Markus Krajewski and Christopher Singer, 'Should Judges be Front-Runners? The ICJ, State Immunity and the Protection of Fundamental Human Rights' (2012) 16 Max Planck Yearbook of United Nations Law 1; Carlos Espósito, 'Jus Cogens and Jurisdictional Immunities of States at the International Court of Justice: "A Conflict does Exist"' (2011) 21 The Italian Yearbook of International Law 161.

[34] *Jurisdictional Immunities* (n 2), [104].

of municipal courts faced with similar or analogous legal questions pertaining to actions of a military during armed conflicts. Interestingly enough, it did not omit the Polish case law, as the judgment of the Supreme Court of Poland in *Natoniewski v Germany*[35] was featured in the ICJ decision on several occasions.[36] It was the domestic jurisprudence of national judges that assisted the ICJ in concluding that 'the Italian Republic has violated its obligation to respect the immunity which the Federal Republic of Germany enjoys under international law by allowing civil claims to be brought against it based on violations of international humanitarian law committed by the German Reich between 1943 and 1945'.[37]

But the judgment in *Jurisdictional Immunities* was not only declaratory in nature, as at the same time the International Court of Justice ordered *restitutio ad integrum*. As the decision addressed actually the conduct of Italian courts, which were found in violation of international law, it is not surprising that the ICJ decided that:

> [T]he Italian Republic must, by enacting appropriate legislation, or by resorting to other methods of its choosing, ensure that the decisions of its courts and those of other judicial authorities infringing the immunity which the Federal Republic of Germany enjoys under international law cease to have effect.[38]

This short passage relates most closely to the obligation to comply as it directs the respondent to undertake actions in order to re-establish the situation which existed before the wrongful act was committed, to the extent possible. Here, the ICJ defined the final result of those actions – the cessation of effects of judicial pronouncements infringing upon the immunity of Germany. But it also hinted the possible means of reaching the prescribed result. Although it still repeated the traditional formula of methods of its choosing, nevertheless the ICJ firstly indicated enactment of appropriate legislation. It seems that in the case at hand, when multiple court proceedings have been concluded with final and unappealable judgments reaching *res judicata* status, it was the only reasonable solution that would also be in line with adequate international law standards. Notwithstanding that, one may also argue that measures of compliance, to which the ICJ hinted in its motives, might in fact be assessed as interfering too much with matters pertaining to internal legal regime of the judgment-debtor. In this regard, the ICJ elucidated that Italy had not demonstrated that the ordered restitution would involve 'a burden out of all proportion' and rejected the constatation that the acts of judiciary should enjoy a special status: 'In particular, the fact that some of the violations may have been committed by judicial organs, and some of the legal

[35] Case IV CSK 465/09, 29 October 2010 Supreme Court of Poland.
[36] *Jurisdictional Immunities* (n 2), [68], [74], [85] and [96].
[37] ibid [139] (1).
[38] ibid [139] (4).

decisions in question have become final in Italian domestic law, does not lift the obligation incumbent upon Italy to make restitution'.[39]

IV. RECEPTION OF THE *JURISDICTIONAL IMMUNITIES* IN ITALY AND A SAGA OF COMPLIANCE

Despite the ICJ's recommendations, it was the judiciary that firstly responded to *Jurisdictional Immunities* and took the responsibility of ensuring the compliance with Article 94 of the UN Charter and with the judgment itself.[40] In less than one and a half month after the ICJ judgment was rendered, the Tribunal of Florence in the *Toldo* case[41] acknowledged that 'whereas Article 94 of the UN Charter states that Member States are obliged to comply with all judgments of the ICJ, it actually does not refer to a particular State's institution (Government, Parliament), but to all institutions and organs of the State, including also the judiciary'.[42]

Hence, as a decision of the International Court of Justice has a similar effect to *jus superveniens*, it carries an immediate effect on the margin of evaluation of a judge deciding a matter. Similar reasoning was presented by the Turin Court of Appeal,[43] which was confronted with two final *res judicata* decisions: one domestic and another from the ICJ. It gave effect to the latter by declaring that the assessment of the merits of the case was precluded due to international obligations deriving from the UN Charter and Italian constitutional provisions incorporating international law. Those cases seem to suggest that Italian courts recognized that Article 94 requiring compliance with the ICJ decisions may be a direct and self-executing legal basis for compliance, even without an explicit domestic rule in this regard.

Soon after, the Court of Cassation in the *Albers* case[44] presented its own stance relating to *Jurisdictional Immunities*. Although it voiced certain criticism finding arguments of the ICJ unconvincing, the pronouncement represents a good

[39] ibid [137].

[40] More about the first judicial response in Giuseppe Nesi, 'The Quest for a "Full" Execution of the ICJ Judgment in *Germany v Italy*' (2013) 11(1) Journal of International Criminal Justice 185.

[41] *Toldo v Repubblica Federale Tedesca*, Case no 16410/2004, 14 March 2012 Tribunal of Florence, Italy.

[42] ibid.

[43] *Germany v De Guglielmi and De Guglielmi and Italy*, Case no 941/2012, 14 May 2012 Court of Appeal of Turin, Italy, ILDC 1905 (IT 2012).

[44] *Military Prosecutor v Albers and Others and Germany*, Case no 32139/2012, 9 August 2012 Court of Cassation of Italy, ILDC 1921 (IT 2012).

example of judicial dialogue[45] on a controversial legal issue and ultimately an instance of judicial compliance with the ICJ decisions. The Court of Cassation acknowledged that its approach to state immunity developed by the *Ferini* judgment was not followed by the ICJ and other domestic courts, although it still insisted that such advancement was still possible in the coming years. Furthermore, it stressed that the *Albers* case relating to the San Terenzo Manti massacre was not considered by the ICJ, thus its judgment was not controlling in this case. Notwithstanding that, the Court of Cassation abandoned its previous jurisprudence by annulling judgments of lower courts 'as the civil action cannot be heard by the Italian judge' and at the same time recognizing the authoritative position of the Court in the Hague and its pronouncements on the contents of customary law. Subsequent cases[46] only reaffirmed the renunciation of the *Ferrini* jurisprudence in line with the *Jurisdictional Immunities*.

Only later did the Italian Parliament resolve to join the efforts to ensure compliance in conformity with the ICJ decision in the Italian-German dispute through its legislative powers. It ratified the UN Convention on Jurisdictional Immunities[47] through its Law no 5 of 14 January 2013,[48] which simultaneously included Article 3 titled 'Enforcement of judgments of the International Court of Justice' reading:

> 1. For the purpose of Article 94(1) of the Charter of the United Nations … , when the International Court of Justice in a judgment resolving a dispute, to which the Italian State is a party, precluded the subjection of a specific conduct of another State to a civil jurisdiction [of Italian courts], a judge before whom a dispute is pending in relation to the same conduct shall declare the lack of jurisdiction *ex officio* at any stage and instance of the proceedings, even if a final interlocutory decision ascertaining jurisdiction has already been rendered.
> 2. Final judgments contrary to the decision of the International Court of Justice referred to in sec. 1 even if rendered subsequently, may be challenged for revision for lack of jurisdiction … .

[45] Anna Wyrozumska (ed), *Transnational Judicial Dialogue on International Law in Central and Eastern Europe* (Wydawnictwo Uniwersytetu Łódzkiego 2017); Antonio Tzanakopoulos, 'Judicial Dialogue as a Means of Interpretation' in Helmust Aust and Georg Nolte (eds), *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence* (Oxford University Press 2016).

[46] *Frascà v Germany and Giachini (Guardian of Priebke)*, Case no 4284/2013, 21 February 2013 Court of Cassation of Italy, ILDC 1998 (IT 2013).

[47] United Nations Convention on Jurisdictional Immunities of States and their Property, signed 2 December 2004 in New York, UNGA Res. A/59/38, not yet in force (UN Convention on Jurisdictional Immunities).

[48] Legge 14 gennaio 2013, n. 5. Adesione della Repubblica italiana alla Convenzione delle Nazioni Unite sulle immunita' giurisdizionali degli Stati e dei loro beni, fatta a New York il 2 dicembre 2004, nonche' norme di adeguamento all'ordinamento interno, Gazzetta Ufficiale no 24, 29 January 2013 (note added).

Interestingly, Law no 5 explicitly referred to Article 94 of the UN Charter containing the obligation to comply. Hence, it constituted a method of compliance with the ICJ decision and confirmed that legislative acts play a substantial role in fulfilling the international commitments of a judgment-debtor state. The same was concluded by the Italian Court of Cassation in yet another proceeding of the *Ferrini* case, where it stated:

> No doubt regarding constitutionality can be raised concerning the provisions of Article 3 of the law in question, since they are dictated for the purposes of Article 94, paragraph 1, of the United Nations Charter … The Statute of the International Court is a rule (derived) from international law; accordingly, Article 3 of Law no 5 of 2013 constitutes a provision for bringing national legislation into line with international law.[49]

At that stage, it seemed that the Italian-German dispute on state immunities was settled and the compliance with *Jurisdictional Immunities* achieved through legislation as well as the jurisprudence of Italian courts. Notwithstanding this, at the beginning of 2014 the Tribunal of Florence[50] petitioned the Italian Constitutional Court (Corte costituzionale) with a question of constitutionality of the measures adopted by Italy in order to implement the decision of the International Court of Justice. In particular, the requesting court pointed to Article 24 of the Italian Constitution[51] guaranteeing absolute judicial protection of individual rights. The Constitutional Court delivered its judgment on 22 October 2014,[52] which generally shared the constitutional objections of the Tribunal of Florence. It acknowledged that the judicial protection of fundamental rights is one of the supreme principles of the constitutional order and declared the unconstitutionality of Article 3 of Law no 5 cited above as well as Article 1 of Law no 848 ratifying the UN Charter, but 'in so far as it concerns the execution of Article 94 … , exclusively to the extent that it obliges the Italian judge to comply with the Judgment of the ICJ of 3 February 2012, which requires that Italian courts deny their jurisdiction in case of acts of a foreign State constituting war crimes and crimes against humanity'.

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[49] *Federal Republic of Germany v Ferrini and Ferrini*, Case no 1136, 21 January 2014 Court of Cassation of Italy, ILDC 2724 (IT 2014).

[50] *Alessi and ors v Germany and Presidency of the Council of Ministers of the Italian Republic* (intervening), Order no 85/2014, 21 January 2014 Florence Court of First Instance, Italy, ILDC 2725 (IT 2014), [10]–[11].

[51] Constitution of the Italian Republic, Gazzetta Ufficiale no 298, 27 December 1947, Art 24: 'Anyone may bring cases before a court of law in order to protect their rights under civil and administrative law'.

[52] Judgment no 238/2014, 22 October 2014 Constitutional Court of Italy, GU no 45, 29 October 2014.

Consequently, the Constitutional Court established limits to the obligation to comply under Article 94 set by the fundamental constitutional principles of the Republic. In this vein, Sentenza n. 238/2014 relied on the doctrine of *controlimiti*:

> [T]he fundamental principles of the constitutional order and inalienable human rights constitute a 'limit to the introduction … of generally recognized norms of international law, to which the Italian legal order conforms under Article 10, para 1 of the Constitution' … and serve as 'counter-limits' to the entry.[53]

This precludes the incorporation into the Italian constitutional order, and hence the application of international obligations in cases of conflicts of those obligations with fundamental principles and inviolable rights. The Constitutional Court understands it even broader as limits on the receptiveness to the international and supranational order. Accordingly, it concluded that customary norms on state immunities, as construed by the International Court of Justice in its judgments, are not simply unconstitutional but rather they have never 'entered the Italian legal order', and hence do not 'have any effect therein'.[54] Similar arguments of *controlimiti*[55] were forwarded in relation to the UN Charter and its Article 94 requiring compliance with ICJ decisions. Even this most fundamental, constitutional international treaty and the Italian ratifying legislation operate within the limits demarcated by the fundamental principles and inviolable rights protected by the Italian Constitution.

To soften somewhat its stand, the Constitutional Court firstly focused its motives on the Law no 848 that ratified the UN Charter. It explained that its conclusions do not have any bearing on 'the lawfulness of the external norm itself' but rather concern the ratifying legislation and through it the incorporation of the conventional norm into the national regime. The outcome, however, is the same as the application of the obligation to comply under Article 94 within the Italian domestic system is hindered or rather confined to cases when fundamental constitutional principles are not infringed.[56] Secondly, the Constitutional Court opted for a restricted application of its conclusions in relation to ICJ decisions stressing their exclusive and specific character relating only to 'the judgment of the ICJ that interpreted the general international law of immunity from the jurisdiction of foreign states as to include cases of acts considered *jure imperii* and classified as war crimes and crimes against humanity, in breach of inviolable human rights'.[57]

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[53] ibid, para 3.2.

[54] ibid, para 3.5.

[55] Fulvio M Palombino, 'Italy's Compliance with ICJ Decisions vs Constitutional Guarantees: Does the "Counter-limits" Doctrine Matter?' (2013) 22 The Italian Yearbook of International Law 185.

[56] It is important in this regard to recall Art 27 of the Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, 1155 UNTS 31, which precludes the invocation of internal law as a justification for a state's failure to fulfil its obligations under an international agreement.

[57] Judgment no 238/2014 (n 52), para 4.1.

Thirdly, it strongly reaffirmed the validity of the obligation to comply within the Italian legal regime in all other cases.

The Constitutional Court recognized in its Sentenza the purpose of Law no 5 and its Article 3 as a compliance means with the ICJ judgment of 3 September 2012: '[T]his article specifically regulates the obligation of the Italian State to comply with all of the rulings by which the ICJ excluded certain conducts of a foreign State from civil jurisdiction'.[58] Also, the parliamentary proceedings were examined, what convinced the Italian court that it was adopted to ensure 'explicitly and immediately observance' of the ICJ decision. This notwithstanding, it also recognized that such a compliance cannot justify 'the absolute sacrifice of the right of judicial protection of fundamental rights'. Hence, Sentenza n. 238/2014 is an interesting example of judicial examination of compliance efforts carried out under Article 94 of the UN Charter. The Constitutional Court was requested to balance two constitutional norms: one addressing the status of international law, and the other providing guarantee of judicial protection. It found that the methods proposed by the Executive on implementing *Jurisdictional Immunities* and adopted by the Legislature in the form of national laws were unconstitutional as not adequately balanced with the *principi fondamentali dell'ordinamento costituzionale*. Nevertheless, at the same time the court confirmed the principle that ICJ decisions have legal effect in Italy and upheld the general obligation to comply. Therefore, it was a call for the Government to find another way of fulfilling international undertakings and simultaneously to observe constitutional standards.

Importantly, the judgment of the Italian Constitutional Court led to revival of the *Ferrini* jurisprudence in the Italian legal order, particularly by the Court of Cassation,[59] and constituted yet another drastic plot twist in applying state immunities to cases of gross violations of international humanitarian law during World War II. This resulted in reinvigoration of domestic proceedings and lodgement of new claims against Germany by private parties. As final judgments were rendered, German real property, particularly in Rome, was being targeted for settlement of claims. As a response to enforcement proceedings against its property in Italy in ongoing violation of its immunity affirmed by the ICJ in its judgment, the Federal Republic of Germany instituted on 29 April 2022 yet another proceeding before the International Court of Justice.[60] In its application in the case of *Questions of Jurisdictional Immunities of the State and Measures of Constraint against State-Owned Property*, Germany referred directly to the judgment of the Constitutional Court. It expressed the opinion that Sentenza n. 238/2014 was

[58] ibid, para 5.1.

[59] *Toldo v Germany*, Case no 20442, 7 July 2020 Court of Cassation of Italy, ILDC 3220 (IT 2020).

[60] ICJ, *Questions of Jurisdictional Immunities of the State and Measures of Constraint against State-Owned Property* (*Germany v Italy*) <www.icj-cij.org/case/183> accessed 21 September 2023.

'adopted in conscious violation of international law and of Italy's duty to comply with a judgment of the principal judicial organ of the United Nations'.[61] The applicant similarly linked dire consequences with this pronouncement by highlighting that at least fifteen judicial proceedings had been completed before Italian courts regarding claims against Germany for its conduct during World War II and measures of constraints were put in place in relation to four German properties in Rome since it had been rendered.[62]

The German application was accompanied with a request for indication of provisional measures as four properties used for governmental non-commercial purposes (a German school, research and cultural institutions) were to be sold in a public auction. It argued that the applicant was facing the permanent loss of its legal title to properties in question and hence the risk of irreparable prejudice was imminent.[63] The Federal Republic of Germany requested that Italy should ensure that German assets were not subjected to sale and any further measures of constraint. Interestingly, this request was withdrawn only after a few days in response to a new law introduced by Italy that was supposed to address concerns voiced by Germany.[64]

The second legislative attempt to implement the *Jurisdictional Immunities* decision took the form of the Decree-Law no 36 of 30 April 2022[65] converted into law under Law no 79 of 29 June 2022[66]. Although the legislation concerned urgent measures implementing the National Recovery and Resilience Plan, its Article 43 established a special compensation fund for damages suffered by victims of war crimes and crimes against humanity committed on the territory of Italy or to the detriment of its citizens by armed forces of the Third Reich between 1 September 1939 and 8 May 1945. The fund was created at the Ministry of Economy and Finance with the endowment of 20 million euros for the year 2023 and 13.6 million euros for three subsequent years.

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[61] *Application Instituting Proceedings Containing a Request for Provisional Measures*, 29 April 2022, [8] <www.icj-cij.org/sites/default/files/case-related/183/183-20220429-APP-01-00-EN.pdf> accessed 21 September 2023.

[62] ibid [23]–[25].

[63] ibid [71].

[64] *Questions of Jurisdictional Immunities of the State and Measures of Constraint against State-Owned Property* (*Germany v Italy*), Withdrawal of the Request for the Indication of Provisional Measures, Order of 10 May 2022 [2022] ICJ Rep. 462.

[65] Decreto-Legge 30 aprile 2022, n. 36. Ulteriori misure urgenti per l'attuazione del Piano nazionale di ripresa e resilienza (PNRR), (22G00049) Gazzetta Ufficiale no 100, 30 April 2022.

[66] Legge 29 giugno 2022, n. 79. Conversione in legge, con modificazioni, del decreto-legge 30 aprile 2022, n. 36, recante ulteriori misure urgenti per l'attuazione del Piano nazionale di ripresa e resilienza (PNRR), (22G00091) Gazzetta Ufficiale no 150, 29 June 2022. Decree-Laws are legislative acts adopted by the Government as urgent measures. They are later submitted to the Parliament for conversion into law. In the case at hand, the Parliament covered the Decree-Law 36 with some amendments, but for the purpose of this paper those changes are immaterial, and so the final version of the provisions is discussed.

Access to the fund is provided for individuals who have secured final judgments awarding damages in proceedings initiated before the entry into force of the Decree or within prescribed deadline of 180 days. Importantly, the Decree envisages that such judgments may be satisfied only from the fund, and any enforcement proceedings against Germany may neither be initiated nor pursued and shall be discontinued. Consequently, the legislation effectively excluded any form of enforcement or measures of constraint against Germany and its assets, but at the same time provided for a new form of redress for victims or their surviving family members.

However, the *Jurisdictional Immunities* saga did not end with Law no 79 and continued with yet another constitutional challenge filed with the Italian Constitutional Court by the Court of Rome. On 4 July 2023, Sentenza n. 159/2023[67] was issued, which basically upheld the legislation in question. The Constitutional Court did not share objections relating to Articles 2 and 24 of the Italian Constitution concerning access to court and protection of individual rights. It explained that the judicial protection guarantee extends over enforcement proceedings that ensure effectiveness of judicial pronouncements. At the same time, the Constitutional Court recognized that compliance with international obligations of the state was likewise the principle of domestic legal system of constitutional nature. In the opinion of the Court, '[t]he contested provision strikes a not unreasonable balance between these principles'.[68] Furthermore, the fund mechanism is actually a method of transferring the economic burden caused by final judgments awarding damages to victims and contested provisions do not hinder judgment-creditors' prospects to satisfy their claims. In summary, 'Article 43 provides that the compensation claim against Germany is replaced by a right of a similar content from the fund, hence providing an adequate and alternative safeguard to the one achievable through an enforcement against the Federal Republic of Germany'.[69] The Constitutional Court explained that the provided method of satisfaction would be actually more effective than pursuing regular enforcement proceedings against German assets. The state immunity extends as well over post-judgment measures of constraint and provides for even more stringent rules in this regard,[70] while many foreign state assets enjoy likewise special diplomatic and consular protection.[71]

Law no 79 along with the endorsement from the Constitutional Court is a step towards compliance with the initial ICJ judgment of 2012 and an Italian attempt to respect its international obligations within the limits of its own constitutional legal regime. It remains to be seen whether it will be considered by

[67] Judgment no 159/2023, 4 July 2023 Constitutional Court of Italy.
[68] ibid [13].
[69] ibid [16].
[70] UN Convention on Jurisdictional Immunities, Art 19.
[71] Vienna Convention on Diplomatic Relations, 18 April 1961, Vienna, 500 UNTS 95, Art 22.

Germany sufficient as it ensures only a partial implementation of *Jurisdictional Immunities.* No measures of constraint may be taken against German assets and no enforcement proceedings may be initiated or continued. Thus, at least at the post-judgment phase, compliance has been secured through legislative and judicial measures. But the access to the fund is dependent on an existence of the final judgment issued by Italian courts against Germany awarding damages for violations, which occurred during World War II. Consequently, on the one hand, the state immunity of Germany is not respected as Italian courts had to exercise its civil jurisdiction in order to render damage judgments. As the ICJ explained, the question of immunity is a procedural matter for courts to consider as a preliminary issue before engaging with the merits of the case.[72] Similarly, it is problematic to conclude whether judicial decisions infringing on immunities of Germany have ceased to have effect, as ordered by the International Court of Justice. On the other hand, Law no 79 provides a solution that does not infringe upon individuals' right to judicial protection, which is not only an Italian constitutional right but also an international standard of human rights. Additionally, Law no 79 introduced a tight statute of limitations for claims to be adjudicated against Germany and most of those proceedings are already concluded or at the final stage.

Likewise, beside reputational harm, the mechanism proposed by the new legislation protects Germany from negative effects of World War II violations and the economic burden falls on the State of Italy. Although the attribution and accountability of the German State were not disputed, neither at the national level nor during the proceedings before the International Court of Justice, it is rather surprising that Germany does not show any willingness to ease this burden via at least an *ex gratia* contribution[73] into the victims' fund established by Italy. This would mitigate the still present animosity in the German-Italian relations, constitute some sort of acknowledgement of suffering of individuals for moral rather than legal reasons, and ultimately lead to the amicable settlement of the dispute and probably all its aspects. This lack of cooperation is particularly puzzling as Germany has already explored and executed similar arrangements that allow no direct acknowledgement of responsibility. For example, in the *Joint German-Namibian Declaration*[74] of 15 May 2021 the Federal Republic of Germany recognized the 'Germany's moral responsibility for the colonization of Namibia', accepted 'a moral, historical and political obligation to tender an apology for this

[72] *Jurisdictional Immunities* (n 2), [82].

[73] For more on the State practice on *ex gratia* payments, see e.g. Steven van de Put, 'Ex Gratia Payments and Reparations: A Missed Opportunity?' (2023) 14(1) Journal of International Humanitarian Legal Studies 131.

[74] *Joint Declaration by the Federal Republic of Germany and the Republic of Namibia 'United in Remembrance of our Colonial Past, United in our Will to Reconcile, United in our Vision of the Future'*, 15 May 2021 <www.dngev.de/images/stories/Startseite/joint-declaration_2021-05.pdf> accessed 27 December 2023.

genocide', and pledged the amount of 1.1 billion euros over 30 years for reconstruction and development as well as reconciliation projects supporting affected communities. Although the arrangement met with certain criticism, often justified,[75] it shows that the political solution is still an option to a highly complex legal matter once at least a moral responsibility is acknowledged.

Furthermore, the Italian-German saga has likewise profound impact on the political discourse on the post-World War II justice and possible compensation for victims or even reparations. In fact, Italy was the first to reopen the discussion. It was the persistence of affected individuals coupled with the activism of domestic judiciary that paved the way for a new channel of accountability: from criminal prosecution to civil liability litigation. This route seems to be finally closed by the International Court of Justice and the Italian Constitutional Court in the name of state immunity. But it certainly does not mean that other venues are not possible, when the perseverance of victims, or rather their heirs, and the supportive domestic judiciary meet. As the legal action against Germany as a state is at least hindered, such obstacles are not present in suing German corporations and other private entities entangled with and assisting the Third Reich.[76] In fact, such an option may prove to be more effective in securing the awarded compensation, if any, as due to processes of globalization and European integration, the presence of German businesses in Italy is widespread and not protected by the jurisdictional immunities.

V. CONCLUSIONS

The Italian quest for compliance with *Jurisdictional Immunities* has been carried out for eleven years with the engagement of all departments of government. The particular role has been undoubtedly played by domestic courts of different levels – from trial institutions to the Constitutional Court. They contributed to the creation of the dispute, later to facilitate the implementation of the ICJ judgment in the domestic legal order, but at the same time to set limits and restraints to means of compliance proposed by other governmental branches. This process of

[75] Karina Theurer, 'Minimum Legal Standards in Reparation Processes for Colonial Crimes: The Case of Namibia and Germany' (2023) 24(7) German Law Journal 1146; Henning Melber, 'Germany and Reparations: The Reconciliation Agreement with Namibia' (2022) 111(4) The Commonwealth Journal of International Affairs 475.

[76] Florian Jessberger, 'On the Origins of Individual Criminal Responsibility under International Law for Business Activity: IG Farben on Trial' (2010) 8(3) Journal of International Criminal Justice 783; Kevin M McDonald, 'Corporate Civil Liability under the US Alien Tort Claims Act for Violations of Customary International Law during the Third Reich' (1997) St. Louis-Warsaw Transatlantic Law Journal 167.

trial and error, which undoubtedly has not contributed to certainty of law in the realm of state immunities with the changing judgments of domestic courts, has lasted for more than a decade. But it also emphasizes the complexity of the general obligation to comply envisaged in Article 94 of the UN Charter and stresses the need of a judgment-debtor to reconcile principles and rules of two distant legal systems: international and domestic. It often requires balancing different values and norms, and emerging normative conflicts may not be resolved easily or at all. It is actually at the national level that the task of compliance becomes complicated, when states need to navigate carefully through multifaceted hierarchies of norms and institutions, constitutional constraints, and political entanglements, as well as legislative and judicial processes and executive regimes. The example of the German-Italian dispute illustrates those challenges. Interestingly, the Italian Republic has not ensured so far a full compliance with the ICJ decision, thus being at least in a partial violation of Article 94 of the UN Charter. Nevertheless, at the same time it has demonstrated significant efforts in meeting its obligations in this regard. Those efforts seem to create a situation when guaranteeing full compliance is not essential to resolve a dispute.

As explained, the legality and efficacy of compliance measures adopted by Italy in the aftermath of *Jurisdictional Immunities* have been subject to judicial scrutiny. At the domestic level, the Constitutional Court rejected the first attempt by declaring relevant legislation unconstitutional but gave its imprimatur to the mechanism based on a compensation fund. Within the international domain, the International Court of Justice has again been petitioned to adjudicate on state immunities as applied by Italian courts but indirectly also on measures implementing its previous judgment. The proceedings are at the initial stage. Thus, the saga continues.

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ON THE STANDARDS OF LAW-MAKING IN CRIMINAL LAW: A POLISH EXAMPLE

Abstract

This paper delves into the standards of law-making in criminal law, emphasizing the significance of these standards within the legal system. The text explores the importance of maintaining constitutional and non-constitutional standards in criminal law and investigates the complexity of defining clear and unambiguous principles for lawmakers. It discusses the dual meaning of the standard of law-making, encompassing both substantive and formal aspects, and how these standards play a crucial role in shaping legal norms. The paper also highlights four key law-making standards in criminal law: legal certainty, adherence to proper legislative procedure, the effectiveness of the law and the adequacy of the language of the law. It raises essential issues regarding the impact of these standards on the quality and trustworthiness of criminal laws.

KEYWORDS

law-making, standard, criminal law

SŁOWA KLUCZOWE

stanowienie prawa, standard, prawo karne

I. INTRODUCTION

Criminal law is a branch of law that exerts the most significant impact on the lives of individuals when applied to them. Its doctrine primarily focuses on the analysis of existing regulations and deriving specific legal norms from them.[1] In this process, the analysis of a given issue is usually accompanied by *de lege ferenda* proposals. Significantly less attention is devoted to the structural aspect of criminal law, or in other words, to how criminal law provisions should be created.[2]

In recent years, it has repeatedly been emphasized that constitutional standards should be maintained both in the enactment and application of criminal law.[3] However, it is difficult to require that all of these standards, particularly in light of the imprecise formulation of the principle of the democratic rule of law expressed in Article 2 of the Constitution of the Republic of Poland of 2 April 1997,[4] be set forth in a clear and unambiguous manner, allowing for their straightforward and unambiguous practical application in the process of law-making. Moreover, these may not be the only standards that the legislator, or even the drafters who formulate provisions in this branch of law, should adhere to.[5]

The aim of this paper is to answer the question of what are the standards of law-making, and then to identify some of the most important standards that

[1] See Jacek Giezek, 'O możliwości naukowego uzasadnienia zmiany modelu odpowiedzialności karnej' (2017) 2 Państwo i Prawo 3, 5, who suggests that in this regard it is appropriate to talk about the dogmatics of criminal law.

[2] Cf. ibid 6, based on which these issues are no longer dealt with by dogmatics but by the theory of criminal law, which should precede the introduction and existence of individual provisions. For more on the theoretical and legal approach to the issue of law-making, see Sławomira Wronkowska, *Podstawowe pojęcia prawa i prawoznawstwa* (Ars boni et aequi 2003) 26–31.

[3] See: Piotr Kardas, 'Prawo karne w świetle standardów konstytucyjnych' (2022) 10 Państwo i Prawo 91ff; Włodzimierz Wróbel, 'Prawo karne a standardy konstytucyjne' in Marek Mozgawa, Piotr Poniatowski and Krzysztof Wala (eds), *Aktualne problemy i perspektywy prawa karnego* (1st edn, Wolters Kluwer Polska 2022) 13ff; Aleksandra Kardas and Piotr Kardas, 'Zasada równości w prawie karnym (zarys problematyki)' (2019) 1 Czasopismo Prawa Karnego i Nauk Penalnych 7ff; Przemysław Cychosz, *Konstytucyjny standard prawa karnego materialnego w orzecznictwie Trybunału Konstytucyjnego* (KIPK 2017). All translations presented in this paper were prepared by the authors. Any translated materials or texts from external sources are accurately attributed.

[4] JoL [Journal of Laws] 78/483 as amended.

[5] See Antoni Rost, *Instytucje polskiego prawa konstytucyjnego* (1st edn, Wydawnictwo Naukowe UAM 2013) 19ff.

might be postulated in the Polish criminal law. This task is achieved by carrying out a formal and dogmatic analysis of normative acts introducing changes to the Penal Code of 6 June 1997.[6] Furthermore, the currently applicable standards are exemplified and presented in selected groups, and their relationship with the law-making models is also outlined.

In section II the idea of standards of law-making is defined, and some further remarks are made on the nature and practical impact of these phenomena. In section III a few potential candidates for standards of law-making in the field of criminal law are supplemented and briefly characterised. Although these standards, for the sake of clarity of the argument, are not analysed in detail, it is possible to draw differences between them, outline their fundamental elements and compare them. In section IV the proposed standards are juxtaposed in order to show the possible conflicts between various standards within a certain model of criminal law and the methods of coordinating them. The idea of meta-standards of law-making is introduced. This way, the general overview of the way in which criminal provisions ought to be enacted is provided.

II. STANDARDS OF LAW-MAKING AND THEIR (DUAL) MEANING IN THE CONTEXT OF CRIMINAL LAW

In order for the argument to be comprehensible, it is necessary to explain what is the standard for law-making and what is its significance, especially for criminal law, which is a branch of law that has the most profound impact on the life of individuals.

According to the dictionary definition, a standard is 'the level that is considered to be acceptable, or the level that someone or something has achieved'.[7] Therefore, a standard is a concept with a positive connotation, and as a consequence, adhering to it must be regarded as beneficial, while failure to apply it should be criticised. In principle, law is understood as a system of norms, which are linguistic expressions and are cognized through their understanding.[8] From the perspective of law-making, it must be perceived even more objectively and essentially reduced to provisions from which, based on language-appropriate methods,

[6] (Ustawa z dnia 6 czerwca 1997 r. – Kodeks karny) consolidated text [2022] JoL 1138 as amended (Penal Code).

[7] *The Longman Dictionary of Contemporary English* <www.ldoceonline.com/dictionary/standard> accessed 20 December 2023.

[8] See Sławomir Żółtek, *Znaczenie normatywne ustawowych znamion typu czynu zabronionego. Z zagadnień semantycznej strony zakazu karnego* (Wolters Kluwer 2017) 23.

the norms constituting the legal system are derived.[9] Consequently, in the most tangible sense, law-making is nothing more than the formulation and adoption of provisions. However, in a broader sense, the norm derived from a given legal provision through interpretation becomes part of the system, which is the law. Furthermore, such an approach confirms the frequent situation in practice when, despite the immutability of the content of a legal provision, there is a change in its interpretation, resulting in a change in the legal norm, and hence, a change in the law.[10] In such cases, it is difficult to speak of law-making. Therefore, it can be stated that in the context of this work, the standard for law-making is a norm specifying the basic requirements for newly created legal provisions. It should be noted at this point that the standard for law-making can be both substantive and formal. A substantive standard pertains to the content of enacted legal provisions, including the values that are to be realized as a result of its application. Formal standards, on the other hand, concern the techniques and procedures for creating legal provisions.

The content of an individual law-making standard is rarely defined in a manner that would not be subject to further interpretation. For this reason, the concept of a meta-standard of law-making, understood as a norm specifying the basic requirements for law-making standards within a given model of law-making, is introduced. The meta-standard is adopted at the political stage when the trajectory of criminal law development and its intended purpose as a specific tool are determined. The political projection defines how criminal law should be structured and, consequently, determines the law-making model adopted at a given time and within a specific political system.

The model of criminal law-making should be understood as a schema representing the legislative process and its outcome when applying a governing set of standards. With a clear understanding of the semantic meaning of the concept of the law-making standard, it is worthwhile to consider its role or importance, seen as the consequence generated by such standard. The primary consequence of establishing the content of a specific law-making standard is the creation of objectified criteria by which both the created regulations and the legislative process can be assessed.

As a result of identifying a standard, it is possible to enhance the quality of created laws by formulating specific requirements regarding the elements considered in the legislative process, directed towards lawmakers and drafters who will apply them. Standards of criminal law-making, when understood broadly, can provide support not only in the literature-referenced debate related to the determi-

[9] For further discussion on the difference between a legal norm and a provision, see ibid 32–34.

[10] See Włodzimierz Wróbel, *Zmiana normatywna i zasady intertemporalne w prawie karnym* (Zakamycze 2003) 311–15.

nation, justification, and limitation of criminalization[11] but also from an axiological perspective, considering the tension between positive[12] and critical morality[13]. This, in turn, means that adhering to law-making standards can contribute to mediating widely accepted moral norms through constructed legal norms.

To conclude the discussion of preliminary issues, it is worth adding that when creating or amending criminal law, lawmakers should first consider which part – general or special – the provisions will apply to. While some principles related to law-making are not dependent on the specific part of the Penal Code being created, some will be more closely associated with or even exclusively tied to a particular group of regulations. For example, the principle of subsidiarity[14] is inherently linked to typifying provisions rather than to the general part of the Penal Code.

It seems that apart from occasional remarks concerning how specific provisions should be shaped, it would be also valuable to develop theoretical frameworks for discussion of models of law-making, especially in the field of criminal law. Unfortunately, this text framework does not provide space for such extensive considerations. However, to at least initiate the discussion on this topic, it is worthwhile to highlight what the standards of criminal law-making are or should be like.

III. LAW-MAKING STANDARDS IN CRIMINAL LAW

1. FOCUS ON LEGAL CERTAINTY

Ensuring legal certainty as a material standard for criminal law-making should be considered a component of the constitutional principle of the democratic rule of law.[15] As stated in the literature: 'The subject to which the law refers (the addressee of the norm, citizen, taxpayer) can predict the legal consequences

[11] Cf. Kardas, 'Prawo karne' (n 3) 96. For criminalization and related standards, see Lech Gardocki, *Zagadnienia teorii kryminalizacji* (PWN 1990) passim.

[12] See HLA Hart, *Law, Liberty and Morality* (Stanford University Press 1963) 20ff; by positive morality is meant 'the morality actually accepted and shared by a given social group'.

[13] See ibid 82; cf. Magdalena Budyn-Kulik, *Aksjologiczne podstawy kryminalizacji w społeczeństwie ponowoczesnym* (Wydawnictwo UMCS 2022) 172. Critical morality can be framed as a set of moral values and norms for evaluating other values and norms. Critical morality thus constitutes the criteria by which legal norms, among others, are assessed.

[14] See Sławomir Żółtek, *Prawo karne gospodarcze w aspekcie zasady subsydiarności* (Wolters Kluwer 2008) 245–303.

[15] See judgment in SK 6/09, 20 October 2009 Polish Constitutional Tribunal, OTK-A 2009/9/177.

of facts (states of affairs), including their own and others' actions and omissions'.[16] When applying the above observations to discussions within the scope of criminal law-making techniques, it is worth noting that the following can be derived from the standard of ensuring legal certainty: (1) the obligation to avoid too frequent and ill-considered changes in the content of legal provisions; (2) the obligation to clearly define the prerequisites for actions taken by authorities; (3) the obligation to adequately formulate legal penalties.[17]

In the context of criminal law-making, it is worthwhile to refer to the concept of 'qualification certainty', defined as follows: '[L]aw is qualitatively certain if minor changes in the factual situation do not lead to significant changes in the legal qualification of a particular behaviour'.[18] The obligation to create criminal law that realizes the standard of legal certainty in terms of qualification certainty imposes on the legislator the duty to establish legal norms whose effects of application are predictable from the point of view of the addressee of the law.

The consequence of not adhering to the specified standard is a state of legal uncertainty or instability, which can be succinctly described as the negation of the characteristics of the standard of legal certainty. The primary consequence of this is the limitation of the law's protective function through criminal law.[19] Equally important is additionally limited trust in the legislator.

An excellent example of the breach of these standards are the provisions implementing the Act of 7 July 2022 amending the Penal Code and some other acts.[20] Despite stipulating the date of its entry into force in the act, the legislator later, after the legislative process had been concluded, decided that it should come into effect much later. Consequently, under the Act of 26 January 2023 amending the Code of Civil Procedure and some other acts,[21] the period of *vacatio legis* was extended to 1 October 2023. Such actions of the legislator, considering the procedure for amending transitional provisions, raised doubts among the criminal law commentators about whether the amendment to the Penal Code had come into force.[22]

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[16] Hanna Filipczyk, *Postulat pewności prawa w wykładni operatywnej prawa podatkowego* (1st edn, Wolters Kluwer Polska 2013) 21.

[17] Prior to further reasoning, it is worth signalling a kind of synergy between the standard of care for legal certainty and the standard of adequacy of the language of law.

[18] Bartosz Brożek, 'Pewność prawa jako stabilność strukturalna' (2011) 6 Forum Prawnicze 23, 26.

[19] See Katarzyna Banasik, 'Stabilność prawa karnego jako wartość' in Tadeusz Biernat (ed), *Stabilność prawa w kontekście wartości, instytucji i funkcjonowania systemu prawnego* (Oficyna Wydawnicza AFM 2016) 38.

[20] (Ustawa z dnia 7 lipca 2022 r. o zmianie ustawy Kodeks karny oraz niektórych innych ustaw) [2022] JoL 2600 as amended.

[21] (Ustawa z dnia 26 stycznia 2023 r. o zmianie ustawy Kodeks postępowania cywilnego oraz niektórych innych ustaw) [2023] JoL 403.

[22] See Mikołaj Małecki, *Niezmieniony Kodeks karny. Niekonstytucyjność vacatio legis nowelizacji Kodeksu karnego z 7 lipca 2022 r. i jej konsekwencje prawne* (Krakowski Instytut

2. ADHERENCE TO THE PROPER LEGISLATIVE PROCEDURE

Since criminal law is generally contained in provisions of a statutory rank, the standard for the adoption of these provisions in the course of proper legislative procedure is particularly important. This is a standard of constitutional nature, since its basic assumptions are included in Articles 118–123 of the Polish Constitution. A legislative act adopted in contravention of this procedure cannot be called a law, and what is more, it can constitute a kind of non-act.[23] The Constitution, however, contains only a rough description of the legislative procedure, while the details are left to be determined by ordinary legislation.[24] Although, as indicated, the constitutional regulation is of rudimentary nature, it is impossible not to specify in some detail the most important points of the legislative procedure. Among these, the requirement to justify a bill deserves special attention. On constitutional grounds, it is only necessary to present to the Sejm of the Republic of Poland the financial consequences of the implementation of drafters' intentions after the law enters into force. Subordinate legislation provides for much more far-reaching requirements in this regard. The practical importance of the obligation to justify a bill is expressed, among other things, by the fact that, in the framework of teleological interpretation, judicial authorities often reach for such justifications in order to decode the meaning of the law (*ratio legis*).[25] Moreover,

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Prawa Karnego 2023). It should be pointed out that even if the author's doubts are shared that the amendment, for reasons of unconstitutional change of *vacatio legis*, did not enter into force, the effect of interpretation was that it was known earlier and, consequently, it entered into force on the original assumed date. The allegation of retroactivity of the law in such a case is not correct, since by way of interpretation it is not indicated that from now on the amendment is considered to have entered into force earlier, but by way of interpretation it should have already been so stated at that point. Thus, there is no retroactivity, or at least retrospection, here. However – regardless of the discussion, which is more academic than practical – the example of the amendment under consideration shows that the legislator sometimes fails to comply with the standard of attention to legal certainty, and such a failure can have far-reaching consequences.

[23] See Sebastian Gajewski and Aleksander Jakubowski, 'Nieakt w prawie administracyjnym' (2013) 6 Zeszyty Naukowe Sądownictwa Administracyjnego 73, 84. The authors argue that 'A non-act can be defined as a factual phenomenon not directed at producing any legal effect, which cannot be attributed to a public administration body, but which creates in the external sphere the appearance that an administrative act exists'.

[24] Detailed requirements for draft justifications of normative acts are specified, among other things, in Art 34 of the Resolution of the Sejm of the Republic of Poland of 30 July 1992: Regulations of the Sejm of the Republic of Poland (consolidated text [2022] MP 990 as amended) and § 27 of the Resolution No 190 of the Council of Ministers of 29 October 2013: Rules of Procedure of the Council of Ministers (consolidated text [2022] MP 348). In addition, the obligation to prepare a statement of reasons applies also to drafts submitted under the legislative initiative procedure of citizens, see Art 11(1) of the Act of 24 June 1999 on the legislative initiative of citizens (consolidated text [2018] JoL 2120).

[25] For further discussion of this topic, see Maciej Dybowski and Verena Klappstein (eds), *Ratio Legis: Philosophical and Theoretical Perspectives* (Springer 2018).

a clear statement of the legislator's intended purpose is a prerequisite – discussed later in this paper – for evaluating the legislative process as ensuring the effectiveness of the law.

Only a legal act that has been drafted in accordance with the constitutionally specified legislative process can come into force and be called a law. A legal act that is not adopted in the correct legislative procedure will not become a law, and no criminal law norms can be derived from it. In other words, a breach of the legislative procedure as defined in the Polish Constitution will result in the provisions being only seemingly adopted, and there will be no normative change in the realm of criminal law. Due to the formal nature of this standard and its extremely precise definition in the Constitution, the assertion of its violation will be evident and easily noticeable, making it highly unlikely, though not impossible.

The legislative procedure, or more precisely its determination, does not end with what is stated in the Polish Constitution. However, a violation of standards of non-constitutional nature will have different consequences. In such cases, the enacted criminal law will be consistently treated as a criminal law statute but may be burdened with a procedural defect that could, for procedural reasons, lead the Constitutional Tribunal to decide on its unconstitutionality.[26]

From the perspective of legislative procedure, the issue of *vacatio legis*, or the period during which a law remains inactive, is significant. This matter is regulated in two pieces of universally applicable law. The first, as a kind of good practice, is a regulation issued by the Prime Minister on 20 June 2002 concerning the Principles of Legislative Technique.[27] The other is addressed in the Act of 20 July 2000 on the announcement of normative acts and some other legal acts.[28] In the legal and criminal context, a too short *vacatio legis* period can be a significant obstacle to distinguishing prohibited actions from permissible ones. A question remains as to the possibility of considering a perpetrator's potential mistake regarding the elements of a crime as justified in such circumstances.[29]

[26] Such a situation occurred quite recently on the occasion of the Act of 13 June 2019 on amendments to the Act: Penal Code and some other acts, which – as a result of the judgment in Kp 1/19, 14 July 2020 Polish Constitutional Tribunal OTK-A 2020/36 – for procedural reasons, did not came into force. See Wróbel, 'Prawo karne a standardy' (n 3) 20; Lech Gardocki, 'Ocena możliwych kierunków zmian prawa karnego z punktu widzenia teorii kryminalizacji' in Marek Mozgawa, Piotr Poniatowski and Krzysztof Wala (eds), *Aktualne problemy i perspektywy prawa karnego* (1st edn, Wolters Kluwer Polska 2022) 76.

[27] (Rozporządzenie Prezesa Rady Ministrów z dnia 20 czerwca 2002 r. w sprawie Zasad techniki prawodawczej) consolidated text [2016] JoL 283 (ZTP).

[28] (Ustawa z dnia 20 lipca 2000 r. o ogłaszaniu aktów normatywnych oraz niektórych innych aktów prawnych) consolidated text [2019] JoL 1461. See Art 4 which indicates a basic *vacatio legis* period of 14 days.

[29] All the more so, since it is generally accepted that even a normative change, occurring despite the absence of a change in the content of the law, can justify the invocation of a mistake as to unlawfulness under Art 30 of the Penal Code. See Sławomir Żółtek and Aleksander

3. STRIVING TO ENSURE THE EFFECTIVENESS OF THE LAW

The issue of the effectiveness of the law is multifaceted and complex. A reason for considering the effectiveness of a law as a standard for law-making may be the observation, which rightly raises doubts in legal literature, that despite the intensification of legislative work over the decades, empirical research does not confirm the claim on increased legal effectiveness.[30]

Starting from the natural language indications, it can be emphasized that 'effective' means something that is 'successful, and working in the way that was intended'.[31] Thus, the concept emphasizes the praxeological value (stressing the achievement of the intended result) and the teleological value (the intended result essentially serves as the goal of intentional action by the subject). When referring to the praxeological evaluation, one considers the degree to which the intended result has been achieved. Therefore, actions can be characterized as dysfunctional, partially realized, or eufunctional with regard to the adopted goal.

Applying these general considerations to the context of effectiveness of criminal law in the legislative process, it can be understood as the creation of norms that bring about changes in the realm of regulated social relations in line with the objective envisaged by the legislator. Two aspects of the standard can be distinguished: (1) ensuring the creation of eufunctional norms (the positive aspect), and (2) avoiding dysfunctional norms (the negative aspect).[32]

Sometimes, it is also pointed out that an element of legal effectiveness is the limitation of side effects (both eufunctional and dysfunctional) of enacted legal norms.[33] Furthermore, as emphasized in the literature on the sociology of law: '[T]he general problem of legal effectiveness and the factors that limit this effectiveness consist of four specific issues: (1) the effectiveness of law-making; (2) the effectiveness of law promulgation (publicity); (3) the effectiveness of law enforcement; and (4) the effectiveness of the validity of the law. The first and third issues are undoubtedly the most important'.[34]

Leszczyński, 'Prawnokarna kwalifikacja błędu wywołanego nieświadomością treści znamienia technicznoprawnego i normatywnego' (2022) 93 Studia Iuridica 318, 326.

[30] See Marek Derlatka, 'Perspektywy skuteczności prawa' (2021) 31 Studia Paradyjskie 305, 307–08.

[31] *The Longman Dictionary of Contemporary English* <www.ldoceonline.com/dictionary/effective> accessed 20 December 2023.

[32] See Andrzej Kojder, 'Ograniczenia skuteczności prawa' in Tomasz Giaro (ed), *Skuteczność prawa. Konferencja Wydziału Prawa i Administracji Uniwersytetu Warszawskiego, 27 lutego 2009 r.* (Liber 2010) 43–45.

[33] Andrzej Kojder, 'Skuteczność prawa' in Andrzej Kojder and Zbigniew Cywiński (eds), *Socjologia prawa: Główne problemy i postacie* (Wydawnictwa Uniwersytetu Warszawskiego 2016) 435.

[34] ibid.

Following the insights from the sociology of law, it can be highlighted that: '[T]he limitations of legal effectiveness in its creation are mainly caused by three factors: inadequacy of legislative axiology with regard to the social sense of justice; errors in the legislative technique; errors in the codification technique'.[35]

Already at this point, however, an important caveat must be made about the limits in striving to ensure the effectiveness of a law. When creating a law, it must be remembered that one has no direct influence on the reality, one can only reconstruct it correctly or incorrectly. However, another thing is deciding on the evaluation – and before that on its criteria – of the previously decoded reality.[36] Consequently, the legislator decides what behaviour to criminalize. Still, when formulating the right legislation, it must render a reality that corresponds to the behaviour in question with the use of adequate linguistic structures.

Failure to meet the standard of legal effectiveness represents the anti-standard of instrumentalization of the law.[37] According to this anti-standard, the law becomes a means to an end, disregarding (intentionally or unintentionally) the limits of legal effectiveness included in the legislative process. It is used as a tool to achieve immediate, often profound, and arbitrary changes in the regulated social relations.[38] In other words, legal norms are established that, in the abstract, may not raise doubts about the true intentions of the legislator. However, these norms, especially when viewed in the context of law enforcement, serve explicitly or implicitly to achieve specific ideological goals.

Therefore, the key distinction between the pursuit of legal effectiveness and the instrumentalization of the law lies in the rationality of selecting legal means and the goals that the created law aims to achieve. In the context of criminal law, this issue is particularly evident in proper criminalization.

As an example, one can point to the departure by the legislator from the commonly accepted practice of setting statutory penalties in the form of 'ranges'. Furthermore, this issue, along with raising the statutory penalties, serves as an example of both the instrumentalization of criminal law and legal populism.[39]

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[35] ibid. A thesis can be posed here, although it will not be further substantiated in this paper, that sociology of law presumably identified significant challenges to law-making models earlier than criminal law jurisprudence. See Adam Podgórecki, 'Skuteczność działania prawa' in Adam Podgórecki, *Zarys socjologii prawa* (PWN 1971) 451–73.

[36] See Giezek (n 1) 9.

[37] For further comments on the difference between the instrumentalization of the law and the instrumental use of the law, see Artur Kotowski, 'Instrumentalizacja prawa i instrumentalne użycie prawa a jego wykładnia' (2016) 4 Studia Prawnicze 39, 49.

[38] Figuratively speaking, following the anti-standard of instrumentalization of the law, the legislator treats the law in a subservient manner, ignoring its essence and the limitations arising from it.

[39] See Gardocki, 'Ocena możliwych kierunków' (n 26) 75.

4. ADEQUACY OF THE LANGUAGE OF THE LAW

Criminal law, as a regulator of social life, affects addressees primarily through criminal penalties. These, in turn, function on the basis of established norms. A characteristic feature of legal norms is their establishment in a linguistic form. Therefore, the significance of the standard of adequacy of the language used to formulate law should not surprise.

First, it is necessary to explain why the adequacy of language is to be considered a standard for the enactment of criminal law. According to the dictionary definition, 'adequate' means something that is 'enough in quantity or of a good enough quality for a particular purpose'.[40] In the context of the language of enacted criminal law, adequacy should be measured against the purpose and functions of criminal law.

It is the language used by the law that serves as the primary method of communication between the legislator and the addressees of the norm.[41] The issue of enacting criminal law is part of a broader discussion on the communicative nature of normative acts. On the one hand, there is a desire to achieve maximum precision in describing reality. On the other hand, the legislator must base legal language on concepts used in everyday language.[42] The fundamental source of contention is the tension between two values achieved by the standard of language adequacy for reality: the precision of the created norms and their comprehensibility.

This aforementioned conflict is also embedded in the criminal law. It is worth noting that the legislator should criminalize only those acts for which criminalization can be defined in a credible manner; otherwise, it would be disloyal to society.[43] Historically, two tendencies in terms of the specificity of criminal law provisions have been in conflict over the centuries. According to the first tendency, criminal law provisions should present potential violations as exhaustively as possible. This approach led to casuistry.[44] However, there has been a departure from this trend in favour of a synthetic approach to criminal provisions,[45] with the current view that syntheticity is the standard for formulating criminal provi-

[40] *The Longman Dictionary of Contemporary English* <www.ldoceonline.com/dictionary/adequate> accessed 20 December 2023.

[41] See Katarzyna Nieciecka, 'Kilka uwag o problematyce komunikatywności tekstów prawnych' (2014) 16 Studenckie Prace Prawnicze, Administratywistyczne i Ekonomiczne 107, 108.

[42] ibid 109.

[43] Lech Gardocki, 'Kilka uwag na temat języka ustawy karnej' (2022) 93 Studia Iuridica 94, 96.

[44] See the Prussian Landrecht, the Tagancev Code, or the (Russian) Code of Main and Correctional Penalties.

[45] What follows is an increase in the scope of discretionary slack in the process of applying the law.

sions correctly.[46] Nevertheless, syntheticity does not necessarily eliminate future ambiguities in interpreting the provisions. As it is often pointed out, there are no criminal provisions that do not raise any doubts.[47] A perfect example in this regard could be, once again, Article 148 § 1 of the Penal Code. This provision is highly synthetic and widely understood. However, it has given rise to problems discussed in legal writings and jurisprudence concerning the question when human life begins and ends.[48] A person can be killed only from the moment they begin to exist until their life comes to an end.[49]

Although, as previously indicated, the synthetic approach seems to be favoured, it is not always used in practice. To realize this, one can have a look at the draft amendments related to so-called 'hate crimes', where attempts are made to expand the catalogue of reasons that lead to hateful behaviour subject to criminalization under Article 257 of the Penal Code.[50] However, this expansion is only apparent. In reality, the reasons that are attempted to be explicitly introduced into criminal law provisions are already covered in broader terms in Article 216 of the Penal Code. The official motive for such actions does not matter. They should be assessed as incorrect. The argument that this is meant to highlight the inappropriateness of being guided by specific reasons does not withstand criticism, either. Since a certain idea has already been synthetically included in a specific provision, it is not only unnecessary but it is also incorrect to add a casuistic approach to it. Furthermore, doubts are raised about why other ideas included synthetically have not received similar casuistic treatment. However, if the cata-

[46] Gardocki, 'Kilka uwag' (n 43) 97–98 and previous contributions by this author, see Lech Gardocki, 'Probleme der Tatbestandstechnik und der Sprache der Strafgesetzbung' in Raimo Lahti and Kimmo Nuotio (eds), *Criminal Law Theory in Transition: Finnish and Comparative Perspectives/Strafrfechtstheorie im Umbruch. Finnische und Vergleichende Perspektiven* (Finnish Lawyers' Publishing Company 1992) 294–96.

[47] Gardocki, 'Kilka uwag' (n 43) 99.

[48] See Rajnhardt Kokot in Ryszard A Stefański (ed), *Kodeks karny: Komentarz* (5th edn, CH Beck 2020) 931–32.

[49] For the sake of completeness, it is worth noting that a similar act but committed on human remains rather than a living person at the time of the act will still be classified as a criminal offense. Depending on the subjective aspect, it may be an unsuccessful attempt to commit the offense of murder (i.e. a crime under Art 13 § 2 of the Penal Code in conjunction with Art 148 § 1 of the Penal Code) or the crime of desecrating human remains (i.e. a crime under Art 262 of the Penal Code) committed as a completed act. See Tomasz Sroka in Michał Królikowski and Robert Zawłocki (eds), *Kodeks karny. Tom I. Część ogólna. Komentarz do art. 1–116* (5th edn, CH Beck 2021) 438.

[50] See legislative draft of the Act amending the Penal Code of 12 December 2019, parliamentary print no 138; legislative draft of the Act amending the Penal Code of 10 June 2020, parliamentary print no 465; and the Committee's draft of the Act amending the Penal Code of 23 September 2020, parliamentary print no 924.

logue mentioned in Article 257 of the Penal Code is to be consistently expanded, it should be done in a much more synthetic way.[51]

The division of the clarity of the legislator's expression into formal and material aspects is widely accepted.[52] A provision is formally clear when the communication contained in the normative act can be read by its addressees without distortion at the level of understanding the linguistic content of the provision. Material clarity of a given legal norm can be discussed when the addressees of the norm are able to decode its axiological content. In other words, material clarity is the intelligibility or transparency of moral presuppositions of any given provision. To ensure material clarity, the legislator should, therefore, refer to a universally accepted catalogue of moral norms, the realization of which is also guaranteed by criminal penalties. For this reason, essential characteristics of the adequacy of the language of the enacted criminal law must include a requirement to use simple and acceptable language in line with the existing catalogue of social norms.

It can be noted that only the application of both of the above criteria of intelligibility allows decoding the content of a legal norm. For example, two main obligations arise from the content of Article 148 § 1 of the Penal Code: the order to prosecute and punish perpetrators who realize certain elements of the criminal act (linguistic aspect) and the prohibition of homicide (axiological aspect).[53]

What is more, there are important guidelines regarding legal language. The enactment of criminal law should be in line with the principles of proper legislation applicable to every branch of law. These principles, at least in terms of ensuring the linguistic effectiveness of legal norms, are defined in the ZTP. There can be no doubt that the legislator, when adopting provisions, and the proposer of the draft should fully comply with the general principles in this regard.[54] However, it should be noted that a detailed analysis of the ZTP allows concluding that it also contains provisions specifically applicable to criminal law.[55] It is significant that legal scholars and commentators,[56] as well as the judges of the Constitutional

[51] For example, the postulated provision could read as follows: 'Whoever insults a group of people or an individual person or violates their bodily integrity because of their characteristics or personal conditions shall be punished ...'.

[52] See Robert Zawłocki, 'O komunikatywności języka prawnego' (2013) 13 Comparative Legilinguistics 69, 76.

[53] See Kamil Siwek, 'O wykorzystaniu derywacyjnej koncepcji wykładni prawa w rozwiązywaniu problemów prawa karnego' (2021) 15(4) Ius Novum 73, 79–80.

[54] What can happen in the event the legislator does not comply with these rules could be observed by analysing the 2011 amendments to Art 67 § 3 of the Penal Code. For further comments, see Sławomir Żółtek, 'Liczne zmiany art. 67 § 3 kodeksu karnego a standardy poprawnej legislacji' (2011) 1 Przegląd Legislacyjny 122, 128–29.

[55] See § 28, 75–81a, 117 ZTP.

[56] See Grzegorz Wierczyński, *Redagowanie i ogłaszanie aktów normatywnych: Komentarz* (2nd edn, Wolters Kluwer Polska 2016) 32.

Tribunal and the Supreme Administrative Court,[57] have expressed the view that the principles of legislative technique drafted in the form of regulations constitute a *superfluum* of constitutional regulation, which in turn provides grounds for holding the legislator accountable for violating these principles.[58]

IV. A FEW REMARKS ON META-STANDARDS OF LAW-MAKING IN CRIMINAL LAW

The application of a law-making standard sometimes requires interpretation of its content. For example, the effectiveness of the law requires the legislator to rationally select legal instruments to ensure that rationally chosen goals are achieved. The indicated standard, however, is not intended to resolve which goals are rational and according to which criteria the legal instruments designed to achieve those goals should be evaluated within a given law-making model. This role is performed in law-making models by meta-standards.

Furthermore, in relation to certain law-making standards, both constitutional and non-constitutional in origin, a conflict is possible between individual standards within the law-making model.[59] For example, the standard of attention to legal certainty may conflict with the standard of adequacy of the language of the law when provisions are formulated in an overly synthetic rather than casuistic manner. This conflict may be resolved primarily by: (1) rejecting one of the standards to more fully achieve the other, (2) optimizing the application of each standard.

It seems that there are no criteria to prejudge the superiority of one of the two presented solutions. With regard to the first, it turns out to be necessary to determine the hierarchy of standards justifying the way of resolving the conflict. In the case of the other method, among other things, there is a problem of determining the manner and limits of reconciling the various standards. This does not mean, however, that there are no – detailed later in this paper – rationales of intra-model nature that seem to speak in favour of the second of the discussed groups of meta-standards.[60]

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[57] Instead of many, see the judgment in P 15/05, 12 December 2006 Polish Constitutional Tribunal (Trybunał Konstytucyjny) OTK-A 2006/11/171; judgment in II OSK 1392/20, 16 May 2023 Polish Supreme Administrative Court (Naczelny Sąd Administracyjny) LEX 3588948.

[58] Including the sanction of repealing a specific normative act.

[59] Of course, the standards in question may also interact with each other in other ways. These issues, however, due to the constraints of space cannot be fully discussed in this paper. Nevertheless, it is worth noting the topic can be explored.

[60] A question that arises is how one can justify the selection of one among potentially many meta-standards without finding a binding directive for higher-level selection (which could lead to

First of all, methods for resolving conflicts between standards need to be discussed. An extreme example of implementing the first of the methods would be a model in which one or a small group of standards are treated as an unquestionable dogma. Such would be the authoritarian model of law-making characterized, among other things, by: the imposition of a set of values protected and implemented by criminal law, as well as a low level of transparency in the norms constituting the legislative process.[61] In addition, it exhibits such features as arbitrariness and lack of coherence in the selection of legal decisions made, as well as a low level of legal certainty.

Regarding the second method of conflict resolution, one of the potentially many proposed actions of lawmakers is to use the balancing mechanism during the process of making criminal law. This involves weighing the benefits of adhering to individual standards to maximize the protection of legal interests. This directive of preferences, which closely resembles the principle of utility[62] applied to the context of legislative technique, seems to remain in the realm of unfulfilled demands made on lawmakers.

The chosen meta-standard of 'legislative utilitarianism', which significantly values the importance of the consequences of legislative actions, pushes proponents of this theory towards an understanding of the standard of law effectiveness in which the intrinsic overarching goal above specific intentions of the legislator becomes the well-being, often worldly, of individuals, groups, communities, or society. Consequently, the content of the standard of law effectiveness will depend on the adopted criteria of 'good' or 'happiness'. A model of law-making based on the meta-standard of legislative utilitarianism, at least in terms of legislative technique in criminal law, is thus susceptible to the charge of relativism and can lead to extremely different practical conclusions that nevertheless find equally strong support in light of the adopted law-making meta-standard. On the one hand, this observation illustrates the size of potential impact of meta-standards on the content of standards and, on the other hand, exemplifies the shortcomings of law-making models based solely on one standard or, at the very least, overvaluing one of the standards. In addition, it points to the possibility of transforming law-making models depending on changes in understanding of individual stand-

regressus ad infinitum). It seems that in the scientific context this regress is harmless, since it can be interrupted at any stage by a researcher's conventional decision. Of course, the researcher can also take a 'step backward' in this reconstruction, if he or she deems it useful for the scientific endeavour at hand.

[61] Wronkowska (n 2) 26–27.

[62] Jeremy Bentham, *Wprowadzenie do zasad moralności i prawodawstwa* (Bogdan Nawroczyński tr, PWN 1958; *An Introduction to the Principles of Morals and Legislation*, 1st edn 1789, Clarendon Press 1907) 17ff.

ards, also due to the legislator's axiological preferences. Therefore, a desirable feature of law-making models seems to be the pluralism of adopted standards.[63]

V. CONCLUSIONS

The discussion allows us to propound the thesis that in the legislative process one should take into account not only the principles of criminal law expressly stated in the Constitution of the Republic of Poland but also its functions.[64] As accurately pointed out in the literature: 'Criminal law ... is treated as a paradigmatic example of legal regulations whose interpretation is not possible without a profound understanding of the philosophical, theoretical, and criminal-political assumptions underlying their development'.[65]

The above statement can be further emphasized with the caveat that not only the interpretation but also the formulation of criminal law norms requires a broad understanding of various disciplines of knowledge. A practical application of this postulate is helped by a thorough reflection on the functioning of standards within the law-making models. In this study, the following criminal law-making standards have been presented: (1) ensuring legal certainty; (2) compliance with the proper legislative procedure; (3) striving for the effectiveness of the law; and (4) adequacy of the language of enacted law. These exemplify, respectively: (1) constitutional material standards; (2) constitutional formal standards; (3) non-constitutional material standards; (4) non-constitutional formal standards.

Next, it has been pointed out that while the standards have a clear content, deriving practical conclusions from them does not take place directly. There is a set of rules or meta-standards that further specify the content of individual standards, thus integrating the law-making models.

What does the above analysis of legislative standards and meta-standards demonstrate? Firstly, it highlights the interaction between legislative standards of different levels. The same standard can be achieved in various ways, depending on the meta-standards present in specific law-making models. Secondly, it clarifies the link between sets of specific legal standards and legislative models. In

[63] Similar comments can be made about other standards. For example, two meta-standards pertaining to the adequacy of language can be mentioned here: casuistry and regulatory syntheticity.

[64] The function of criminal law is a subject of numerous introductory studies to the subject of substantive criminal law. Therefore, this issue is not exhaustively discussed in this paper. For a brief summary, see Lech Gardocki, *Prawo karne* (CH Beck 2021) 7–8.

[65] Piotr Kardas, 'Współczesne koncepcje ujmowania podstaw odpowiedzialności karnej oraz ich wpływ na stanowienie i stosowanie prawa' in Marek Mozgawa, Piotr Poniatowski and Krzysztof Wala (eds), *Aktualne problemy i perspektywy prawa karnego* (1st edn, Wolters Kluwer Polska 2022) 56–57.

particular, this suggests the possibility of developing a methodology for creating law-making models,[66] and as a consequence, a typology of both observed and only postulated models. Thirdly, it is worth emphasizing in this context that there are interconnections between standards of the same level, which help make the content of the standards in a particular model more specific. For example, the standard of ensuring legal certainty will place certain requirements on the standard of adequate legislative language, and at the same time influence the legislative procedure by limiting the possibility of interference in the already adopted normative act.[67] Fourthly, even the example of the relationship between the standard of legal effectiveness and its negation – instrumentalization of the law – clearly shows that a qualitative change of a standard and its anti-standard may consist of disregarding the already mentioned perspective of critical morality. However, one should not lose sight of the fact that this assessment is not made in isolation of other elements of the legislative model, including the assumed meta-standards.

The above findings suggest that the provided framework for law-making standards seems to be applicable to a wide range of possible scenarios. These include not only different legal systems, comprising those in which the rule of law is not a fundamental value, but also different branches of law.

In this sense, the Polish criminal law serves as an example which helps to track certain standards in a selected normative context. While the given set of standards (and the meaning of each standard) does not need to be necessarily universal,[68] the proposed analysis might also, apart from distinguishing and comparing these standards, serve as an invitation to broadening the knowledge on different legal systems.

One might argue that the presented set of standards is not exclusive to criminal law. While it is undeniable that the given standards might also be discussed from the perspective of other branches of law, and the flexibility of the provided framework definitely allows that, it is suggested here that in the context of various branches of law, even the same standards might yield different requirements for newly created legal provisions. Because of this, a specific area of law has been chosen in order to establish a starting point for further discussion. This choice was dictated by the nature of criminal law which, as it involves the most intrusive measures against one's rights, requires the highest attention to the standards that the created norms must meet.

Finally, the presented study indicates that legislating in criminal law is a more complex and multifaceted process than it may appear. Therefore, it is crucial for the legislator to make conscious and reasoned decisions while deliberating on

[66] It consists, at least in its outline, in an appropriate selection of standards of criminal law-making and methods for resolving conflicts between them in the legislative process.

[67] In a sense, the remark made can be read as an intra-system argument in favour of law-making models that seek to implement multiple standards simultaneously.

[68] However, this problem requires further inquiry, which is beyond the scope of this paper.

the shape of adopted provisions. This involves paying attention not only to the linguistic correctness of the provisions but also to their axiological determinants. Adhering to consistent law-making standards that align with the adopted legislating model can contribute to achieving the established goal.

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THE STORTING LEGISLATIVE PROCESS: PRAGMATISM OF SOLUTIONS AND THE QUALITY OF LAW

Abstract

The purpose of this paper is to analyse the impact of changes in the internal structure of the Storting and nature of the legislative process on the quality of laws passed. The authors point out the essential elements of this process in the Storting, but also in the pre-parliamentary phase, defining the legislative process more broadly than is traditionally done. They also emphasize the importance of consensus in political culture and political pragmatism in making high-quality laws. Both of these features are present in Norwegian parliamentarism and are its distinguishing features compared to other European countries. The amendment to the Basic Law of the Kingdom of Norway in 2007 established a unicameral structure of the Storting on pragmatic grounds. Contrary to the fears of some researchers and politicians, this has not resulted in a decrease in the quality of legislation, especially in the provisions of laws. At the same time, it has put in order and streamlined the legislative process in parliament, giving deputies the opportunity

to focus on other matters related to fulfilling their mandate as representatives. The unicameral Storting is nowadays, in the unanimous opinion of researchers, one of the most efficiently and effectively functioning parliaments in Europe in carrying out its functions.

KEYWORDS

Basic Law, the Storting, legislative process, pre-parliamentary phase, quality of law, financial effects of regulation, consensus

SŁOWA KLUCZOWE

ustawa zasadnicza, Storting, proces ustawodawczy, faza przedparlamentarna, jakość prawa, skutki finansowe regulacji, konsensus

I. INTRODUCTION

Many of the Polish studies, especially from the 1990s, presented a mythical idea of the role of the unicameral and bicameral parliament in carrying out the legislative function and the belief that the bicameral parliament in Poland would pass better laws by having a 'chamber of reflection'. What was once emphatically expressed about the bicameral parliament by Emmanuel-Joseph Sieyès, stating that if the second chamber of parliament does the same thing as the first, it is superfluous, while if it does something else, it is harmful, was forgotten or considered erroneous. Especially if it involves a unitary state. All parliaments in the Nordic countries, with the exception of the Norwegian Storting, had a unicameral structure already in the 20th century. Iceland had the latest parliamentary reform. In Norway, proposals to change the structure of the Storting were made as early as in the interwar period, but attachment to the solutions contained in the Basic Law of the Kingdom of Norway (*Kongeriket Norges Grunnlov*) of 17 May 1814, and the established tradition and practice of the system did not allow the political groups of the time to make an effective decision. Of all the tasks carried out by the Storting, only the work on draft laws, and for that matter not all of them, took place within a different structural framework than the implementation of the other functions of parliament. The Norwegians, having a long and good history of developing customary law and the rule of written law, have not been willing to make any significant changes in this regard.

The primary purpose of the paper relating to modern Norwegian parliamentarism is to identify and analyse the strong components of the legislative process

in and out of the Storting, which affect the high quality of the legislation produced, especially laws. It could be assumed that this is determined by legislative techniques, but the studies of Nordic scholars strongly emphasize the idea of Nordic Community Law, which significantly influences its content. In principle, however, we do not equate high-quality law and good law.[1] By high-quality Norwegian law we mean its coherence and unquestionability in the rulings of the Supreme Court, which has the authority to test the compatibility of laws with the Basic Law and the provisions of lower government acts with laws. Therefore, we link the quality of the law directly and indirectly to the style of government or political regime practised, as this study is mainly political rather than legal science. Hence, we base the main hypothesis of the paper on the belief that the 2007 amendment to the Norwegian Basic Law, resulting, among other things, in a structural reform of the parliament to establish the unicameral Storting, did not reduce the quality of laws passed. On the contrary, based on pragmatic considerations (in neo-institutional methodology, this means aiming for structural and functional optimisation of existing legal and political institutions), ordering of the legislative process makes it possible, on the whole, to make more efficient use of deputies' time devoted to working on drafts both in standing committees and in parliament, which has given them the opportunity to effectively focus on other issues related to the implementation of their mandate. Another hypothesis is that the quality of the laws passed in the Storting is not determined solely by the legislative process in parliament itself. In the case of Norway, the pre-parliamentary phase is crucial in the preparation of laws and the participation of a wide range of stakeholders.[2] In this phase, the essential content of the regulations is formulated, as well as a preliminary assessment of the financial impact of a regulation in question. The analyses in the paper are based on the assumptions and categories of neo-institutional methodology using original documents and literature on the subject, mainly by Norwegian authors.

II. EVOLUTION IN THE ORGANIZATION OF THE LEGISLATIVE PROCESS IN THE STORTING AND THE QUALITY OF LAW

The historical Norwegian Kingdom Assembly (*Riksforsamlingen*) in 1814 resolved that the *Storthinget* (the name proposed by Nicolai Wergeland) would

[1] See Stanisław Kaźmierczyk, 'O trzech aspektach jakości prawa' (2015) 1(5) Studia z Polityki Publicznej 81.

[2] Christine Guy-Ecabert, 'The Pre-parliamentary Phase in Lawmaking: The Power Issues at Stake' in Andreas Ladner and others (eds), *Swiss Public Administration* (Governance and Public Management series, Palgrave Macmillan 2019) 87–103.

consist of two divisions (*to Afdelinger*): *Lag-thing* and *Odels-thing*, and not – as proposed in the basic draft by Johan G Adler and Christian M Falsen – of two chambers or Houses (*to Kammer*). The two divisions were elected and constituted at the first session of parliament after the elections, so that a quarter of the elected members would form the Lag-thing, while the remaining three-quarters of the deputies would constitute the Odels-thing.[3] The selection was not to be determined by any additional conditions, and the uniform criteria for selection were set forth in the then Section 50 of the Basic Law. A number of earlier Polish studies treated the Norwegian parliament as bicameral, but this was not justified by the genesis of the Storting or the provisions of the Basic Law.[4] In contrast, significant arguments pointing to its unicameral structure were offered in the Scandinavian literature on the subject.[5] It was stressed that the Storting was elected in a unified election, while the division into the Lagting and the Odelsting members was made by the deputies themselves at the first meeting of parliament. There were no additional criteria for membership in one section of parliament, except for membership in the Storting itself. Parliament met in session and finished its deliberations as a single, homogeneous body. The term of office of the Lagting and the Odelsting was identical due to the fact that the term of office referred to the Storting as a whole. The appointed standing committees, which were committees of the Storting, were composed of deputies from both divisions. The entire work of the parliament was directed by its presidium, although both divisions also had their own leadership bodies. The Storting deliberated *in pleno* on the vast majority of matters within its competence, with the exception of discussing and passing draft laws (though not all of them) and in the case of activities related to the election of judges of the Kingdom Court from among the members of the Lagting (Section 87 of the Basic Law).[6]

The genesis of the Storting indicates that its founders saw it as a unicameral body, albeit with a specific design.[7] The arguments cited thus suggested describing the Storting, unique in its structure and functioning, as a modified unicameral

[3] See Sverre Steen, 'Hvordan Norges Storting ble til' in CJ Hambro and others (eds), *Det Norske Storting gjennom 150 år*, vol 1 (Oslo 1964) 13–14.

[4] See Marian Grzybowski, *Prawnoustrojowe przesłanki formowania rządów w Szwecji i Norwegii* (Uniwersytet Jagielloński 1981) 62.

[5] See James A Storing, *Norwegian Democracy* (Houghton Mifflin 1964) 73; Johannes Andenæs, *Statsforfatningen i Norge* (Oslo 1984) 142–43ff.

[6] In accordance with the analysed content, the relevant paragraphs are cited after: The Basic Law of the Kingdom of Norway enacted at Eidsvoll on 17 May 1814; see *Konstytucja Królestwa Norwegii* (Joachim Osiński tr, Introduction, Wydawnitwo Sejmowe 1996) or The Basic Law of the Kingdom of Norway as last amended on 13 January 2023, *Kongeriket Norges Grunnlov* <https://lovdata.no/dokument/NL/lov/1814-05-17> accessed 12 March 2023.

[7] For more on the nature of second chambers in various countries, see Eugeniusz Zwierzchowski (ed), *Izby drugie parlamentu* (Białystok 1996).

parliament.[8] The modification was expressed in the fact that in constitutionally defined situations it functioned differently from unicameral parliaments, in a manner similar to bicameral parliaments, although not identical to them.[9] Its separation into two internal divisions was intended mainly to serve the legislative process, in which the Lagting acted as a sort of 'upper house', fitting into the activity of making the best possible law and correcting any shortcomings of the draft law initiated and passed in the Odelsting. The evolution of the legislative function emphasized that the ability to reflect on a pending draft law in the Lagting allowed better laws to be passed in the end, which was particularly highlighted in the 19th century. This was confirmed by constitutional practice, in which a challenge by the Norwegian Supreme Court (*Norges Høyesterett*) to a statutory provision on the grounds that it was inconsistent with the provisions of the Basic Law did not, in principle, occur, since the 'Eidsvoll constitution', according to the state of legal science at the time, did not contain a relevant provision.[10] However, this was to happen, as in the US, through partial decisions by the Supreme Court itself in the 1860s and 1870s, with the first Supreme Court decision formulated *expressis verbis* on the issue in question dating back to 1890.[11] In the 20th century, from the 1920s to the 1960s, the Court's activity in reviewing legislation was negligible, and it was not until 1976 that the Supreme Court issued a negative ruling in the *Klofta* case (*Klofta saken*).[12] On the other hand, the substantive work of the Storting's standing committees and the very good pragmatic cooperation between parliament and the government aimed at improving the content of draft laws were emphasized as the main factors behind the high quality of legislation.[13] This cooperation was fostered by both the provisions of the Basic Law and customary law (*Sedvanerett*), as well as relations between political factions. In addition, constitutional practice and the provisions of the first chapter of the Storting's Session Regulations (*Stortingets forretningsorden*) after the 17 December 1920 election law, the introduction of multi-member districts and proportional elections to the Storting,[14] resulted in the need to preserve the proportional arrangement of

[8] See Joachim Osiński, *Storting. Parlament Królestwa Norwegii* (Warszawa 1993) 9–10.

[9] In some legislative activities, the Storting functioned as a unicameral parliament, for example, by passing amendments to the Basic Law, in accordance with Section 110 of its original wording (later Section 112).

[10] Eivind Smith, *Høyesterett og folkestyret* (Universitetsforlaget 1993) 158–59.

[11] Carsten Smith, *Judicial Review of Parliamentary Legislation: Norway as a European Pioneer* (2000) 32 Amicus Curiae 11, 11–13.

[12] Norges Høyesterett, *Kløftadommen – prøvingsretten i utvikling*, <www.domstol.no/no/hoyesterett/om/historie/hoyesterett-200-ar/kloftadommen---provingsretten-i-utvikling> accessed 15 March 2023.

[13] See Joachim Osiński, *Parlament i rząd w Królestwie Norwegii* (Monografie i Opracowania: 390, Szkoła Główna Handlowa 1994) 165–87.

[14] Lov om stortingsvalg av 17. desember 1920, Norges Offisielle Statistikk, VII 66., Stortingsvalget 1921 (Kristiania 1922).

seats found in the Storting as a whole when electing members of the Lagting. Thus, the majority or minority government in the composition of the two divisions was identical. In addition, the composition of the Lagting after the elections was unchanged, and those filling any vacancies of deputies entering parliament became members of the Odelsting, even if a vacancy arose in the Lagting. Over time, especially since 1945, during the period of the Norwegian Labour Party's dominance in the Storting, the quality of draft laws was sometimes unsatisfactory, and the Lagting was treated as a convenient alibi for the authors of some of the government drafts submitted in the Odelsting, which in the Lagting 'could be improved'. When describing and analysing the position and functioning of the Storting, it is impossible ignore the Norwegian constitutional practice, as we will not find a legal basis for many parliamentary behaviours and procedures or it will be partial, and it will be an evolutionary parliamentary custom. In such a situation, we can analyse the institution in question in a form in which it does not exist in the system practice, being only our perception. The continuity and tradition of Norway's constitutional institutions make it often necessary to go back to their origins to understand the present.[15]

The existence of the Lagting and the Odelsting, as two sections of parliament that fundamentally affect the quality of law-making, was most widely questioned with the development of the neo-institutionalist theory in economics and political science in the late 1970s and early 1980s.[16] However, the discussion by Norwegian researchers was initiated earlier by Fredrik Hiorthøy posing a fundamental question: 'Isn't the Lagting an Anachronism?'[17] According to the canon of neoliberalism, all institutions, and especially those in democratic states, had a price, which was the result of financial and non-financial inputs and outputs of their operation. If the actual figures were clearly lower than the amount of outlays a proponent of the aforementioned theory would certainly advocate its modernization, if possible, or liquidation, if the first solution was impossible. The discussions pointed out, among other things, the complexity of the legislative process, its lengthening in time, the involvement of significant resources in situations where laws were passed without amendments and sometimes by acclamation, indicating the redundancy of the Lagting, as an ostensible 'upper house', just to meet the 19th-century requirements of the idea of parliamentarism. However, the question of tradition

[15] For example, without going back to the events of the early 19th century in Norway, it is difficult to explain why, even today, the state budget, national budget and social security budget take the form of a resolution of the Storting and not, as in other countries, the form of a law.

[16] Cf. Johan P Olsen and Per Lægreid, 'Byråkrati, representativitet og innflytelse' (1979) 4 Nordisk Administrativt Tidsskrift 428–38; Johan P Olsen, *Organized Democracy: Political Institutions in a Welfare State – The Case of Norway* (Universitetsforlaget 1983); James G March and Johan P Olsen, *Rediscovering Institutions: The Organizational Basis of Politics* (The Free Press 1989; in Polish: *Instytucje: Organizacyjne podstawy polityki*, Dariusz Sielski tr, Scholar 2005).

[17] Fredrik Hiorthøy, 'Lagtinget – en anakronisme?' (1963) Samtiden 375–83.

and attachment to the solutions contained in the Eidsvoll's Basic Law, a value in itself for Norwegian political history, was also raised, and doubts were expressed about the effectiveness of adopting other solutions to guarantee the enactment of high-quality laws.

Synthesizing the provisions of Sections 76, 77, 78, 79 and 81 of the Basic Law of the Kingdom of Norway in the 1980s and 1990s, as well as the provisions of the Storting's Session Regulations and established parliamentary customs, the legislative process would formally begin with the initiation of a draft law (*Lovforslag*) vested in the Odelsting deputies and the government by the relevant minister (Section 76).[18] The Lagting deputies and individual ministers did not have such a right, as it was for the benefit of the government as a whole (formally: for the King in the Council of State). The draft laws were submitted first to the Odelsting, which should have happened just after the opening or before the closing of the session. Government drafts were called 'royal proposals' or 'proposals for the Odelsting' (*Odelstingproposisjoner* or *Ot. prp.*) and prepared in the form of a law. The deputies' proposals were drawn up in the form of written legislative proposals and could not be signed by more than ten Odelsting deputies. The proposals were initially addressed to the government, which took the appropriate initiative to the Odelsting if it felt there was a need for statutory regulation of a particular matter. Such routine was met with criticism from deputies, who saw it as a way to reject any 'private' draft.[19] Based on Section 30(3) of the Session Regulations, such proposals were referred to one of the standing committees, which made a recommendation (*Innstilling*) on the future fate of the draft. The procedure for considering government draft laws was proposed by the Odelsting Presidium, and ultimately decided by *ting* deputies. There were many options for further handling of the draft: (1) there was the possibility of sending the proposal to the government for additional comments or proposals, or to one or more of the Storting's standing committees for detailed discussion and preparation of recommendations to the Odelsting; (2) the proposal could be made available to the Odelsting deputies for more than a day and then placed on the agenda for plenary debate; (3) the proposal could be submitted to plenary debate immediately, unless opposed by the Odelsting President or a fifth of the deputies present; (4) the proposal could be sent back to the initiator; (5) it could be excluded from debate and not considered at all. In the case of both government and private drafts that have been forwarded to the government after initial approval by the Storting's standing committee, the lead role in piloting the draft was played by the ministry concerned, which forwarded the draft to the Legal Department of the Ministry of Justice. The legal department gave it, often loose and deviating from the canons of a normative act, legal form required for a law. In addition, the motives of the regulation undertaken were

[18] See the diagram of the legislative process in the Storting in Osiński, *Storting* (n 8) 21.

[19] Andenæs (n 5) 210.

specified and the relationship of the draft under development to legislation that already existed in the field was determined. All draft laws and normative resolutions passed obligatorily through the said department, which, among other things, in the absence of a permanent legislative committee in the Storting at the time, seemed the most rational solution.[20]

In the case of draft laws of special importance for the economy, social security, environmental protection, regulating citizens' property and tax affairs or emergencies, etc., the ministry overseeing the draft law could appoint experts and have them prepare a special report on the most important issues in the field related to the draft. The role of experts could be fulfilled by individual research and academic institutions or by individually appointed researchers and practitioners in the field. The final result of their work was in the form of a public report (*Norges offentlige utredninger* or NOU), which was discussed in interested circles, government agencies and subjected to public debate.[21] Such reports, along with a motivation indicating the need to regulate a particular issue, could be forwarded to particularly interested organizations: trade unions, employers' unions, environmental or regional civil society organizations (*Sivilsamfunnsorganisasjoner*, i.e. apolitical civil society organizations, as opposed to environmental organizations, effectively 'annexes' of political parties) in order to learn their opinions and gather possible proposals and conclusions.[22] Over time, such a procedure was referred to as a 'hearing' (*høring*) and was considered the pre-parliamentary phase of the legislative process. It sought to establish more precisely the purpose of the regulation, define the interests of the draft's most significant beneficiaries, and make a preliminary determination of the financial impact of the regulation. The aforementioned reports (NOUs) fostered closer cooperation between the scientific community and the institutions of the political system, as dozens of such reports were commissioned annually from research bodies, from 37 in 1985 through 42 in 1988 and 33 in 1993.[23]

In 1970s, yet another interesting solution became popular in the pre-parliamentary phase of the legislative process to improve the quality of laws. It dealt with topics that were controversial in society and clearly differentiated the positions of political parties. Prior to drafting the law, the government directed

[20] See Osiński, *Parlament i rząd* (n 13) 174–75.

[21] For example: NOU 1986: 5 *Konkurransen på finansmarkedet*; NOU 1986: 6 *Erstatning til fiskere for ulemper ved petroleumsvirksomheten*; NOU 1986: 14 *Om grunnlaget for inntektsoppgjørene*; NOU 1986: 17 *Landbruksfagskolene – Videregående opplæring i landbruksfag og naturbruk*; NOU 1986: 23 *Livslang læring.*

[22] 'Civil society is understood as an arena in which citizens, alone or with others, can promote interests and needs on behalf of themselves and others. A diverse and dynamic civil society assists in correcting the exercise of power in key areas of the society's life.'; see Norad <www.norad.no/tilskudd/sok-stotte/sivilt-samfunnfrivillige-organisasjoner> accessed 15 March 2023.

[23] Regjeringen.no <www.regjeringen.no/no/dokument/nou-ar/nou-samandrag/id425855> accessed 15 March 2023.

information to parliament announcing such activities (*Stortingsmelding*). The information included a list of problems, the resolution of which could guide and determine the course of the draft, and was presented at a plenary meeting of the Storting, sometimes preceded by a recommendation from an interested standing departmental committee. The resolution adopted by the Storting in a vote, which was a response, or rather the parliament's position on the matter, laid down the essential rules on which the draft being prepared by the government should be based. Among the issues that were subjected to a similar procedure were the liberalization of abortion legislation,[24] the democratization of commercial banks,[25] the main trajectories of further construction and use of cable television,[26] and some issues concerning the taxation of oil extraction and refining[27]. It used to be the rule that government drafts and private legislative proposals, after being drafted in government agencies, were forwarded to the Ministry of Finance. The ministry was tasked with determining the *financial impact* of enacting a new statutory regulation, particularly on the state budget, but also on citizens, communities or regions, and presented its position. The ministry's opinion was obligatorily attached to the draft law and sent with it to the Odelsting. Submitted drafts were referred after the Odelsting's initial decision to one (less frequently, to several) of the Storting's standing committees for discussion and the committee's *recommendation* to the Odelsting (*Innstilling til Odelstinget* or *Innst. O.*). If the initiator of the draft wished to withdraw it, they had to do so at a plenary meeting of the Odelsting (in the case of a draft law) or the Storting (in the case of a draft resolution). Drafts for amendments to the Basic Law could not be withdrawn after parliament decided to print them and make them public (Section 33 of the Session Regulations).

The committee's work on the recommendation for the Odelsting, its mode and duration depended on the size of the draft and the regulated matter. The committee could establish a subcommittee and consult experts.[28] As a rule, the pace of work was faster when the matter concerned the introduction of amendments to already existing laws. However, also in the case of drafts of new laws, work proceeded smoothly and in a disciplined manner, in accordance with the work plan set by the committee. If a departmental committee did not present a recommendation by the established deadline, the Presidium could refer the matter to another standing committee for an opinion. Some of the significance for the effectiveness of the work of the committees was the small number of members

[24] *Stortingsmelding nr 51 (1973–74).*

[25] *Stortingsmelding nr 99 (1973–74).*

[26] *Stortingsmelding nr 57 (1986–87).*

[27] *Stortingsmelding nr 41 (1986–87).*

[28] There was also a possibility of setting up a special commission. However, the Odelsting could not appoint it on its own and should refer the matter to the Storting (Section 14 of the Session Regulations).

of the standing committees, ranging from 10 to 16. This made it easier for the chairmen to convene them, and the frequency depended on the number of issues referred to the committee for opinion. Sometimes, committee meetings were even convened between the Storting sessions. Each case under consideration had its own spokesperson selected from among the committee members, who presented the draft and tried to obtain additional information and answer questions posed by committee members. As a result, the spokesperson wrote down the content of the recommendation, which he or she signed together with the chairman and secretary of the standing committee. The committee's recommendations could be presented to the Odelsting or the Storting (in the case of resolutions) in written or oral form. The oral form was more applicable to resolutions of a repetitive nature on which the committee was in agreement. The written form was the rule for legislative drafts. The recommendation had to be concise and primarily contain the opinion of the committee.[29] If the committee proposed amendments and additions, they had to be put together on a separate page with an indication of who was presenting the amendment during the plenary debate in the Odelsting or the Storting. The committee's recommendation had to be immediately reproduced by the Storting Secretariat and distributed to deputies. The debate on the draft and recommendation could not begin earlier than two days after the content of the recommendation had been submitted, although in special cases the Odelsting or the Storting (in the case of resolutions) could decide by a simple majority to deal with the matter earlier (Section 32 of the Session Regulations).

The *Odelsting's first debate* on the draft law began with a discussion of the general principles of the draft. Before the debate, the President of the Odelsting usually agreed with the chairmen of the party factions on the order in which the representatives of the factions would speak. *Ting* could, after an initial discussion, suspend the draft, dismiss it or accept it, moving on to discussing individual paragraphs. During the first debate, deputies could propose changes and additions to or deletions from the draft without restriction and at their own discretion. Proposals were put to a vote, and a simple majority of votes was needed to pass them. Each deputy could speak twice in the debate, while the committee spokesman and the minister who piloted the draft could speak more than once. The first speech was limited to an hour, while the second speech was limited to 20 minutes (Section 36 of the Session Regulations). At any point during the discussion of details, the Odelsting could, by majority vote, postpone debate on the draft until the next session of parliament or reject it in its entirety. The rejection could be in the form

[29] In practice, the recommendations of the committees did not exceed six pages of print, and only in exceptional cases were they more extensive, for example, the recommendation of the Justice Committee on the law 'On the Sámi Assembly and the state of other Sámi laws' was 26 pages long. See Lov om Sametinget og andre samiske rettsforhold (sameloven), Ot. prp. nr 33, Innst. O. nr 79, besl. O. nr 84 for 1986–1987.

of: suspension, non-acceptance or failure to forward for further consideration.[30] If a draft law was postponed or rejected in its entirety (which was exceptional), its run in parliament was over. When the draft received the approval of a majority of the Odelsting's deputies (the majority present during the debate) and was voted on (*Odelstingets vedtak* or *Besl. O.*), it had to be forwarded in its adopted form to the Lagting for further processing.[31]

The *Lagting debate* began with a discussion of the general provisions of the draft, and once these were approved, subsequent paragraphs would discussed and voted on. If the Lagting agreed with the Odelsting's decision on the content and shape of the draft and expressed this in a vote, it sent it, in accordance with Section 77 of the Basic Law, to the King for his signature and sanction. The Lagting deputies could decide that certain amendments were necessary in the draft adopted by the Odelsting and could adopt them by vote. In this case, the draft, together with the comments, had to be resubmitted to the Odelsting (*Lagtingets anmerkninger til Odelstingets vedtak* or *Besl. L.*). In connection with this solution, the literature raised the issue of the limit to which the Lagting could go in formulating its comments on the draft.[32] The prevailing opinion, which was first formulated by Bredo Morgenstierne, indicated that the limit of the amendments made by the Lagting in the draft law adopted by the Odelsting was set by the constitutional provision under which a draft law could be brought by the 'King in the Council' (the government) or by an Odelsting deputy and was considered by the Odelsting first.[33] The Lagting deputies could not, therefore, propose such new provisions in the draft that would expand the matter of statutory regulation and cause a presumption that deputies were exercising their 'limited' right of initiative. Nor could they submit additions or changes that were completely different from those adopted by the Odelsting. Instead, they were able to spot formal and legal errors from a certain distance, as well as point out references to other acts and the financial implications that escaped the Odelsting deputies' attention. Such activities could have a significant impact on the quality of the draft. However, the literature highlighted the limited nature of the Lagting's activities in the legislative process, and thus the redundancy of its existence.[34]

In addition to expressing approval of the draft or sending it back to the Odelsting with comments, the Lagting could decide to reject the draft in its entirety. The rejection in such a case meant suspending of the draft or referring it to the government for rework. However, such a decision could not be made by the Lagting alone but took the form of a proposal contained in the comments on the draft sent back to the Odelsting. The final decision to reject the draft, after reviewing

[30] Andenæs (n 5) 212.
[31] Osiński, *Parlament i rząd* (n 13) 177.
[32] See Frede Castberg, *Norges Statsforfatning*, vol 1 (Oslo Universitetsforlaget 1964) 301–02.
[33] See Bredo Morgenstierne, *Lærebog i den norske Statsforfatningsret* (Oslo 1926/1927) 119.
[34] Hiorthøy (n 17) 380–83.

the Lagting's comments, was made by the Odelsting. As the latter in practice not always approved of the Lagting's suggestions, the evolution of the legislative function led to a pragmatic solution in this regard. Its essence was the fact that the Lagting made two kinds of remarks: substantive comments (*prinsipalt anmerkninger*), which then included a proposal to reject the draft in its entirety and a brief justification for it, and alternative comments (*subsidært anmerkninger*), which contained substantive amendments and additions to the draft and which had to be taken into account in the event that the Odelsting did not reject the draft (i.e. suspend it or send it back to the government for reworking) while undertaking further work on it.[35]

The *Odelsting's second debate* began with a review of the Lagting's position, and the Odelsting itself had several possible options in this phase. If the Lagting's decision was negative, it could decide to suspend the draft, which meant that the draft completed its run in parliament. However, if the Lagting formulated amendments to the draft in its 'comments', the Odelsting could not decide during the second debate to reject the draft, because that was the form in which it accepted it during the first debate. Thus, the Odelsting's activities were no longer entirely arbitrary, as in the first debate. Regardless of the Lagting's comments, the Odelsting could decide to keep the form and content of the draft as it was given during the first debate. In such a case, it would send the draft back to the Lagting without changes. Alternatively, the Odelsting, after reviewing the Lagting's comments, could decide to accept them in full and make appropriate changes to the draft. Such a revised draft would be sent back to the Lagting, where it would not be subject to further consideration but would be forwarded directly to the monarch for signature and sanction. The Odelsting could also make corrections to the Lagting's proposals contained in the comments or accept some and reject others. However, in this case, too, it could not make changes without restriction. The limits were the content and shape of the draft, which was adopted by the Odelsting during the first debate, and the content of the amendments proposed in the Lagting's comments. In the case at hand, the new revised draft law should fall between these two determinants. In any case, those parts of the draft that the Lagting accepted could not be changed at that time, without proposing other solutions. All in all, the second Odelsting debate was generally short-lived, and several drafts could be decided in a single meeting. A new draft or a draft without changes would be resubmitted to the Lagting. The starting point for the second debate was to hear the arguments of the Odelsting, which sent the draft in its first, unchanged version, or incorporated the Lagting's comments in part. No more changes could be made to the draft during the second debate, and deputies had the alternative of accepting or rejecting the Odelsting's draft in its entirety. If they decided to adopt it, the draft would be sent to the monarch for signature. Rejection

[35] Andenæs (n 5) 213.

of the draft, passing it back to the Odelsting, made it necessary for the Storting to meet in plenary and decide the draft's fate, pursuant to Section 76(3) of the Basic Law.[36]

Incidents of disputed draft laws being considered in *plenary session in the Storting* were very rare, and there were few such cases throughout the 20th century. The Basic Law formulated two requirements that had to be met in such a situation: a decision on the draft would be taken by a qualified majority of two-thirds of the deputies relative to the number present at the meeting, and there had to be a break of at least three days between the last debate in the Lagting and the plenary debate in the Storting. A similar requirement also applied to the individual Odelsting and the Lagting debates (Section 76(4)). The Storting *in pleno* had no right to make any changes to the disputed draft and decided to pass or reject the draft in the form and content in which it was last submitted to the Lagting. If at least two-thirds of the deputies voted in favour of the draft, it was forwarded to the Lagting, who sent it to the King for his signature and sanction. If a draft did not receive the required number of votes, it was considered rejected. In practice, the outcome of votes in both parts or in the plenary session of the Storting was determined by the current party line-up in parliament, rather than the Odelsting-Lagting controversy. Formally, given that the Odelsting was three-quarters of the Storting, in plenary voting *en bloc*, this part would always get the required two-thirds vote in favour of the draft law, effectively nullifying the Lagting's efforts to improve the draft law and calling into question its usefulness. A draft law passed by both divisions of parliament or in a plenary session of the Storting was sent to the King for sanction. The Basic Law, in Sections 78–81, regulated various aspects concerning the King's signature or lack thereof on draft laws passed by the Odelsting and the Lagting and, exceptionally, by the Storting. Finally, all laws (with the exception indicated in Section 79 of the Basic Law) were made in the name of the King, and the granting of sanctions followed the traditional constitutional formula enshrined in Section 81 of the Basic Law.[37]

A problem in the Norwegian constitutional practice, known from the subject literature and the constitutional practice of other countries, is the *delegation of the Storting's legislative powers* to other organs of the state: the government, ministers, provincial assemblies, local government bodies or even social and professional organizations. The delegation of the legislative powers is a constitutional fact that, in the opinion of most Norwegian researchers, does not have the effect of lowering the authority of the parliament, nor does it automatically lead to a deterioration in the quality of legal regulations.[38] It rather stems from

[36] Osiński, *Parlament i rząd* (n 13) 179.

[37] The King's refusal to sanction a draft law was rare and always took place at the initiative of the Council of State (government).

[38] See Torkel Opsahl, *Delegasjon av Stortingets myndighet* (Johan Grundt Tanum 1965) 29–32; Andenæs (n 5) 31–32; Castberg (n 32) vol 2, 46–47ff.

parliamentary pragmatism and the desire for professionalization and efficiency of normative solutions, being within the general constitutional competence of the Storting. Therefore, it will be appropriate to conclude that the delegation of legislative powers is due to professional considerations and the reluctance of the Storting to deal with 'technical' issues, and concerns matters on which there is almost complete consensus between the ruling party (coalition) and the opposition. In the political practice, we have seen an increase in the number of matters delegated this way in Norway, especially during the post-war expansion of executive power associated with the establishment of institutions and mechanisms of the welfare state (*Velferdsstaten*). The subject of research and analysis by Norwegian lawyers and political scientists was the material and temporal scope of the delegation of legislative powers. On this basis, significant constitutional limitations on the substantive scope of the delegation were pointed out. One of the fundamental issues that had to be resolved in light of the Basic Law provisions and principles was whether the Storting could delegate all legislative authority to itself sitting *in pleno*,[39] albeit the problem whether the Storting exceeded the limits of legislative delegation was decided in the last instance by the Supreme Court, which tested the compliance of lower-level acts with laws and the latter with the Basic Law provisions and principles. The delegation of legislative powers occurred (and occur today) in two main forms: in the form of proxy laws (*fullmaktlover*) and framework laws (*rammelover*), which correspond to the 'skeletal legislation' familiar from the British constitutional practice. The first may have included a delegation to supplement statutory provisions or an authorization to issue norms necessary to implement the law in question.[40] Framework laws containing general principles and regulatory frameworks were filled with normative ordinances of the government and individual ministers (*forskrifter*, defined as 'acts concerning the rights or obligations of a certain number or an indefinite circle of persons'). Normative ordinances enter into force as soon as they are enacted or at the time specified in the ordinances themselves. They are subject to mandatory publication in *Norsk Lovtidend*, as are laws of parliament, although this is not a condition for their validity.

In summary, the implementation of the legislative function was an important mechanism in the *cooperation between the parliament and the government*. Their interaction in law-making was also evidenced by the Storting's relatively frequent use of the institution of delegation of legislative powers. This was an expression of pragmatism, dictating that the parliament, sitting in session, should not waste time regulating issues of lesser importance, instead focusing only on controlling the use of delegated powers by the executive bodies. However, even a concise

[39] Opsahl (n 38) 116–23.

[40] For example, of the 250 laws enacted between 1960 and 1963, 74 contained legislative delegations, including: 43 delegations to supplement the laws and 31 authorizations to issue normative ordinances necessary to bring the laws into force. See Opsahl (n 38) 40–42.

presentation of the course of the legislative process in the bicameral Storting reveals its complex nature, unjustifiably so in the context of the improvement of draft laws. If, in the past under the 'gentlemen's legislature', the relationship between the Odelsting and the Lagting was conducive to the objective optimisation of the work on drafts, together with the development of political parties, the generalisation of elections to the Storting and the introduction of proportionality in the staffing of both divisions of the parliament, the standing committees and the governing bodies of the Storting, this relationship all but crumbled. Instead, it has been replaced by relationships between party factions (groups) of the coalition or the ruling party and opposition groups with mostly the largest and most important party in the lead.[41] In contemporary Norwegian parliamentarism, consensus-based relationships between political groups during debates on draft laws play a crucial role. In these relationships, all parties seek an acceptable substantive consensus. This continues to be particularly important during the long periods of governments having minority support in the Storting. Of the 25 Norwegian governments that operated between 1945 and 2021, as many as 15 were minority governments, of which 9 were governments with single-party support, while 6 had the support of minority coalitions.[42]

A qualitative change in the structure of the Storting had its effective beginning on 30 September 2004, when five deputies: Jørgen Kosmo – President of the Storting (A), Berit Brørby (A), Siri Hall Arnøy (SV), Olav Gunnar Ballo (SV) and Kjell Engebretsen (A) moved a motion to amend (Sections 17, 49, 73, 74 and 76–78), seeking to repeal the division of the Storting into two sections: the Odelstinget and the Lagtinget.[43] The authors of the motion stated in their explanatory memorandum that, inter alia:

> In Norway, the members of both divisions of the parliament are elected in the same elections and the Storting has long been split in such a way that the balance of power between the parties is the same in both divisions. If they do not have their own committees, then it becomes even less likely that the Lagting will have something of value to contribute to what has already been achieved by the actions in the relevant standing committee and in the Odelsting. Therefore, the quality of the legislative process must be ensured in other ways. In this context, it is not surprising that the sittings of the Lagting in recent years have mostly taken place without any debate or vote. This has not had a positive impact on the handling of different matters. At the same time, the formal organisation may have given outsiders the false impression of added value through additional scrutiny in the two *tings*. The current arrangement

[41] For further details, see Joachim Osiński, *Parlamentaryzm skandynawski. Norwegia: Studium ustrojowe* (Elipsa 2021) 281–365.

[42] ibid 376.

[43] Grunnlovsforslag fra Jørgen Kosmo, Berit Brørby, Siri Hall Arnøy, Olav Gunnar Ballo og Kjell Engebretsen om endringer i Grunnloven §§ 17, 49, 73, 74 og 76–78 med sikte på å oppheve inndelingen av Stortinget i to avdelinger (Odelstinget og Lagtinget) Document no 12:14 (2003–2004).

> also brings about some inconveniences in the day-to-day operation of the Storting. Indeed, it raises problems for the members of the standing committees, who sit concurrently in the Lagting and have to act as rapporteurs (spokespersons) in legislative work in areas in which they have considerable knowledge and involvement. In practice though, they will not participate in the open debate on laws, which takes place almost exclusively in the Odelsting.[44]

The draft was subjected to the procedure provided for in Section 112 of the Basic Law and referred to the Control and Constitution Committee, which unanimously formulated its recommendation for the Storting (*Innstilling til Stortinget*) on 12 December 2006.[45] The committee voiced a positive opinion on the draft amendments to the Basic Law to the extent indicated in the draft and stressed in its justification that:

> [T]he separation of parliament into two divisions produces consequences in two respects. Firstly, the Odelstinget is the prosecuting authority when ministers, members of the Supreme Court and deputies of the Storting are indicted before the Kingdom Court, while members of the Lagting judge the defendants in this process. Secondly, formal laws must be discussed and passed in both divisions of the Storting before being submitted to the King for signature.[46]

It was clear that both these issues had to be regulated, with the first one – the amendments to Sections 86 and 87 of the Basic Law – addressed by the parliament marginally earlier as items 1 and 2 of the Storting's session agenda on 20 February 2007, together with another extremely important issue, namely the *constitutionalisation of the principle of political accountability* of the government and ministers.[47] The starting point was a legislative initiative to amend the provisions of the Basic Law (Sections 20, 30, 86 and 87) and new ones (Sections 15 and 82) by a group of deputies: Jørgen Kosmo – President of the Storting (A), Inge Lønning (H), Lodve Solholm (FrP), Ågot Valle (SV), Odd Holten (KrF), Berit Brørby (A) and Carl I Hagen (FrP) on 18 June 2004. This initiative was historic and ground-breaking in that it regulated in the Basic Law an issue that had hitherto stemmed from constitutional custom. According to the draft, it would be now formulated in Section 15 as follows: 'Anyone who is a member of the Council of State shall be obligated to submit a motion to resign after the Storting has passed

[44] Document no 12:14 (2003–2004) 1.

[45] Innstilling til Stortinget fra kontroll- og konstitusjonskomiteen om grunnlovsforslag fra Jørgen Kosmo, Berit Brørby, Siri Hall Arnøy, Olav Gunnar Ballo og Kjell Engebretsen om endringer i Grunnloven §§ 17, 49, 73, 74 og 76–78 med sikte på å oppheve inndelingen av Stortinget i to avdelinger (Odelstinget og Lagtinget) Innst. S. nr. 100 (2006–2007).

[46] Innst. S. nr. 100 (2006–2007) 1.

[47] Grunnlovsforslag fra Jørgen Kosmo, Inge Lønning, Lodve Solholm, Ågot Valle, Odd Holten, Berit Brørby og Carl I. Hagen om endringer i Grunnloven §§ 20, 30, 86 og 87 og nye §§ 15 og 82 (Riksretten) Document no 12:1 (2003–2004). For details see O Mestad, D Michalsen and H Ruus, *Grunnloven (Sections 86 og 87)*, Idunn <www.idunn.no/doi/10.18261/9788215054179-2021-104> accessed 16 March 2023.

a vote of no confidence in the given minister or in the Council of State as a whole. The King shall be obligated to grant the motion to resign. Once the Storting has passed the vote of no confidence, only those actions that are necessary for proper administration may be carried out.'

The motion moved by the representatives of the most prominent parties in the Storting also met with approval on other issues and the resolution on the matter was adopted unanimously by 160 deputies.[48] This was a historic milestone, although it did not quite conclude the process of transition from negative to positive parliamentarism, as sought by some deputies. It does, however, represent an important first step on this path and opens up the possibility of future amendments concerning, for example, the dissolution of the Storting before the end of the parliamentary term, which has already been moved in the parliament several times, albeit with little chance of actually being passed.[49]

The amendments to the Basic Law proposed in the legislative initiative by a group of deputies resulting in the introduction of a 'purely' *unicameral parliament* were debated and passed in the plenary session of the Storting on 20 February 2007 under item 3 of the session's agenda. The discussion was opened by the deputy spokesman for the draft law, Svein Roald Hansen (A), who made reference to the historical circumstances surrounding the establishment of the Storting structure still in place, and pointed out the inconveniences for the deputies and the weaknesses of such an organisation of the parliament. Next, the floor was taken by party group representatives: Carl I Hagen (FrP), Inge Ryan (SV), Ola T Lånke (KrF), Magnhild Meltveit Kleppa (Sp), Odd Einar Dørum (V), Berit Brørby (A) and Inge Lønning (H).[50] In the debate, it was pointed out, among other things, that already on 15 January 1932 the issue of the continued existence of the Odelsting and the Lagting had been raised and discussed in the Storting and that the parliament had also considered proposals for constitutional amendments similar to the one under consideration in 1932, 1937, 1951 and 1954. Usually, the proposal to abolish the bicameral structure of the Storting was presented together with proposals to change the constitutional accountability mechanism. After discussion, the President of the Storting ordered a vote on the final version of the amendments to Sections 17, 49, 73, 74 and 76–78 of the Basic Law proposed in the committee's recommendation and included in the plenary resolution (*Grunnlovsvedtak*). In the roll-call vote, 159 deputies were 'for', 1 'against' (Sverre Myrli – A), while 9 dep-

[48] Stortinget – Møte tirsdag den 20. februar 2007 kl. 10, Sak nr. 2 <www.stortinget.no/no/Saker-og-publikasjoner/Publikasjoner/Referater/Stortinget/2006-2007/070220/2> accessed 20 March 2023. Cf. Trond Nordby, *Grunnlov og styreform: Norge 1814*–2010 (Universitetsforlaget 2010) 43–52.

[49] Osiński, *Parlamentaryzm skandynawski* (n 41) 355–56.

[50] Stortinget – Møte tirsdag den 20. februar 2007 kl. 10, Sak nr. 3 <www.stortinget.no/no/Saker-og-publikasjoner/Publikasjoner/Referater/Stortinget/2006-2007/070220/3> accessed 20 March 2023. It was a stimulating, substantive debate of a historical nature, given the intrinsic value of the Basic Law of 1814 drafted in Eidsvoll for the national identity of Norwegians.

uties were absent.[51] The adopted amendments to the Basic Law entered into force on 1 October 2009 and changed the legislative process in the Storting, significantly improving its efficiency. Moreover, the provisions of the Storting's Session Regulations were amended to bring them into line with the new constitutional regulations, while the comprehensive amendment of the Rules of Procedure was carried out by a resolution of the Storting on 7 June 2012, which came into force on 1 October 2012.[52] The establishment of a unicameral Storting was a tangible demonstration of a consensual political culture[53] and concerted action by the political class to optimise the parliament's legislative function.

As a result of the changes, the legislative process has become more transparent and efficient due to the elimination of apparent or sometimes phantom procedures and activities that did not actually contribute to formally and substantively better law-making. It allows the full participation of all deputies at every stage of the draft-making procedure, starting with the legislative initiative, which previously only members of the Odelsting were entitled to, up to the final vote in the Storting plenary session on a draft law. Proposals from the government (ministers) for the Storting containing draft laws are referred to as *Prop. L* (*Proposisjon til Stortinget (lovvedtak)*), while those containing a draft law and other draft legislative act: *Prop. LS* (*Proposisjon til Stortinget (lovvedtak og stortingsvedtak)*). The deputies' legislative proposals are: Representatives' drafts *Representantforslag L* (*Representantforslag (lovvedtak)*), while together with another draft legislative act: *Representantforslag LS* (*Representantforslag (lovvedtak og stortingsvedtak)*). The recommendations of the standing committees for the Storting are of two types depending on whether they relate to a draft law: *Innst. L* (*Innstilling til Stortinget (lovvedtak)*) or another draft legislative act: *Innst. S* (*Innstilling til Stortinget (stortingsvedtak)*). Consideration of the draft law takes place in two readings, between which there must be a three-day break.[54] In the first reading, the recommendation of the standing committee and the draft to which it relates are submitted for discussion, and there is an opportunity to submit amendments, which are voted on. At the end, a vote is taken on the draft as a whole, and a positive result of the vote is necessary to proceed to the second reading. The President

[51] Stortinget – Møte tirsdag den 20. februar 2007 kl. 10, Voteringer <www.stortinget.no/no/Saker-og-publikasjoner/Publikasjoner/Referater/Stortinget/2006-2007/070220/voteringer> accessed 20 March 2023.

[52] Vedtatt av Stortinget 7. juni 2012, jf. Innst. 350 S (2011–2012), Ikrafttredelse 01.10.2012, Lovdata <https://lovdata.no/dokument/STV/forskrift/2012-06-07-518?q=stortingetsforretningsorden> accessed 20 March 2023.

[53] The discussion and findings still recognised in the literature on this subject arose in the 1980s and 1990s (e.g. A Lijphardt, P Mair, J Steiner, and with regard to Northern states, e.g. D Arter, N Elder, AH Thomas, L Lewin, R Heffernan, O Petersson) and we draw on them in this paper.

[54] *Stortingets forretningsorden*, Kapittel 6: *Stortingets arbeidsordning* (the Storting's mode of work), Oktober 2022, Bokmål, §§ 38–42.

of the Storting decides how to vote, taking into account the provisions of Chapter 7 of the Storting's Session Regulations (*Om avstemninger*). For draft laws on each reading, decisions are made by a simple majority. In the second reading, there is no re-recommendation from the committee and the discussion is about the decision taken by the Storting in the first reading. If the parliament's decision on the first reading of the draft is taken again unchanged (*Lovvedtak*), the second reading is completed and the Storting's decision, together with the final draft law, is sent to the 'King in the Council' for signature and sanction (Section 77 of the Basic Law). The monarch's signature is a formality (so unlike in the previous regulation, when the King had the right to suspend the veto twice (*suspensivt veto* or *utsettende veto*) and must be countersigned by the prime minister, after which the documents are forwarded to the ministry that piloted the draft law. In the event of a disagreement between the content of the Storting resolution from the first reading and the second reading involving the addition of comments in the resolution on the draft (*anmerkning til lovvedtaket*) during the second reading, the draft is referred to the third reading. In the third reading (after a break of at least three days), the Storting has two options to choose from (Section 76(2) of the Basic Law): the first is to recognize the content of the comments made on the draft and approve the draft with the amendments made in the comments (*Lovanmerkning*),[55] after which the draft is sent to the King in the Council; the other is to decide to suspend the draft law (*Lovsaken henlegges*). Data on the number of laws passed during the Storting sessions in recent years is provided in Table 1.

Table 1. Draft laws passed by the Storting between 2012 and 2022

Session of the Storting	Drafts passed		Session of the Storting	Drafts passed	
	Approval at first reading	With comments at the second reading		Approval at first reading	With comments at the second reading
2012–2013	131	0	2017–2018	112	0
2013–2014	94	0	2018–2019	105	0
2014–2015	122	2	2019–2020	156	2
2015–2016	121	1	2020–2021	200	7
2016–2017	146	4	2021–2022	115	1
Total:	614	7	**Total:**	688	10

Source: **S**tortinget Lovvedtak og lovanmerkninger <www.stortinget.no/no/Saker-og-publikasjoner/Vedtak/Beslutninger/?pid=2021-2022&dt=Lovvedtak#primaryfilter> accessed 21 March 2023

[55] By way of example, cf. the Storting 2014–2015, Lovanmerkninger <www.stortinget.no/no/Saker-og-publikasjoner/Vedtak/Beslutninger/?pid=2014-2015#primaryfilter> or Storting 2016–2017, Lovanmerkninger <www.stortinget.no/no/Saker-og-publikasjoner/Vedtak/Beslutninger/?pid=2016-2017#primaryfilter> accessed 21 March 2023.

The data shows that the vast majority of draft laws, after receiving a positive assessment in the first reading, receive a similar assessment in the second reading and are sent to the King for signature and sanction, according to Section 77 of the Basic Law. This is indicative of the high quality that draft laws achieve in the pre-parliamentary stage. This is due to the agendas and people (usually highly competent civil servants) in the ministries piloting the various draft laws, as well as in the Ministry of Justice and the Ministry of Finance, which are responsible for the legal and financial side of the new laws. In the Storting, the most important thing is the work in the standing committees and special committees, and the participation in their meetings of competent representatives of the mentioned ministries. Close cooperation between parliamentary committees and relevant departments in ministries results in the formulation of very good draft laws even before the first reading in the Storting.[56] The mere activity of deputies in the legislative function and the pragmatic organization of work on draft laws in the Storting would be clearly insufficient if they were not preceded by knowledge, competence of those working on the legislative initiative in government agencies, universities, research institutions and civil society organizations. At the same time, it is very important that all of these activities find support in the consensus political culture prevalent among both the political class and the public.

In such a situation, the Supreme Court, which upholds the homogeneity and coherence of the legal system, extremely rarely has the opportunity to correct adopted legislation, especially laws. Such fundamental issues are taken up and decided at its plenary meetings. Thus, between 2008 and 2018, the Supreme Court issued 11 plenary rulings, or one plenary ruling per year. These included: lack of legal basis in jury cases (Rt-2009-750 and Rt-2009-773), the case of taxation of shipping companies and the prohibition of retroactive law in connection with Section 97 of the Basic Law (Rt-2010-143), the case of retroactivity in criminal proceedings against war criminals (Rt-2010-1445), and two expulsion cases in connection with the Convention on the Rights of the Child (Rt-2012-1985 and Rt-2012-2039). In 2020, the plenary session recognized the issue of the so-called climate target (*Det såkalte klimasøksmålet*) in connection with Section 112 of the Basic Law (HR-2020-2472-P). In 2021, the appalling *NAV-saken* (*Trygdeskandalen*) case was heard in the Grand Chamber (*Storkammer*) (HR-2021-1453-S). In addition, for the first time in 75 years, the Supreme Court issued a plenary ruling under Section 83 of the Basic Law on the European Union's 'Fourth Railway Package' (HR-2021-655-P). In 2023, the Supreme Court considered in plenary the issue of the geographic scope of the Svalbard Treaty (*Svalbard-traktakten*, HR-2023-491-P).[57] Of particular social and legal importance was the *NAV-saken*,

[56] *Stortingets forretningsorden*, Kapittel 3. *Stortingets komiteer*, §§ 10–19, Kapitel 4. *Komiteenes arbeidsordning*, §§ 20–32, Oktober 2022, Bokmål.

[57] Norges Høyesterett, *Avgjørelser* <www.domstol.no/no/hoyesterett/avgjorelser/2010> accessed 24 March 2023.

also known as the social security scandal.[58] The case, revealed on 28 October 2019 (during the government led by Prime Minister Erna Solberg), turned out to be the biggest legal and political scandal in Norway in the 21st century, and involved a misinterpretation of the 1994 European Economic Area Agreement (*Det europeiske økonomiske samarbeidsområde – EØS-avtalen*). The mistakes made were related to negligence on the part of a large part of the state bodies: the government administration, the judiciary, but also the Storting, which misunderstood the rules and regulations by which Norway was bound under the Treaty. The case involved individuals, Norwegian citizens, who received sickness benefit, work evaluation allowance (premiums) or care allowance while living in other EEA countries between 1994 and 2012. At least 80 people were wrongly convicted of social security fraud by the courts, and at least 2,400 recipients of these benefits wrongly received claims for reimbursement.[59] It turned out that the judicial authorities had also indiscriminately applied erroneous regulations, and the aforementioned ruling by the Grand Chamber of the Supreme Court finally clarified the matter from the legal side. However, a certain resentment and mental trauma of those directly affected by unjust accusations and verdicts remained. This did not harm the generally positive opinion of the Norwegian judicial system, as in this situation the original perpetrators of the problem were particular individuals in government bodies.[60]

III. CONCLUSION

The progressive professionalisation of the parliament, one aspect of which is the change in legislative behaviour resulting from higher competences, including better access to information by the deputies and the deputies' greater experience, as well as the introduction of the unicameral Storting facilitate the cooperation between the executive and the legislative powers in the law-making process. The consensual cooperation between the parliament and the government is clearly influenced by political professionalisation. The political career pattern of the deputies and members of the government often originates from activities in local self-government bodies at the provincial or municipal level. It is less often participation in regional and local party structures, which has practically ruled out the

[58] *Store norske leksikon*, 'NAV' <https://snl.no/NAV> accessed 24 March 2023.

[59] *EØS – saken* <www.nav.no/no/nav-og-samfunn/kontakt-nav/feiltolkning-av-eos-reglene> accessed 24 March 2023.

[60] Jørn Ø Sunde, *Høgsteretts historie: 1965–2015* (Fagbokforlaget 2015); see also Tore Schei, Jens EA Skoghøy and Toril M Øie, *Lov sannhet rett: Norges Høyesterett 200 år* (Universitetsforlaget 2015).

stability of party-bureaucratic government since the mid-1960s. Close interaction between the Storting and the government takes place not only when working on draft laws but also on budget documents and when implementing financial policy. With regard to the Norwegian parliament, the view that high-quality legislative acts are passed due to the existence of a bicameral parliament structure cannot be defended. Nordic unicameral parliaments excel at efficient passing high-quality legislative acts. This is a result of both legal and non-legal conditions affecting their functioning and of a favourable social environment.

In the constitutional practice of Norway, cases where a statutory provision is challenged on the grounds that it is incompatible with the Basic Law (or subordinate acts with the provisions of a respective law) by the Supreme Court or in other situations (according to Section 89 of the Basic Law: 'In cases brought before the court, the courts shall have the right and obligation to examine whether the application of a legal provision is contrary to the Basic Law and whether the application of other decisions made in the exercise of public authority is contrary to the Basic Law or laws') are extremely rare and occur once every few or several years. It is therefore hardly surprising that Norway has not followed the existing European trend of appointing a 'constitutional court or tribunal', despite the fact that the appointment of the Supreme Court judges is much more politicised in Norway than in most European countries, including Poland.[61] Norway has never established a formalised judicial career system, with appointments to the courts being made by the King in the Council of State on the basis of an opinion from the Minister of Justice, in accordance with Section 21, in conjunction with Section 91 of the Basic Law. This indicates the great importance of traditions and extra-legal arrangements between political groups endorsed in the political culture of those in power and in the society. The contradiction between ideological identification and the consensus necessary for decision-making is resolved by members of different political parties by means of consensus.

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[61] See Eivind Smith, 'Courts and Parliament: Norwegian System of Judical Reviews of Legislation' in Eivind Smith (ed), *The Constitution as an Instrument of Change* (SNS Förlag 2003) 179.

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EX-POST ANALYSIS AS AN INTEGRAL PART OF THE LEGISLATIVE DECISION-MAKING PROCESS

Abstract

The paper presents the theoretical arguments and practical benefits of developing a system of ex-post evaluation of regulatory impact by studying the actual effects of the decisions of legislative decision-making bodies. The individual issues under consideration involve: the analysis of general assumptions of the decision-making approach in legal studies and its application to the problems of a law-making policy; presentation of the stages of the legislative decision-making process, with a particular emphasis placed on the effects of such decisions; and discussion of the conditions of a contemporary law-making policy, from both the theoretical and practical points of view, based on a distinction of several dimensions of legislative decision-making (instrumental, axiological, power game, social conflict, discursive, social normative system, economic, and temporal). For each dimension, ex-post evaluation criteria are proposed.

KEYWORDS

legislation, law-making policy, law effectiveness, evaluation

SŁOWA KLUCZOWE

legislacja, polityka tworzenia prawa, skuteczność prawa, ewaluacja

I. INTRODUCTION

The purpose of the paper is to define the role that a system of ex-post evaluation of law-making decisions can play for a more effective application of legislative instruments. The arguments for introducing a comprehensive system for evaluating such decisions based on theoretical premises of the Lawmaker's Decision Field Model, which is a proposal for a novel theoretical approach to the study of a rational law-making policy,[1] will be analysed in detail. The legislative decision-making process can be defined as the overall intention of a legislator as an institution to create new or amend or repeal existing normative acts. The discussion will take into account both the general conditions of the law-making processes occurring in modern democracies and the specific conditions of the law-making policy in Poland. It is beyond the scope of the paper to analyse the current Polish legal regulations on the law-making procedures by authorized bodies, but the commentary presented below and the practical conclusions that follow from it may provide a basis for further analyses focused on formulating *de lege ferenda* postulates.

The first part outlines general principles of the decision-making approach in the legal sciences, as that research perspective allows analyses of legislative decision-making processes using the findings of other social sciences, primarily managerial science. This is followed by a discussion of the theory of the legislative decision-making process, with special attention paid the importance of the implementation stage and the effects of legislative decisions. Next, I characterize the eight dimensions that make up the legislative decision-making process, and outline the importance of the different factors for the validity and effectiveness of ex-post analyses. The final part of the discussion consists of conclusions regarding further theoretical and legal research, recommendations for law-making institutions, and comments on the practical aspects of developing a system of legislative evaluation in Poland.

II. DECISION-MAKING APPROACH IN LEGAL STUDIES VS THEORETICAL MODELS OF LEGISLATIVE POLICY

The main theoretical perspective of this discussion is the decision-making approach (the decision-making conception of law), which basically assumes that:

[1] Mateusz Pękala, *Pole decyzyjne ustawodawcy* (Akademia Ignatianum w Krakowie, Wydawnictwo WAM 2016).

> [A]t least part of social reality can be captured and interpreted as decision-making processes or the products of these processes: decisions. This is reflected in key conceptual categories, including the concepts of decision-making situation, decision-making process, decision-maker (decision-making centre), participants in the decision-making process, and the decision and its implementation. Accordingly, the main research issues falling into this approach include, at the very least: studying the decision-making situation as a necessity or possibility (permissibility) of initiating a decision-making process; identifying the conditions and regularities in the course of the decision-making process and the possible phases of the process; locating the decision-making centre; identifying the participants in the process, their roles in the decision-making process, and analysing the communication between the decision-maker and the other participants; and description of the actions taken to implement a decision and evaluation of the actual effects of the decision made and implemented.[2]

The advantage of this perspective is that it offers analytical tools for studying and designing various types of decision-making processes, including law-making decisions, drawing on the findings of many social science disciplines, in keeping with the idea of creating a unified conceptual framework for intradisciplinary studies, especially those concerning the social functioning of various systems of social norms, and therefore also legal norms.[3] The focus is on the law-making process, understood as one of the ways for state institutions to create binding models of behaviour, and the main inspiration for determining the validity of conducting ex-post analyses are normative models of decision-making processes built on the grounds of managerial science (the systemic approach and situational models of decision-making processes developed within its framework). In addition, the output of sociology and social psychology will also be used.

This approach views a decision as a process related to a given subject's (decision-making centre) conscious choice of a certain course of action or inaction to achieve some specific goal from among mutually exclusive options, and to carry out the chosen option (in this case, the decision of an institutionally defined legislator to introduce or amend a selected normative act).[4] Consequently, a decision is a process in which the main role is played by the body of information that the decision-maker possesses and 'processes' according to their analytical skills. The phase of transforming information into decisions (in this case, normative decisions) can be regarded, for example, as: a function of factual information; a consequence of meta-decisions that limit the deci-

[2] Henryk Groszyk and Andrzej Korybski, 'Podejście decyzyjne w prawoznawstwie (zarys problematyki)' in Wojciech Witkowski (ed), *W kręgu historii i współczesności polskiego prawa* (Wydawnictwo Uniwersytetu Marii Curie-Skłodowskiej 2008) 532–33.

[3] Stanisław Ehrlich, *Dynamika norm: Podstawowe zagadnienia wiążących wzorów zachowania* (2nd edn, Wydawnictwa Szkolne i Pedagogiczne 1994) 37, 40–41.

[4] Stanisław Ehrlich, *Wiążące wzory zachowania: Rzecz o wielości systemów norm* (Wydawnictwo Naukowe PWN 1995) 17, 41, 45, 47.

sion-maker's choice; a process activated under the influence of various factors of cognitive nature, i.e. stored messages and values; or a process of establishing a hierarchy of values ranging from short-term goals to fundamental goals.[5] Deciding on a particular alternative (determining the decision-maker's intended goal) is further contingent on a number of other choices regarding, for example, the sources of information on which the decision-making centre will rely and the internal and external values that will have to be factored in at further stages. Information analysis is not a one-time act but should be carried out continuously at all stages of the primary decision-making process and during secondary decision-making processes (e.g. related to the implementation of a particular normative act).[6] Moreover, in the course of implementing a decision (in this case, in the application of and compliance with legal norms), one deals with the analysis of information which should provide feedback to the primary decision-maker, mainly in order to verify and possibly correct the diagnosis of the decision-making field made at the preparatory stage.[7]

A normative decision is a decision type that is binding on the behaviour of other subjects, which limits the decision-making freedom of the addressee(s) by regulating their obligatory or permissible ways of behaviour through imposing obligations or granting powers.[8] The implementation of a normative decision, i.e. conscious behaviour in accordance with its disposition, can be defined as the transformation of a normative statement into 'social concreteness'.[9] With regard to legal norms, this involves various types of 'formalized decision-making sequences', which can be described as a 'chain reaction of state bodies implementing the law'.[10]

Let us note that the approach presented above rests on different assumptions and includes a much broader perspective than the traditional concepts based on legal theory. One of the main benefits of the decision-making approach is that it provides the tools to comprehensively analyse both factors that influence legislative decisions one way or another and to determine how effective they actually are in influencing social reality. In practice, 'decision-making sequences can be blocked, distorted, and extinguished (annihilated)',[11] which may have to do with the fact that normative acts are often implemented by a variety of entities independent (or only indirectly dependent) on the main decision-making centre, whose activities are not in any way (or only minimally) coordinated. There-

[5] Ehrlich, *Dynamika norm* (n 3) 65.

[6] ibid 66.

[7] ibid 58.

[8] See ibid 29; Ehrlich, *Wiążące wzory zachowania* (n 4) 103; Stanisław Ehrlich, *Norma, grupa, organizacja* (Wydawnictwa Prawnicze PWN 1998) 33, 37ff.

[9] Ehrlich, *Dynamika norm* (n 3) 103.

[10] Ehrlich, *Norma, grupa* (n 8) 113, 73.

[11] Ehrlich, *Dynamika norm* (n 3) 12.

fore, broadly defined law-making cycles can be referred to as (at least partially) ergodic, i.e. outside the control of those actors that started them.[12] However, this does not change the fact that, in line with the decision-making approach, both the legislative decision and the decisions to apply and implement certain legal norms are 'sequences of facts, empirically verifiable macro-social processes',[13] formed by typical situations in which the same decisions are repeated.[14] Comments on the limited possibilities to comprehensively control the implementation of law-making decisions provide the first and basic argument for the important role that post-decisional analyses play in increasing the effectiveness of legislative decision-making processes.

III. STAGES OF THE LEGISLATIVE DECISION-MAKING PROCESS

The process of law-making is 'a set of orderly, consecutive activities (both factual and conventional), beginning with a specific subject's intention to make specific changes in society by establishing legal norms and fully embracing the preparation and adoption of a given law-making act'.[15] It should be emphasized that this is therefore always a certain process, i.e. a sequence of decisions 'overlapping, although not limited only to the (legislative) law-making procedure'.[16] The politics of law, construed as one of the branches of legal science whose main field of research are law-making processes, uses two research perspectives: descriptive and directive. The former is intended to 'formulate a set of assertions about the law-making process, e.g. assertions about the societal consequences of the establishment and validity of norms with a certain content, about the effectiveness of certain institutions that draft legal acts, about the consequences of editing legal texts in such and not another way'.[17] On the other hand, the latter, which is employed in this paper, has main goal of developing normative models of legislative decision-making processes, which indicate, among other things, the

[12] Ehrlich, *Wiążące wzory zachowania* (n 4) 211.

[13] ibid 33, 40.

[14] Ehrlich, *Norma, grupa* (n 8) 29ff, 33, 37ff.

[15] Sławomira Wronkowska, *Problemy racjonalnego tworzenia prawa* (Wydawnictwo Naukowe UAM w Poznaniu 1982) 16. See also Ewa Kustra, *Polityczne problemy tworzenia prawa* (Wydawnictwo UMK w Toruniu 1994) 16.

[16] Leszek Leszczyński, *Podejmowanie decyzji prawnych: Tworzenie i stosowanie prawa* (Wyższa Szkoła Zarządzania i Administracji w Zamościu 2003) 59.

[17] Andrzej Redelbach, Sławomira Wronkowska and Zygmunt Ziembiński, *Zarys teorii państwa i prawa* (Wydawnictwo Naukowe PWN 1992) 166.

indispensable changes that should be introduced in the operation of legislative decision-making centres.

Classical concepts of the politics of law indicate the need to clearly distinguish (at both the functional and the institutional level) a stage involving axiological decisions (about values/objectives) from a stage involving instrumental decisions (evaluation of alternatives and selection of legal means to achieve the objectives) and from a codification stage (formulation of a decision in the legal language and in conformity with other regulations in force in a given legal system).[18] The last stage often entails choosing between competing projects or combining elements of different projects.[19] Maria Borucka-Arctowa proposes a more detailed distinction:

- a decision on the selection and implementation of a specific goal,
- a decision to use law as an instrument of influence, taking into account the limits of law 'determined not only by the criteria of the effectiveness of law but also by accepted moral and political principles … and by the evaluation of legal measures in relation to other social measures',
- a decision to choose a particular branch of law and method of influence (in other words, criminal, civil, administrative, and mixed methods),
- a decision on the method of direct influence (i.e. by establishing a legal standard) and indirect influence (i.e. by establishing a standard that introduces legally regulated economic incentives, increased control, procedural simplification, and greater accessibility of law),
- a decision regarding a specific 'stage of impact', aiming at a preventive or corrective impact,
- a decision to place emphasis on coercive or persuasive measures, and
- a decision to place emphasis on certain functions of law.[20]

The Lawmaker's Decision Field Model, on the other hand, distinguishes the following main stages of the legislative decision-making process:

- identifying the (already recognized or predicted) decisional problem and a comprehensive diagnosis of various dimensions of the decision-making field,
- determining the values/objectives which the new regulation will serve (defining the axiological underpinnings of a legal act), identifying and evaluating decision-making alternatives, and making a choice,
- wording of the text of a legal act, enacting it, and promulgating it, and

[18] See Wronkowska, *Problemy* (n 15) 182; Anna Michalska and Sławomira Wronkowska, *Zasady tworzenia prawa* (2nd edn, Wydawnictwo Naukowe UAM w Poznaniu 1983) 47; Redelbach, Wronkowska and Ziembiński (n 17) 174; Leszczyński (n 16) 17; Pękala, *Pole decyzyjne* (n 1) 294ff.

[19] Leszczyński (n 16) 17.

[20] Maria Borucka-Arctowa, *Świadomość prawna a planowe zmiany społeczne* (Zakład Narodowy im. Ossolińskich 1981) 116–17.

– implementation of the decision, monitoring of its effectiveness, and taking any corrective action.[21]

This concept views ex-post analysis as one of the basic stages of law-making.

According to the tenets of the decision-making approach, one of the essential components of any law-making process is to organize and analyse information on a specific decision-making situation. The detailed structure of the lawmaker's decision-making field, as well as the list of factors based on which it should be analysed, will be discussed later in the paper. At this point, let me just mention that, according to Jerzy Wróblewski, the decision-making centre should at least have knowledge about the following:

– the content of law in general and in the area covered by the legislation, in particular,
– the practice of applying the law in force, that is, about the decisions regarding the application of the law (validation decisions, interpretative decisions, evidentiary decisions, and decisions on the choice of consequences),
– the effects of law in society, both directly and through decisions to apply the law,
– any social relations relevant to law-making,
– assessments and social rules that apply to phenomena regulated by the legislator, and
– the legal writings related to *de lege lata* and *de lege ferenda* issues as relevant to the legislature.[22]

Equipped with such information, the legislator is able, at least at the most general level, to identify the role that legal regulations can play in resolving a given decision-making problem. It is then also possible to decide on the necessity (or lack thereof) of intervening by legal means in the social order, and thus it is a matter of 'deciding to decide'. It should be remembered, though, that failure to take normative action can also have a significant impact on the social order (and sometimes can be part of sham activity). The impact by means of legislative instruments on a certain sphere of social life can be classified into one of three categories: necessary and sufficient (when the behaviour in question is and should be regulated by law, without the need for any other type of regulation in this respect), necessary and insufficient (when legal measures should be supplemented by other societal factors or when moral, customary or religious norms are dominant, and law acts as their 'ultimate safeguard'), and unnecessary (or impossible).[23] It should be noted that this typology can also be successfully used in ex-post analyses.

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[21] Pekala, *Pole decyzyjne* (n 1) 295.

[22] Jerzy Wróblewski, *Teoria racjonalnego tworzenia prawa* (Zakład Narodowy im. Ossolińskich 1985) 99.

[23] Borucka-Arctowa (n 20) 82.

At the implementation stage, information about the decision-making situation should be analysed continuously, while keeping in mind any changes that may be required due to the dynamics of the various dimensions of the decision-making field. Implementation of the decision and monitoring of its effects should include at least the following stages: planning and organizing the implementation; the implementation itself and ongoing tracking of the implementation work; and monitoring and evaluating the results and making necessary adjustments.[24] Management science offers a great deal of guidance in developing implementation schedules, defining time frames for various stages, gathering necessary resources, and making necessary preparations. The growing importance of analysis conducted during the implementation of public decisions has also been highlighted in public policy research. For example, Giandomenico Majone notes that 'analysts have finally realized that the effective delivery of public services requires not only the preparation of some theoretically optimal program. It is even more important to know how the implementation of the program actually proceeds, who benefits and who loses from it, whether the program achieves its intended goals, and, if it does not, how it can be improved or discontinued'.[25] Relating the detailed instructions of managerial science scholars to the problem of implementing legislative decisions is beyond the scope of this paper, and it is one of the most difficult challenges facing the study of politics of law, if only in the context of the ergodic nature of legislative decision-making processes mentioned earlier. After all, in law-making (as in the management of large organizations) each time it is imperative to check whether the chosen course of action is appropriate, and therefore to carry out evaluative research in order to determine whether a given law-making decision that has been made in a methodologically rational way is also rational in practical terms.[26]

Many scholars studying law-making issues have expressed this opinion. By way of example, let us list the law-making principles formulated by Lesław Grzonka: constitutionality (rule of law, competence); compliance with international law; stability and continuity; reality; justification of normative acts; non-repressiveness; adequate time for discussion; effectiveness; avoiding contradiction with moral, social, or religious norms; minimal interference (not encroaching on law where it is not necessary); holding public consultations; openness; clear communication; adequacy of a means to an end; and periodic analysis of the effects of

[24] Henryk Bieniok, Henryk Halama and Marian Ingram, *Podejmowanie decyzji menedżerskich* (Wydawnictwo Akademii Ekonomicznej w Katowicach 2006) 36.

[25] Giandomenico Majone, *Evidence, Argument, and Persuasion in the Policy Process* (*Dowody, argumenty i perswazja w procesie politycznym*, Dariusz Sielski tr, Wydawnictwo Naukowe Scholar 2004) 248.

[26] Jerzy Supernat, *Techniki decyzyjne i organizatorskie* (2nd edn, Kolonia 2003) 248.

the law in order to eliminate ineffective norms.[27] It is worth noting that this listing could also provide the most general framework for a system of ex-post evaluation of legislative decisions. After all, both the pre-decision stage and the implementation stage should be based on consistent assumptions about the very purpose and organization of the entire process (so-called meta-decisions that shape the context of the decision-making situation). Management science makes the supposition that the decision-making centre must strive to adapt to changing external and internal circumstances. This adaptation, however, does not consist only in reacting to phenomena occurring in the decision-maker's environment but primarily in shaping the decision-making situation independently. This is done mainly by making meta-decisions about the context of the decision-making process. In public management terms, this issue is referred to as *setting the agenda*. The Rational Law-Making Model does not provide any specific recommendations in this regard, other than to point out that it is the legislator who takes responsibility for the way in which the legislative decision-making process is organized (as it determines the organizational structures, identifies the participants in the norm-making process and their tasks, and defines their material and procedural framework for action). Some scholars have analysed the organizational rationality of the law-making decision-making centre in this context.[28]

IV. THE DIMENSIONS OF THE LEGISLATOR'S DECISION-MAKING AND THEIR ROLE IN EX-POST ANALYSES

The decision-making approach puts in focus the analysis of internal factors (such as the structure of the decision-making centre and the formal and informal rules of its functioning) and external factors (such as the broader institutional context or cultural factors). Some of these factors are dependent and some are independent of the decision-making centre, and all of them together make up the general category of the 'decision-making field'. This term was borrowed from the managerial sciences by Stanisław Ehrlich, who used it to describe 'the situation (in its various interrelationships) in which a decision is to be made or executed (once made)'.[29] Thus, the legislator's decision-making field can be defined as the totality of conditions that should be accounted for at the stages of both preparation

[27] Lesław Grzonka, *Legislacja administracyjna: Zarys zagadnień podstawowych* (CH Beck 2011) 18–30.

[28] Sławomira Wronkowska, 'Prawodawca racjonalny jako wzór dla prawodawcy faktycznego' in Sławomira Wronkowska and Maciej Zieliński (eds), *Szkice z teorii prawa i szczegółowych nauk prawnych* (Wydawnictwo Naukowe UAM w Poznaniu 1990) 125.

[29] Ehrlich, *Norma, grupa* (n 8) 27.

and implementation of a law-making decision. In his monograph entitled *Pole decyzyjne ustawodawcy*[30] Mateusz Pękala proposes a model that groups these factors into eight dimensions: instrumental, axiological, power game, social conflict, discursive, social normative system, economic, and temporal. Each of them is characterized below from the point of view of the role they should play in ex-post analyses.

The first, instrumental, dimension relates to the conditions that make it possible to pinpoint the problem and potential solutions. In accordance with the pragmatic principle, the starting point in the process of formulating normative regulations (as in any other decision-making process) should be the precise identification of the given area of the social system in which there are dysfunctions that require intervention by legal means. Defining the actual social problem (and not just its symptoms) and identifying the critical factors lay the foundation for further stages and are subject to review in the evaluation of decision-making alternatives and in the subsequent evaluation of the chosen solution. The key is the ability to acquire and analyse information; and in the ex-post evaluation, the data should be updated, taking into account any changes in the degree of structuring of the decision-making problem in question (and therefore the relationship between knowledge of the current state of affairs and the desired state in the context of transforming the former into the latter).

Pre-decisional and post-decisional analyses proceed differently for open and closed decision-making problems, and depending on whether they can be quantified and objective criteria applied, as well as whether the problem is legal or non-legal in nature. Regarding the choice (and subsequent evaluation of this choice) of legal means available to the law-making decision-making centre in a given situation, it is necessary to point out the general limits of the effectiveness of law, which include a limit on the quantity of regulations and the quantitative communication barrier, which when exceeded leads to 'legislative inflation'.[31] These factors lead to the conclusion that the omnipotence of legal means should not be viewed as a sufficient way to adequately shape the social system. Instead, one can consider various ways of intervening in the behaviour of addressees, e.g. through penalties and rewards, economic incentives (concessions or subsidies), or administrative procedures (permits, certificates or declarations), that is, with the methods of *hard law* and *soft law*: law-making decisions that, depending on the degree of freedom left to the addressees, form a continuum from those based on guidance, through coordination, management, and occasional supervision, to the deliberate waiver of any regulation. The ways in which norms are expressed

[30] In English: *The Legislator's Decision Field*.

[31] Krzysztof Pałecki, *Prawoznawstwo: Zarys wykładu. Prawo w porządku społecznym* (Difin 2003) 154, 162, 167.

in legal texts in an inseparable way include injunction, prohibition, permission, right, authorization, and claim.[32]

The second dimension of the legislator's decision-making field is the axiological dimension. Every public decision, and therefore also every law-making decision, is determined to some extent by a prior choice regarding the values that it is to embody. Indeed, one of the limits of legal regulation in general is the axiological limit, which is crossed when the axiological basis of a given normative act is not consistent with the preferential scales of the addressees of the norms.[33] Moreover, the axiological basis fulfils important functions in the processes of rationalizing, interpreting, and evaluating legal norms. It is also crucial for the social legitimacy of political power and the legal system itself.[34] To date, theoretical studies on the axiological choices made by legislators have most often been restricted to formulating idealistic suppositions about the perfect legislator, i.e. one whose preferences are asymmetrical and transitive and who additionally follows a system of values approved on the basis of the ideology in force in a given socio-political system.[35] One way to overcome the difficulties of analysing the axiological dimension, inspired by the organization theory, may be to introduce a three-level classification of public decisions into strategic, tactical, and operational.

The third dimension, the power game, centres on the fact that legislative decision-making processes are influenced by their political context, which is tied to the mechanisms of gaining and maintaining power in the state. There is no denying that such conditions as, for example, the term of office of authorities or the need to solicit the support of voters, have impact on the actual law-making policy. Instead, the democratic mechanism of competition for public support should be included in research on the law-making policy.

Moreover, not only is the dimension of the power game negative, but the connection between politics and law (in this case, the power game and legislative activity) is so strong that some researchers postulate the use of the term political/legal power in reference to modern social systems.[36] Moreover, it is the decision-making problems, so strongly linked to these two spheres, that often constitute the most difficult problems facing legislative decision-making centres. According to Tadeusz Biernat, the so-called *hard case* in legislation requires, first of all, a 'political opening', i.e. an agreement on the solution of the problem (*policy*); thus, it is necessary 'to define the standards related to targeted political

[32] Redelbach, Wronkowska and Ziembiński (n 17) 144.

[33] Pałecki, *Prawoznawstwo* (n 31) 158.

[34] Tadeusz Biernat, *Legitymizacja władzy politycznej: Elementy teorii* (Adam Marszałek 2000) 108.

[35] Wronkowska, *Problemy* (n 15) 124.

[36] Tadeusz Buksiński, *Prawo a władza polityczna* (Wydawnictwo Naukowe IF UAM w Poznaniu 2009) 222.

action and re-evaluation of political goals, and with it the strategy of action'.[37] What is vital here is the decision-making centre's self-awareness of the best leadership style under the given circumstances and the skilful use of various forms of power.

Legislative decision-making processes always involve specific contradictions in a given social system, and are also always a potential source of new conflict-generating situations – these issues are accounted for by another dimension of the legislator's decision-making field. One of the core social functions of law is that of an arbiter 'in the manifold conflicts that must inevitably arise in any politically organized society'.[38] Therefore, the Model of the Lawmaker's Decision Field contains a diagnosis of the various ways in which the legislator performs the role of a 'social arbiter', that is, an entity that (at least partially) manages how social conflicts unfold. In order to choose the most effective conflict management strategy, the legislative decision-making centre should first ascertain what kind of conflict it is dealing with in a particular case: whether it is, for example, a structural, interest, value, relationship, or data conflict; what are the attitudes of parties to the conflict; whether it is bipolar or multipolar; whether it is destructive or constructive; whether it is axiological (concerning the choice of values/goals to be realized) or cognitive (concerning the means of realizing the chosen values/goals); and whether it is real (e.g. when it concerns conflicting interests) or irrational (e.g. when it is the outcome of irrational emotions). The role of the legislative decision-making centre is to create suitable conditions for successful communication between all parties, with the caveat that deliberation is not an end in itself.

The discursive dimension encompasses those activities that the legislative decision-making centre undertakes as one of the participants in the public debate on the current state and future changes to existing legal regulations; here, it is a party to the dialogue with the addressees that comes up with its own initiative, and advocates the adoption of the most effective solutions to a particular decision-making problem (such as those developed by experts). These are mechanisms for reconciling rationality between the legislative decision-making centre and the future addressees of normative acts, building and using the infrastructure and capacity for cooperation between different social partners, and anticipating their reactions, possibly while preventing or mitigating the negative effects of their resistance. These issues are closely related to discussions of the public legal awareness, and in particular, the authority (prestige) of the law and the mechanisms of legitimizing the legal system.

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[37] Tadeusz Biernat,'"Trudne sprawy" w procesie tworzenia prawa. Pole dyskursu legislacyjnego' in Agnieszka Choduń and Stanisław Czepita (eds), *W poszukiwaniu dobra wspólnego. Księga jubileuszowa Profesora Macieja Zielińskiego* (Wydawnictwo Naukowe Uniwersytetu Szczecińskiego 2010) 489.

[38] Pałecki, *Prawoznawstwo* (n 31) 198.

In management science, the degree of acceptance on the part of the addressees is one of the indicators used to assess the quality of decisions. The first step in diagnosing this dimension of the legislator's decision-making field is establishing how ready the addressees are to participate in the decision-making process and whether participatory methods should be used or not, whereby participation in the social debate is not related to the institutional legislator's surrender of the power it holds. Rather, it is a matter of listening to all parties and weighing the various arguments that may be pertinent to the effectiveness of the legislation (and therefore suitable as criteria for post-decisional analysis). It is also important to create a good social 'atmosphere' for new normative acts and to provide the addressees with a sense of security. Of key significance here are the communication strategies used by the legislative decision-making centre, whether rational, persuasive or emotional.[39] Thus, when it comes to this dimension, it is necessary for the institutional decision-making centre to have a good reputation and credibility in the eyes of the citizens.[40]

What distinguishes the social dimension of the normative system is the fact that the law is not the only type of social norms that regulate the behaviour of individuals and groups and that any normative decision is an interference in the broader world of social normativity. Thus, here again we should reject the notion of the omnipotence of legal measures, i.e. the possibility of introducing effective normative acts with any content in all spheres of the social order. Additionally, we must repudiate the concept of legal imperialism and the view of the autonomy of legal norms' content.[41]

The model of the Lawmaker's Decision Field stipulates that any law-making process should include a diagnosis of the norms governing a given sphere of human relations and assumptions made about the constitutive or declarative nature of a new legal regulation. Among other things, customary, moral, and religious norms should be considered, as well as other types of norms found in certain social environments. It is most often pointed out that there can be relations of compatibility, incompatibility, or indifference between different normative systems.[42] Compatibility boosts the effectiveness of particular types of norms, even if it is not full compatibility. Incompatibility, on the other hand, often causes societal tensions, contributes to a loss of prestige of both types of norms, and can pose a serious threat for the effectiveness of law. Researchers suggest moderation and preference for such legal solutions that are supported by other types of

[39] Mateusz Pękala, 'Ustawodawca jako organizator i uczestnik prawotwórczego procesu decyzyjnego' in Konrad Oświecimski, Aleksandra Pohl and Mirosław Lakomy (eds), *NetoDEMOkracja: Web 2.0 w sferze publicznej* (Akademia Ignatianum w Krakowie, Wydawnictwo WAM 2016).

[40] Majone (n 25) 70ff.

[41] Pałecki, *Prawoznawstwo* (n 31) 105.

[42] Grzonka (n 27) 25.

social norms.[43] Tadeusz Biernat further notes that 'difficult cases are born on the grounds of law clashing with other normative systems'.[44] This primarily refers to value/objective conflicts (axiological basis), justifying different types of social norms that regulate the same matter. Another issue that is part of this dimension of the legislator's decision-making field is the need to maintain the coherence of the legal system: with the rapidly increasing number of legal acts, which are also becoming more and more detailed, it is increasingly difficult to avoid collisions between new regulations and existing ones and to predict the impact of legislative decisions on the functioning of legal acts already in force.

At this point, it is worth citing some of the directives formulated so far in the legal policy relating to the determinants of law-making discussed above:

- Legislating should be undertaken only if there is reason to believe that it will increase the likelihood of the desired behaviour of the addressees and that this behaviour will lead to the intended goals.
- Enactment of legal norms should be initiated when it is possible to enforce observance of these norms without damaging the prestige of the law.
- Legislative acts should be issued only when the proper management of society is no longer possible with the existing regulations and when a change in the interpretation or application of existing regulations is not sufficient.
- Successive, overlapping changes to individual regulations should be avoided; the necessary changes should be based on common principles and uniform terminology, without compromising the consistency of existing regulations.
- Criminal, administrative, and civil means of influence should be used complementarily and should ensure a concerted interaction in guiding the conduct of the addressees of the norms.[45]

The economic dimension of the lawmaker's decision-making field includes analyses of the costs of introducing and enforcing legal regulations, which is important from the point of view of the growing legislative inflation resulting, among other things, in the situation where addressees find it hard to efficiently exercise their rights and fulfil their obligations.[46] In the sociology of law, a state in which excessive regulation requires excessive costs from monitoring and social compliance is defined as exceeding the economic limit of legal regulation. The dimension in question is thus determined by 'the economic capacity of a given society to bear the costs of implementing its laws'.[47] As for financial incentives, they are traditionally regarded as means of indirect influence on the behaviour of the addressees.

[43] Ewa Kustra, *Podstawy teorii legislacji* (Wydawnictwo UMK w Toruniu 1983) 138. See also Borucka-Arctowa (n 20) 85ff.

[44] Biernat, 'Trudne sprawy' (n 37) 480.

[45] Michalska and Wronkowska (n 18) 62ff.

[46] Pałecki, *Prawoznawstwo* (n 31) 167.

[47] ibid 162.

The economic dimension reveals another facet of the 'rationalized effectiveness' of the law, while providing further criteria that can be used in ex-post analyses. To some extent, the costs of a regulation can (and should) be expressed quantitatively, and calculated according to specific algorithms. However, this cannot be done with regard to, for example, addressees' psychological discomfort caused by the violation of their dignity or a sense of threat from the new regulations. Other costs are related to analysing historical data, establishing and maintaining relationships, acquiring and enhancing skills, and communicating with others involved in the decision-making process.[48]

The issue of the political costs of legislative decisions has been discussed above in relation to the dimensions of the power game. On the other hand, the intangible (although to some extent quantifiable) payoffs for both the legislative decision-making centre and for the addressees of the law can include saving time, reduced burden of administrative procedures, and increased comprehensibility of legal texts.[49] The authors of the report 'Reform of the law-making process' rightly state that 'the cornerstone of an effective law-making system in today's complex economic environment is a combination of the ability to analyse the economic effects of proposed solutions and the opinions of a wide group of entities affected by a given regulation'.[50] A comprehensive system of regulatory cost control should comprise, for example, periodic reviews of normative acts aimed at evaluating their effectiveness, if only material effectiveness.[51]

The last dimension of the lawmaker's decision-making field allows for the fact that each stage of the decision-making process should be placed on a timeline and the legislative decision-making centre should have the ability to manage its time as an intangible resource. The amount of time available for decision-making affects, in particular, the ability to gather or expand the knowledge about the origin of the decision-making problem and the related action. Time also has a bearing on the decision-making procedure that can be adopted. Stanisław Ehrlich argued that:

> Every decision must be made – if it is to be implemented – within the period determined by the totality of behavioural conditions, i.e. within socially useful time. This also applies to carrying out a decision. A decision made prematurely will be worse or will derail its impact, and furthermore may cause conflict. The same can be said

[48] Erwin Rausch and Charles Anderson, 'Enhancing Decisions with Criteria for Quality' (2011) 49(5) Management Decision 722ff; Gregory S Parnell, Patrick J Driscoll and Dale L Henderson (eds), *Decision-Making in Systems Engineering and Management* (2nd edn, John Wiley & Sons 2011) 145.

[49] Krzysztof Pałecki, 'Legal Policy: The Attempt of Reinterpretation and New Legislative Fields' in Tadeusz Biernat and Marek Zirk-Sadowski (eds), *Politics of Law and Legal Policy: Between Modern and Post-modern Jurisprudence* (Wolters Kluwer Polska 2008) 63–64.

[50] Piotr Rymaszewski, Piotr Kurek and Paweł Dobrowolski, 'Reforma procesu stanowienia prawa' (2004) 72 Zeszyty BRE Bank – CASE 7–68.

[51] ibid 12–13, 19.

> about a delayed decision. This is a major conclusion because time is a factor in the political process that no political decision-making centre should ignore. Seemingly, it is only a matter of individually evaluated facts and not scientific directives.[52]

Let us add that time is an irrecoverable asset: 'The inappropriate use of time has the same consequences as the inappropriate use of people, raw materials or machines'.[53]

There is a whole continuum of attitudes toward this dimension: from obsession with time to complete indifference to it, while it seems that a moderate approach to specific decision-making problems is justified in the legislative field. As for the time frame, it is possible to adopt a short-term or long-term perspective, and it is optimal to combine the two. When we look only at the most recent events, we are often unable to identify the 'critical factor' that is the cause of the problem, while when we place importance only on remote past issues, this can contribute to unforeseen consequences due to unresolved decision-making problems. Another issue related to the temporal dimension is the attitude of the legislative decision-making centre toward the future, which may consist of passive waiting for the upcoming effects of a decision or monitoring them on an ongoing basis and shaping further stages of the decision-making process. The issue of the institutionalization of time has a special significance with regard to legislative decision-making processes: after all, overly frequent normative changes are some of the main causes of legislative inflation. Legal norms can be in force for an indefinite period (i.e. until they are amended or repealed or until the occurrence of *desuetudo*) or for a fixed period.

Decision-making is only an intermediate step, not the end of the process, and ex-post analyses of this issue are essential for evaluating and possibly adjusting legislative decisions. Theorists agree that the possibilities for rapid social change through legislative decisions are largely limited. A diagnosis of the temporal dimension of the legislator's decision-making field should help determine the appropriate *timing* for the drafting and implementation of specific normative acts. Premature normative innovation takes place when the decision-making centre anticipates that the state of affairs which needs to be regulated by law will occur, but in reality it does not occur or occurs in a different form than anticipated. Normative lag, on the other hand, consists in failure of legal norms to keep pace with social change, i.e. 'the persistence of legal norms officially in force, or only the belief that norms once established for past social situations that no longer exist must always be valid and observed in social practice'.[54] Both phenomena should be avoided.

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[52] Ehrlich, *Dynamika norm* (n 3) 184–85.

[53] ibid 192. See also Pałecki, *Prawoznawstwo* (n 31) 157.

[54] Pałecki, 'Legal Policy' (n 49) 156.

V. CONCLUSIONS AND RECOMMENDATIONS

In view of the above discussion on legislative activity as one of the many varieties of decision-making processes conditioned by various factors, and especially in view of potential benefits of post-decisional review of the eight dimensions in the legislator's decision-making field, it should be stated that a comprehensive system for ex-post evaluation of law-making decisions in Poland should be introduced due to its crucial importance for improving the quality and efficiency of legal regulations. This is a necessity that has been neglected for years and is conditioned both historically (political transformation) and practically (socioeconomic development). It would not be difficult to cite here a number of scholarly works pointing to the advantages of instituting such solution. Giandomenico Majone, taking a practical view, stresses that 'decision-makers need retrospective analysis at least as much as they need analysis of expected effects (i.e., pre-decisional), and probably even more so'.[55] Moreover, some cases justify the use of even 'multiple evaluations' of law-making decisions, which should be conducted using a variety of criteria and viewpoints.[56] With this postulate in mind, let us review examples of the criteria that should be taken into account in an ex-post analysis of the various dimensions of the legislator's decision-making field.

Table 1. Criteria for evaluating dimensions of the legislator's decision-making field

Dimensions of the legislator's decision-making	Examples of ex-post evaluation criteria
Instrumental	– Accuracy of the diagnosis of a given social problem and critical factors associated with it – Extent to which the causes of a given decisional problem can be eliminated; the extent and timeliness of the knowledge about a given area of social life used at the pre-decision stage – Role of experts – Choice of means of legal intervention in society and their effectiveness
Axiological	– Transparency of the preferential scale of the legislative decision-making centre and its relevance to the social preferential scales in the context of the problem at hand – Ways to eliminate discrepancies between these scales (public consultation, participation, and deliberation) – Consequences of ignoring these discrepancies – Dynamics of addressees' preference scales

[55] Majone (n 25) 108.
[56] ibid 250.

Power game	– Existence of public and institutional support for a given form of legislation – Making a decision at the right moment in the democratic political cycle – Political limitations on the effectiveness of a given normative act – Possibility of reaching a political agreement to solve a given problem – Effectiveness of the decision-making strategies used to gain public and/or political support for the solution
Social conflict	– Effectiveness of the diagnosis of social contradictions associated with a particular normative act – Effectiveness of determining the attitudes and interests of various parties to the conflict – Impact of a normative decision on conflict dynamics – Role of the legislative decision-making centre in conflict management – Social dialogue tools and their effectiveness
Discursive	– Effectiveness of the analysis of societal consent to the introduction of particular solutions to a given decision-making problem – Accuracy of predictions about the behaviour of addressees of the law – Addressees' degree of willingness to participate and actual participation in the decision-making process – Methods used to overcome their resistance to change; validity and effectiveness of the forms of participation – Effects of the communication strategy – Impact of the regulation on the public image of the legislator and the authority of law in general
Social normative system	– Accuracy of the assessment of the previous way of handling the problem in question; the main effect and side effects of the social impact of the regulation – Effectiveness of the decision in the context of the objective and subjective boundaries of the regulation; legitimacy and effectiveness of the use of references in the normative act to other types of social norms – Consequences of ignoring the norms operating in the social system that deal with the issue in question – Compliance of the normative act with the basic principles of the legal system and other applicable normative acts – Effectiveness of the implementation of the normative act, practice of interpreting it at the stage of application, and implementation of norms by the addressees – Compliance of the normative act with binding international regulations
Economic	– Quality and relevance of the analyses carried out on the material and societal costs of implementing a given solution to a decision-making problem and its side effects – Impact of a given normative act on the organizational costs of the institutions applying the law; costs of monitoring and enforcing a given solution – Material and societal benefits of the solution – Importance of a particular normative act in the context of legislative inflation – Selection and use of economic impact assessment tools
Temporal	– Effectiveness of time management at different stages of the decision-making process – Impact of time on regulatory efficiency – Reasonableness of the schedule of consultations and legislative work – Legitimacy of the decision-making mode in terms of efficiency of the process – Effectiveness of the solutions adopted for the duration of a normative act – Developed schedule for monitoring the effects of a normative act and its implementation

Source: Elaboration by Mateusz Pękala 2024

The effectiveness of the post-decisional analysis is dependent on a number of other factors. The most important of these is the way in which pre-decisional analyses are carried out, which should be the principal source of assumptions for the secondary evaluation of legal regulations. Referring to one of the recommendations in this study, it can be added that ex-post analyses, too, should be based on a clear distinction between the evaluation of decisions on the choice of public policy, the choice of means to achieve a goal, and the 'translation' of political decisions into the language of legal acts. In the absence of precise objectives for drafting new regulations, ex-post analyses will be significantly hampered.

Each of the dimensions of the lawmaker's decision-making field requires a more in-depth analysis than merely one that is guided by 'common sense', i.e. based on common knowledge. The latter usually comes from the decision-maker's own experience or information about the experiences of others, but is certainly not sufficient. Zygmunt Ziembiński claims that:

> [O]ften the actual participants in the legislative process rely on very fragmentary knowledge of social reality, and legal dogmatics when deciding problems from a specific narrow area of law frequently ascribes such knowledge only to the 'lawmaker' it has constructed (which can lead to significant praxeological errors in the construction of the legal system as a whole), yet in more general matters it becomes necessary to ascribe to the 'lawmaker' knowledge based on a specific theory of social life. Given the contemporary complexity of legislative tasks relative to the increasingly complicated problems of social life, associated not only with revolutionary political transformations, but also, for example, with the population densification and growing ecological threats, it becomes indispensable for actual legislators, and correspondingly also for the 'perfect legislator' to rely on a specific theory of social phenomena.[57]

It should be added that the diagnosis of the lawmaker's decision-making field should not be a one-time undertaking but a dynamic process. The idea that it is necessary to constantly monitor potential decision-making problems and refine law-making decisions corresponds with the tenets of pragmatism and relativism adopted on the grounds of the situational decision-making theory. Since there is no single best way to make decisions (either in managing organizations or in 'managing' social systems) – because there is no single universal and best solution to every decision-making problem – the decision-making centre should focus on self-improvement, enhancing the effectiveness of its decisions and constantly seeking ways to adapt to new circumstances. One method of such improvement could be, for example, the use of time-limited regulations that will expire if not renewed intentionally (upon prior appropriate evaluation). It would

[57] Zygmunt Ziembiński, *Wstęp do aksjologii dla prawników* (Wydawnictwo Prawnicze 1990) 178.

also be reasonable to adopt relevant provisions obliging public authorities to review the decision-making problem after a period of time.

Certainly, the introduction of a system for ex-post evaluation of law-making decisions would increase the effectiveness of legal regulations, understood as efficiency in shaping the social order, for example, by introducing targeted innovative interventions into social reality.[58] The decision-making approach makes it possible to apply the findings of many different fields of social science in the law-making practice, in particular politics of law, which deals with a wide range of phenomena involving the causal chain starting from the complex process of formulating legal norms to end in individual acts complying with them. The latter, in turn, may itself be tantamount to the achievement, multiplication, and/or protection of a certain social value, or may lead to such a goal.[59] The proposed model goes beyond the traditional cost-benefit analysis using exclusively economic criteria and applies axiological and praxeological criteria in the analysis. For it to be complete, the proposed model should be supplemented with specific instruments for transparent, authoritative and objective ex-post evaluation, which would be crucial for its credibility. In addition, the said criteria need to be operationalized. At a later stage, it would also be necessary to take into account such criteria as consistency of the legal system.

The introduction of the evaluation system for law-making decisions would contribute to raising awareness of the institutionally understood legislative decision-making centre, which would gain the opportunity to accumulate and use its 'organizational memory' that enables the processes of 'learning' and increases the efficiency of future actions, even if the previous ones proved unsuccessful. It is often emphasized in management science that making a mistake in the decision-making process does not necessarily mean failure, and at most causes some delay in proper problem resolution.[60] Of course, such an approach, which is vitally needed in the law-making policy, will only have a chance to materialize if the legislative decision-making centre develops the ability to learn from its previous experience; but this will not be possible without the ability to conduct post-decision analyses.

[58] Pałecki, 'Legal Policy' (n 49) 58–59.

[59] Krzysztof Pałecki, 'Polityka prawa – próba reinterpretacji' in Elżbieta Kremer and Zygmunt Truszkiewicz (eds), *Rozprawy i studia. Księga pamiątkowa dedykowana profesorowi Aleksandrowi Lichorowiczowi* (Wydawnictwo Uniwersytetu Jagiellońskiego 2009) 180.

[60] Parnell, Driscoll and Henderson (n 48) 227.

Let us conclude with a summary of potential benefits that can be gained by initiating a broader debate and carrying out well-defined organizational work to introduce mechanisms into the Polish legal system that would allow ex-post evaluation of legislative decisions.

Table 2. Potential benefits of introducing a comprehensive system of ex-post evaluation of legislative decisions

Social actors	Potential benefits
Policy-makers	– Increased effectiveness of public policy actions – Opportunity to use expertise in drafting new regulations – Increased efficiency in identifying the real causes of social problems – A broader perspective on the solutions possible in any decision-making situation – Obtaining criteria for assessment when legislative intervention is needed and when it is not necessary – Gaining more control over the context of law-making processes – Obtaining a reliable rationale to justify the necessary institutional changes – Limited number of legal acts whose content will be challenged on the grounds of unconstitutionality or incompatibility with international law – Developed tools for determining tangible and intangible costs of regulations – Developed tools for effective planning of the decision-making process – Making legislative decisions credible (by referring to scientific knowledge) – Improved quality and form of public debate between political actors and between government and citizens – Knowledge about the society's axiological system – Increased efficiency in defining and resolving societal conflicts – Gaining tools to overcome public resistance to change – Opportunities to improve time management skills

Legislative institutions (legislative decision-making centres)	– Basing the law-making process on a coherent theoretical concept (interdisciplinary decision-making approach) – Obtaining a theoretical framework to appropriately organize the law-making process – Separation of the political decision-making stage from the codification stage – Determining the responsibility of various actors for particular stages of the law-making process – Defining specific criteria for assessing the impact of regulations – Gaining the possibility for organizational 'learning' by using the conclusions of ex-post analyses when drafting subsequent normative acts – Increased quality of legislation – Reduced risk of legal inflation – Developed tools for managing the context of law-making processes (meta-decisions) – Increased participation of social partners in decision-making – Development of instruments and justification for communication with addressees of the law and better prediction of their reactions to new regulations – Acquiring and improving knowledge management skills in the field of regulatory development – Developed tools for coordinating the process of implementing normative acts by other institutions – Obtaining the ability to periodically monitor the quality of legislation and to eliminate redundant, dead, or ineffective regulations – Breaking the stereotype about the omnipotence of legislative measures – Basing legal regulations on precisely defined axiological premises (interpretation of legal norms made easier) – Increased social legitimacy, authority, and prestige of law – Developed tools for determining tangible and intangible costs of regulations – Developed tools for effective planning of the decision-making process
Addressees of legal norms (citizens and their associations, civil society)	– Increased transparency of government operations – Broader opportunities to participate in law-making processes and influence their outcomes – Increased quality of legislation – Reduced administrative burden imposed on the addressees of law – Gaining the ability to evaluate legislative actions – Better understanding of the mechanisms of law-making institutions – Accessibility of information on the rationale considered by the institutions of power when making legislative decisions – Knowledge about the general axiology of the legal system and its various branches – Knowledge about the axiology of policy-makers – Resolving social conflicts in a well-organized debate between the parties – Availability of information on tangible and intangible costs of law-making decisions

Source: Elaboration by Mateusz Pękala 2024

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AUTOMATION OF ADMINISTRATIVE ACTS: AN EXAMPLE OF THE GERMAN ADMINISTRATIVE PROCEDURE ACT

Abstract

The subject of this paper is an analysis of the 2016 amendment to the German Administrative Procedure Act (*Verwaltungsverfahrensgesetz*), which introduced fully automated administrative acts. The purpose of the discussion is to evaluate the current status of the law on issuing automated acts and to identify the risks associated with the automation of administrative acts.

KEYWORDS

Artificial Intelligence, public administration, automation of administrative acts

SŁOWA KLUCZOWE

sztuczna inteligencja, administracja publiczna, automatyzacja aktów administracyjnych

I. INTRODUCTION

It is an unquestionable truism to claim that automation and digitization carry enormous innovative potential and a wide range of possibilities. It is, therefore, not surprising that these developments are equally of interest to legislators in the process of devising the basis for the operation of state structures, including public administration. The progressive advancement of artificial intelligence has propelled automation in public administration to become the subject of increasingly vigorous scholarly and social debate, as well as the centrepiece of legislative activity aimed at implementing instruments in administrative processes which enable the automatic issuance of administrative decisions. It is not surprising, either, that, after the successful implementation of automation processes in the private sector, the idea of process automation has also become more prevalent in the discourse around the reform of public administration, and in particular those of its areas where this could bring about significant relief for administrative structures, whilst generating substantial financial savings. It should be noted that automation has the potential to achieve measurable benefits by actualizing the principle of expeditiousness of proceedings and thus help attain measurable savings of personal and public resources.[1]

The foregoing is related to the development of modern technology, which played a key role as an operational instrument in discharging the basic functions of the state, including public administration, during the COVID-19 pandemic. It was the advancement of technology, together with identified both contemporary and future needs, that drew attention to the possibilities of using new technologies in the area of automation of many activities, including administration in the broadest sense, where, until recently, the participation of the human factor seemed indispensable and necessary.

However, the automation of administration processes engender not only benefits but also risks. The dehumanization and anonymity of adjudication give rise to significant problems related to the need to comply with elementary principles

[1] Heribert Schmitz and Lorenz Prell, 'Neues zum E-Government. Rechtsstaatliche Standards für E-Verwaltungsakt und E-Bekanntgabe im VwVfG' (2016) 18 Neue Zeitschrift für Verwaltungsrecht 1273.

in administration, and thus necessitate careful and controlled implementation and application.

The Polish legislator is facing the problem of increasing automation in administrative procedures, which is part of the digitization of administration, or, more aptly, its next stage. Changes in this regard can already be observed in the legislative area, for example, in the provisions of the Administrative Procedure Act, or the Law on Enforcement Proceedings in Administration.[2] Nevertheless, Germany is undoubtedly spearheading innovation in this regard, having previously introduced pertinent regulations. It is therefore worth taking a deeper look at these solutions and evaluating them in the context of the challenges faced by the Polish legislature.

The aim of this paper, for the sake of brevity, is not to present and evaluate all manifestations of automation of administration in German law, but only to analyse this phenomenon with regard to administrative proceedings (*Verwaltungsverfahrensgesetz*),[3] with a particular focus on the 2016 amendment to the same, which was introduced in parallel with a revision to the Tax Law (*Abgabenordnung*) and the Tenth Book of the Social Code (SGB X). The primary objective of this study is to assess the current state of the law on the issuance of automated acts and to identify challenges that will inevitably be faced when legislating on an automated administrative act.

II. SOCIO-ECONOMIC JUSTIFICATION FOR THE AUTOMATION OF GERMAN ADMINISTRATIVE PROCEDURE

On 17 June 2016, the Federal Council approved a resolution of the Bundestag to amend the tax law.[4] A recommendation of the amending bill and a report of the Finance Committee indicated that in view of the social and economic changes taking place at the time, the increasing digitization of all areas of life, and the projected demographic crisis leading ultimately to an aging population, technical and organizational modernization and an adjustment of legal regulations are nec-

[2] See Piotr Rączka and Seweryn Sasin, 'Automation of Administrative Enforcement Proceedings Using the Examples of the Administrative Enforcement Act for the Free State of Saxony (SächsVwVG) and the Polish Act on Administrative Enforcement Proceedings (EgzAdmU)' in M Löhnig and others (eds), *Poland in Good Constitution? Contemporary Issues of Constitutional Law in Poland in the European Context*, vol 5 (Böhlau Verlag 2023) 237.

[3] Verwaltungsverfahrensgesetz in der Fassung der Bekanntmachung vom 23. Januar 2003 (BGBl. I S. 102), das zuletzt durch Artikel 24 Absatz 3 des Gesetzes vom 25. Juni 2021 (BGBl. I S. 2154) geändert worden ist, i.e. German Administrative Procedure Act as amended (VwVfG).

[4] Documents on the legislative procedure are available at <http://dipbt.bundestag.de/extrakt/ba/WP18/712/71245.html> accessed 10 September 2023.

essary in order to maintain a tax procedure that efficiently fulfils its tasks.[5] One of the changes introduced by virtue of this amendment was § 35a added to the German General Administrative Procedure Act (VwVfG), i.e. a provision facilitating fully automated issuance of administrative acts.

In the aforementioned report, the positive effects associated with the introduced regulation were contended to entail a reduction in the bureaucratic burden, increased profitability and efficiency due to the more widespread use of information technology, as well as simpler and easier management of the tax procedure. The report also made an estimate of the financial impact of those changes. However, presenting all the costs associated with the amendment mentioned in the report could appear misguided, given that the amendment of the tax law in question conjoined the introduction of automation of administrative acts into the administrative procedure with amendments to other statutory provisions. Nonetheless, one cannot ignore the fact that, according to the report, sending 80% of tax certificates electronically will allow savings of EUR 19,504,000.

Considering the above, it is also worth referring to other studies proving the cost-effectiveness of providing administrative services digitally and the economic viability of implementing automation. The cost-effectiveness of implementing automation is also illustrated by a report drawn up by the National E-Government Competence Center e.V. (NEGZ) report, which indicated that automating the issuance of parking permits in a municipality with a population of about 250,000 would save about EUR 750,000.[6]

In addition, a published expert report commissioned by the National Standards Review Board shows that an efficient e-government system would save companies EUR 1 billion a year, and in public administration as much as EUR 3.9 billion.[7] Moreover, the implementation of automation processes is closely correlated with the digitization of administration. It is germane, therefore, to the discussion to cite a study by the National Standards Control Board[8] (*Der Nationale*

[5] Deutscher Bundestag Drucksache 18/8434. Beschlussempfehlung und Bericht des Finanzausschusses (7. Ausschuss) zu dem Gesetzentwurf der Bundesregierung – Drucksache 18/7457 – Entwurf eines Gesetzes zur Modernisierung des Besteuerungsverfahre (German Bundestag Paper No. 18/8434. Resolution Recommendation and Report of the Finance Committee (7th Committee) on the Federal Government's Draft Law – Paper No 18/7457 – Draft Law on the Modernization of the Taxation Process).

[6] Benjamin Fadavian and others, *Data Driven Government* (2019) 4 Berichte des NEGZ <www.regioit.de/Portals/0/Dokumente/sonstige-dokumente/negz-kurzstudie-data-driven-government.pdf?ver=WeJ1EFtyYQv2OmSi_rlOQA%3D%3D> accessed 26 March 2023.

[7] McKinsey, *Mehr Leistung für Bürger und Unternehmen: Verwaltung digitalisieren. Register modernisieren* (im Auftrag des Nationalen Normenkontrollrats 2017) 10, 16, 55 <www.normenkontrollrat.bund.de/Webs/NKR/SharedDocs/Downloads/DE/Gutachten/2017-nkr-gutachten-registermodernisierung.pdf?__blob=publicationFile&v=2> accessed 20 September 2023.

[8] This is an advisory body to the federal government that, since 2006, has been reviewing the transparency and intelligibility of the presentation of bureaucratic costs resulting from information

Normenkontrollrat), according to which citizens in Germany could save some 84 million hours a year if administrative services were provided digitally.[9]

However, the support for implementing automation in administration was not underpinned exclusively by financial reasons. German academic writers surmise that public administration will face serious challenges in the future, such as the reduced availability of qualified employees in government offices. Staff shortages, as the outcome of demographic changes, will force public administration to provide their services with fewer employees.[10] This, in turn, necessitates measures to be introduced in administrative procedures that would reduce workload in public offices.

In this context, it should be noted that the German legislator also argued for the introduction of automation as a response to demographic problems associated with the ongoing aging of the German population. Indeed, imminent demographic problems are closely correlated with potential personnel shortages in the administration. The implementation of automation is thus intended to be an adequate response to the forecasted staffing problems in government offices.

In conclusion, it should be emphasized that the motives of the German legislator in the analysed scope were not only financial ('cost-saving') but also directed *pro futuro*, which, to a large extent, testifies to their rationality. Indeed, the anticipation of social changes and the appropriate adaptation of legal regulations to upcoming challenges should be assessed positively.

III. IMPLEMENTATION OF AUTOMATION IN ADMINISTRATIVE PROCEDURE

As already indicated in the introduction, the framework of this paper does not allow a comprehensive discussion of the amendments made for the purpose of automation in tax law, in particular, the changes made precisely to the German Tax Law and the Social Code. For these reasons, the discussion has been limited to the automation of issuance of administrative acts in light of the changes made to the German Administrative Procedure Act.

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obligations and total follow-up costs in all bills and regulations since 2011 as well as regulations drafted by the federal government.

[9] McKinsey (n 7) 55.

[10] Jan Etscheid, 'Automatisierungspotenziale in der Verwaltung' in Resa Mohabbat-Kar, Basanta Thapa and Peter Parycek (eds), *(Un)berechenbar? Algorithmen und Automatisierung in Staat und Gesellschaf* (Kompetenzzentrum Öffentliche IT 2018) 126 <www.oeffentliche-it.de/documents/10181/14412/(Un)berechenbar+-+Algorithmen+und+Automatisierung+in+Staat+und+Gesellschaft> accessed 10 September 2023.

The primary amendment to the administrative procedure provisions made in 2016 was § 35a added to VwVfG. The provision is hailed among academics as a 'milestone' in the wide-ranging reform of public administration.[11]

It is worth noting that what may accentuate the role and significance of § 35a VwVfG is that in the German Administrative Procedure Act it immediately follows § 35 VwVfG, which provides definitions of an administrative act.[12] The newly added § 35a VwVfG is worded as follows: 'An administrative act can be generated through a fully automated, digital process when envisaged by a legal provision and if there is no discretion (*Ermessen*) or *Beurteilungsspielraum* – room for independent appreciation on behalf of the administration'.[13] The commentators point out that § 35a VwVfG serves as a basic norm (*Grundnorm*).[14]

As can be seen from the cited regulation, § 35a VwVfG in its content refers directly to the concept of 'administrative act' stipulated in § 35 VwVfG. It should be concluded that the relevant provisions for administrative acts apply to § 35a VwVfG.[15] Importantly, an administrative act issued in an automated manner, as provided for in the provision under review, should be distinguished from an electronic administrative act referred to in § 37 VwVfG. The regulation in § 37 VwVfG concerns the form of the electronic document that an administrative act may take, not the procedure involved in issuing the same in an automated manner.[16]

At this juncture, it is proper to quote the reasoning used in the parliamentary committee report relating to the amendment to VwVfG. It propounds that § 35a VwVfG:

(1) will clarify the nature of fully automated acts as administrative acts within the meaning of § 35 VwVfG (*Klarstellungsfunktion*),

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[11] Elena Buoso, 'Fully Automated Administrative Acts in the German Legal System' (2020) 1(1–2) European Review of Digital Administration & Law 113.

[12] Nadja Braun Binder, 'Weg frei für vollautomatisierte Verwaltungsverfahren in Deutschland' (September 2016) Justletter IT

[13] The original wording is: 'Ein Verwaltungsakt kann vollständig durch automatische Einrichtungen erlassen werden, sofern dies durch Rechtsvorschrift zugelassen ist und weder ein Ermessen noch ein Beurteilungsspielraum besteht' (translation by the authors). The term *Beurteilungsspielraum* refers to the margin of appreciation with respect to the legal conditions that define the situations to which administrative powers apply. It can also be translated as margin of judgment or margin of assessment.

[14] Mario Martini and David Nink, 'Wenn Maschinen entscheiden... – vollautomatisierte Verwaltungsverfahren und der Persönlichkeitsschutz' (2017) 36(10) Neue Zeitschrift für Verwaltungsrecht – Extra 1, 8.

[15] <https://dserver.bundestag.de/btd/18/084/1808434.pdf> accessed 20 September 2023.

[16] Ulrich Stelkens, § 37 VwVfG in Paul Stelkens, Heinz J Bonk and Michael Sachs (eds), *Verwaltungsverfahrensgesetz: Kommentar* (9th edn, CH Beck 2018) no 64; Nadja Braun Binder, 'Vollautomatisierte Verwaltungsverfahren, voll automatisiert erlassene Verwaltungsakte und elektronische Aktenführung' in Margrit Seckelmann (ed), *Digitalisierte Verwaltung, Vernetztes E-Government* (2nd edn, Erich Schmidt Verlag 2019) 321.

(2) will limit the implementation of full automation only to relevant procedures and acts (*Begrenzungs- uns Warnfunktion*),
(3) will allow the legislature to select procedures and acts suitable for full automation (*Kompetenzzuweisungsfunktion*).[17]

However, the implementation of changes aimed at automating the issuance of administrative acts required the introduction of further regulations that would help avoid dangers resulting from the unreasonable automation of this process. First and foremost, risks were seen in the possibility of having the procedural rights of parties to administrative proceedings (their right to participate) limited, as well as in the possibility of violating the obligation to thoroughly clarify the facts in pending administrative proceedings (*Untersuchungsprinzip*).[18]

The response to such concerns was an amendment to, inter alia, § 24 VwVfG. The German parliament, as part of the 2016 amendment in question, amended § 24 VwVfG by adding a third sentence thereto, which reads as follows: 'If an authority uses automatic devices to issue administrative acts, it must take into account factual information of the person concerned that is relevant to the individual case and that would not be taken into account in an automatic procedure'.[19]

The amended § 24 VwVfG avoids a situation where the issuance of an automated administrative act would not involve a consideration of individual circumstances of an administrative case relevant to the content of the decision to be issued. Thus, the German legislator recognized that the implementation of automation in cases with similar or identical factual circumstances poses a risk of overlooking individual, unusual circumstances, which, in turn, could constitute a violation of the rules of administrative procedure.[20]

The German legislator's implementation of a peculiar 'guarantee mechanism', involving the obligation for the adjudicating authority to take into consideration, when deciding an administrative case, relevant information that otherwise would

[17] Beschlussempfehlung und Bericht des Finanzausschusses (7. Ausschuss) zu dem Gesetzentwurf der Bundesregierung zu Art. 20 Nr. 1, Bundestag Drucksache 18/8434 del 11.05.2016. See Stelkens in *Verwaltungsverfahrensgesetz* (n 16) § 35a VwVfG, no 1; Alexander Windoffer, § 35a VwVfG in Thomas Mann, Christoph Sennekamp and Michael Uechtritz (eds), *Verwaltungsverfahrensgesetz: Großkommentar* (2nd edn, Nomos 2019) no 1.

[18] Filip Geburczyk, 'Zautomatyzowane wydawanie decyzji administracyjnych w prawie niemieckim' in Maciej Kruś, Lucyna Staniszewska and Marek Szewczyk (eds), *Kierunki rozwoju jurysdykcji administracyjnej* (1st edn, Wolters Kluwer Polska 2022) <https://sip.lex.pl/#/monograph/369521833/121?keyword=geburczyk&tocHit=1&cm=SREST> accessed 25 March 2024.

[19] The original text reads: 'Setzt die Behörde automatische Einrichtungen zum Erlass von Verwaltungsakten ein, muss sie für den Einzelfall bedeutsame tatsächliche Angaben des Beteiligten berücksichtigen, die im automatischen Verfahren nicht ermittelt würden'.

[20] Alexander Schmid, 'Der vollständig automatisierte Erlass eines Verwaltungsakts (§ 35a VwVfG) sowie die Bekanntgabe eines Verwaltungsakts über öffentlich zugängliche Netze (§ 41 Abs. 2a VwVfG)' part 1 (2017) 3 Juris PraxisReport no 2.

not be taken into account in the automated procedure, is evidence of the legislator's rationality and should be assessed in a strongly positive way.

It is also significant that the German parliament, with respect to administrative acts issued in a fully automated administrative procedure, waived the requirement to offer reasons therefor. According to amended § 39(2)3 VwVfG, a statement of reasons is not obligatory, among other things, in situations in which an authority issues a decision using automatic means (*automatische Einrichtungen*), and provided that a statement of reasons is not required under the circumstances of a particular case.[21] It appears that the intention of the legislator here was to introduce a regulation that allows omitting the statement of reasons in acts issued in mass cases with a similar or even identical state of facts, as well as in cases that are not complex.

IV. ADMISSIBILITY OF APPLYING § 35A VWVFG

The use of an automated procedure when issuing administrative acts is, nevertheless, significantly restricted in § 35a VwVfG. First of all, it should be emphasized that the regulation under review makes it clear that § 35a VwVfG does not provide a legal basis in its own right for issuing administrative acts in an automated manner. Based on a plain reading of this provision, an administrative act may be issued automatically only if the law permits it. Therefore, the German legislator, when adding § 35a to VwVfG, limited its application to cases regulated by law. Consequently, its application requires an additional legal basis for issuing a fully automated administrative act. Such legal basis can, therefore, be a provision of a statute, as well as a provision contained in a regulation.[22]

In accordance with the scope of the Administrative Procedure Act set forth in § 1 VwVfG,[23] the provisions of this law apply to the administrative activities of federal authorities and federal states[24] when they act under federal law based on the division of administrative powers stipulated in Article 83 (*GrundGesetz*).[25] VwVfG shall be applied where:

(1) an operating public law entity (authority) at a federal or national level is concerned;

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[21] Geburczyk (n 18).

[22] Nadja Braun Binder, 'Vollständig automatisierter Erlass eines Verwaltungsaktes und Bekanntgabe über Behördenportale – Anmerkungen zu den §§ 24 Abs. 1 Satz 3, 35a und 41 Abs. 2a VwVfG' (2016) 21 Die Öffentliche Verwaltung 891.

[23] See § 1 VwVfG.

[24] Buoso (n 11) 117.

[25] Ferdinand Kirchof, Art. 83 Grundgesetz in Theodor Maunz and Günter Dürig (eds), *Grundgesetz: Kommentar* (89th edn, CH Beck 2020) no 128.

(2) that authority undertakes juridical actions within the realm of public law;
(3) the laws of the federation do not envisage provisions identical or contradictory in their content;
(4) actions of the authorities impact the outside world as they are taken with a view to issuing an administrative decision or concluding a public law contract, save for exceptions stipulated in § 2 VwVfG;
(5) public law administrative activity of the said authority is not regulated, at a national level, by procedural laws issued by central government.[26]

The principle of subsidiarity is a key feature of VwVfG and embodies a compromise reached in the wake of a dispute over the scope of federal law in connection with the constitutional division of legislative powers between the *Länder* and the Federation.[27]

In essence, it is the legislator who, after analysing the nature of cases decided in administrative acts, is competent to decide whether § 35a VwVfG[28] should apply in each category of cases.

It is also worth noting that the legislative decision as to which procedures can be automated must meet the requirements of EU law. In particular, one must have regard to restrictions under the General Data Protection Regulation (GDPR). Article 22(1) GDPR on 'automated individual decision-making, including profiling' imposes a number of requirements related to such procedures.

Article 22(1) GDPR introduces a general prohibition on automated decisions in relation to the three cases generally indicated in para 2, i.e. where:

(a) the decision is necessary for entering into, or performance of, a contract between the data subject and a data controller;
(b) the decision is authorised by Union or Member State law to which the controller is subject and which also lays down suitable measures to safeguard the data subject's rights and freedoms and legitimate interests; or
(c) the decision is based on the data subject's explicit consent.

Thus, Article 22(2)(b) GDPR, which gives the national legislator leeway to introduce legal grounds exempting from the prohibition of automated decision-making, will generally apply to automated decision-making in administration, provided that the law of a Member State provides for 'suitable measures to safeguard the data subject's rights, freedoms and legitimate interests'.[29] Although

[26] Franz Mayer, 'Postępowanie administracyjne Republiki Federalnej Niemiec' in Jan Pruszyński (ed.), *Postępowanie administracyjne krajów zachodnich: Teksty i komentarze* (Ossolineum 1986), cited after Agnieszka Kubiak, 'Republika Federalna Niemiec' in Zbigniew Kmieciak (ed), *Postępowanie administracyjne w Europie* (2nd edn, Wolters Kluwer Polska 2010).

[27] Kubiak (n 26) 310.

[28] Ariane Berger, 'Der automatisierte Verwaltungsakt: Zu den Anforderungen an eine automatisierte Verwaltungsentscheidung am Beispiel des § 35a VwVfG' (2018) Neue Zeitschrift für Verwaltungsrecht 1260.

[29] Igor Gontarz, 'Automatyczny akt administracyjny na gruncie RODO' in Czesław Martysz (ed), *Skuteczność w prawie administracyjnym* (Wolters Kluwer Polska 2022).

Article 22(2)(b) GDPR does not require that these 'suitable measures' include the safeguards set out in Article 22(3) GDPR, those safeguards, it appears, must nevertheless be referred to in order to achieve the purposes of this provision.[30] They shape and delineate the standard for a safeguard to be observed by data subjects where the data processor makes automated decisions. The VwVfG provisions do not require an administrative authority issuing an automated administrative act to inform the data subject thereof, nor does the data subject have an express right to demand a comprehensive human intervention beyond individual fact-finding, which raises reasonable concerns about failure to provide adequate safeguards as mandated in Article 22(2)(b) GDPR.[31]

Some legal scholars and commentators believe that the provision contained in § 35a VwVfG does not meet the requirements of Article 22 GDPR, whilst also stressing that it is still possible to achieve this objective in a sectoral law specifying which procedures will be subject to automated processing.[32]

In addition to the stated positive premise of a specific legal basis for issuing administrative acts automatically, § 35a VwVfG formulates two other negative conditions. According thereto, the issuance of a fully automated administrative act is excluded if the administrative act is issued under administrative discretion (*Ermessen*), or within the margin of judgment (*Beurteilungsspielraum*).[33] The provision thus refers to two separate institutions actualized at different stages of application of a norm of substantive administrative law.

It should be noted that administrative discretion is a concept that originated in the German system[34] and is actualized at the final stage of applying the law, namely when its legal effect is determined.[35] This happens when a legal norm

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[30] Lee A Bygrave in Christopher Kuner, Lee A Bygrave and Christopher Dockley (eds), *The EU General Data Protection Regulation (GDPR*): *A Commentary* (Oxford University Press 2020) 537.

[31] Gerrit Hornung, § 35a VwVfG in Friedrich Schoch and Jens-Peter Schneider (eds), *Verwaltungsverfahrensgesetz: Kommentar* (CH Beck 2022) paras 20–24; Gabriele Britz and Martin Eifert, '§ 26 Digitale Verwaltung' in Andreas Voßkuhle, Martin Eifert and Christoph Möllers (eds), *Grundlagen des Verwaltungsrechts* (CH Beck 2022) para 91; Martini and Nink (n 14) 1, 8.

[32] Mario Martini, 'Transformation der Verwaltung durch Digitalisierung' (2017) 11 DÖV 8.

[33] German administrative law differentiates between what is called *Beurteilungsspielraum* and *Ermessen*. While the former concerns the material requirements of a norm, the latter becomes relevant only from the viewpoint of legal consequences which ensue once a norm is actualized (*Rechtsfolgenseite*).

[34] Daria Danecka, 'Dyskrecjonalność w dyskursie administracyjnoprawnym, czyli…?' in Krystian Ziemski and Maria Jędrzejczak (eds), *Dyskrecjonalność w prawie administracyjnym* (Seria Prawo 188, Wydawnictwo UAM w Poznaniu 2015) 110; German concepts of administrative discretion are discussed in more detail in Małgorzata Mincer, *Uznanie administracyjne w doktrynie zachodnioniemieckiej* (1977) 83 Zeszyty Naukowe UMK, Prawo XV-Nauki Humanistyczno-Społeczne.

[35] Currently, the Polish commentary on administrative law is dominated by reporting on or a narrow approach to the matter of administrative discretion, based essentially on the concept

that forms the basis for the issuance of an administrative act allows the adjudicating authority to choose between the various legal effects prescribed and envisaged thereby. Thus, with reference to the division of administrative acts into non-discretionary and discretionary[36] (*Gebundene und Ermessensregelungen*),[37] as accepted in German and Polish legal writings, the application of § 35a VwVfG has been restricted to non-discretionary acts only.

On the contrary, the concept of *Beurteilungsspielraum* is typically equated with all forms of discretion available to an adjudicating authority at earlier stages of the decision-making model of applying law, in particular at the stage of determining the content of a legal norm (e.g. relative freedom to determine the meaning of vague terms) or establishing the facts.[38]

Exceptions to the applicability of automatic issuance of administrative acts relate to cases for the settlement of which, in the opinion of the legislator, an assessment by the human (official) is necessary, which, as a consequence, may lead to a differentiation of decisions issued in similar cases based on the same legal basis.

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espoused in Małgorzata Mincer, *Uznanie administracyjne* (Wydawnictwo Naukowe UMK w Toruniu 1983) passim.

[36] Katarzyna Gębala, *Uznanie administracyjne w systemie prawa niemieckiego* (2011) 1 Państwo i Prawo 73.

[37] The distinction between non-discretionary and discretionary acts is endorsed by many writers, notably Eugeniusz Ochendowski, who assumed that there is a division of acts based on discretion and those issued within the scope of strict statutory bindingness. See Eugeniusz Ochendowski, *Prawo administracyjne* (Toruń 2006) 207; Krystian Ziemski did not relate discretion to any decision-making leeway accorded to administrative entities. Concurring with Małgorzata Jaskowska, this author assumed that discretionary acts are those issued under the conditions of possibility accorded to a given administrative body within which, at the stage of subsumption, a decision is reached; see Krystian Ziemski, 'Formy prawne działania administracji publicznej' in Jerzy Posłuszny (ed), *Aktualne problemy administracji i prawa administracyjnego* (WSAiZ w Przemyślu 2003) 196–98, cited after Krystian Ziemski 'Formy prawne w sferze działań zewnętrznych administracji publicznej' in Roman Hauser, Zygmunt Niewiadomski and Andrzej Wróbel (eds), *Prawne formy działania administracji*: *System Prawa Administracyjnego*, vol 5 (1st edn, CH Beck 2013) Legalis.

[38] Zbigniew Kmieciak and Joanna Wegner-Kowalska, 'O ułomności formuły sądowej kontroli uznania administracyjnego' (2016) 5 Przegląd Prawa Publicznego 18: 'The concept of the scope of administrative assessment (*Beurteilungsspielraum*) was developed in the middle of the 20th century in Germany. It relates to the limited ability of administrative authorities to examine and supervise the application of undefined concepts. According to O. Bachof, the possibility granted to public administration by the legislature to categorize certain states of facts as falling within a given indefinite concept means granting the administration its own (not subject to valuation and judicial oversight) area of decision-making, called the evaluative scope' (translation by the authors of this paper). Cf. Maria Jędrzejczak, *Władza dyskrecjonalna organów administracji publicznej* (CH Beck 2021). See also Mincer, *Uznanie* (1983) (n 35) 119–34; Mincer, *Uznanie* (1977) (n 34). See also Zofia Duniewska and others (eds), *Instytucje prawa administracyjnego: System Prawa Administracyjnego*, vol 1 (2nd edn, CH Beck 2015).

At this point, it should be noted that there is extensive discussion among German administrative law scholars and commentators on the appropriateness of limiting the issuance of automated administrative acts as defined in § 35a VwVfG. This is because, according to some scholars, the decisive parameter 'should be the current development of computer technology'.[39] 'Only deterministic algorithms currently correspond to decision-making norms of the public administration and allow their translation into computer language'.[40] 'Deterministic instructions guarantee the traceability of decisional steps and the predictability of the measure, which constitute requirements not yet met by AI'.[41]

Limiting the issuance of automatic administrative acts to situations where there is no administrative discretion is reasonable. It is rightly emphasized in the literature that: 'Indeed, the use of discretion or discretionary latitude by authorities is a cognitively complex activity that carries the risk of arbitrariness and, consequently, in the case of their automation, also the risk of exposing individuals to decisions that are not grounded in the law'.[42] This is because, in the case of discretionary acts, the authority enjoys a certain amount of freedom in choosing how to decide, whereas their freedom is absent in the case of non-discretionary acts. Non-discretionary acts generally lack flexible, soft actions, which are based on relatively and subjectively determined principles of equity. In addition, in the case of non-discretionary acts, the authority's decision must keep within the parameters (confines) specified by the relevant provision (provided that the statutory prerequisites for its issuance are fulfilled).

The consequence of adopting the regulations under review is that the issuance of acts in certain categories of cases will not be subject to automation.[43] Such cases should include those involving an investigation of complex facts or requiring contemplation of variables that are difficult to translate into numerical data (such as, for example, consulting services or organizational choices related to the operation of facilities, oversight of sanitary and hygienic requirements and granting of awards).[44] Furthermore, it will be impracticable to issue an administrative act automatically when the procedure provides for the obligatory participation of third parties or consultation of other administrative authorities.[45]

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[39] Annette Guckelberger, 'E-Government: Ein Paradigmen wechsel in Verwaltung und Verwaltungsrecht?' in Ute Sacksofsky (ed), *Gleichheit, Vielfalt, technischer Wandel* (De Gruyter 2019) 265.

[40] An algebraic translation of legal instructions was conducted in Francesco Volpe, *Ammissioni e autorizzazioni* (1st edn, Giappichelli 2018), cited after Buoso (n 11) 118.

[41] Buoso (n 11) 118.

[42] Geburczyk (n 18).

[43] Buoso (n 11) 118.

[44] This category may also include non-discretionary administrative acts that are not suitable for full automation; see Guckelberger (n 39) 265.

[45] Braun Binder, 'Vollautomatisierte Verwaltungsverfahren' (n 16) 320.

Based on § 35a VwVfG, scholars include the following cases among those that may be subject to automation pursuant to 35a VwVfG:[46] building permits (in the most straightforward cases); exemptions from certain obligations in the building permit procedure when specific conditions laid down in the regulations are met; pecuniary benefits (e.g. *Kindergeld*)[47] or sanctions based on simple calculations (e.g. traffic offences); the issuing of certificates and identity documents; acts issued in the context of mass proceedings in which the procedural requirements for the active participation of a party are reduced to a minimum (e.g. tax proceedings, proceedings for permits for access to restricted traffic and parking zones for residents).[48] In these types of cases, automation may significantly bolster the principle of legal certainty on account of predictability resulting from the repetition of facts determining the issuance of identical decisions. However, attendant risks should also be pinpointed, namely a potential defective outcome of the case where 'unusual' circumstances arise.

Notwithstanding the above, there are also critical voices of commentators, according to which such formulated prerequisites for the admissibility of the use of automation in the process of issuing administrative acts do not correspond to the realities of administrative practice.[49] The critics claim that the content of § 35a VwVfG ignores the institution of so-called self-bindingness in administration (*Selbstbindung der Verwaltung*) derived from Article 3 of the German Constitution,[50] which boils down to the obligation not to deviate from the established practice of adjudicating cases where the same factual and legal circumstances are involved.[51] The institution of administrative self-bindingness supports the 'standardisation' of discretionary acts. In is argued that self-bindingness in administration as regards discretionary decisions is not only possible but even desirable in the context of ensuring transparency of administrative actions and equal treatment guarantees.[52] However, in view of the risks expounded in this paper, it appears the foregoing opinion should not be accepted as a basis for extending the scope of automation in issuing administrative acts.

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[46] Berger (n 28) 1263; Braun Binder, 'Vollautomatisierte Verwaltungsverfahren' (n 16) 317. For more examples, see also Hanno Kube, 'E-Government: Ein Paradigmenwechsel in Verwaltung und Verwaltungsrecht?' in Ute Sacksofsky (ed), *Gleichheit, Vielfalt, technischer Wandel* (De Gruyter 2019) 306; Stelkens in *Verwaltungsverfahrensgesetz* (n 16) § 35a VwVfG, no 46.

[47] A fixed monthly amount allocated for each child to German tax residents, regulated by the Bundeskindergeldgesetz (BKGG) of 11 October 1995 (Bundesgesetzblatt 1995 I 3177).

[48] For example, with regard to controls on electronic devices under the Elektro und Elektronikgerätegesetz of 20 October 2015 (Bundesgesetzblatt 2015 I 1739). See Schmitz and Prell (n 1) 1274.

[49] Geburczyk (n 18).

[50] Grundgesetz für die Bundesrepublik Deutschland, BGBl. 23 May 1949, s 1546.

[51] Eberhard Schmidt-Aßmann, *Das allgemeine Verwaltungsrecht als Ordnungsidee* (Springer 2006) 53ff.

[52] Stelkens in *Verwaltungsverfahrensgesetz* (n 16) 1205.

Other opponents claim that the assumed benefits, which were the reason for the implementation of the legal solutions under review, are actually being cancelled out. There is a real risk of a rapid increase in the number of administrative and judicial appeal procedures against administrative acts issued automatically, which could, as a consequence, ultimately lessen the positive effect, i.e. improvement and streamlining of the administrative system in dealing with administrative cases.[53]

V. DISCRIMINATION AND LACK OF TRANSPARENCY

When making a comprehensive assessment of the regulation related to the automated issuance of administrative acts, it is impossible to ignore other non-legal risks flagged in the legal writings, in particular the emergence of what is called a 'black box' where an algorithm is used to issue an automated act. After all, automated systems very often depend on the principle of black box, that is a non-transparent mechanism that performs mathematical operations, not always comprehensible to humans, using a large amount of data.[54]

The use of 'self-learning algorithms' is undermined by the black box problem. Unlike conventional algorithms, self-learning algorithms can optimize and 'evolve' on their own. The manner and direction of this evolution may not be transparent to the programmers themselves.[55]

This black box issue has led to the development of Explainable Artificial Intelligence (XAI). XAI is defined as self-explanatory systems that reveal the reasoning behind the results of AI models.[56] According to some researchers, an XAI system should: '(1) explain the output of an AI system; (2) using partially or fully automated methods; (3) to clearly defined stakeholders; (4) in a relevant and accurate manner'.[57]

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[53] Martin Stegmüller, 'Vollautomatische Verwaltungsakte – eine kritische Sicht auf die neuen § 24 I 3 und § 35a VwVfG' (2018) 37(6) Neue Zeitschrift für Verwaltungsrecht 353.

[54] Frank Pasquale, *The Black Box Society: The Secret Algorithms that Control Money and Information* (Harvard University Press 2015).

[55] Ulrich Stelkens, 'Der vollständig automatisierte Erlass eines Verwaltungsakts als Regelungsgegenstand des VwVfG' in Hermann Hill, Dieter Kugelmann and Mario Martini (eds), *Digitalisierung in Recht, Politik und Verwaltung* (Nomos 2018).

[56] Balint Gyevnar, Nick Ferguson and Burkhard Schafer, 'Bridging the Transparency Gap: What can Explainable AI Learn from the AI Act?' in Kobi Gal and others (eds), *Proceedings of ECAI 2023, the 26th European Conference on Artificial Intelligence* (vol 372 Frontiers of Artificial Intelligence, IOS Press 2023) 964.

[57] ibid.

At this juncture, it is worth adding that current tools that enable observers to identify the causal relationship between a variable input and a specific outcome are unavailable to deep neural networks. Additionally, the complexity of many AI-based systems exacerbates the difficulty of representing the causal factors that have led to a decision in a way that is understandable to the average person.[58] Creating a legal framework for XAI that is functional from a technological point of view and, at the same time, provides citizens with guarantees of transparency, is a significant legislative challenge.

The issue of transparency in AI has been a topic of discussion both in public and academic circles for several years. The black box effect poses a threat to fundamental rights. To mitigate this, the EU legislator has introduced a number of requirements in the proposed Artificial Intelligence Act to ensure the transparency of AI systems. Transparency of the code, data, and AI development process are essential elements for effective human oversight.[59]

It should be noted that the German Federal Financial Services Supervisory Authority (BaFin) has published a study outlining the supervisory principles for the use of Artificial Intelligence algorithms in the financial sector.[60] However, the recommendations presented in the publication can be applied to the use of algorithms in other sectors; the study provides also guidelines for the use of algorithms in decision-making processes. The document endorses the principle of 'putting the human in the loop', which requires employees to be 'sufficiently involved in the interpretation and use of algorithmic results when reaching decisions'.[61]

In the context of the subject under discussion, one should also note the possibility of discrimination in the operation of the system issuing automated decisions. It should be emphasized that some researchers believe that the risk of discrimination is reduced *de lege ferenda* not only by the obligation to justify a decision issued in an automated manner, but also by the use of control mechanisms consisting of testing and certification of the automated system.[62]

Pertinently, there is also a probability of technical problems related to the disclosure of software and attempts to circumvent the same if, as a result of com-

[58] Thomas Wischmeyer, 'Artificial Intelligence and Transparency: Opening the Black Box' in Thomas Wischmeyer and Timo Rademacher (eds), *Regulating Artificial Intelligence* (Springer 2020) 89.

[59] Ben Green, 'The Flaws of Policies Requiring Human Oversight of Government Algorithms' (2022) 45 Computer Law & Security Review.

[60] BaFin, *Big Data and Artificial Intelligence*: *Principles for the Use of Algorithms in Decision-Making Processes* (15 June 2021) 12 <www.bafin.de/SharedDocs/Downloads/EN/Aufsichtsrecht/dl_Prinzipienpapier_BDAI_en.html> accessed 15 January 2024.

[61] ibid.

[62] Martini and Nink (n 14) 14.

pliance with the requirement for transparency, one finds out 'how the algorithm works'.[63]

The statutory restriction on the possibility of issuing an automated administrative act in cases where there is no administrative discretion (*Ermessen*) or margin of judgment (*Beurteilungsspielraum*) goes some way to offset the identified risks, including in particular the possibility of discrimination, but does not guarantee that the acts issued will not have discriminatory effects.[64]

VI. CONCLUSIONS

In conclusion, the added § 35a VwVfG is viewed as a milestone on the path towards the automation of processes in public administration. On the one hand, it is a response to the development of modern technologies and, on the other hand, an attempt to ensure the proper operation of public administration by addressing and pre-empting imminent problems stemming from the shortage of qualified civil servants, as one of the outcomes of the projected demographic crisis resulting from the population aging. Undoubtedly, potential staff shortages in administration pose a serious challenge, and the modernization, digitization and automation of public administration are liable to constitute an adequate response of the authorities to the signalled demographic problems, whilst producing tangible benefits in the process. Once implemented in the administrative procedure, the solution also raises hope for a significant reduction in the costs of public administration operations, especially those incurred during standard administrative procedures.

Attendant legal restrictions on the automatic resolution of administrative cases, as provided for in the wording of § 35a VwVfG, causing the application of the provision in question to proceedings in simple cases (*unechte Massenverfahren*), i.e. where it is possible to establish the legal effect on the basis of the undisputed facts of the case,[65] should be viewed positively. It is for this reason why such restrictions help, in a certain time perspective, verify the correctness of the chosen trajectory of administrative transformation without taking considerable risk.

[63] ibid 10.

[64] Buoso (n 11) 121.

[65] Lorenz Prell in Johann Bader and Michael Ronellenfitsch (eds), *Verwaltungsverfahrensgesetz mit Verwaltungs-Vollstreckungsgesetz und Verwaltungszustellungsgesetz: Kommentar* (CH Beck 2016).

Automation in public administration certainly promotes expeditiousness, cost savings and human resources.[66] It is important not to ignore the real risks accompanying automation, such as the inability of new technologies to take into account individual circumstances surrounding a given case or a significant limitation of the parties' active participation in ongoing procedures. It should also be emphasized that automated acts issued without the participation of the human factor may not be compatible with the changing state of the law or the dynamic evolution of the courts' jurisprudence.[67] Moreover, legal scholars and commentators point out that there is a high risk related to transparency and the possibility of discriminatory decisions when using AI, which is a potential peril also accentuated by EU restrictions on automatic decision-making (e.g. Article 22(2)(b) GDPR).

The risks of automation identified in this paper illustrate the breadth of the issue of automation in administration, which explicitly affects society, politics and economics.

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[66] Christian Djefall, 'Das Internet der Dinge und die öffentliche Verwaltung – Aufdem Weg zum automatisierten Smart Government' (2017) 13 Deutsches Verwaltungsblatt 808, 813; Windoffer in *Verwaltungsverfahrensgesetz: Großkommentar* (n 17) 746.

[67] Jan Ziekow, 'Das Verwaltungsverfahrensrecht in der Digitalisierung der Verwaltung' (2018) 16 Neue Zeitschrift für Verwaltungsrecht 1169, 1171.

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CONSEQUENCES OF THE IMPOSSIBILITY OF FULFILLING TAX OBLIGATIONS

Abstract

The impossibility of fulfilling tax obligations may have many causes, but nowadays the importance of potential impossibility increases significantly due to the historically unprecedented dependence of the tax system on factors of technical and IT nature. The author, for the purposes of tax law, adapts various types of impossibility of performance established in civil law. He also finds it acceptable to use the concept of impossibility both in relation to the obligation to pay a tax and in relation to the so-called instrumental tax obligations. He discusses the ways in which cases where tax obligations could not be fulfilled have been dealt with to date, taking into account both the jurisprudential concepts of the Polish administrative courts based on the principle of *impossibilium nulla obligatio est* and the legislative solutions introduced in Ukraine in connection with the 2022 invasion by the Russian Federation, in Poland in connection with the war started in 1939 by the German Third Reich, as well as the regulations introduced into the legal systems of various countries in connection with the COVID-19 pandemic and the new regulations on the Polish National Electronic Invoice System enacted on 16 June 2023. In addition, the author analyses the possibility of using, in the scope discussed, the provisions of the present Tax Ordinance on reliefs in payment of tax obligations. The study indicates the need to introduce general provisions on the impossibility of fulfilling tax obligations. In the author's opinion, these should address cases of impossibility differently depending on their nature and whether they relate to obligations to pay tax or to instrumental tax obligations.

KEYWORDS

impossibilium nulla obligatio est, tax obligation, tax payment, fulfilment/performance of a tax obligation, reliefs in tax payment

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impossibilium nulla obligatio est, zobowiązanie podatkowe, zapłata podatku, wykonanie zobowiązania podatkowego, ulgi w spłacie zobowiązań podatkowych

> Accepted authority rests first of all on reason. If you ordered your people to go and throw themselves into the sea, they would rise up in revolution. I have the right to require obedience because my orders are reasonable.
> Antoine de Saint-Exupéry, *The Little Prince*

I. INTRODUCTION

As a matter of principle, laws are enacted to regulate future events. This is also the basic logic of tax legislation, which is designed to generate public revenue in the future. The assumptions and calculations made on their basis are then used to plan budget revenues. The correctness of these activities affects the proper functioning of public finances. However, this model system of interdependencies can, and in practice is, subject to various distortions. These distortions can have different causes. They may be related to the defectiveness of legal regulations (e.g. the presence of legal loopholes of structural nature, regulations being repealed due to their unconstitutionality or incompatibility with EU law), the incorrect functioning of the tax administration (e.g. strikes of tax administration employees whose work is necessary for the fulfilment of certain taxpayers' obligations), or the actions or omissions of passive subjects of tax law, in particular taxpayers (e.g. various reactions to the tax burden). They may also be the result of other circumstances that affect the ability of (both active and passive) tax law subjects to take certain actions. Such situations can be referred to as impossibility of fulfilling tax obligations. A special type of such impossibility is the impossibility of tax performance.

It is worth noting that the impossibility of fulfilling tax obligations is not sufficiently regulated, and the problem is generally overlooked in tax law writings and commentary. This is especially incomprehensible as the potential scale

of the phenomenon seems to be very large today. Recent years have provided even more evidence in this regard. A notable example is the SARS-CoV-2 virus epidemic, which caused significant disruption in the life and operation of both the population and the public administration in many countries. However, the impossibility of fulfilling tax obligations is not necessarily the result of an epidemic. Historically, the situation has been caused, for example, by wars or some other disturbance of similar nature. The ongoing conflict in Ukraine confirms that such events are not purely theoretical possibilities, even in geographically peaceful areas like Europe. It is important to note that there is now another potential source of events leading to the impossibility of fulfilling tax obligations. Linking the fulfilment of said obligations to the use of specific technical and IT resources may result in the impossibility of fulfilling them in the absence or failure of those resources. Attention should be drawn to the growing legal obligation on passive tax law subjects to use IT tools made available via the Internet. The difficulties in using them are not just hypothetical scenarios. For example, there have been numerous failures of Internet services provided by the public administration, such as ePUAP, Twój e-PIT, e-deklaracje, CEIDG and others.[1] There are no grounds for assuming that further expansion of IT tools and the Internet used for the fulfilment of tax obligations will be accompanied by a decrease in the number of failures. On the contrary, it is more probable that these problems will multiply. It is not only the reliability of the IT solutions that matters but also the fact that their operation is affected by, for example, the energy or telecommunications infrastructure. In fact, the proper functioning of the tax system today depends on a number of factors of technical and IT nature, and the extent of this dependence is unprecedented in history. It is, therefore, appropriate to examine the legal consequences of the impossibility of fulfilling tax obligations. Findings in this regard should be the starting point for possible new legislation on these issues. This, in turn, should facilitate the assessment of possible consequences of the impossibility of fulfilling the aforementioned obligations for the collection of budget revenues.

Within the framework outlined above, situations in which passive subjects of tax law are unable to fulfil their obligations due to circumstances beyond their control appear to be of particular interest. The study will, therefore, concentrate on these cases. Moreover, the discussion will generally be limited to issues of

[1] See e.g.: <www.gov.pl/web/cyfryzacja/awaria-systemow>; <www.podatki.gov.pl/komunikaty-techniczne>; <https://spidersweb.pl/bizblog/program-500-plus-awaria-empatia-banki-zaswiadczenia-zarobkach>; <www.money.pl/podatki/awaria-systemu-e-pit-problemy-na-finiszu-rozliczen-6891848557259360a.html>; <https://tvn24.pl/biznes/pieniadze/twoj-e-pit-awaria-w-e-urzedzie-skarbowym-strona-nie-dziala-7007479>; <www.money.pl/gospodarka/profil-zaufany-nie-dziala-awaria-serwisu-6624297689185216a.html>; <https://spidersweb.pl/bizblog/awaria-jpk-vat>; <www.komputerswiat.pl/awaria-e-deklaracje>; <www.rp.pl/polityka/art37963831-problemy-z-systemem-ruszylo-rozliczenie-pit-za-2022-r> accessed 2 October 2023.

substantive law. This is an area which has not yet been the subject of in-depth analysis.[2] Procedural matters will be addressed to a limited extent only, as long as they relate to the main subject at hand.

II. CLASSIFICATION OF CASES WHERE FULFILLING TAX OBLIGATIONS IS IMPOSSIBLE

The impossibility of fulfilling tax obligations can be viewed – similarly to civil law[3] – as objective impossibility (when no one can fulfil the given obligation)[4] and subjective impossibility (when a specific entity cannot fulfil the given obligation)[5]. Subjective impossibility, where no one but the debtor can perform, is generally equated with objective impossibility.[6] A broad understanding of objective impossibility also includes economic impossibility, i.e. a case in which performance is possible but becomes extremely difficult due to a change in circumstances.[7] Impossibility can also be categorised into primary (antecedent) and subsequent impossibility.[8] The former exists from the outset, from the moment the obligation should have arisen. The latter occurs after the obligation has arisen.

The above does not mean that the concept of impossibility is identical in civil and tax law. For example, the differences are due to the fact that in civil law impossibility is governed by legal provisions with a specific role in the comprehensively regulated law of obligations. The situation is different in tax law. A narrow view of impossibility would, therefore, exclude from examination a number of important problems mentioned at the beginning. For this reason, in this paper, impossibility is understood in a broader sense than in civil law, covering both permanent and temporary impossibility.[9]

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[2] For tax procedure, see e.g. Tomasz Burczyński, Tomasz Nowak and Kamil Szczęsny, *E-postępowanie podatkowe w praktyce* (Presscom 2017).

[3] See in particular Kazimierz Kruczalak, *Niemożliwość świadczenia w prawie zobowiązań* (Uniwersytet Gdański 1981) 15–19.

[4] See e.g. Fryderyk Zoll, 'Wykonanie i skutki niewykonania lub nienależytego wykonania zobowiązań' in Adam Olejniczak (ed), *System Prawa Prywatnego: Prawo zobowiązań – część ogólna*, vol 6 (CH Beck 2014) 1142.

[5] See e.g. Tomasz Pajor, *Odpowiedzialność dłużnika za niewykonanie zobowiązania* (Państwowe Wydawnictwo Naukowe 1982) 96–97.

[6] ibid 96–97.

[7] ibid 98.

[8] Kruczalak (n 3) 12–14.

[9] In civil law, the impossibility of performance is considered permanent (not temporary) in nature. See e.g. Kruczalak (n 3) 26–31; Bartłomiej Gliniecki in Małgorzata Balwicka-Szczyrba and Anna Sylwestrzak (eds), *Kodeks cywilny: Komentarz aktualizowany*, LEX/el. 2023, art. 387;

There are various kinds of tax obligations. The fundamental obligation is undoubtedly the obligation to pay a tax. In other words, it is an obligation to make a pecuniary settlement.[10] This raises a question of whether it is possible to speak of impossibility in relation to the fulfilment of a tax obligation understood in this way. Since Roman times, it has been accepted that there can be no question of impossibility of performance of a pecuniary obligation. This approach emphasises the issue of responsibility for solvency and places it on the debtor. At the same time, it is based on the assumption that the lack of financial means is a situation that can be changed. This is because debtors can, in a way known only to them, increase their financial resources.[11] Today, this concept seems outdated. First of all, it should be noted that bankruptcy law has largely introduced the possibility of declaring bankruptcy for natural persons. With a subjective understanding of the impossibility of performance, this leads to the conclusion that the legislator has accepted the impossibility of performance in the case of pecuniary obligations.[12] It should also be noted that nowadays the fulfilment of a tax obligation often does not consist in the mere delivery of cash to the cash desk of a tax authority. This is because, as a rule, the payment of taxes involves the use of non-cash resources and the interaction of a number of entities using complex technical and IT solutions.[13] Moreover, in certain cases, tax law requires that a tax obligation be paid exclusively using non-cash means.[14] A disruption in the functioning of the systems that allow the use of this type of money may, therefore, make it impossible to fulfil the tax obligation. What follows, it is perfectly reasonable to consider cases when fulfilment of such tax obligation is impossible. A similar assumption should also be made with regard to other tax-related obligations from which a pecuniary obligation arises, such as the obligation of the withholding agent and the collector to pay the collected tax to the tax authority.

Apart from the fundamental obligation to pay tax, tax law imposes a number of other obligations on passive tax law subjects. These are called instrumental tax obligations. Their purpose is to ensure proper fulfilment of the fundamental obligation mentioned above.[15] Based on the assumption that both the withholding

Roman Trzaskowski and Czesława Żuławska in Jacek Gudowski (ed), *Kodeks cywilny: Komentarz. Zobowiązania – część ogólna*, vol 3 (2nd edn, Wolters Kluwer Polska 2018) art. 387.

[10] For a broader discussion of the performance of a tax obligation and the relation of this concept to a pecuniary performance, see Maciej Ślifirczyk, *Wykonanie, niewykonanie i nienależyte wykonanie zobowiązania podatkowego* (1st edn, Wolters Kluwer Polska 2018) 39–40, 63–67.

[11] See judgment in I ACa 737/13, 27 February 2014 Court of Appeal in Białystok LEX 1437900, and the literature cited therein.

[12] Zoll (n 4) 1146–147.

[13] See more extensively in Ślifirczyk (n 10) 211–41, 312–39.

[14] See, for example, Art 61 of the Polish Tax Ordinance of 29 August 1997 as amended (Tax Ordinance).

[15] Paweł Mikuła, *Obowiązki dokumentacyjne i formalne w prawie podatkowym* (1st edn, Wolters Kluwer Polska 2019) 74.

agent and the collector are parties to separate obligational relationships of legal and tax nature, which give rise to the obligation to make a pecuniary payment of the collected tax to the tax authority, it should be assumed that in these cases, too, there are specific instrumental obligations that serve the proper fulfilment of the obligation to pay the collected tax. Moreover, it is not possible to limit the group of subjects with instrumental obligations to taxpayers, withholding agents and collectors.

Instrumental obligations include a number of different types of tax obligations. A distinction is sometimes made between obligations of informational or evidentiary nature and instrumental obligations of a different type,[16] although it may be difficult to assign an obligation to only one of these categories. Instrumental obligations include, for example, the obligation to file a registration declaration, the obligation to file tax returns, the obligation to make the notifications required by tax law, the obligation to provide certain information and reports, the obligation to issue invoices, the obligation to keep tax records, including by means of special equipment (e.g. cash registers, which entail a number of specific additional obligations), the obligation to hold certain documents (e.g. the confirmation of purchase of goods), or the obligation to appoint a tax representative.[17] In some cases, the fulfilment of certain instrumental obligations is a condition for the exercise of legal rights. Many of the above instrumental obligations can or must now be fulfilled electronically, using the Internet.

The legal construction of instrumental obligations is not entirely clear, and in particular it is not certain whether they can be regarded as a structural element of separate obligational relationships.[18] It seems that in many cases it can indeed be assumed that they are associated with separate obligational relationships where the consideration is not pecuniary. However, it is also possible to identify cases in which the construction of such a separate obligational relationship does not make much sense because the performance or non-performance of a particular instrumental obligation will affect, for example, the tax settlement rules or the tax amount in a fundamental tax obligation relationship. Therefore, in such a situation, there is no reason to regard the fulfilment of an instrumental obligation as the performance and to grant the tax authority a separate right to claim it. There

[16] ibid 255.

[17] ibid 255–366.

[18] Such a view is sometimes presented directly or indirectly in the literature. For example, Mikuła (n 15) 30 (footnote 1) states: 'it is certainly correct to assume ... that the instrumental tax law relationship between the tax authority and the tax debtor may consist in the fact that the debtor is obliged to fulfil an instrumental obligation and the authority has the power to demand the fulfilment of such an obligation'. The association with an obligatory relationship is also created by distinguishing among instrumental obligations the obligations to act, not to act and to endure. See Marek Kalinowski, *Podmiotowość prawna podatnika* (TNOiK 1999) 134. This distinction is similar to the traditional division of performance into *dare* (giving something), *facere* (doing something), as well as *non facere* (not doing something) and *pati* (enduring something).

is also no consensus in legal writings as to the classification of instrumental obligations into substantive or procedural obligations.[19] It seems that instrumental obligations can be identified as both. Their legal classification depends on the provisions of the law applicable to a particular case.

The non-fulfilment of instrumental obligations may have various legal consequences, which are, in principle, obviously negative for the subject who is obliged to fulfil them. Apart from passive obligations (non-action or endurance), undoubtedly there may be situations in which the fulfilment of instrumental obligations will be impossible for the already mentioned reasons. This is particularly the case where the fulfilment of such obligations depends on the cooperation of the tax administration or on the efficient operation of the technical and IT infrastructure.

III. LEGAL RESPONSE TO THE IMPOSSIBILITY OF FULFILLING TAX OBLIGATIONS

1. GENERAL REMARKS

The starting point for assessing the legal situation in the case of impossibility of fulfilling tax obligations should be a reference to the Roman law principle of *impossibilium nulla obligatio est* (there is no obligation if its performance is impossible).[20] It is traditionally applied to civil law obligations.[21] It should be noted that this principle presupposes the existence of an initial and objective impossibility of performance which has prevented the obligation to arise.[22] On the other hand, the debtor could be released from an obligation that has already arisen only if the impossibility has resulted from circumstances for which the debtor is not responsible.[23] It is pointed out that the modern understanding of impossibility of performance in civil law differs from that of Roman law and that the *impossibilium nulla obligatio est* 'must have undergone both conceptual and semantic evolution in the course of legal development'.[24]

[19] Cf. Mikuła (n 15) 31–48.

[20] Digesta 50,17,185; Celsus 8 dig.

[21] As noted in the literature, it is not certain under what circumstances the Roman jurists invoked this principle. In this respect, one can only rely on more or less plausible hypotheses. Nevertheless, an analysis of the sources indicates its use in the field of contractual obligations. See Dagmara Skrzywanek-Jaworska, 'Nieważne zobowiązania *ex stipulatione*. Znaczenie "impossibilium nulla obligatio est" Celsusa (D. 50,17,185) w prawie rzymskim' (2011) 83 Studia Prawno-Ekonomiczne 205–06.

[22] ibid 209.

[23] ibid 214.

[24] ibid 230.

Nowadays, the principle in question is derived from Article 2 of the Constitution of the Republic of Poland. The Polish Constitutional Tribunal, in its judgment of 13 March 2007,[25] when considering the allegation of a violation of the principle of good legislation and the possibility of a violation of the said provision of the Constitution of the Republic of Poland in this context, stated that 'the legislator may not impose impossible obligations on the addressees of the law. The principle of *impossibilium nulla obligatio est* should also be an important directive for the legislator in the legislative process'. Although the quoted statement did not apply to tax legislation, it has such a universal scope that its validity is undeniable in tax law. As a result, the principle in question is currently applied not only to civil law but also to tax law obligations,[26] even though tax law does not contain any general legal provisions directly relating to it. This principle has been repeatedly invoked by administrative courts. For example, in its judgment of 30 November 2011,[27] the Polish Supreme Administrative Court stated: 'Although the above legal maxim derives from contract law and has no normative reflection in public law, it should nevertheless be treated as an important element of the rule of law and an interpretative guideline. The legislator may not introduce legal solutions that establish obligations that are impossible to fulfil, let alone attach negative legal consequences to the subject in question'. Relying on the principle of *impossibilium nulla obligatio est*, the administrative courts have held that tax provisions that create impossible obligations are not applicable.[28] In particular, it is claimed that tax consequences are not generated by situations in which it is not possible to determine all the essential elements of the hypothesis of the tax norm (e.g. the amount of income). Interestingly, situations in which it would be theoretically possible to determine the necessary elements of the hypothesis of the tax norm by appropriate actions of taxpayers, but these actions would be very seriously impeded, have also been qualified in this way.[29] Such an understanding brings the accepted concept of impossibility of obligations closer to economic impossibility. A reference to the principle of proportionality may also provide some basis for this type of reasoning.

[25] K 8/07, OTK-A 2007/3/26; see similarly in the judgment in U 8/08 of 7 July 2011, and in the judgment in K 15/08 of 6 March 2012.

[26] An argument for this is also the principle of protection of citizens' trust in the State and the law enacted by it, derived from Article 2 of the Constitution of the Republic of Poland. See, for example, the judgment in II GSK 51/12, 23 April 2013 Polish Supreme Administrative Court.

[27] II FSK 1096/10.

[28] See, for instance, judgment in III SA/Wa 2245/22, 4 April 2023 Voivodeship Administrative Court in Warsaw; judgment in I SA/Kr 197/22, 26 September 2022 Voivodeship Administrative Court in Kraków.

[29] This applies in particular to situations involving the determination of income from various types of gratuitous performance provided by employers to employees. Cf. e.g. judgments of the Polish Supreme Administrative Court in: II FSK 1531/09, 11 January 2011; II FSK 1724/10 and II FSK 1730/10, 11 April 2012; II FSK 1356/10, 20 January 2012; II FSK 1256/11, 20 February 2013.

As can be seen from the above, the possibility of relying on the principle of *impossibilium nulla obligatio est* in tax law can no longer be questioned. Although the concept presented by the jurisprudence is not completely clear and complete, it seems that so far it has been used mainly in the area of primary and objective impossibility. On the other hand, it has been rejected in situations of subjective impossibility.[30]

When analysing the problem of the impossibility of fulfilling tax obligations, it should be noted that in the legal systems of various countries it is linked, directly or indirectly, to force majeure. However, whereas the principle of *impossibilium nulla obligatio est* refers directly to such effect as the absence of an obligation, the reference to force majeure in fact indicates a cause that may affect the ability to fulfil a tax obligation in various ways. Such a reference has a potentially far-reaching consequence and can also be linked to subjective impossibility.

A good illustration of the above is the practice of applying law in Ukraine in the context of the ongoing war. These solutions are worth looking at because of their highly topical and dynamic nature. Shortly after the start of the invasion of Ukraine by the armed forces of the Russian Federation, the Chamber of Commerce and Industry of Ukraine issued a document dated 28 February 2022,[31] in which it declared the occurrence of force majeure in the form of the Russian Federation's military aggression against Ukraine and the subsequent declaration of martial law. At the same time, the aforementioned document stated that these circumstances of 24 February 2022 until their official end constituted extraordinary, unavoidable and objective circumstances with respect to the tax obligations that should have been fulfilled and the fulfilment of which became impossible due to the occurrence of the aforementioned extraordinary circumstances (i.e. force majeure).[32] The said document was a confirmation of an announcement that appeared earlier (26 February 2022) on the social media of the Chamber of Commerce and Industry of Ukraine.[33] Taking this into account, on 27 February 2022 the State Tax Service of Ukraine issued a statement[34] announcing that, due to the occurrence of force majeure, taxpayers were exempted from financial responsibility for tax offences and violations of other regulations whose observance is

[30] Cf. e.g. judgment in II FSK 1778/16, 21 June 2018 Polish Supreme Administrative Court.

[31] No. 2024/02.0-7.1.

[32] Pursuant to Arts 14 and 14[1] of the Law on Chambers of Commerce and Industry of Ukraine (uk. Закону України 'Про торгово-промислові палати в Україні'), the Chamber of Commerce and Industry of Ukraine is entitled to certify the occurrence of force majeure. Force majeure itself, in turn, is understood as extraordinary and irreversible circumstances that objectively make it impossible to fulfil obligations under statutory and other regulations.

[33] <www.facebook.com/1780981079/posts/10216868915793444/?d=n> accessed 25 September 2023. The purpose of posting the document was to facilitate the procedure. Any interested party could use a printout of this document for confirmation of force majeure.

[34] <https://tax.gov.ua/media-tsentr/novini/576179.html> accessed 25 September 2023.

controlled by supervisory authorities.[35] Taxpayers were exempted from responsibility if they were unable to fulfil their tax obligations on time. At the same time, it was stated that these obligations must be fulfilled immediately after the end of the force majeure. It was also stated that during the period of force majeure no tax audits would be initiated and those already initiated would be suspended. The described approach was subsequently replaced by provisions introduced into the Tax Code of Ukraine as of 27 May 2022.[36] The new provisions set a deadline of six months from the end or lifting of martial law in Ukraine for the fulfilment of tax obligations (other deadlines applied to taxpayers who had previously regained the ability to fulfil their obligations). The previous moratorium was also cancelled for those taxpayers who were able to fulfil their obligations on time. It should be noted that, under the provisions in question, the mere fact of the occurrence of force majeure does not automatically mean an exemption from tax law obligations. It is only a circumstance that may lead to it in a particular case. However, it is necessary to demonstrate a causal link between the occurrence of force majeure and the impossibility of fulfilling a tax obligation.[37]

The measures described above in Ukraine largely resemble solutions introduced into Polish law during World War II.[38] The Decree of the President of the Republic of Poland of 26 January 1940 on a moratorium on public dues[39] suspended, for the duration of the exceptional circumstances caused by the war, the payment and collection of public tributes, taxes, stamp duties and other dues payable to the state, municipal unions and units of economic and professional self-government, which were due in the period up to and including the date of the entry into force of the said Decree, regardless of whether and when the assessment of such dues took place. In a similar manner, the obligations relating to the filing of returns and the assessment of the aforementioned dues for economic or tax periods expiring on the date of entry into force of the decree were suspended, as well as the legal force of payment orders, reminders, summonses and all other documents relating to payment, and enforcement proceedings relating to the dues

[35] The legal basis was Art 112 of the Tax Code of Ukraine (Податковий кодекс України) on criminal and fiscal liability.

[36] Law of Ukraine dated 12 May 2022 'On Amendments to the Tax Code of Ukraine and other laws of Ukraine regarding the peculiarities of tax administration of taxes, fees and single contributions during martial law state of emergency' (Закон України від 12 травня 2022 р. 'Про внесення змін до Податкового кодексу України та інших законів України щодо особливостей податкового адміністрування податків, зборів та єдиного внеску під час дії воєнного, надзвичайного стану').

[37] Cf. the judgment in 826/9302/17, 27 January 2022 Supreme Court of Ukraine; see also Юлія А Коваль, 'Особливості звільнення від фінансово-правової відповідальності за порушення податкового законодавства під час карантину' (2022) 3 Нове українське право 75, 80–81.

[38] However, due to the occupation of the country by enemy troops, they had little practical significance.

[39] [1940] JoL [Journal of Laws] 4.

listed in the decree. On the other hand, the Decree of the President of the Republic of Poland of 21 February 1940 on the stopping and suspension of the running of time periods[40] stated that, with retroactive effect from 1 September 1939, for the duration of the exceptional circumstances caused by the war, the time limits prescribed by all laws, decrees, regulations and orders in force throughout the territory of the state or in individual parts thereof for, inter alia, the performance of acts necessary for the creation or preservation of claims, receivables and rights, as well as for limitation and preclusion, and all time limits in general, the non-observance of which results in the extinction or modification of claims, receivables and rights, should be suspended. With effect from 1 September 1939, for the duration of the exceptional circumstances caused by the war, the running of the administrative procedural time limits prescribed by all laws, decrees, regulations and orders in force in the entire territory of the state or in certain parts thereof, as well as the time limits prescribed by all decisions and orders of the state and municipal offices and authorities, which had not yet begun, were stopped and those which had already begun were suspended.

Also in contemporary Polish tax law, the occurrence of fortuitous events or force majeure is treated as a circumstance that may exclude fault (where this premise may be relevant to the liability of the tax law subject[41] or the timeliness of the fulfilment of its obligations)[42] or constitute an important element that is taken into account when assessing whether the prerequisites such as an important interest of the taxpayer or the public interest,[43] conditioning the granting of reliefs in payment of tax obligations,[44] have been met. However, the existence of these prerequisites is not determined automatically.[45] Sometimes, the occurrence of force majeure may be of such a general nature and its connection with the impossibility of fulfilling tax obligations will be so obvious that proving the existence of the aforementioned prerequisites will be very simple (e.g. a long-lasting power cut in a certain region of the country resulting in the impossibility of fulfilling instrumental obligations that should be fulfilled via the Internet). These situations seem to be close to objective impossibility. For the applicability of fortuitous events or force majeure, it is also irrelevant whether the impossibility is primary or subsequent.

[40] [1940] JoL 9.

[41] E.g. Art 116 § 1(1)(b) of the Tax Ordinance.

[42] E.g. Art 162 § 1 of the Tax Ordinance.

[43] E.g. judgment in II FSK 1007/10, 8 December 2011 Supreme Administrative Court.

[44] Cf. Chapter 7a Section III of the Tax Ordinance.

[45] A good illustration of this is the judgment in I SA/Gl 1631/21, 17 March 2022 of the Voivodeship Administrative Court in Gliwice, in which the taxpayer invoked the occurrence of force majeure related to the COVID-19 pandemic, and yet both the tax authorities and the court found that the prerequisite of an important interest of the taxpayer or the public interest did not occur.

The general solutions described above are sometimes supplemented by specific regulations. They are not comprehensive and provide only a limited response to the problem. For example, it is possible to refer to the regulation on the National Electronic Invoicing System (KSeF), enacted on 16 June 2023.[46] The new wording of Article 106ne of the Polish Goods and Services Tax Act stipulates that the Minister of Public Finance shall publish notifications on the occurrence and termination of the KSeF failure in the Public Information Bulletin on the website of the Ministry's office (or, if this is not possible, in the social media). Information on the duration of the KSeF unavailability shall also be published in the said Public Information Bulletin. In addition, provisions are made for the way in which invoices are to be issued during periods of KSeF failure and unavailability, and for the case when a taxpayer is unable to issue a structured invoice for a reason other than the KSeF failure.[47] While these solutions certainly address many cases of impossibility to comply with invoicing obligations, they do not address some extreme situations.[48] They also impose additional obligations on taxpayers, although taxpayers are not necessarily responsible for the occurrence of the KSeF unavailability. Moreover, the KSeF failure may be caused by the tax administration. Despite these regulatory shortcomings, it is positive that certain problematic issues have been provided for, although this does not obviate the need for more general solutions.

One should also mention the legislation introduced in response to the COVID-19 pandemic. Both the pandemic and the various types of related restrictions introduced may have made it difficult, and in some cases even impossible, to comply with tax obligations. In many countries, tax law solutions were adopted to remedy this situation. In particular, the extension of time limits for fulfilling the obligations in question was widespread, or waiving of sanctions for exceeding these time limits, and reductions or exemptions from certain payments were introduced.[49] The fact that the vast majority of these solutions were adopted during the

[46] The National Electronic Invoicing System was introduced in Poland much earlier, but it is the cited legislation that makes its use mandatory for a wide group of taxpayers.

[47] Arts 106nf–106nh of the Polish Goods and Services Tax Act of 11 March 2004 [2004] JoL 54 535.

[48] For example, it is assumed that it will be possible to issue electronic invoices during a KSeF failure (Art 106nf(1)) and that the taxpayer will be able to send an invoice in electronic form to the KSeF no later than on the working day following the day on which it was issued if the taxpayer is unable to issue a structured invoice for reasons other than a KSeF failure (Art 106nh(2)2). It is not clear how to proceed if these assumptions do not correspond to reality.

[49] See European Commission, Directorate General Economic and Financial Affairs, Policy measures taken against the spread and impact of the coronavirus – 20 August 2020, passim. In this context, the Irish solutions are worth mentioning; they also addressed the situation where, due to the pandemic, key personnel to calculate the tax due were not available on the taxpayer's side. In such a case, it was advisable to file a return on the basis of 'best estimates'. For the solutions adopted in different countries, see e.g. KPMG, *COVID-19 Global Tax Developments Summary* (as of 1 September 2021) <https://assets.kpmg.com/content/dam/kpmg/us/pdf/2020/03/covid-19-

pandemic and for a limited period of time shows that the national legal systems of many countries do not have adequate regulations in place for such situations.

2. IMPOSSIBILITY OF FULFILLING FUNDAMENTAL TAX OBLIGATIONS

As it follows from the preceding sections, it is fully justified to consider the case when fulfilment of an obligation to pay a tax is impossible.[50] In this respect, several situations can be distinguished based on different types of impossibility.[51]

In the case where the legislator has introduced strictly defined ways of settling a tax liability, their actual and objective unavailability makes the fulfilment of the tax obligation impossible. In such a situation, it does not seem permissible to assume that the debtor should fulfil his obligation by a means which, although available, is not provided for by the law. Indeed, this would be contrary to the principle that tax relationships are governed by law. In view of the fact that, as a rule, an essential element of the construction of a tax is at issue,[52] the use of analogy in this respect also seems inadmissible.[53] On the basis of the discussed principle of *impossibilium nulla obligatio est*, it could be assumed that no obligation arises. This is a very radical conclusion, given that the impossibility in question will normally be temporary or even short-lived. It is easy to imagine a situation in which it is not possible to perform an obligation at the time when it should have arisen, but such a possibility opens up after only a few days. It is, therefore, difficult to draw the conclusion that in such a case the obligation does not arise at all. It should also be noted that, even in normal circumstances, it is not usually possible to fulfil a tax obligation at any time during the payment period. For example, if

tax-developments-summary.pdf> accessed 29 September 2023. The Polish provisions in this area were mainly included in the Act of 2 March 2020 on special solutions related to the prevention, counteraction and combating of COVID-19, other infectious diseases and crisis situations caused by them (Ustawa z dnia 2 marca 2020 r. o szczególnych rozwiązaniach związanych z zapobieganiem, przeciwdziałaniem i zwalczaniem COVID-19, innych chorób zakaźnych oraz wywołanych nimi sytuacji kryzysowych). However, these were not covered by the original version of the Act but through amendments. Not all of the adopted provisions can be considered successful, given the discrepancies in their application in case law.

[50] I have already addressed this issue in my book (see Ślifirczyk (n 10) 95–99). In this paper, I do not analyse the issues related to the insolvency of tax debtors, which are comprehensively provided for in special provisions, such as bankruptcy law.

[51] Strictly speaking, it should not be characterised as an impossibility of fulfilling an obligation in a situation where the construction of a given tax is incomplete and its amount of tax attributable to a taxpayer cannot be determined and therefore cannot be paid (e.g. there is a legal loophole concerning the substance, subject, rate or basis of taxation). In such a case, the prerequisites for the effective imposition of the tax and the creation of an obligation relationship in this respect have not occurred and, therefore, there is no obligation to pay.

[52] For more on this topic, see Ślifirczyk (n 10) 52–55.

[53] Bogumił Brzeziński, *Wykładnia prawa podatkowego* (ODDK 2013), see e.g. 146–47.

someone wants to make a payment order at a bank branch, they will not be able to do so on bank holidays. In addition, electronic systems have planned technical interruptions during which it is not possible to place orders. On this basis, it is impossible to assume that the tax obligation has lapsed. Rather, it seems more reasonable to conclude that when the tax factual situation (the hypothesis of the tax-legal norm) is actualized and the impossibility of providing the payment ceases, the tax obligation should be fulfilled. On the other hand, prior to the cessation of the impossibility, the taxpayer cannot be held liable for the non-fulfilment of the obligation. The same should be assumed in the case of a subsequent objective impossibility. In such a situation, it does not seem justified to conclude that the tax obligation expires. Rather, it should be considered that it continues to exist, even though it cannot be fulfilled. The effect of non-establishment or expiry of the tax obligation as a result of the impossibility of its fulfilment can, therefore, only be accepted if the objective impossibility is permanent.[54]

However, the above does not solve all the problems. After all, if, due to the impossibility of fulfilling the tax obligation, the obligation did not expire but could not be fulfilled within the original payment period, by what date, from the end of the impossibility, should the payment be made? Should the fact that it was not possible to fulfil the tax obligation during part of the payment period not lead to an extension of such payment period? Existing legislation does not make the creation of a tax obligation directly dependent on the availability or non-availability of the legally prescribed means of fulfilment.[55] The time limit for payment is also independent of this.[56] Given that Polish tax law currently links the existence of tax arrears to mere failure to meet a payment deadline,[57] one would have to conclude that even if the debtor is unable to fulfil the obligation, the tax arrears arise on his part, with all the negative consequences of such a situation. This conclusion is difficult to accept in the case of impossibility of an objective nature, independent of the debtor. However, if it is considered that an objective impossibility results in postponement of the deadline for fulfilling the obligation, this conclusion would also have negative consequences for the taxpayer, since the limitation period for the obligation would be extended for reasons beyond his control. This is due to the fact that the limitation period for a tax obligation is, in principle, calculated from the end of the calendar year in which the deadline for payment of the tax has passed.[58] It might be postulated that a period of objective impossibility of fulfilling an obligation, independent of the taxpayer, should be treated in the same way as postponement or extension of the payment deadline

[54] The conclusions are, therefore, parallel to those in a similar case under civil law. See Arts 387 and 475 § 1 of the Civil Code.

[55] Cf. Art 21 § 1 of the Tax Ordinance.

[56] Cf. Art 47 of the Tax Ordinance.

[57] Ślifirczyk (n 10) 404.

[58] Cf. Article 70 § 1 of the Tax Ordinance.

provided for under tax law, but only for the purpose of assessing whether the obligation has been duly fulfilled.[59] On the other hand, the limitation period of a tax obligation would be calculated as if the impossibility of fulfilling a tax obligation did not exist.[60]

In the case of objective impossibility, the impossibility may, by its very nature, affect large groups of taxpayers in a similar situation, so an individual decision in each case could place an excessive and unnecessary burden on the tax administration. Therefore, it seems advisable to introduce legal solutions to deal with such situations in a general way. Cases of subjective impossibility should be treated differently. They require an individual examination, for which the procedure for the application of relief in payment of tax obligations may be an appropriate solution.[61] At present, however, the application of these reliefs is generally associated with a discretionary power of the tax authorities, which does not lead to the expected result. This means, for example, that a tax authority may refuse to grant relief in the payment of a tax obligation, even though there is a public interest in granting it and force majeure makes it impossible for a particular taxpayer to fulfil the obligation. Therefore, the postulate that discretion in the application of these reliefs should be abandoned remains valid.[62]

A situation in which several means of fulfilment are legally permissible and the impossibility concerns only one of them requires separate attention. Undoubtedly, a taxpayer is entitled to use any of the legally permissible ways of fulfilling

[59] *De lege lata*, such an effect can be achieved through the application of appropriate reliefs in payment of tax obligations, although there is a problem with the widely accepted discretionary nature of these reliefs, as discussed later in this text.

[60] In a similar manner, the resolution of 7 judges of the Polish Supreme Administrative Court of 27 March 2023, I FPS 2/22, resolved the problem of the application the statute of limitations to tax obligations based on Art 15zzr(1)3 of the Act of 2 March 2020 on special solutions related to the prevention, counteraction and combating of COVID-19, other infectious diseases and crisis situations caused by them, although the argumentation used by the court was multifaceted. The aforementioned provision stipulated that the running of the limitation periods provided for by administrative law did not begin, and that those that had begun were suspended during the period of the epidemic emergency. However, the reasoning formulated in the resolution for the understanding of administrative law may generate doubts as to whether the said Art 15zzr could be applied to the deadlines provided for in the provisions of tax law to the remaining extent (excluding the limitation periods). It is correct and in line with the concept presented in this text to resolve doubts related to the interpretation of Art 15zzr in favour of the taxpayer, i.e. to assume that, on this legal basis, there is no starting or suspension of the time limits laid down in Art 15zzr other than the limitation period. This was done, for example, in the judgment in I SA/Gl 100/23, 22 June 2023, of the Voivodeship Administrative Court in Gliwice.

[61] However, the declaration of impossibility alone is not sufficient for granting such relief. The prerequisites of the important interest of the taxpayer or the public interest also require an examination of other issues, such as the origin of the impossibility. In addition, the state aid rules constitute a certain limitation for the application of relief in the payment of tax obligations.

[62] I have argued more extensively in favour of this claim in my book, see Ślifirczyk (n 10) 183–88.

a tax obligation, and the elimination of any of them for reasons beyond the taxpayer's control limits the taxpayer's rights. If this leads to unfavourable tax consequences (e.g. delays in payment, which in turn result in the need to pay interest on tax arrears), a certain solution may be the application of reliefs in payment of tax obligations, although here, too, the problem is the discretionary nature of these reliefs. On the other hand, if the situation in question involves additional costs of another kind for the taxpayer and the impossibility is the result of an action or omission by a public authority, it may be permissible to seek protection by filing a claim for damages against the State Treasury or a local government unit.[63]

The foregoing discussion concerning the impossibility of fulfilling a tax obligation imposed on taxpayers may be applied mutatis mutandis to the impossibility of fulfilling other tax obligations involving pecuniary performance. Nevertheless, it should be noted that the application of certain reliefs in payment of tax obligations is excluded in relation to withholding agents and collectors.[64] In this respect, they will not be able to provide a legal solution to the problem of impossibility of fulfilling obligations by these subjects.

3. IMPOSSIBILITY OF FULFILLING INSTRUMENTAL TAX OBLIGATIONS

It follows from the above that impossibility may concern not only the fulfilment of a fundamental tax obligation but also the fulfilment of instrumental tax obligations. In cases where the fulfilment of instrumental tax obligations actually consists in meeting a specific non-pecuniary liability, the findings made above regarding the impossibility of fulfilling a fundamental tax obligation apply mutatis mutandis. This means that in this case, too, an extension of the deadlines for the fulfilment of instrumental obligations should be postulated if the impossibility is beyond the control of the subject obliged to fulfil them. It may be added that the penalties for failure to comply with the original deadline should not apply in this case, either. This seems easy to be achieved in any case where the application of penalties depends on proof of fault on the part of the obligated subject. Indeed, the occurrence of an impossibility to perform of an objective nature will generally exclude fault. It should also be noted that the reliefs in payment of tax obligations do not apply to instrumental obligations. Therefore, at present, they cannot constitute a remedy for the impossibility of fulfilling these obligations. Instead, they can be replaced with the institution of postponement of the deadline provided for in Article 48 of the Tax Ordinance[65] and the institution of extension of the deadline, the application of which is based on Article 50 of the Tax Ordinance.

[63] Cf. Art 417 of the Civil Code.

[64] This is a conclusion *a contrario* under Art 67c § 1 and Art 67d § 3 of the Tax Ordinance.

[65] Here, too, the widespread acceptance of the discretionary nature of decisions is a problem.

On the other hand, if the fulfilment of instrumental obligations takes place within the framework of tax proceedings, it will be possible to apply the institution of reinstatement of a time limit, if it is possible to substantiate that the time limit has been exceeded without fault of the subject of the obligation.[66]

However, the above conclusion does not solve all the related problems. Sometimes, the fulfilment of instrumental obligations conditions a specific legal qualification, influences the amount of tax or otherwise shapes the legal situation of the taxpayer. It may also condition the exercise of certain rights by the taxpayer. In such a case, when applying the principle of *impossibilium nulla obligatio est*, it should be assumed that a condition that is objectively impossible to be fulfilled is not applicable. As a result, the taxpayer could act as if the condition had been fulfilled (i.e. as if he had lawfully performed an instrumental obligation), as long as he proves he intended to do so. If this opened the way to different legal qualifications, it would be up to the taxpayer to decide, according to the principle of resolution of legal doubts in favour of the taxpayer,[67] which legal qualification applies to him. However, this reasoning can only be accepted if the impossibility existed during the entire period in which the obligation should have been fulfilled, or during the entire period in which the taxpayer could realistically have fulfilled it,[68] or if the taxpayer could, for legitimate reasons, erroneously assume that he had actually fulfilled the obligation imposed on him. In the latter case,

[66] Art 162 of the Tax Ordinance.

[67] See in particular Art 2a of the Tax Ordinance.

[68] However, it should be noted that case law sometimes overlooks the importance of temporary technical problems. The Polish Supreme Administrative Court, in its judgment in II FSK 3054/16, 14 November 2018, referred, inter alia, to problems related to the functioning of the ePUAP platform and the effectiveness of deliveries made as part of tax proceedings. It concerned the recognition of a decision that had not been received in the form of an electronic document as delivered. Although it was demonstrated that there had been technical problems with the operation of the said platform during the period set for the receipt of the document, the court found that 'the technical problems on the ePUAP platform were temporary and did not result in the inability to receive the decision in the form of an electronic document', which in effect entitled the authority to assume that the decision had been delivered in accordance with the then applicable Article 152a § 3 of the Tax Ordinance. Leaving aside the context of this case, it should be noted that such a position essentially means that, in the event of technical problems, a party to the proceedings must, in principle, constantly try to use the electronic platform in order to avoid the allegation that it could have done so at some point and failed to do so. This view, therefore, places the full responsibility for the malfunctioning of the IT infrastructure on the party to the proceedings and ignores the costs that the party incurs for the additional obligations arising from this. In my opinion, this is not a correct standpoint. It should be noted, however, that there is also a visible line in the Supreme Administrative Court case law, according to which the consequences of difficulties, errors or irregularities in the design and operation of official systems for communication with public administration authorities cannot be transferred to the users of these systems (see e.g. the Polish Supreme Administrative Court judgments in: III OSK 2624/21, 17 March 2023; I OSK 708/17, 1 March 2019; I OSK 1876/15, 17 February 2017; decision I OZ 1414/15, 5 November 2015, LEX no 1915487).

this refers in particular to the situation of malfunctioning web services provided by the tax administration which appear to operate correctly.[69] In practice, it may be difficult to prove such a circumstance if it is not officially confirmed by the competent administration. Therefore, it seems necessary to reduce the rigour of proof and to open the possibility of a mere prima facie proof of the occurrence of such events by those obliged to fulfil instrumental obligations.

The situation in which an instrumental obligation can be fulfilled in several ways and the impossibility relates to only one of them is to be assessed in a similar way to the parallel case of the impossibility of fulfilling a fundamental tax obligation, except that, as already mentioned, the institution of postponement or extension of the deadline may be applied instead of reliefs in payment of tax obligations.

A variant of the impossibility of fulfilling instrumental obligations is a situation in which they can be fulfilled but not properly. This is the case, for example, when the online service provided by the tax administration does not allow the tax return to be completed in a way that complies with the law and the taxpayer's will. It seems obvious that in such a situation the taxpayer should not bear the negative consequences of possible irregularities, nor should he be deprived, for example, of interest on an overpayment that he could not properly declare.[70] In such a case, it should also be irrelevant that it is possible to fulfil the said obligations in another way (e.g. by bypassing the online services provided). To conclude otherwise would mean that the taxpayer's right to take advantage of certain opportunities offered by the tax administration is fictitious or even a kind of trap, and that the taxpayer would have to bear all the negative consequences resulting therefrom. The use of public services cannot be a kind of lottery, and moreover one in which there can only be loss.

The above remarks should be applied mutatis mutandis to the impossibility of fulfilling instrumental obligations imposed on passive tax law subjects other than the taxpayer. However, it should be noted that the institution of postponement provided for in Article 48 of the Tax Ordinance refers only to taxpayers, withholding agents and collectors. Therefore, its application to other subjects will be problematic. Therefore, it should be postulated that relevant regulations should be introduced to solve the problem of impossibility of fulfilling instrumental obligations in a more comprehensive manner also with respect to subjects.

[69] Situations of this kind were described, for example, in the articles: Jarosław Królak, 'Przedsiębiorcy wpadli w cyfrową pułapkę' *Puls Biznesu* (11–15 August 2023) and Przemysław Wojtasik 'Jak udowodnić, że zmieniliśmy formę rozliczeń' *Rzeczpospolita* (8 May 2023).

[70] The author of this paper is in possession of a tax decision in which the first instance authority took the opposite view. This decision was overturned by the second instance authority.

IV. CONCLUSION

As can be seen from the carried out analysis, the impossibility of fulfilling tax obligations is not a purely theoretical situation but occurs frequently in practice. It concerns both subjective impossibility and objective impossibility. The impossibility of fulfilling obligations may concern the fulfilment of the tax obligation by the taxpayer, the fulfilment of the obligation to pay the collected tax by the withholding agent and the collector, as well as the fulfilment of instrumental obligations.

Although the impossibility of fulfilling tax obligations should not, in principle, have an immediate effect on the level of budget revenues (it does not lead to the automatic expiration of obligations), it may cause disruptions in the functioning of the tax system and delay the collection of revenues. It may also be a source of various disputes concerning the consequences of those events for the legal situation of tax law subjects. Therefore, it is necessary to properly regulate this matter in tax law.

The current legal regulations in this area are quite fragmentary or provisional; they respond to specific events that interfere with the ability to fulfil the aforementioned obligations. Neither the reference to the principle of *impossibilium nulla obligatio est*, nor the application of the legal institutions provided for in the current tax law, such as, in particular, reliefs in payment of tax obligations, produce a satisfactory effect. Therefore, it is necessary to postulate the introduction of comprehensive legal regulations on the impossibility of fulfilling tax obligations. They should fairly distribute the burden of the negative consequences of the said impossibility between the tax administration and the passive subjects of tax law. This is particularly important in the case of objective impossibility. In this respect, it seems advisable to introduce the principle that all time limits for the fulfilment of the obligations affected by the impossibility are extended by the period of the said impossibility. This extension should not be accompanied by an extension of the limitation periods for obligations where the public administration is liable for the impossibility to perform. In such a situation, there is also no reason to impose penalties on the obligated subjects. If the fulfilment of an instrumental obligation conditions a certain legal qualification, the exercise of certain rights, or affects the amount of a tax or otherwise determines the legal situation of a passive tax law subject, it can be assumed in certain cases, in accordance with the principle of *impossibilium nulla obligatio est*, that an objectively impossible condition does not exist. This is the case if the impossibility existed during the entire period in which the obligation should have been fulfilled, or during the entire period in which a passive tax law subject could realistically have fulfilled it, or if the passive tax subject could, for legitimate reasons, erroneously assume that it had effectively fulfilled the imposed obligation.

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IMPORTANCE OF THE PRINCIPLE OF DECENT LEGISLATION FOR POLISH ADMINISTRATIVE LAW

Abstract

The paper analyses the principle of decent legislation and its significance for Polish administrative law. The principle in question derives from the concept of a democratic state under the rule of law. The significant role of administrative law in shaping the status of individuals (citizens) in the state as well as the influence of this branch of law on particular areas of social life are indicated. Due to the special characteristics of this branch of law, the principle of correct legislation should be absolutely taken into account in the legislative process that involves drafting of administrative legal acts. The case law of the Polish Constitutional Tribunal has distinguished certain elements or aspects of the principle of good legislation, including the following: non-retroactivity, protection of acquired rights, *pacta sunt servanda*, respect for pending interests or appropriate *vacatio legis*. The vast majority of them should be taken into account when working on administrative regulations. The paper also refers to the current crisis of administrative law discussed in the domestic literature from a practical point of view, by presenting two errors made by the legislator when amending administrative procedural laws. The conclusion of the study includes i.a. a proposal for a fuller involvement of experts, legal scholars and commentators, professional attorneys or administrative court judges in the process of drafting administrative laws.

KEYWORDS

democratic state under the rule of law, principle of decent (good) legislation, administrative law

SŁOWA KLUCZOWE

demokratyczne państwo prawne, zasada przyzwoitej legislacji, prawo administracyjne

I. INTRODUCTION

The development of good law and its subsequent proper application is a fundamental responsibility of public authority. This general assumption is widely shared and accepted. In practice, it is much more difficult to decode what this 'good law' actually is and what standards it must meet in each particular case. It is important to remember that positive (written) law is by its very nature the primary means of resolving conflicts and balancing controversial social interests. Consequently, a lot of tension frequently grows around the process of legislation, and it serves as a platform for the natural game of interests.

It is stated in the literature that the legislature is well placed to secure and promote human rights.[1] Although it may be somewhat controversial, in my opinion, the area of law that has the greatest impact on the realization of human rights is administrative law. It is within this branch of law that public administration authorities can enter into the sphere of individual rights and freedoms most often and most freely. Due to the specific characteristics of administrative law, I argue that it is within this field of law that the principle of decent legislation plays a particular role.

In a democratic state under the rule of law, the process of formulating law is the subject of constitutional regulation and the issue constantly undertaken in the research and dispute of the scientific community, especially among legal scholars and commentators. In Poland, based on historical experience, the case law of the courts, especially of the Constitutional Tribunal (also Tribunal), and scientific dissertations, legal theorists have reconstructed the principle of decent legislation. This directive has a particularly important role in a modern state ruled by law.

[1] Grégoire Webber and Paul Yowell, 'Introduction: Securing Human Rights through Legislation' in Grégoire Webber and others, *Legislated Rights. Securing Human Rights through Legislation* (Cambridge University Press 2018) 1.

As Sławomira Wronkowska points out, making of law that would effectively serve the implementation of the adopted social goals is a particularly complex task in contemporary states. The growth of the organisational functions of the state and its enormous activity, especially in the economic and social sphere, have led to the inclusion of more and more new areas of social life in legal regulations as well as to an extremely rapid increase in the number of law-making acts issued. At the same time, the rapid and dynamic changes taking place in all areas of social life mean that changes to previously binding legal provisions and the drafting of new legal regulations must be carried out more frequently than ever before. Therefore, law-making decisions are becoming more and more difficult because, despite the progress in various fields of knowledge, including knowledge of social life, the systems of social affairs in which norms are established prove to be increasingly complex.[2]

The above view, expressed at the beginning of the 1980s, remains perfectly valid nowadays, and the difficulties and risks it outlined are even more evident at present. As I have mentioned, it seems that this is especially relevant to administrative law,[3] which has a particular impact on the status of the individual in the state, by determining his or her rights and obligations towards public authority and safeguarding a catalogue of the society's fundamental values. Some time ago, it was claimed in the domestic literature that Polish administrative law was in crisis. The source of this crisis is the growing distortion of administrative law itself, manifested above all in the excessive codification of social life (by means of administrative law regulations), as well as in the instrumental approach and the lack of legitimacy and moral deficiency of the law.[4]

Taking into account the particular importance of administrative law for the protection of civil and human rights and, additionally, its current crisis, it seems obvious that safeguarding the appropriate quality of this branch of law is currently a fundamental challenge for the legislator. In this context, the issue of the relevance of the principle of decent legislation for Polish administrative law should be thoroughly analysed. This paper is intended to serve this purpose. It should be noted, however, that due to the constraint of its scope, the issue may only be treated as a contribution to further scientific discussion on the subject.

[2] Sławomira Wronkowska, *Problemy racjonalnego tworzenia prawa* (Wydawnictwo Naukowe UAM w Poznaniu 1982) 6.

[3] For the purposes of this paper, I have adopted a broad understanding of administrative law, which includes substantive, systemic and procedural norms.

[4] Jacek Jagielski and Piotr Gołaszewski, 'Kryzys prawa administracyjnego a zmiana jego paradygmatu' in Dariusz R Kijowski, Alina Miruć and Agnieszka Suławko-Karetko (eds), *Kryzys prawa administracyjnego? Jakość prawa administracyjnego*, vol 1 (Wolters Kluwer Polska 2012) 28–29.

II. THE ESSENCE OF THE PRINCIPLE OF DECENT LEGISLATION

Broadly speaking, the concept of legislation is related in individual constitutional systems to the legislative activity of parliaments. Elected representatives have the task to adopt the law, which is then interpreted by the courts and applied by the executive power.[5] Over the years, the essence of legislation has become not so much the power of the parliament to make law but the quality of the 'produced' provisions, i.e. the principle of decent legislation has emerged.

Under Polish law, the starting point for considering the principle of decent legislation is the clause of a democratic state under the rule of law[6], *de lege lata* provided for in Article 2 of the Constitution of the Republic of Poland.[7] Under this provision, the Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice. There is a well-established view in the case law of the Polish Constitutional Tribunal, according to which an indispensable element of the principle of a democratic state under the rule of law are the rules of law-making, known as the principle of decent legislation.[8]

Following Bogusław Banaszak, it may be summarised that the essence of the principle of good legislation is the establishment of constitutional standards of

[5] Alexander H Türk, *The Concept of Legislation in European Community Law: A Comparative Perspective* (Kluwer Law International 2006) 7.

[6] As Mirosław Wyrzykowski points out, it seems that the attempt to formulate a universally accepted definition of the rule of law is doomed to fail. He does, however, provide a catalogue of specific determinants of the principle of a democratic state ruled by law, among which he lists, for example, the following: (a) the purpose of the state ruled by law is the development and consolidation of justice as well as the will and ability to protect the citizen from arbitrary power; (b) the state ruled by law should be a constitutional state, and civil rights and freedoms should be fundamental (basic) rights, which means that, in the case of civil freedoms, they establish, in principle, unlimited freedom towards the state and an essentially limited possibility of the state's authoritative influence on citizens; (c) the state ruled by law determines the limits of its relations towards citizens, thus transforming the relations between the state community and the individual into legal relations (Mirosław Wyrzykowski, 'Zasada demokratycznego państwa prawnego – kilka uwag' in Marek Zubik (ed), *Księga XX-lecia orzecznictwa Trybunału Konstytucyjnego* (Biuro Trybunału Konstytucyjnego 2006) 234–35). A complete interpretation of the principle of a democratic state under the rule of law goes beyond the subject matter of this paper, however, a simple juxtaposition of the aforementioned determinants leads to the assumption that they cannot be actualised without the adoption and strict observance of the principle of decent legislation.

[7] The Constitution of the Republic of Poland of 2 April 1997 [1997] JoL [Journal of Laws] 78 483 as amended.

[8] Leszek Garlicki, *Polskie prawo konstytucyjne: Zarys wykładu* (5th edn, Wolters Kluwer Polska 2018) 76–77. In this context, the jurisprudence and literature also refer to 'good' or 'correct' legislation. In the following discussion, I use these terms interchangeably in view of the initial principle of 'decent' legislation.

correctness of the lawmaker's actions.[9] In the Constitutional Tribunal case law, the following elements of the principle have been identified: (a) the principle of non-retroactivity of law, (b) the principle of protection of acquired rights, (c) the principle of *pacta sunt servanda*, (d) the principle of respect for pending interests, (e) the principle requiring the application of transitional provisions, (f) the principle of appropriate *vacatio legis*, (g) the principle prohibiting changes to the tax law in the course of the fiscal year, (h) the principle of the definiteness of laws, (i) the principle of proportionality, and (j) the requirement of observance of the principles of legislative technique.[10]

The Constitutional Tribunal continuous developing its standpoint on the essence and meaning of the principle of correct legislation, based on the already extensive case law in this regard. In order to show the visible tendency of a peculiar 'continuity' in the position of the Constitutional Tribunal on the discussed issue, it is necessary at this point to quote *in extenso* a passage from the relatively recent judgment of the Constitutional Tribunal in Case K 15/16 of 13 May 2021.[11] The Tribunal indicated therein that: 'one of the essential elements of the rule of law is the directive of observance of the principle of correct legislation …'. In its judgment of 14 July 2010 issued by the full adjudicating panel, Case Kp 9/09, OTK ZU 6/A/2010, 59, the Tribunal, when analysing its previous case law, drew attention to three assumptions which are important for the assessment of the compliance of a legal provision with the requirements of correct legislation:

> First – any provision of law, especially one that restricts constitutional freedoms or rights, should be worded in a way that allows unambiguous determination of who is subject to the restriction and in what situation. Second, the provision of law should be sufficiently precise to ensure its uniform interpretation and application. Third, such a provision of law should be so worded that the scope of its application includes only those situations in which a rational legislator actually intends to introduce a regulation limiting the exercise of constitutional freedoms and rights (see the judgment in Case K 33/00, 30 October 2001 OTK ZU 7/2001, 217; similarly i.a., the judgment Case K 47/04, 27 November 2006 OTK ZU 10/A/2006, 153) ... Another important element of the principle of correct legislation is also the observance of the requirements of logical and axiological consistency of the legal system. Therefore, 'legislative correctness means also legislating in a logical and consistent manner, respecting the general principles of the system and due axiological standards. It would, therefore, be incompatible with this principle to adopt legislation (even if the rationale of such legislation might appear to be correct) the provisions of which are inconsistent and cannot be explained with reference to other legal provisions. The purposefulness and possible legitimacy of the implementation of particular legal regulations cannot be an excuse for the making law in a chaotic and haphazard manner. Therefore, the

[9] Bogusław Banaszak, *Prawo konstytucyjne* (5th edn, CH Beck 2010) 233.

[10] Tomasz Zalasiński, *Zasada prawidłowej legislacji w poglądach Trybunału Konstytucyjnego* (Wydawnictwo Sejmowe 2008) 51.

[11] OTK-A 2021 29.

arbitrariness and haphazardness of the enactment of legal regulations violates the principle of correct legislation, which is an infringement of Article 2 of the Constitution' (judgment in Case K 1/05, 21 February 2006 OTK ZU 2/A/2006, 18; similarly, i.a. judgment, Case P 28/07, 23 October 2007 OTK ZU 9/A/2007, 106).

Regardless of the critical remarks occasionally voiced in the literature about certain aspects of the Constitutional Tribunal's activity,[12] it should be noted that its decisions and judgments have had a significant impact on the Polish legal order.[13] It should be recognised that the quoted stand of the Tribunal concerning the principle of decent legislation deserves approval. The Tribunal derived the said directive from the clause on the democratic state ruled by law, granted it a significant importance and continues developing its content in its judgments. The Constitutional Tribunal emphasizes the significance of understanding the principles of good legislation so that the legislator, respecting them, first and foremost should have to take into account the rights and freedoms of citizens. Most of the elements of the principle of decent legislation have a strictly protective role for individual citizens. One should mention here the principles of non-retroactivity, the protection of acquired rights and respect for pending interests.

III. SPECIAL ROLE OF THE PRINCIPLE OF DECENT LEGISLATION IN THE DEVELOPMENT OF POLISH ADMINISTRATIVE LAW

As already pointed out in the introduction to this paper, administrative law in its broadest sense performs significant roles in a democratic state under the rule of law. The specific feature of this branch of law is the fact that it regulates a very sensitive sphere of relations between the public authority and individual citizens. In other words, by means of administrative laws, the status of an individual in the state is affected in the most direct way. It is administrative law that determines the way in which civil rights and freedoms are exercised. Administrative law is part of public law, and so it typically implies the attempt of a public administration authority to regulate the conduct of usually many persons under legislative standards designed to promote the public interest.[14] Within the framework of sub-

[12] Magdalena Malinowska-Wójcicka, 'Trybunał Konstytucyjny jako negatywny ustawodawca – skutki wyroków Trybunału Konstytucyjnego' in Maciej Kłodawski, Alicja Witorska and Mariusz Lachowski (eds), *Legislacja czasu przemian, przemiany w legislacji: Księga jubileuszowa na XX-lecie Polskiego Towarzystwa Legislacji* (Wydawnictwo Sejmowe 2016) 42.

[13] I leave aside the political and legal disputes concerning the current shape and activity of the Constitutional Tribunal.

[14] Richard J Pierce Jr, Sidney A Shapiro and Paul R Verkuil, *Administrative Law and Process* (Foundation Press 1999) 1.

stantive and procedural administrative law, the private interest of an individual and the public interest are balanced. By its nature, the influence of public administration authorities on the legal situation of individuals is decisive.

In American legal literature, Daniel E Hall describes administrative law as a body of law that defines the powers, limitations and procedures of administrative agencies (public administration authorities).[15] In the United States, scholars devote much attention to the issue of control over administration.[16] This is an obvious consequence of the assumption about the overwhelming influence of administrative agencies on the rights and obligations of individuals.

Regarding the national level, it is consistently argued in the literature that it is extremely difficult to define administrative law in an unambiguous and universal way, assuming that it is possible at all.[17] Therefore, a number of domestic administrative theorists attempt to isolate the determinants (features or elements) of Polish administrative law that would predetermine its essence.[18] The analysis

[15] Daniel E Hall, *Administrative Law* (Lawyers Cooperative Publishing 1994) 1. Characteristically, this author quotes the following words of President Gerald Ford as a starting point for his discussion: 'a government big enough to give you everything you want is a government big enough to take away from you everything you have'.

[16] William F Fox Jr, *Understanding Administrative Law* (Matthew Bender & Co. 1997) 31ff.

[17] Jacek Jagielski, 'Określenie prawa administracyjnego i jego ogólna charakterystyka' in Jacek Jagielski and Marek Wierzbowski (eds), *Prawo administracyjne* (Wolters Kluwer Polska 2022) 43.

[18] For instance, Elżbieta Ura presents the following catalogue of basic features of administrative law: (a) it is a branch of law, like civil law, except that it is not codified (there is no code of administrative law) and it is not uniform, as it is distinguished by certain detailed sections, e.g. environmental law or construction law, which contain also legal norms falling into other sections (branches) of law; (b) administrative law belongs to public law, which means that while in private law (civil law) the activities governed by it depend only on the will of the subjects of the law, in public law the decision as to the application of its provisions results from the will of the competent public authorities, and the addressees must respect them, unless the provisions stipulate certain rights which the addressees not always have to exercise; (c) it is a statute law and consists of a number of normative directives, prohibitions, authorisations, limitations, etc., the observance of which is safeguarded by a system of state-recognised legal sanctions, i.e. measures falling within the competence of administrative authority; (d) the sources of administrative law are the provisions of EU law, including the general principles of the Court of Justice of the European Union, the provisions of national law generally applicable and the provisions of internal law; (e) it governs the way in which administrative processes are carried out in the state by means of established institutions (bodies, administrative entities); (f) it is a component part of the whole system of law in the state; (g) it is the law that changes most frequently (every change in the political system and in the ruling elites affects administrative law and usually there is a change in it) and it is to the greatest extent dependent on politics (which certainly is not its advantage); (h) there is a close relationship between administrative law and the tasks and functions of the public administration: the subordination of the administration to law is one of the basic principles of the organisation and functioning of the state; (i) administrative law is also drafted by the administration itself, which means that the public administration can formulate directives for itself and, through its competence to make law, can continuously respond to various social phenomena; (j) the provisions

of the presented sets of the most relevant distinctive features of administrative law intuitively leads to the conclusion about the overwhelming influence that administrative law has on society and individuals.

Let us now turn to the central issue, i.e. the presentation of the special role that the principle of decent legislation has for Polish administrative law and law-making. Due to the complicated and multifaceted nature of this problem, the scope of the following analysis is limited to the presentation of three fundamental assertions concerning the mutual relations between administrative law and the principle of decent legislation.

Firstly, administrative law is by all means the most extensive branch of law in the Polish legal system. Apart from the rather extensive general part, the discussed branch of law has also a very comprehensive detailed part, which consists of acts governing particular areas of social life, e.g. the already mentioned environmental protection law and construction law, but also planning and spatial development law, geological law, mining law, health protection law, law on the market of medical products, law on access to public information, law on education (including higher education), law on assemblies, etc. Within substantive administrative law, there is no equivalent to the Civil Code,[19] which is the most important, systemic compilation for private (civil) law, or so to say its 'constitution'. The primary effect is that legislative changes in the basic concepts or constructs of administrative law may in practice affect several statutes, which automatically leads to amendments. This specific 'fragmentation' of the administrative law requires the legislator to be very well versed in the normative substance.

Secondly, the classic theoretical categories of administrative law, which, however, affect its application in practice, include administrative law authority, administrative law interference, administrative law coercion or public burdens. As Rafał Stankiewicz points out, the essence of administrative law authority includes the possibility of authoritative, unilateral shaping of a legal situation of the subject of the external sphere (individual, citizen) by the administering subject. This authority has the power, established by legislation, to issue various types of orders or prohibitions, permits, authorisations and concessions that are based on the presumption of legality.[20] In administrative law – contrary to civil law, where one of the main principles is freedom of contract[21] – the initiative to produce certain legal effects frequently comes from the public administration body, which,

of administrative law are addressed partly to the administration and partly to entities outside it. See Elżbieta Ura, *Prawo administracyjne* (1st edn, LexisNexis 2010) 25–26.

[19] Act of 23 April 1964 Civil Code (Ustawa z dnia 23 kwietnia 1964 r. – Kodeks cywilny) consolidated text [2023] JoL 1610 as amended (Civil Code).

[20] Rafał Stankiewicz, 'Władztwo prawnoadministracyjne' in Jacek Jagielski and Marek Wierzbowski (eds), *Prawo administracyjne* (3rd edn, Wolters Kluwer 2022) 115.

[21] Pursuant to Article 353[1] of the Civil Code, parties entering into a contract may determine the legal relation at their own discretion, provided that its content or purpose do not prejudice the nature of the relation, a statute or the principles of social coexistence.

acting *ex officio*, may by issuing an administrative act (administrative decision) unilaterally shape the legal situation of the individual (citizen). Examples of such administrative decisions can easily be provided, which are often (e.g. expropriation of real estate) or almost always (e.g. imposition of an administrative fine) issued against the will of a party.

In the above context, the already mentioned elements of the principle of correct legislation gain particular significance, such as, for instance, the following directives: protection of acquired rights, appropriate *vacatio legis*, and definiteness of legal provisions or proportionality. The Constitutional Tribunal in its judgment in Case P 13/14 of 9 March 2017,[22] when examining the issue of valorisation of compensation for expropriated real estate, found, i.a. that:

> [A]t this point, the Tribunal considered it appropriate to remind that when assessing a provision in terms of whether its imprecision can be allowed in light of constitutional standards of correct legislation, the Tribunal takes it into account whether the legislator has taken care to maintain procedural guarantees protecting the individual against arbitrariness of the bodies enforcing the law. This method of review has been applied in the present proceedings. The correctness of the application of Article 227 of the Act of 21 August 1997 on real estate management[23] is subject to appeal at the appellate body and then examination in two-instance administrative court proceedings, which is a procedural guarantee limiting the discretion in the application of this provision.

Thirdly, the observance of the principle of decent legislation in the administrative law-making seems to be the best answer to the crisis in this branch of law indicated in the introduction to this paper. It is significant to note that the title of the 22nd Congress of the Chairs of Administrative Law and Administrative Procedure (Białystok, 23–26 September 2012) was 'Crisis of administrative law in public administration?'.[24] Among the commonly perceived symptoms of the poor state of administrative law are its extraordinary inflation observed in recent years and the phenomenon of the replacement of administrative regulations by civil law provisions. It is not difficult to find examples of laws that are completely incomprehensible to the average consumer or contractor.[25]

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[22] OTK-A 2017 14.

[23] (Ustawa z dnia 21 sierpnia 1997 r. o gospodarce nieruchomościami) [1997] JoL 115 741 as amended.

[24] Dawid Ziółkowski, 'Historia Zjazdów Katedr Prawa i Postępowania Administracyjnego 1950–2018' in Jacek Jagielski and Marek Wierzbowski (eds), *Prawo administracyjne dziś i jutro* (1st edn, Wolters Kluwer Polska 2018) 20.

[25] See e.g. the Act of 20 February 2015 on renewable energy sources (Ustawa z dnia 20 lutego 2015 r. o odnawialnych źródłach energii) consolidated text [2023] JoL 1436 as amended, or the Act of 5 September 2016 on trust services and electronic identification (Ustawa z dnia 5 września 2016 r. o usługach zaufania oraz identyfikacji elektronicznej) consolidated text [2021] JoL 1797 as amended.

The above analyses lead to the obvious conclusion that the importance of the principle of decent legislation for the Polish administrative law cannot be underestimated. The significant role of this branch of law for the organisation of social life and its impact on shaping the rights and obligations of individual citizens in a democratic state ruled by law require the legislator to be particularly careful when drafting administrative legal acts. Meeting the requirements and standards arising from the principle of correct legislation should, in the long term, result in a considerable improvement in the quality of administrative law.

In conclusion of this part of the discussion, two examples can be cited that illustrate the errors that the legislator can make in the course of amending administrative laws. These irregularities are related to the adoption of the Act of 6 March 2018 introducing provisions of Law on Entrepreneurs and other acts on economic activity,[26] and refer to amendments to two acts of key importance for general administrative procedures: the Act of 14 June 1960: Code of Administrative Procedure[27] and the Act of 30 August 2002: Law on Proceedings before Administrative Courts[28].

In my view, the first error is the inclusion, by virtue of the aforementioned amendment, of Article 14a in Chapter I, Section 2 (General Principles) CAP, according to which the public administration bodies allow parties to assess the performance of offices managed by these bodies, including the employees of these offices. In this case, the doubt is not so much about the content of the regulation but its placement in the statute. The said chapter of the CAP governs the basic general principles of administrative proceedings, such as the rule of law (Articles 6 and 7), the principle of objective truth (Article 7), the principle of increasing trust in public authority (Article 8), the principle of active participation of a party (Article 10), the principle of promptness and simplicity of proceedings (Article 12), or the principle of two-instance proceedings (Article 15). These have an overwhelming influence on the shape and course of administrative proceedings, and their content essentially expresses protective rules for the parties to the proceedings. It is pointed out in the literature that the general principles define a required benchmark for action of the authority conducting the proceedings and must be co-applied with other, specific provisions of the CAP that make them more detailed. In particular, these principles serve as interpretative directives in relation to the other provisions of the CAP, which means that the latter should be interpreted in such a way that the values derived from the general principles are

[26] [2018] JoL 650. The law entered into force on 30 April 2018.

[27] (Ustawa z dnia 14 czerwca 1960 r. – Kodeks postępowania administracyjnego) consolidated text [2023] JoL 775 as amended (CAP).

[28] (Ustawa z dnia 30 sierpnia 2002 r. – Prawo o postępowaniu przed sądami administracyjnymi) consolidated text [2023] JoL 1634 as amended (PAC).

not affected.[29] The general principles are obviously procedural in nature since they define the basic rules of administrative procedure.

In principle, however, the already cited Article 14a CAP does not strictly concern the conduct of administrative proceedings. It essentially amounts to the imposition of an unspecified obligation on public administration bodies to enable the parties to assess the performance of offices and their employees. Even a cursory analysis of the provision leads to the conclusion that it does not introduce any basic overriding, fundamental principle of administrative procedure. Prima facie, the insignificance of the regulation in question is also noticeable. The obligation of the authority, which can be met e.g. by providing questionnaires about the quality of service in the office, can hardly be regarded as comparable to the basic rules governing administrative proceedings, such as the obligation of public administration bodies to observe the rule of law or enabling parties to submit an effective appeal (two-instance procedure).

The other error in the amendment is the fact that it introduced incomplete changes in the PAC related to the establishment of a new special entity that may act in administrative court proceedings having the rights of a party, i.e. the Ombudsman of Small and Medium-Sized Entrepreneurs (SME Ombudsman). Pursuant to the added Article 8(3) PAC, the SME Ombudsman may take part in any pending proceedings, and submit a complaint, a cassation appeal, a grievance as well as a petition for reopening proceedings if, in his/her assessment, it is required for the protection of the rights of a micro, small or medium-sized entrepreneur within the meaning of the Act of 6 March 2018: Law on Entrepreneurs.[30] In such a case he/she enjoys the rights of a party.[31] The aforementioned provision has been worded by analogy with Article 8(1) PAC (concerning the public prosecutor and the Ombudsman) and Article 8(2) PAC (concerning the Ombudsman for Children). All four entities listed in these regulations may be parties to any pending proceedings, as well as submit a complaint, a cassation appeal, a grievance and a petition for reopening proceedings.[32]

At the same time, pursuant to the unchanged by the amendment Article 50(1) PAC, the entity entitled to submit a complaint is anyone who has a legitimate interest in it, the public prosecutor, the Ombudsman, the Ombudsman for Children, and a community organisation within its statutory activity, in matters concerning

[29] Wojciech Chróścielewski, Jan P Tarno and Paweł Dańczak, *Postępowanie administracyjne i postępowanie przed sądami administracyjnymi* (Wolters Kluwer Polska 2018) 53.

[30] (Ustawa z dnia 6 marca 2018 r. – Prawo przedsiębiorców) consolidated text [2023] JoL 221 as amended.

[31] By virtue of the amendment in question, Art 173(2) PAC (the right to submit a cassation appeal) and Art 264(2) PAC (the right to request the Supreme Administrative Court to adopt an 'abstract resolution') were also amended, in both cases taking into account the SME Ombudsman.

[32] Obviously, the premises enabling participation in a case are defined differently. For instance, the powers of the Ombudsman for Children are actualised if, in his or her judgment, the protection of the rights of the child requires it.

the legal interests of other persons, if they took part in the administrative proceedings. Thus, as it can be noticed, the SME Ombudsman is no longer included among the entities entitled to submit a complaint. On the other hand, pursuant to Article 239(1)2 PAC, the following are not obliged to cover court costs: the public prosecutor, the Ombudsman and the Ombudsman for Children. The SME Ombudsman has been omitted also in this list. As commentators on the discussed provision point out: 'the obligatory subjective exemption from covering court costs, however, does not include the SME Ombudsman, who is not mentioned in Article 239(1)2 PAC. It is difficult to decide explicitly whether this is a deliberate omission or an oversight of the legislator'.[33] It seems that, taking into account the systemic nature of the equal procedural status of the SME Ombudsman and three other special subjects (the public prosecutor, the Ombudsman and the Ombudsman for Children), we face here an oversight of the legislator, who, as it were, 'forgot' about the SME Ombudsman in the listing of entities in Article 50(1) and Article 239(1)2 PAC. Thus, gaps in the law were created as a result of legislative errors.[34]

The demonstrated irregularities in the drafting (or amendment) of provisions of the broadly understood administrative law are all the more disturbing as they relate to two very important statutes governing the course of administrative and administrative court proceedings. The legislator should amend such important legal acts with particular care, being aware of the universality of their application and the direct impact on the procedural rights of individual citizens. Unfortunately, reliable activity of the legislator in this respect is not always the rule.[35]

IV. CONCLUSIONS

In conclusion, the significance of the principle of decent legislation for Polish administrative law should be emphasised. The branch of law in question shapes

[33] Maria Jagielska, Jacek Jagielski and Piotr Gołaszewski, 'Komentarz do art. 239–240' in Roman Hauser and Marek Wierzbowski (eds), *Prawo o postępowaniu przed sądami administracyjnymi: Komentarz* (CH Beck 2019) 1071.

[34] The issue of the incorrect drafting of Art 50(1) PAC is of secondary importance, since the right to submit a complaint against the SME Ombudsman is granted directly in Art 8(3) PAC, which has already been cited. On the other hand, the problem of exemption from the obligation to cover court costs (Art 239(1)2 PAC) remains unresolved.

[35] In this context, it is worth recalling the discussion included in the study of Jan P Tarno, 'Psucie Kodeksu postępowania administracyjnego' in Janusz Niczyporuk (ed), *Kodyfikacja postępowania administracyjnego: Na 50-lecie K.P.A.* (Wyspa 2010) 847ff. The author argues, for instance, that 'the lower quality of legislation on administrative proceedings is primarily a consequence of ill-considered amendments to the Code of Administrative Procedure', ibid 848.

the legal situation of individual citizens in a democratic state under the rule of law. Since administrative law governs the rights and obligations towards public authorities, the elements of the principle of decent legislation play a particularly important role in the law-making process. These include, for instance, such aspects as the protection of acquired rights, the requirement of an appropriate *vacatio legis* or the requirement of proportionality of legal regulations.

At the same time, the domestic administrative law-making has specific characteristics. It is a very extensive branch of law, covering a number of areas of social life. The multiplicity and comprehensiveness of legal acts of administrative law, as well as their practical significance for the protection of individual rights, require the involvement of experienced and very well-prepared legislators in the process of making and amending administrative regulations. The participation of experts, representatives of jurisprudence and legal scholars, professional attorneys or administrative court judges in the legislative process should be postulated. It is worth taking advantage of the knowledge of people who apply administrative law on a daily basis and carry out scientific research in this area.[36]

Finally, in the foregoing study, I have referred to convincing views on the crisis in which Polish administrative law currently is. In this regard, I have pointed out and discussed two errors made in the amendment to the Code of Administrative Procedure and the Law on Proceedings before Administrative Courts. They are certainly very modest, but nevertheless measurable, evidence of a general deterioration in the quality of this branch of law. Even in such important acts as those discussed, there are oversights or errors by the legislator, and their overall reliability may raise serious doubts.

In the above context, it seems that a kind of remedy for the current state of national administrative law should be a consistent reform of this branch of law through deliberate and careful action by the legislator. The starting point should be the rigorous observance of the requirements and standards arising from the principle of decent legislation. There is also a task emerging here for legal scholars and commentators, who should constantly 'remind' the legislator of the importance that the quality of administrative law has for the development of social and economic relations in the state. One can only hope that this study, at least to some extent, will fulfil this obligation on the part of science.

[36] Another proposal is to work towards a decisive improvement in the quality of explanatory memoranda to bills. They should be extensive, insightful and thoroughly prepared. Currently, it is not uncommon for the written reasons to draft legislation to contain a brief introduction to the subject matter being addressed, and then essentially to repeat the proposed provisions.

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